

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

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ERNEST F. HEFFNER, *et al.*,  
*Petitioners,*

v.

DONALD J. MURPHY, *et al.*,  
*Respondents.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Third Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

In applying rational-basis review, does a court evaluate the rationality of enforcing a challenged law under the factual circumstances of the world today, or must a court consider only the rationality of the law when enacted, no matter how long ago and no matter how much the facts have changed?

## **PARTIES TO THE PROCEEDINGS**

The Petitioners are Ernest F. Heffner, a licensed funeral director in York, PA; Harry C. Neel, President of Petitioners Jefferson Memorial Funeral Home, Inc., and Jefferson Memorial Park, Inc.; Bart H. Cavanagh, Sr., a licensed funeral director in Norwood, PA; John Katora, a licensed funeral director in York, PA; Brian Leffler, a licensed funeral director in Avoca, PA; Rebecca Ann Wessel, a licensed funeral director in Pittsburgh, PA; Mark Patrick Dougherty, formerly a licensed funeral director in Pittsburgh, PA; Cynthia Lee Finney, a licensed funeral director in Pittsburgh, PA; Nathan Ray, a licensed funeral director in York, PA; Todd Eckert, a licensed funeral director in Red Lion, PA; Ben Blascovich, a licensed funeral director in Mill Hall, PA; Matthew Morris, a licensed funeral director in Red Lion, PA; William Sucharski, a licensed funeral director and owner of a duly approved crematory in Philadelphia, PA; John McGee, a licensed funeral director in Philadelphia, PA; Amber M. Scott, a licensed funeral director in Pittsburgh, PA; Erika Haas, a licensed funeral director in Reading, PA; Nicolas Wachter, a licensed funeral director in Pottsville, PA; David Halpate, a licensed funeral director in Pittsburgh, PA; Patrick Connell, a licensed funeral director in Bethlehem, PA; Eugene Connell, a licensed funeral director in Bethlehem, PA; Matthew Connell, a licensed funeral director in Bethlehem, PA; James J. Connell, Jr., a licensed funeral director in Bethlehem, PA; Jefferson Memorial

**PARTIES TO THE PROCEEDINGS – Continued**

Park, Inc., a PA corporation with a principal place of business in Pittsburgh, PA and sole shareholder of Petitioner Jefferson Memorial Funeral Home, Inc., also a PA corporation with a principal place of business in Pittsburgh, PA; Wellman Funeral Associates, Inc., d/b/a Forest Park Funeral Home, a Louisiana corporation with a principal place of business in Shreveport, LA; East Harrisburg Cemetery Company, d/b/a East Harrisburg Cemetery & Crematory, a PA corporation with a principal place of business in Harrisburg, PA; Robert Lomison, former owner and operator of the William Howard Day Cemetery, East Harrisburg Cemetery, and Petitioner Wellman Funeral Associates, Inc.; Craig Schwalm, former operator of a crematory and cemetery and Vice President and General Manager of East Harrisburg Cemetery; Gregory J. Havrilla, business manager of White Memorial Chapel; and Betty Frey, an associate of Petitioner Ernest F. Heffner.

Respondents Donald J. Murphy; Joseph A. Fluehr, III; Michael J. Yeosock; Bennett Goldstein; James O. Pinkerton; Anthony Scarantino; Basil Merenda; and Michael Gerdes are members of the Pennsylvania Board of Funeral Directors. Respondent Peter Marks is the former Executive Deputy Chief Counsel for the Pennsylvania Bureau of Professional and Occupational Affairs. Respondent C.A.L. Shields is the former director of the Pennsylvania Bureau of Enforcement and Investigation.

**RULE 29.6 CORPORATE  
DISCLOSURE STATEMENT**

In accordance with Supreme Court Rule 29.6, Petitioners make the following disclosures:

1. Petitioner East Harrisburg Cemetery Company d/b/a East Harrisburg Cemetery & Crematory has no parent, and there are no publicly held companies that hold 10% or more of the petitioner's stock.

2. The parent company of Petitioner Jefferson Memorial Funeral Home, Inc., is Jefferson Memorial Park, Inc., and there are no publicly held companies that hold 10% or more of the petitioner's stock.

3. Petitioner Jefferson Memorial Park, Inc., has no parent, and there are no publicly held companies that hold 10% or more of the petitioner's stock.

4. Petitioner Wellman Funeral Associates, Inc. d/b/a Forest Park Funeral Home has no parent, and there are no publicly held companies that hold 10% or more of the petitioner's stock.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.



### OPINIONS BELOW

The United States Court of Appeals for the Third Circuit denied the petition for rehearing *en banc* without opinion. The panel decision of the Court of Appeals is reported at 745 F.3d 56 and is reprinted in the Appendix (Pet'rs' App. 1). The decision of the District Court is reported at 866 F. Supp. 2d 358 and is reprinted in the Appendix (Pet'rs' App. 84).



### JURISDICTION

This Petition is timely, and this Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Third Circuit was entered on February 19, 2014. Petitioners filed a timely petition for rehearing *en banc* on March 4, 2014. The Court of Appeals denied that petition on March 17, 2014. On May 8, 2014, Justice Alito granted Petitioners' motion to extend the deadline for this Petition to July 15, 2014.



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1 (Pet’rs’ App. 245). The challenged statute is Pennsylvania’s Funeral Director Law, 63 Pa. Stat. § 479.1 *et seq.*, the relevant portions of which are reproduced in the Appendix (Pet’rs’ App. 246).



### STATEMENT OF THE CASE

1. This Petition involves a fundamental question about rational-basis review. In its seminal opinion in *United States v. Carolene Products*, this Court announced a broad holding that set forth the elements of rational-basis review. In doing so, this Court stated that a plaintiff can overcome the presumption of constitutionality by proving that the factual premises for a law are no longer true, and, therefore, that the enforcement of the obsolete law today would be irrational. 304 U.S. 144, 153 (1938) (“[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.”). In framing the inquiry this way, the Court made clear that the rational-basis test focuses on the rationality of *enforcing* the law *now*, not simply on the rationality of the statute when enacted.

This rule of *Carolene Products* – one of the most cited decisions in constitutional law – has never been

overruled. It has, however, been abandoned by some federal appellate courts that have been led astray by *dicta* in later rational-basis decisions of this Court suggesting that the only question is whether the challenged statute was rational when enacted. *E.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (“[A] legislative choice is not subject to courtroom factfinding. . . .”); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (“Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.”); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (“Where, as here, there are plausible reasons for Congress’ action, our inquiry is at an end.”); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”). Some courts of appeals and state supreme courts continue to follow the *Carolene Products* rule, while others do not. In addition, if the rule in *Carolene Products* is defunct, then there is also conflict between rational-basis jurisprudence and many other areas such as free speech and administrative law, which recognize that what matters is the *enforcement* of the law today under the facts of the world as they are now, not the legitimacy of a law in the abstract when it was passed long ago.

Review should be granted under Rule 10. This Petition presents a question of fundamental

constitutional importance because the decision below conflicts with the decisions of this Court, the lower courts of appeals, and various state supreme courts. The decision below also exposes a basic contradiction between the foundational rational-basis opinion in *Carolene Products* and the way the rational-basis test is frequently described in this Court's *dicta*, as well as a contradiction between rational-basis jurisprudence and the wider body of American law.

a. In its decision below, the Third Circuit focused exclusively on the rationality in the abstract of the challenged provisions of the Pennsylvania Funeral Director Law ("Funeral Law") when it was enacted in 1952. That court dismissed as irrelevant the district court's conclusion that the obsolescence of the challenged provisions rendered their enforcement irrational now. (Pet'rs' App. 5) ("As a threshold matter, we surmise that much of the District Court's conclusions regarding the constitutionality of the [Funeral Law], enacted in 1952, stem from a view that certain provisions of the [Funeral Law] are antiquated in light of how funeral homes now operate. That is not, however, a constitutional flaw."). Although the unambiguous rule in *Carolene Products* is the law, the Third Circuit felt bound by this Court's more recent descriptions of the rational-basis test, which concentrate on the rationality of the legislative decision when enacted into law. (Pet'rs' App. 63 ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends.'")) (quoting *Heller v. Doe*,

509 U.S. 312, 321 (1993))). Thus, the decision of the Third Circuit does not simply conflict with *Carolene Products*, it reveals a fundamental conflict between the rule of *Carolene Products* and the standard formulation of the rational-basis test as frequently recited by this Court.

b. The doctrinal tension is not confined to this Court's rational-basis jurisprudence. If it is true that this Court has in fact overruled the changed-circumstances doctrine in *Carolene Products sub silentio*, then there is a conflict between rational-basis law and this Court's analytic approach in virtually every other context, from *stare decisis* through various constitutional provisions to administrative law. For example, this Court recently invalidated the preclearance formula in the Voting Rights Act of 1965, which specified measures that certain jurisdictions had to take to ensure non-discrimination in ballot access, because those measures were based on "decades-old data and eradicated practices." *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612, 2627 (2013). This Court demanded that a statute's "current burdens' must be justified by 'current needs[.]'" *Id.* (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)). Given the eradication of blatant and pervasive racism by 2014, the Court held that the preclearance formula was so obsolete that it could not be constitutionally enforced now. *Shelby Cnty.*, 133 S. Ct. at 2631. Thus, if the rule of *Carolene Products* is no longer valid, then rational-basis jurisprudence conflicts fundamentally with the

basic principle of constitutional analysis expressed in *Shelby County* and a diverse body of other case law: What matters is the constitutionality of what government officials are actually doing to people today when enforcing a law, not just what the legislature did long ago.

2. Petitioners challenged four aspects of Pennsylvania's Funeral Director Law of 1952: (1) restrictions on funeral-home ownership; (2) prohibiting funeral directors from working at more than two funeral homes; (3) forcing funeral directors to build unused and hence useless embalming facilities; and (4) the prohibition on serving food to funeral attendees. (Pet'rs' App. 246-55).

a. The Funeral Law stringently restricts funeral-home ownership. As a general rule, only a Pennsylvania-licensed funeral director may own a funeral home, 63 Pa. Stat. § 479.8, (Pet'rs' App. 250-55), and that funeral home may have only one additional branch location, 63 Pa. Stat. § 479.8(e); (Pet'rs' App. 254-55).

The exceptions to this general rule, however, had by 2012 created such arbitrary patterns of ownership that the ownership rule, as enforced in the real world, bore no rational relationship to any plausible government interest. For example, the statute allows funeral homes to be owned through a restricted business corporation ("RBC"), which may in turn own only one funeral home and one branch. 63 Pa. Stat.

§ 479.8(b), (e); (Pet’rs’ App. 251-52, 254-55). A Pennsylvania-licensed funeral director may own an interest in only one RBC, but a funeral director’s family members may own an interest in as many RBCs as they like. 63 Pa. Stat. § 479.8(b)(4); (Pet’rs’ App. 252-53). Petitioner Heffner brought this suit to eliminate the profound waste of time and money associated with using RBCs in a farcical way to structure his business affairs. He is a Pennsylvania-licensed funeral director, and he owns an interest in one RBC. His wife, on the other hand, who is not a funeral director, owns twelve funeral homes through eight RBCs. (Pet’rs’ App. 143-44). In addition, the Third Circuit referred to the “Pinkerton Rule,” (Pet’rs’ App. 36-37, 48-50), after Respondent Pinkerton, who in 2004 collaborated with an out-of-state funeral-home chain, which cannot directly own funeral homes in Pennsylvania, in a complicated lease-back arrangement that gave the chain *de facto*, if not *de jure*, ownership. The district court found that these modern realities – that the ownership restrictions have devolved into a charade of form with no substance – “obliterates Defendants’ thread-bare argument” that the statute can be enforced rationally.<sup>1</sup> (Pet’rs’ App. 146).

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<sup>1</sup> The ownership irrationalities do not end there. Contrary to the general rule that only funeral directors may own a funeral home, there are 56 funeral-home corporations in Pennsylvania that may be owned by anyone. (Pet’rs’ App. 127). These corporations are in effect licenses for anyone – funeral director, layperson, or other corporation – to own a funeral home in Pennsylvania. These corporate licenses are analogous to New

(Continued on following page)

b. The Funeral Law restricts funeral directors from practicing at more than one “principal” location and one “branch” location. 63 Pa. Stat. § 479.8(e); (Pet’rs’ App. 254-55). Respondents contended below that this kept funeral directors from being “spread too thin.” (Pet’rs’ App. 49). Petitioners argued, and the district court agreed, that limiting funeral directors to practicing at two locations may not in fact “limit the number of funerals a director may perform,” since funeral homes of different sizes perform different numbers of funerals annually. (Pet’rs’ App. 142). The district court pointed out that while Petitioner Heffner and his wife own twelve funeral homes and handle only 900 funerals annually, Respondent Goldstein owns two funeral homes and performs 1,800 funerals annually. (Pet’rs’ App. 142). And these restrictions can be circumvented in any case through the clever use of family-owned RBCs. (Pet’rs’ App. 146). Therefore, the district court concluded that the “one-and-a-branch” requirement could not rationally be enforced today in light of the fact that the “spread-too-thin” rationale had no connection to reality. (Pet’rs’ App. 145-46).

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York taxi medallions and trade on the open market for hundreds of thousands of dollars. Other than the “Pinkerton Rule,” these licenses are the only way for the national funeral-home chains to enter the Pennsylvania market and one way for Pennsylvania-licensed funeral directors to own more than his or her allotted two funeral homes.

c. The Funeral Law also forces funeral directors to spend tens of thousands of dollars building useless “preparation rooms.” A preparation room is where funeral directors prepare remains for disposition through techniques such as embalming. Every funeral home must have a preparation room. 63 Pa. Stat. § 479.7; (Pet’rs’ App. 248-49). The Funeral Law does not, however, require a preparation room to be used, and many mandatory preparation rooms are, in fact, unused. Under modern business practices, it is routine to centralize the preparation of remains at a single funeral home, which is perfectly legal. In fact, multiple funeral-home businesses may centralize their preparation at a single location. “[G]iven [Respondents’] admission that requiring each funeral home to equip and maintain a preparation room is unnecessary,” the district court concluded that the Funeral Law’s 1952 preparation-room requirement could no longer be rationally applied. (Pet’rs’ App. 172).

d. The Funeral Law also forbids funeral homes from serving food, but not beverages, to funeral attendees. Even if we assume that the distinction between food and beverages was somehow non-arbitrary in 1952, Petitioners established that undeniable advances in technology and hygiene practices made it impossible to enforce the food rule rationally today. A medical expert provided un-rebutted testimony that “[f]rom a public health perspective, I find no medical or scientific merit in the

argument that serving food at a funeral home would constitute a potential public health risk[.]” (Pet’rs’ App. 174). He also observed that “distinguishing between foods and beverages in this manner is obviously illogical because hygiene concerns attributable to food would also apply to beverages.” There are no OSHA or state occupational-health regulations on food in funeral homes, even though employees eat at work every day. For its part, the Board stated that it can simply declare a portion of a funeral home not to be a funeral home in order for food to be able to be served there. (Pet’rs’ App. 175-76). The district court concluded that this kind of semantic contrivance proved the absence of any rational basis for enforcing the food prohibition now, even assuming that the food provision seemed plausible in 1952. (Pet’rs’ App. 177-78).

3. The Third Circuit reversed the district court on these rational-basis claims. The panel rejected the principle that the rationality of a statute depends on the rationality of its application now: “As a threshold matter, we surmise that much of the District Court’s conclusions regarding the constitutionality of the [Funeral Law], enacted in 1952, stem from a view that certain provisions of the [Funeral Law] are antiquated in light of how funeral homes now operate. That is not, however, a constitutional flaw.” (Pet’rs’ App. 5).

Instead, the panel focused on whether it was rational for the legislature to enact the Funeral Law in 1952: “Under rational-basis review, ‘a statute

withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature could rationally conclude was served by the statute.’” (Pet’rs’ App. 46). In other words, the question is not the rationality of enforcement today, but whether “‘there are plausible reasons for [the legislature’s] action,’” in which case, “‘our inquiry is at an end.’” (Pet’rs’ App. 46 (quoting *U.S. R.R. Ret. Bd.*, 449 U.S. at 179)).

The Third Circuit maintained this backward focus for each rational-basis claim. In the context of restrictions on ownership and place of practice, the court waved off evidence of the statute’s irrational effect today and simply underscored that “the State could have rationally concluded that limiting licensees to owning funeral businesses at no more than two locations” prevented funeral directors from being “spread too thin.” (Pet’rs’ App. 49). “All that [was] necessary,” according to the Third Circuit, was that in 1952 “the selected means [wa]s rationally linked to the stated ends.”<sup>2</sup> (Pet’rs’ App. 49).

Similarly, the panel dismissed Petitioners’ effort to use contemporary evidence to demonstrate the irrationality of enforcing the Funeral Law’s 1952 requirement that every funeral establishment maintain a preparation room, even if never used. Instead,

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<sup>2</sup> Relatedly, the panel below reversed the district court’s conclusion that a particular supervision requirement could not be rationally enforced today. (Pet’rs App. 56).

the panel simply focused in the abstract on whether there was an articulable purpose in 1952. Satisfied that there was, the court reiterated that “[a]s long as the State has chosen a rational method of addressing its concerns, our inquiry is at an end.” (Pet’rs’ App. 59). The panel punctuated this point by stating that it is “‘up to legislatures, not courts, to decide on the wisdom and utility of legislation.’” (Pet’rs’ App. 59 (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963))). Yet Petitioners were not questioning the wisdom of the 1952 legislature, just the rationality of enforcing the legislature’s 1952 scheme when evidence conclusively demonstrated that the factual premises of that scheme – mandatory preparation facilities are necessary to protect the public – have disappeared from a world in which millions of dollars in unused preparation rooms litter the state gathering dust.

Finally, the Third Circuit acknowledged that the prohibition on serving food was obsolete due to “the passage of time, and the advanced technology used in modern air conditioning and ventilation systems. . . .” (Pet’rs’ App. 62). In fact, the panel indicated that “the Pennsylvania General Assembly may want to revisit the need for some of these restrictions as [Respondents] ha[ve] suggested.” (Pet’rs’ App. 62). But the court did not regard the evidence of irrational obsolescence as relevant, holding that “there is a fundamental difference between legislative enactments that may be archaic and those that are irrational for the purposes of our substantive due process inquiry.” (Pet’rs’ App. 63). The panel concluded that “[t]he

Constitution is not a lever that we can use to overcome legislative inertia[.]” (Pet’rs’ App. 63), and that “[C]ourts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends.” (Pet’rs’ App. 63) (quoting *Heller v. Doe*, 509 U.S. at 321).

4. Panel rehearing and rehearing *en banc* were denied. (Pet’rs’ App. 243-44).



## REASONS FOR GRANTING THE PETITION

### **A. There Is a Conflict Within This Court’s Rational-Basis Jurisprudence and That of the Lower Courts on Whether Rational-Basis Review Is About the Rationality of a Statute When Enacted or About the Rationality of Enforcing a Statute Today.**

1. Review is necessary to resolve a doctrinal conflict within rational-basis case law. In elucidating the principles of modern rational-basis review, *Carolene Products* specified that a plaintiff can overcome the presumption of constitutionality by proving that the factual premises for a law are no longer true, and accordingly that enforcement of a once-rational statute may be irrational today. 304 U.S. at 153 (“[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.”). This Court preserved the

possibility of proving a law irrational due to changed factual circumstances in order to protect liberty. The Court understood that there will be situations in which it is irrational to enforce a law today even though there may have been adequate factual premises for the law when originally enacted.

a. The utility of the changed-circumstances doctrine in the rational-basis context is obvious. For example, in 1924, Houston banned private vans from competing with the capital-intensive streetcar industry. *Santos v. City of Houston*, 852 F. Supp. 601, 603 (S.D. Tex. 1994). Recognizing that Houston now allowed a wide variety of vehicles for hire that were indistinguishable from private vans and that even city officials acknowledged the law was “archaic and no longer relevant,” the court invalidated the anti-van law because its rationale no longer existed. *Id.* at 608-09 (“[E]ven if the ordinance ever had a purpose, legitimate or not, its utility has passed.”).<sup>3</sup>

b. Even though *Carolene Products* was unambiguous, this Court has been silent for 76 years about the relevance of changed circumstances to rational-basis review. The Court has not, however, been silent about rational-basis review. During this interval, the Court has heard over 150 rational-basis cases. As best as Petitioners can discern, these cases concerned challenges to recently enacted laws. As a consequence, there was never an important

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<sup>3</sup> This decision was not appealed.

discrepancy in these cases between the factual premises of a challenged law when enacted and the actual circumstances of the world when the law was enforced. This is notably true of this Court's principal decisions that are cited again and again. *E.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (upholding 1951 occupational licensing statute); *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (upholding 1972 ordinance prohibiting push-cart street vending); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980) (upholding Railroad Retirement Act of 1974); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (upholding 1977 statute prohibiting certain types of milk containers); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (striking down 1980 denial of a special-use permit); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993) (upholding Cable Communications Policy Act of 1984); *Romer v. Evans*, 517 U.S. 620 (1996) (striking down 1992 amendment to the Colorado Constitution concerning the rights of homosexuals).

This accumulating body of rational-basis jurisprudence had one thing in common: Its formulation and application of the rational-basis test necessarily focused on the rationality of the challenged legislation when enacted. *E.g.*, *Fritz*, 449 U.S. at 179 ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end."); *Clover Leaf Creamery*, 449 U.S. at 464 ("Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the

legislation merely by tendering evidence in court that the legislature was mistaken.”); *Lee Optical*, 348 U.S. at 488 (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

This focus on the rationality of the legislative decision when made – even though that has simply been a function of this Court’s case selection – has conveyed that the *only* relevant consideration is the rationality of a law when enacted. To see the impact of this Court’s principal decisions, one need only undertake a random survey of lower court rational-basis decisions. They will almost invariably have boilerplate language consisting of quotations from the decisions cited above that convey the same basic point: rational-basis review is about the rationality of a law when enacted, not about the rationality of enforcement today.

c. This exclusive focus on the rationality of a law when enacted conflicts with the changed-circumstances doctrine in *Carolene Products* in two fundamental respects. First, the repeated focus in this Court’s case law on the rationality in the abstract of legislative decisions – “[w]here . . . there are plausible reasons for Congress’ action, our inquiry is at an end,” *Fritz*, 449 U.S. at 179 – is difficult to reconcile with the rule in *Carolene Products* that the enforcement of a statute today may be irrational even if the law was rational when passed. Second, the oft-cited maxim that “legislative choice is not subject to

courtroom fact-finding,” *Beach Commc’ns*, 508 U.S. at 315, is just as difficult to reconcile with the principle enunciated in *Carolene Products* that a plaintiff may use evidence to establish that the facts upon which a statute is predicated have vanished. Indeed, this familiar statement from *Beach Communications* conflicts with how rational-basis review is actually done. See, e.g., *St. Joseph Abbey v. Castille*, 712 F.3d 215, 226-27 (5th Cir. 2013) (holding that a 1960s-era restriction on who may sell a casket could not be rationally enforced in 2013 against Benedictine monks after they used evidence to refute every plausible rationale for enforcement).

2. The evolution of the Third Circuit’s position on changed circumstances illustrates how this Court’s formulation and application of rational-basis review over the years has undermined the foundational rule of *Carolene Products*. In *Kress, Dunlap & Lane, Ltd. v. Downing*, the Third Circuit relied on changed circumstances to reverse summary judgment upholding a rent-control statute, remanding for fact-finding on whether the “public emergency with respect to the shortage of housing and business accommodations” still existed. 286 F.2d 212, 213 (3d Cir. 1960). The court noted: “That a legislative body cannot for all time insulate its determinations from judicial inquiry into the continued existence of the legislative facts upon which the constitutionality of the legislation is dependent is well settled.” *Id.* at 215. See also *Black United Fund of N.J., Inc. v. Kean*, 593 F. Supp. 1567, 1575 (D.N.J. 1984) (law invalid because it “carve[d] in

stone the Legislature’s judgment . . . nearly thirty years ago”), *rev’d on other grounds*, 763 F.2d 156 (3d Cir. 1985).

Roughly twenty years after *Kress*, however, the Third Circuit retreated from the rule of *Carolene Products*. In *Murillo v. Bambrick*, the Third Circuit rejected an equal-protection challenge to a New Jersey law imposing trial fees on parties filing for divorce but not on other civil litigants. 681 F.2d 898 (3d Cir. 1982). The panel acknowledged that “[t]here may be a role for the courts to play when a statute, rendered manifestly unreasonable by changed conditions, remains in effect for many years without legislative action.” *Id.* at 912. Yet that panel declined to decide the question of changed circumstances because “the Supreme Court appears not to have determined definitively whether changed conditions are a relevant consideration in equal protection analysis.” *Id.* at 912 n.27.

The *Murillo* court highlighted the stark tension between this Court’s emphasis on the rationality of a statute when enacted, with the binding rule of *Carolene Products*. The panel contrasted this Court’s familiar statement in *Clover Leaf Creamery* that “[w]here there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken,” with the key language in *Carolene Products* that “the constitutionality of a statute predicated upon the existence of a particular state of

facts may be challenged by showing to the court that those facts have ceased to exist.” *Id.* (quoting *Clover Leaf Creamery Co.*, 449 U.S. at 464; *Carolene Prods.*, 304 U.S. at 153). To be sure, neither *Carolene Products* nor Petitioners here are suggesting that it is necessary to prove that the legislature was wrong in passing the law in the first place; instead, they suggest that plaintiffs have the right to try to prove that a statute cannot rationally be enforced today by demonstrating that the factual circumstances of the world have dramatically changed. But it is not difficult to understand why the *Murillo* court, and courts in general such as the panel below, are confounded by this contradiction in this Court’s case law.

Finally, the decision below reflects the full swing of the pendulum away from changed circumstances. The panel reversed the district court on all of the rational-basis claims because, “as a threshold matter,” the obsolescence of a 62-year-old statute as applied today is “not a constitutional flaw.” (Pet’rs’ App. 5). *See also Alexander v. Whitman*, 114 F.3d 1392, 1401 (3d Cir. 1997) (upholding wrongful death statutes by observing that “no advance in technology or science can authorize us to depart from well-established legal precedent”). The Third Circuit’s holding is consistent with the body of rational-basis authority upon which that court relied, but in square conflict with *Carolene Products*.

3. The contradiction in this Court’s rational-basis jurisprudence has perplexed various courts over the years. Some courts, like the Tenth Circuit, the

Seventh Circuit, and most state courts of last resort, continue to adhere to the *Carolene Products* doctrine. Others simply ignore it or (as in the case of the Second and Ninth Circuits, and, with the decision in this case, the Third Circuit) have explicitly disavowed it.

a. The Tenth Circuit, for example, recently adopted a changed-circumstances approach, reversing a dismissal involving a challenge to Denver’s pit bull ban. *Dias v. City & Cnty. of Denver*, 567 F.3d 1169 (10th Cir. 2009). That court held that the plaintiffs had sufficiently stated a claim for relief because “although pit bull bans sustained twenty years ago may have been justified by the then-existing body of knowledge, the state of science in 2009 is such that the bans [may] no longer [be] rational.” *Id.* at 1183. *See also Gen. Foods Corp. v. Priddle*, 569 F. Supp. 1378, 1387 (D. Kan. 1983) (striking down the Kansas Filled Dairy Products Act of 1923 because “[w]hatever purposes that the courts in the past found to justify the filled dairy laws are no longer viable today”).

The Fifth Circuit has done the same, though not recently. *Seaboard Air Line R.R. Co. v. City of West Palm Beach*, 373 F.2d 328, 329 n.3 (5th Cir. 1967) (stating that “the slightest reflection would disclose the fallacy of a rule which would require a determination of the reasonableness of a long-standing ordinance in the light of circumstances and conditions that may have existed at the time of its adoption”). *See also United States v. S. Ry. Co.*, 364 F.2d 86, 95 (5th Cir. 1966) (“[A] law depending upon the existence of an emergency or other certain state of facts to

uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.”); *Santos v. City of Houston*, 852 F. Supp. 601, 609 (S.D. Tex. 1994) (van prohibition “ha[d] long outlived its ill-begotten existence”).

The Seventh Circuit has similarly acknowledged the *Carolene Products* rule. *United States v. Moore*, 644 F.3d 553, 554-56 (7th Cir. 2011) (stating “there remains at least some evidence that crack cocaine is more dangerous than powder cocaine,” but recognizing that “as the instant statute is based on the belief that crack is more dangerous than powdered cocaine[], its constitutionality ‘may be challenged by showing to the court that those facts have ceased to exist’”) (quoting *Carolene Prods.*, 304 U.S. at 153-54).

Finally, the Fourth Circuit affirmed a district court’s holding that the distinction between Baltimore and the rest of Maryland with regard to the age for being tried as an adult was irrational because the basis for the distinction no longer existed. *Long v. Robinson*, 316 F. Supp. 22, 27-28 (D. Md. 1970) (“Whatever may have been the original justification for the exclusion of sixteen and seventeen year olds arrested in Baltimore City from the scope of the Juvenile Court Act, the uncontroverted evidence is that such basis no longer exists.”), *aff’d*, 436 F.2d 1116 (4th Cir. 1971).

State supreme courts tend to follow a changed-circumstances doctrine. For example, in *Wegan v. Village of Lexington*, 309 N.W.2d 273, 280 (Minn. 1981), the Minnesota Supreme Court held that a

Prohibition-era statutory distinction between weak and strong beer could not be rationally applied today to deny a claim for dram-shop liability under the applicable statute of limitations. The differences in dram-shop liability were based on the Minnesota legislature’s long-ago attempt to evade the strictures of Prohibition by declaring certain alcoholic beverages legal. With Prohibition a distant memory by 1981, “a lay person unable to obtain just compensation because of the peculiarities of Minnesota’s Dram Shop Law could justifiably conclude that he was the victim of artificial legal word games.” *Id.*<sup>4</sup>

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<sup>4</sup> See also *Brown v. Merlo*, 506 P.2d 212, 222 (Cal. 1973) (*en banc*) (striking down automobile guest statute in light of liability insurance coverage and other factual changes); *People v. Albrecht*, 358 P.2d 4, 7 (Colo. 1960) (*en banc*) (employment regulations deprived defendant of due process because circumstances had changed since enactment); *Estate of McCall v. United States*, 134 So. 3d 894, 913 (Fla. 2014) (“Conditions can change, which remove or negate the justification for a law, transforming what may have once been reasonable into arbitrary and irrational legislation.”); *Ga. S. & Fla. Ry. Co. v. Seven-Up Bottling Co. of Se. Ga., Inc.*, 175 So. 2d 39, 42 (Fla. 1965) (striking down comparative negligence statute passed in 1887 because of changed conditions); *Conner v. Cone*, 235 So. 2d 492, 498 (Fla. 1970) (striking down ban on filled milk because decision by legislature that imitation milk could be sold as milk substitute with proper labeling “removed the constitutional props out from under the filled milk prohibition”); *Atl. Coast Line R. Co. v. Ivey*, 5 So. 2d 244, 247 (Fla. 1941) (*en banc*) (striking down 1889 statute requiring railroads to pay damages for livestock killed by trains because there was no such thing as “motor carriers engaged in common carriage on the public roads” when statute was enacted); *Thompson v. Hagan*, 523 P.2d 1365,

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b. The changed-circumstances doctrine is generally ignored by other federal courts in reliance on this Court's standard formulation of the rational-basis

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1368 (Idaho 1974) (striking down automobile guest statute); *People v. McCabe*, 275 N.E.2d 407, 409-10 (Ill. 1971) (striking down statute punishing marijuana sales significantly harsher than sales of other illegal drugs because of current scientific data); *Strehlow v. Kan. State Bd. of Agric.*, 659 P.2d 785, 791 (Kan. 1983) (striking down the Kansas Filled Dairy Products Act as applied to imitation milk because of "changed conditions in the food industry"); *Henry ex rel. Henry v. Bauder*, 518 P.2d 362, 369-70 (Kan. 1974) (striking down automobile guest statute because of the advent of widespread liability insurance); *Palmer Park Theater Co. v. City of Highland Park*, 106 N.W.2d 845, 856-57 (Mich. 1961) (striking down ordinance imposed on city's water customers because of changes in city's water system since ordinance's enactment six years before); *McGeehan v. Bunch*, 540 P.2d 238, 242 (N.M. 1975) (striking down automobile guest statute because "[a] classification that may once have had a fair and substantial relation to the objectives of the statute because of an existing factual setting, may lose its relationship due to altered circumstances"); *Defiance Milk Prods. Co. v. Du Mond*, 132 N.E.2d 829 (N.Y. 1956) (striking down absolute ban on evaporated skim milk because "[t]ime has certainly disproved completely" the assertion that filled milk was injurious to health); *Flynn v. Horst*, 51 A.2d 54, 59-60 (Pa. 1947) (striking down higher licensing fee for oleomargarine wholesale dealers because fee had become disproportionate); *Boucher v. Sayeed*, 459 A.2d 87, 93-94 (R.I. 1983) (striking down medical malpractice statute because medical malpractice crisis may no longer exist); *Malan v. Lewis*, 693 P.2d 661, 669 (Utah 1984) (striking down automobile guest statute because "the intended effect of [the] statute ha[d] been severely limited by subsequent legislative enactments"); *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 468 (Wis. 2005) (striking down damages cap, noting that "a past crisis does not forever render a law valid").

test. In addition to the Third Circuit, however, two other circuits have rejected it. *United States v. Then*, 56 F.3d 464, 465 (2d Cir. 1995) (majority expressly disavows Judge Calabresi's concurrence stating that the rationality of the crack/powder-cocaine disparity could be challenged due to changed factual circumstances); *Burlington N. R.R. Co. v. Dep't of Pub. Serv. Regulation*, 763 F.2d 1106, 1111 (9th Cir. 1985) (stating that the Supreme Court "has been ambivalent on whether changed circumstances can transform a once-rational statute into an irrational law"); *see also Jones v. Schneiderman*, 888 F. Supp. 2d 421, 425-27 (S.D.N.Y. 2012) (expressing uncertainty over changed circumstances and not applying the doctrine). Thus, not only is there serious tension within this Court's case law, there is also a split of authority among the Courts of Appeals.

**B. The Conflict Within Rational-Basis Jurisprudence Also Represents a Conflict with Other Bodies of Law in Which the Focus Is on Enforcement Now, Not the Validity of a Law in the Abstract When Enacted.**

1. Review is also necessary to harmonize rational-basis jurisprudence with the wider body of law in which the relevant question has always been whether the enforcement of a law is legitimate now under the factual realities of the world, not whether a law was valid in the abstract when passed. This principle of changed circumstances runs the length and breadth of American law, from *stare decisis*

through the analysis of various constitutional provisions to administrative law.

a. *Stare decisis* incorporates the changed-circumstances doctrine. In one of its most monumental decisions, this Court overruled *Plessy v. Ferguson* in part due to changed circumstances. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492-93 (1954) (“In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.”); *id.* at 494-95 (“Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.”).

Similarly, in *Planned Parenthood v. Casey*, the Court asked, in contemplating overruling *Roe v. Wade*, “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.” *Planned Parenthood*, 505 U.S. 833, 855 (1992). Citing this oft-quoted passage, Justice Thomas has expressed his willingness to revisit two First Amendment cases, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), because “dramatic technological advances

have eviscerated the factual assumptions underlying those decisions.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 533-35 (2009) (Thomas, J., concurring).

b. This Court uses changed circumstances in evaluating Fourteenth Amendment claims under heightened scrutiny. For example, in *United States v. Virginia*, the Court held that Virginia’s ban on women at the Virginia Military Institute (“VMI”) violated the Fourteenth Amendment because the need for gender parity in higher education and the rise of female military personnel rendered obsolete the reasons for excluding women from VMI. 518 U.S. 515, 544-45 (1996). *See also Pickett v. Brown*, 462 U.S. 1, 17-18 (1983) (striking down child-support law because uncertainties about paternity no longer valid due to technological advancement); *Clark v. Jeter*, 486 U.S. 456 (1988) (same).

c. The changed-circumstances doctrine also applies to the First Amendment. For example, in *McCutcheon v. FCC*, 134 S. Ct. 1434, 1456 (2014), this Court refused to evaluate the rationality of aggregate limits on campaign contributions in light of the outdated facts present when the Court upheld aggregate limits in *Buckley v. Valeo* in 1976. *See also Edwards v. District of Columbia*, No. 13-7063, slip op. at 13 (D.C. Cir. June 27, 2014) (rejecting the government’s reliance on a 1927 *Washington Post* article because “[r]eliance on decades-old evidence says nothing of the present state of affairs”).

d. Changed circumstances also play a role in criminal procedure. In *Missouri v. Frye*, this Court invalidated the old rule that defense counsel did not need to convey plea offers to clients because “plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.” 132 S. Ct. 1399, 1407 (2012). *Cf. Williams v. Illinois*, 399 U.S. 235, 240 (1970) (noting the “need to be open to reassessment of ancient practices” when striking down statute requiring an indigent defendant to serve jail time in excess of his original sentence in order to “work off” a fine and court costs when “greatly increased use of fines as a criminal sanction has made nonpayment a major cause of incarceration in this country”).

e. This Court has struck down obsolete laws that burden interstate commerce. For example, this Court noted in *Granholm v. Heald*, 544 U.S. 460 (2005), that states’ “health and safety” justifications for bans on direct shipment of wine by out-of-state wineries have been made obsolete by advances in technology that have allowed state regulatory bodies to monitor out-of-state wineries cheaply, easily, and efficiently. *Id.* at 492 (striking down states’ laws burdening or prohibiting direct shipment of wine from out-of-state wineries). *See also Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 672

(1981) (striking down truck length statute because obsolete rules “are of limited relevance on modern interstate highways”); *Am. Trucking Ass’ns v. Scheiner*, 483 U.S. 266, 301-302 (1987) (O’Connor, J., dissenting) (“Significantly changed circumstances can make an older rule, defensible when formulated, inappropriate, and we have reconsidered cases in the dormant Commerce Clause area before.”).

f. In the administrative-law context, an agency’s statutory interpretation is reasonable – and therefore valid under *Chevron* – only when that interpretation takes into account relevant changed circumstances. For example, in *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914 (D.C. Cir. 1998), the D.C. Circuit reviewed EPA regulations for the treatment and disposal of hazardous material that were promulgated pursuant to the Resource Conservation and Recovery Act of 1976. The court struck down the regulations as arbitrary and capricious because they continued to mandate a certain toxicity-testing method despite new data that had come to light proving that the testing method was inaccurate. *Id.* at 923 (“An agency’s use of a model is arbitrary if that model ‘bears no rational relationship to the reality it purports to represent.’” (quoting *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1005 (D.C. Cir. 1997))). See also *Am. Trucking Ass’ns v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967) (“[Agencies] are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.”); *Detsel ex rel. Detsel v.*

*Sullivan*, 895 F.2d 58, 64 (2d Cir. 1990) (“[A]gencies must interpret their regulations in light of changing circumstances, particularly in areas characterized by rapid technological development.”); *Natural Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1408 (D.C. Cir. 1985) (DOE efficiency standards for household appliances “would be patently unreasonable” if “based on data half a decade old”).

g. As discussed earlier, this Court just invoked changed circumstances to invalidate a portion of the Voting Rights Act of 1965. In *Shelby County*, this Court invalidated measures that certain jurisdictions were required to implement to guarantee ballot access because those measures were predicated on “decades-old data and eradicated practices.” *Shelby Cnty.*, 133 S. Ct. at 2617. *See also Karcher v. Daggett*, 462 U.S. 725, 733 (1983) (redistricting not in good faith because modern technology had negated New Jersey’s traditional justifications for not ensuring equal representation); *Kirkpatrick v. Preisler*, 394 U.S. 526, 535-36 (1969) (rejecting old voting district map because changes in transportation and communications had rendered it obsolete in terms of promoting equal representation).

### **C. Recognizing That a Statute Must Be Rational in Its Application Today Will Not Undermine Judicial Deference.**

1. This Petition concerns the role of courts in our democracy and the nature of judicial review. The

rule of *Carolene Products* protects our constitutional rights by ensuring that the *enforcement* of a statute must be rational, and not merely that the statute itself was rational at some distant point in the past. The changed-circumstances doctrine is a particularly important protection because the separation-of-powers principles at the heart of rational-basis review are attenuated when the factual circumstances of a law's passage bear little resemblance to the real world many years later. In enjoining enforcement of certain Funeral Law provisions against Petitioners, the district court was not "sit[ting] as a superlegislature to judge the wisdom or desirability of . . . policy determinations," *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), made by the Pennsylvania legislature in 1952. The trial court was simply recognizing that a legislative scheme devised over sixty years ago, even in good faith and with the best intentions, could not be rationally enforced in certain respects in light of Petitioners' evidence about the way the world actually is today.

Fundamental concerns about deference are the root cause of the conflict within this Court's rational-basis jurisprudence, the conflict between this Court's rational-basis jurisprudence and other areas of the law, and the Third Circuit's reversal of the district court in this case. Rational-basis "review is a paradigm of judicial restraint." *Beach Commc'ns*, 508 U.S. at 314. Going back to Footnote Four, this Court has long been wary of trespassing upon the prerogatives of the elected branches in the context of

non-fundamental rights. *Id.* at 313 (“[Rational-basis review] is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.”).

But the separation-of-powers principles underlying deference have never demanded judicial abdication in the face of government irrationality. Rational-basis review is a meaningful source of protection for freedom, as demonstrated in opinions of this Court concerning an array of liberties, from the rights of same-sex spouses to limits on Congress under the Commerce Clause. *See United States v. Windsor*, 133 S. Ct. 2675 (2013) (holding that restricting federal definition of marriage to apply only to heterosexual unions under DOMA unconstitutional); *Nat’l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) (holding that the individual mandate of the Patient Protection and Affordable Care Act exceeded Congress’ authority under the Commerce Clause); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (striking down Texas sodomy law); *Romer v. Evans*, 517 U.S. 620, 623 (1996) (striking down 1992 amendment to the Colorado Constitution concerning the rights of homosexuals); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (striking down portions of the Violence Against Women Act as exceeding Congress’ authority under the Commerce Clause); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (striking down statute making it a federal offense to knowingly possess firearms in a school zone as exceeding Congress’ authority under the Commerce Clause). Indeed, this Court has struck down laws under rational-basis

review twenty-two times in the last forty-odd years, approximately twenty percent of the time it has applied that standard.<sup>5</sup>

The fate of the Filled Milk Act at issue in *Carolene Products* illustrates how separation-of-powers concerns need not conflict with the changed-circumstances doctrine. In *Carolene Products*, this Court upheld the Filled Milk Act of 1923 under the nascent rational-basis test out of deference to Congress' then-contemporary determination that dairy products fortified with vegetable oil were unwholesome and could create consumer confusion. 304 U.S. at 149. Over the course of several decades, new technologies led to legal imitation-dairy products that were indistinguishable from Milnot, the product in *Carolene Products*. *Milnot Co. v. Richardson*, 350

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<sup>5</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Morrison*, 529 U.S. 598 (2000); *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000); *Romer v. Evans*, 517 U.S. 620 (1996); *United States v. Lopez*, 514 U.S. 549 (1995); *Quinn v. Millsap*, 491 U.S. 95 (1989); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336 (1989); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Plyler v. Doe*, 457 U.S. 202 (1982); *Zobel v. Williams*, 457 U.S. 55 (1982); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *James v. Strange*, 407 U.S. 128 (1972); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Mayer v. City of Chicago*, 404 U.S. 189 (1971); *Reed v. Reed*, 404 U.S. 71 (1971); *Turner v. Fouche*, 396 U.S. 346 (1970).

F. Supp. 221, 223 (N.D. Ill. 1972). In the early 1970s, the Milnot Company, which until 1950 had been called Carolene Products, brought a second constitutional challenge to the Filled Milk Act, arguing that the original justifications for prohibiting the interstate sale of Milnot had disappeared. *Id.* at 224. The federal court agreed, holding that the application of the Filled Milk Act to Milnot, though once rational, was no longer so. *Id.* In refusing to permit further enforcement of the Act against Milnot, the district court was not judging the “wisdom, need, or general appropriateness,” *id.*, of Congress, just enforcing the bedrock right to be treated rationally by the government.

2. It bears emphasizing that the rule of *Carolene Products* is not a rule about how the Constitution itself changes, a rule about how courts ought to strike down unpopular laws when public sentiment shifts, or a rule allowing courts to institute their own social and economic policies. The meaning of the Constitution remains the same, public sentiment is irrelevant, and courts may not substitute their preferences for those of the elected branches. Instead, the modest rule of *Carolene Products* simply ensures that when government officials take away a liberty interest *today*, they do so for reasons that are rational *today*, not merely for reasons that were rational long ago.

To be sure, it may be rare that the factual circumstances surrounding the enforcement of a statute will differ materially from the factual circumstances

of the law's passage, and also rare that changed circumstances have eliminated any plausible rationale for a law. But this Court has never held that the high bar set by the rational-basis test precludes plaintiffs from invoking the full protections that this Court has recognized, including the binding rule set forth in *Carolene Products*.

Judicial review requires judicial engagement with the facts of every case, including cases under rational-basis review, even though laws are presumed constitutional and the government has no affirmative burden. That meaningful judicial engagement is not possible, however, when this Court's major rational-basis decisions are in conflict, and the courts cannot serve as Madison's "bulwark of liberty" if they are instructed to ignore the actual irrationality of enforcing a law today in deference to facts that disappeared long ago.

**D. This Case Is an Ideal Vehicle for Addressing the Conflicts Identified in This Petition Because No Further Legal or Factual Development Is Necessary.**

This Court should grant review because the decision below squarely presents the issue. The district court heard this case under a fully developed record on cross-motions for summary judgment. Petitioners argued below that enforcement of the Funeral Director Law is irrational under the realities of the funeral industry as they are today. The district

court held in Petitioners' favor, enjoining the arbitrary application of several provisions. The Third Circuit reversed as a matter of law on the ground that obsolescence was not a legitimate basis for invalidating a statute under rational-basis review and upheld the challenged provisions on the ground that they were rational when enacted in 1952. No further legal or factual development is necessary.

This Court need reach only the legal question of how the rational-basis test operates when a plaintiff has adduced evidence demonstrating changed factual circumstances. This Court can remand with the proper constitutional rule announced and allow the lower court to apply the clarified rule to the record.



**CONCLUSION**

This Petition should be granted.

Respectfully submitted,

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**PRECEDENTIAL**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 12-3591

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ERNEST F. HEFFNER; HARRY C. NEEL;  
BART H. CAVANAGH, SR.; JOHN KATORA;  
BRIAN LEFFLER; REBECCA ANN WESSEL;  
MARK PATRICK DOUGHERTY; CYNTHIA LEE  
FINNEY; NATHAN RAY; TODD ECKERT;  
BEN BLASCOVICH; MATTHEW MORRIS;  
WILLIAM SUCHARSKI; JOHN MCGEE;  
AMBER M. SCOTT; ERIKA HAAS; NICOLAS  
WACHTER; DAVID HALPATE; PATRICK  
CONNELL; EUGENE CONNELL; MATTHEW  
CONNELL; JAMES J. CONNELL, JR; JEFFERSON  
MEMORIAL PARK, INC; JEFFERSON MEMORIAL  
FUNERAL HOME, INC.; WELLMA FUNERAL  
ASSOCIATES INC., doing business as Forest Park  
Funeral Home; EAST HARRISBURG CEMETERY  
& CREMATORY; ROBERT LOMISON;  
CRAIG SCHWALM; GREGORY J. HARVILLA;  
BETTY FREY

v.

DONALD J. MURPHY; JOSEPH A. FLUEHR, III;  
MICHAEL J. YEOSOCK; BENNETT GOLDSTEIN;  
JAMES O. PINKERTON; ANTHONY SCARANTINO;  
BASIL MERENDA; MICHAEL GERDES;  
PETER MARKS; C.A.L. SHIELDS,  
Appellants.

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Appeal from the United States District Court  
for the Middle District of Pennsylvania  
(D.C. Civil Action No. 4-08-cv-00990)  
District Judge: Honorable John E. Jones III

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Argued: June 11, 2013

Before: McKEE, *Chief Judge*  
AMBRO and GREENBERG, *Circuit Judges*

(Opinion filed: February 19, 2014)

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OPINION OF THE COURT

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McKEE, *Chief Judge*.

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[4] The Pennsylvania Board of Funeral Directors (the “Board”) appeals the grant of summary judgment that the District Court awarded based upon its conclusion that several provisions of Pennsylvania’s Funeral Director Law (“FDL”), 63 Pa. Stat. Ann. § 479.1 *et seq.*, violate various provisions of the U.S. Constitution. The suit was brought by individuals and entities who are either involved in, or wish to be involved in, Pennsylvania’s “death care industry.”<sup>1</sup> In relevant part, the Plaintiffs challenged statutory provisions that: (1) permit warrantless inspections of funeral establishments by the Board; (2) limit the number of establishments in which a funeral director may possess an ownership interest; (3) restrict the capacity of unlicensed individuals and certain entities to hold ownership interests in a funeral establishment; (4) restrict the number of funeral establishments in which a funeral director may practice his or her profession; (5) require every funeral establishment to have a licensed full-time supervisor; (6) require funeral establishments to have a “preparation room”; (7) prohibit the service of food in a funeral establishment; (8) prohibit the use of trade names by funeral homes; (9) govern the trusting of monies advanced pursuant to pre-need contracts for

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<sup>1</sup> The Plaintiffs-Appellees are collectively referred to as the “Plaintiffs.”

merchandise; and (10) prohibit the payment of commissions to agents or employees.

[5] As a threshold matter, we surmise that much of the District Court's conclusions regarding the constitutionality of the FDL, enacted in 1952, stem from a view that certain provisions of the FDL are antiquated in light of how funeral homes now operate. That is not, however, a constitutional flaw. Thus, for the reasons that follow, we reverse the District Court's judgment striking down the FDL's warrantless inspection scheme on Fourth Amendment grounds. We also reverse the District Court's judgments concerning the Plaintiffs' dormant Commerce Clause challenges to certain provisions of the FDL. We reverse as well the District Court's conclusions that the disputed FDL provisions violate the substantive component of the Due Process Clause. We also reverse the District Court's ruling that the Board's actions unconstitutionally impair the Plaintiffs' private contractual relations with third parties in violation of the Constitution's Contract Clause. We will affirm the District Court's ruling that Pennsylvania's ban on the use of trade names in the funeral industry runs afoul of First Amendment protections, but reverse its ruling that the ban on the payment of commissions to unlicensed salespeople violates the Constitution. Finally, we remand to the District Court to modify its order in accordance with this opinion.

**[6] I. Facts and Procedural History**

The FDL was enacted in 1952 to “provide for the better protection of life and health of the citizens of [Pennsylvania] by requiring and regulating the examination, licensure and registration of persons and registration of corporations engaging in the care, preparation and disposition of the bodies of deceased persons. . . .” 63 Pa. Stat. Ann. § 479.1. The FDL created the Board, it entrusts the Board with enforcing the FDL, and “empower[s] [it] to formulate necessary rules and regulations not inconsistent with [the FDL] for the proper conduct of the business or profession of funeral directing and as may be deemed necessary or proper to safeguard the interests of the public and the standards of the profession.” *Id.* § 479.16(a); *see also id.* § 479.19.

The FDL requires individuals to obtain a license to be a funeral director or own funeral homes in Pennsylvania.<sup>2</sup> *Id.* § 479.13(a). Generally, only licensed

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<sup>2</sup> The FDL defines “funeral director” as includ[ing] any person engaged in the profession of a funeral director or in the care and disposition of the human dead, or in the practice of disinfecting and preparing by embalming the human dead for the funeral service, burial or cremation, or the supervising of the burial, transportation or disposal of deceased human bodies, or in the practice of funeral directing or embalming as presently known, whether under these titles or designation or otherwise. The term “funeral director” shall also mean a person who makes arrangements for funeral service and who sells funeral merchandise to the public incidental to such service

(Continued on following page)

funeral directors or partnerships of two or more licensed funeral directors may own funeral homes. *Id.* § 479.8(a). The statute also restricts the types of individuals and entities that may obtain such licenses. However, upon the death of a licensee, the FDL authorizes the Board to issue a license to the licensee's estate [7] for a period of three years or to the licensee's surviving spouse while s/he remains unmarried. *Id.* The statute authorizes restricted corporations ("RBCs") to obtain licenses, provided that they are formed for the sole purpose of conducting a funeral directing practice. *Id.* § 479.8(b).<sup>3</sup> The FDL prohibits an RBC from having an ownership interest in any other funeral establishment and requires that at least one of its principal officers be a licensed funeral director. *Id.* Upon the death of a shareholder funeral director, shares or stock of an RBC may be transferred to members of the decedent's immediate family. *Id.*

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or who makes financial arrangements for the rendering of such services and the sale of such merchandise.

63 Pa. Stat. Ann. § 479.2(1).

<sup>3</sup> As defined by § 479.8(b), "[a] restricted business corporation is . . . a corporation formed by one or more licensed funeral directors specifically for the purpose of conducting a funeral directing practice and whose shareholders are licensed funeral directors or members of the immediate family of a licensed funeral director." *H.P. Brandt Funeral Home, Inc. v. Commonwealth of Pennsylvania, et al.* 467 A.2d 106, 107 (Pa. Cmwlth 1983).

The FDL also codifies Pennsylvania’s prohibition of general business corporations owning funeral directing licenses. *See id.* § 479.8(d). Prior to 1935, Pennsylvania issued funeral directing licenses to individuals as well as corporations. However, in 1935 the General Assembly imposed restrictions. Consistent with a 1936 decision of the Pennsylvania Supreme Court, *see Rule v. Price*, 185 A. 851 (Pa. 1936), the legislature eventually allowed a total of seventy-seven “pre-1935” licenses to be “grandfathered” into the new law. Currently, any person or entity – including general business corporations – may own an interest in one of these licenses and own and operate a funeral establishment pursuant to the authority granted by that license.

Licensed funeral directors are limited to operating at one principal place of business with no more than one branch location. 63 Pa. Stat. Ann. § 479.8(e). These establishments must be conducted under the name of a licensed principal or that of a predecessor establishment. *Id.* §§ 479.8(a)-(c). In addition, the FDL requires that each establishment retain a licensed funeral director as a “full-time supervisor,” *id.*, and include a “preparation room . . . for the preparation and embalming of human bodies,” *id.* § 479.7. Food service is generally prohibited inside a funeral establishment. Only “non-intoxicating” beverages may be served, and they may [8] only be served in rooms “not used for the preparation and conduct of [] funeral service[s].” *Id.*

As the administrative entity entrusted with enforcing the FDL, the Board's inspectors are authorized to conduct warrantless and unannounced inspections of funeral establishments. Specifically, Section 16(b) of the FDL authorizes the Board to appoint inspectors who have:

[T]he right of entry into any place, where the business of funeral directing is carried on, or advertised as being carried on, for the purpose of the inspection and for the investigation of complaints coming before the board and for such other matters as the board might direct.

*Id.* § 479.16(b).

Finally, the FDL also contains two provisions relating to the “pre-need” sale of funeral arrangements that are at issue here.<sup>4</sup> First, Section 11(a)(8) of the FDL provides that a funeral director or funeral home's license may be suspended or revoked if a licensed funeral director pays unlicensed employees commissions on sales. *See id.* § 479.11(a)(8) (“The board . . . may refuse to grant, refuse to renew, suspend or revoke a license of any applicant or licensee . . . for . . . (8) paying a commission . . . to any person

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<sup>4</sup> “‘Preneed’ services are what their name implies: a customer makes his or her funeral arrangements and pays for them, either in a lump sum or over time with the idea that, at the time of death, the services are fully paid for.” *In re Forest Hill Funeral Home & Mem’l Park*, 364 B.R. 808, 811 (Bankr. E.D. Okla. 2007).

... for ... business secured. ...”). Second, the FDL requires that a funeral director who enters into a pre-need contract to provide funeral services deposit 100% of any advance payments into an escrow or trust account. *Id.* § 479.13(c).

In May 2008, the Plaintiffs initiated this suit against the Board, asserting claims under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 for alleged violations of their rights under the U.S. Constitution. Specifically, the Plaintiffs’ amended complaint asserted that the above-referenced FDL provisions [9] violated several constitutional provisions, including the Commerce Clause, the Contract Clause, the First Amendment, the Fourth Amendment, and the substantive component of the Fourteenth Amendment’s Due Process Clause.

By way of stipulation, the parties dismissed one of the counts in the amended complaint with prejudice.<sup>5</sup> Thereafter, the Board and Plaintiffs both moved for summary judgment.

The District Court largely agreed with the Plaintiffs that the challenged FDL provisions violated various constitutional provisions. *See Heffner v. Murphy*, 866 F. Supp. 2d 358 (M.D. Pa. 2012). The Court struck down FDL provisions that: (1) permit

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<sup>5</sup> The parties agreed to dismiss Count X, which claimed that the Board had arbitrarily and unreasonably restricted licensed funeral directors from securing continuing education credits online.

warrantless inspections of funeral establishments by the Board; (2) limit the number of establishments in which a funeral director may possess an ownership interest; (3) restrict the capacity of unlicensed individuals and certain entities to hold ownership interests in a funeral establishment; (4) restrict the number of funeral establishments in which a funeral director may practice his/her profession; (5) require every funeral establishment to have a licensed full-time supervisor; (6) require funeral establishments to have a “preparation room”; (7) prohibit the service of food in a funeral establishment; (8) prohibit the use of trade names by funeral homes; (9) govern the trusting of monies advanced pursuant to pre-need contracts for merchandise; and (10) prohibit the payment of commissions to agents or employees.<sup>6</sup>

This appeal followed.

## [10] II. Discussion

### A. Jurisdiction and Standard of Review

We have jurisdiction to review a district court’s order granting an injunction under 28 U.S.C.

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<sup>6</sup> The District Court found in the Board’s favor on Count XI of the amended complaint, which alleged that certain restrictions that the FDL places on cremation violated the Plaintiffs’ rights under the Commerce Clause, the First Amendment, and the Due Process Clause. *See Heffner*, 866 F. Supp. 2d at 408-18. The Plaintiffs have not appealed the District Court’s ruling on this issue.

§ 1292(a). The District Court had federal question jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343.

We exercise plenary review over a district court's grant or denial of summary judgment. *Carter v. McGrady*, 292 F.3d 152, 157 (3d Cir. 2002). "To prevail on a motion for summary judgment, the moving party must demonstrate that 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Interstate Outdoor Adver., L.P. v. Zoning Bd. of Twp. of Mount Laurel*, 706 F.3d 527, 530 (3d Cir. 2013) (quoting Fed. R. Civ. P. 56(a)). Moreover, "where, as was the case here, the District Court considers cross-motions for summary judgment 'the court construes facts and draws inferences in favor of the party against whom the motion under consideration is made.'" *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 925 (3d Cir. 2011) (quoting *Pichler v. UNITE*, 542 F.3d 380, 386 (3d Cir. 2008) (internal quotation marks omitted)).

## **B. Facial versus As-Applied Challenge**

Before we proceed to the merits of the Plaintiffs' constitutional claims, we need to address the threshold matter of whether we are reviewing a facial or an as-applied challenge to the disputed FDL provisions. The difference between the two is significant. "A party asserting a facial challenge 'must establish that no set of circumstances exists under which the Act would be valid.'" *United States v. Mitchell*, 652 F.3d

387, 405 (3d Cir. 2011) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). This is a particularly demanding standard and is the “most difficult challenge to mount successfully.” *Salerno*, 481 U.S. at 745. By contrast, “[a]n as-applied attack . . . does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right.” *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010).

[11] In granting summary judgment to the Plaintiffs on all but one of their asserted counts, the District Court only engaged in a facial analysis. Confusingly, however, the District Court’s subsequent order invalidated those same FDL provisions both on their face and as-applied to the Plaintiffs.

When confronted with this kind of ambiguity in the past, our inquiry has examined whether the challenged statutes survive either type of challenge. *See Mitchell*, 652 F.3d at 405-06; *Marcavage*, 609 F.3d at 273. However, in those cases, the parties themselves disputed the nature of the challenges. Here, the amended complaint is generally consistent with a facial challenge and Plaintiffs’ briefs exclusively advance facial challenges. This is consistent with the position Plaintiffs’ counsel took at oral argument. On appeal, counsel relies on several grounds in continuing to argue that the FDL is invalid on its face.

Accordingly, we will limit our inquiry to whether the challenged provisions of the FDL are facially invalid.<sup>7</sup>

### C. Fourth Amendment

Section 16(b) of the FDL gives board inspectors “the right of entry into any place, where the business or profession of funeral directing is carried on or advertised as being carried on, for the purpose of inspection and for the investigation of complaints coming before the board and such other matters as the board may direct.” 63 Pa. Stat. Ann. § 479.16(b). Count I of the Plaintiffs’ amended complaint charged that this authority to conduct warrantless searches of funeral establishments violates the Fourth Amendment.

The Supreme Court has recognized that “warrantless searches are generally unreasonable, and [ ] this rule applies to commercial premises as well as homes.” *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312 (1978). Therefore, the [12] government must secure a warrant before searching or inspecting private

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<sup>7</sup> As noted above, a finding that the FDL’s provisions are facially invalid negates any need to conduct an as-applied challenge. *See Salerno*, 481 U.S. at 745. If the FDL is determined to be unconstitutional *as written*, it is irrelevant whether the statute’s application to a particular person under particular circumstances deprived that person of a constitutional right. *See Marcavage*, 609 F.3d at 273. Moreover, given the arguments asserted by Plaintiffs and the record before us, we conclude that an “as applied challenge” is not supported by this record.

premises absent certain narrow circumstances that are not alleged here. *Showers v. Spangler*, 182 F.3d 165, 172 (3d Cir. 1999). The Board defends its authority to conduct warrantless searches by relying on the “well recognized exception” to the warrant requirement that applies to highly regulated industries. *See id.*; *see also Free Speech Coal., Inc. v. Att’y Gen. of U.S.*, 677 F.3d 519, 544 (3d Cir. 2012) (“Certain industries have such a history of government oversight that no reasonable expectation of privacy could exist.”).

In *New York v. Burger*, 482 U.S. 691 (1987), the Supreme Court rejected a Fourth Amendment challenge to a New York statute that authorized warrantless inspections of vehicle-dismantling businesses. The Court reasoned that the authority to inspect such businesses without a warrant came within the narrow exception to the warrant requirement for administrative inspections of closely regulated businesses. *Id.* at 703. The state had a substantial interest in regulating industries associated with motor vehicle theft, and warrantless administrative inspections advanced that interest. *Id.* at 708. The Court held that the challenged statute provided a “constitutionally adequate substitute” for warrants by informing operators of a vehicle-dismantling business that inspections will be made on a regular basis and by limiting discretion of inspection officers. *Id.* at 711.

Accordingly, we begin our Fourth Amendment inquiry by determining whether the FDL is a “closely regulated industry.” *Free Speech Coal., Inc.*, 677 F.3d

at 544. “Factors to consider when determining whether a particular industry is closely regulated include: duration of the regulation’s existence, pervasiveness of the regulatory scheme, and regularity of the regulation’s application.” *Id.*

The funeral “industry” in Pennsylvania is clearly subjected to extensive regulations.<sup>8</sup> The FDL and its supporting regulations prescribe a broad range of standards that funeral directors in Pennsylvania have long been required to comply with. These include licensing requirements, health standards, and funeral services that funeral homes must provide. *See, e.g.*, 63 Pa. Stat. Ann. §§ 479.6 (issuance of licenses), 479.7 (health restrictions); *see also Guardian Plans v. Teague*, 870 F.2d 123, 126 (4th Cir. 1989) (describing [13] similar requirements governing funeral service professionals in Virginia as “extensive”); *Toms v. Bureau of Prof’l and Occupational Affairs*, 800 A.2d 342, 349 (Pa. Cmwlth. 2002) (“The [FDL] . . . impose[s] rules and restrictions on funeral directors not only to protect the bereaved . . . , but also to provide a framework with which to help the bereaved address each of the issues that arise when making final arrangements for a deceased loved one.”). The funeral industry is also subject to significant federal regulation. Not only does the Federal Trade Commission require funeral homes to disclose

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<sup>8</sup> Indeed, one need look no further than the breadth of the regulations being challenged by the Plaintiffs to understand the breadth of Pennsylvania’s regulations of the funeral industry.

pricing information prior to all transactions, *see* 16 C.F.R. 453.2, funeral establishments must also comply with several health and safety standards imposed by the Occupational Safety and Health Administration, *see, e.g.*, 29 C.F.R. 1910.1030 (Blood borne Pathogen Standard).

Since we have no difficulty concluding that Pennsylvania’s funeral industry is a “closely regulated industry,” our *Burger* inquiry proceeds to determining if the searches authorized by the FDL are reasonable. *Free Speech Coal., Inc.*, 677 F.3d at 544 (“Once a business is determined to be part of a closely regulated industry, then we must decide whether the alleged warrantless search was reasonable.”). That inquiry requires us to focus on three criteria:

First, there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made. . . . Second, the warrantless inspections must be necessary to further the regulatory scheme. . . . Finally, the statute’s inspection program . . . must provide a constitutionally adequate substitute for a warrant.

*Burger*, 482 U.S. at 702-03 (internal quotation marks and citations omitted); *Free Speech Coal., Inc.*, 677 F.3d at 544.

The Plaintiffs argue that the searches authorized by the FDL are not supported by a sufficient governmental interest to withstand Fourth Amendment

scrutiny under *Burger*. However, Pennsylvania obviously has a substantial interest in [14] public health, safety, and consumer protection. *See, e.g., Grime v. Dep't of Public Instruction*, 188 A. 337, 381 (1936) (noting that the General Assembly has a legitimate interest in regulating the licensing of funeral directors in order “to protect the public health from the dangers attendant upon the inexpert conduct of undertaking by those not qualified by the necessary knowledge of principles of sanitation and disease prevention.”); *Brown v. Hovatter*, 561 F.3d 357, 368 (4th Cir. 2009) (“[A] State has ‘a legitimate interest in protecting the health, safety and welfare of its citizens through regulation of the funeral profession.’” (quoting *Guardian Plans, Inc.*, 870 F.2d at 126)); *Toms*, 800 A.2d at 346 (“[T]he General Assembly has a legitimate interest in regulating the funeral industry to safeguard the interests of the public and the standards of the profession.” (quoting *Ferguson v. Pa. State Bd. of Funeral Dirs.*, 768 A.2d 393, 397-98 (Pa. Cmwlth. 2001))).

The Plaintiffs claim that Section 16(b) of the FDL does not satisfy *Burger* because a *warrantless* search is not necessary to further the regulatory objectives. The Plaintiffs support that argument by highlighting differences between funeral homes on the one hand, and searches of premises involved in the rapid exchange of fungible items – *e.g.*, the “chop shops” at issue in *Burger* – on the other. According to the Plaintiffs, inspectors’ searches of funeral establishments are likely to focus on compliance with such regulations

as building standards, and the need for surprise inspections is therefore attenuated to such an extent that it cannot justify a warrantless intrusion under *Burger*.

Although that may be true, it is neither outcome determinative nor does it advance our inquiry. Although the need for unannounced inspections of funeral parlors may not be as great as for other kinds of businesses, that does not negate the need for surprise inspections of funeral parlors. The Board need not show that warrantless searches are the *most* necessary way to advance its regulatory interest. See *Contreras v. City of Chicago*, 119 F.3d 1286, 1290 (7th Cir. 1997) (“The pertinent inquiry is whether the [government’s] objectives would be frustrated by requiring a warrant or notice.”) (internal quotation marks and alterations omitted).

[15] The Board persuasively explains that if inspectors are barred from entering funeral homes without a search warrant or advance notice, unscrupulous funeral practitioners could bring their establishments into regulatory compliance prior to an inspection, only to let them fall below prescribed standards when the threat of detection passes. We agree. Thus, Pennsylvania’s warrantless search regime is not qualitatively different from various other administrative inspection schemes that depend on the element of surprise to both detect and deter violations. See, e.g., *Lesser v. Espy*, 34 F.3d 1301, 1308 (7th Cir. 1994) (upholding statutory regime authorizing

warrantless searches of businesses that supplied rabbits to research laboratories).

Plaintiffs also argue that Section 16(b) cannot survive the third prong of the *Burger* inquiry because it does not sufficiently limit inspectors' discretion and therefore cannot be a constitutionally adequate substitute for a warrant. The Plaintiffs base that claim on the statutory text which allows inspection for any complaints or "other matters as the board may direct[.]" 63 Pa. Stat. Ann. § 479.16(b). According to the Plaintiffs, this gives inspectors nearly absolute discretion and infringes upon the privacy interests of funeral directors. Plaintiffs stress, for example, that "no regulation or policy specifies what will be inspected or when," and they claim that the "frequency, nature, and extent of an inspection" appear to be left to an inspector's discretion. Plaintiffs' Br. at 11.

The third prong of the *Burger* test requires that a regulatory statute authorizing warrantless searches both (1) advise the owner of the premises that a search is pursuant to the law, and (2) limit the discretion of the officers conducting the search. *See Burger*, 482 U.S. at 703. "Inspectors, in other words, cannot barge into an establishment any time they want and inspect the place however they please." *Contreras*, 119 F.3d at 1291.

We agree that a delegation of authority as broad as that which Plaintiffs describe could not satisfy *Burger*. However, Plaintiffs mischaracterize Section 16(b). Their argument ignores other aspects of the

statutory regime that place restrictions on warrantless searches under the FDL as required by *Burger*. The statute plainly states that any [16] business that engages (or represents itself as engaging) in the practice of funeral directing is subject to search by Board inspectors. Notice that inspections of private premises may take place “pursuant to the law” is sufficient under *Burger*, so long as limits are placed on the discretion of the inspecting officer. *See id.* at 703, 711; *see also LeSueur-Richmond Slate Corp. v. Fehrer*, 666 F.3d 261, 265 (4th Cir. 2012) (“[T]he *Burger* Court meant that a statute permitting warrantless administrative searches must clearly indicate that the [relevant] property is subject to search, whether or not any government official actually conducts one.”).

Section 16(b) provides that only Board-appointed inspectors may search private premises used in the funeral business. Accordingly, the FDL more closely circumscribes who may conduct searches than the statutory regimes that the Supreme Court upheld in *Burger*. *See Burger*, 482 U.S. at 704, 711 (discussing scheme authorizing inspections “by the police or any agent of the Department of Motor Vehicles”); *see also Tart v. Commonwealth of Mass.*, 949 F.2d 490, 497 (1st Cir. 1991) (upholding scheme authorizing “any authorized person” to inspect fishing permits).

Moreover, while the FDL permits officers to inspect for “such . . . matters as the Board may direct,” it exclusively restricts the Board’s enforcement

duties to matters pertaining to the FDL. *See* 63 Pa. Stat. Ann. § 479.16(a). As the Board correctly notes, under *Burger* we have upheld significantly broader grants of authority. *See Watson v. Abington Twp.*, 478 F.3d 144, 152 (3d Cir. 2007) (recognizing that Pennsylvania’s liquor board is authorized to inspect for “any violation of the Liquor Code or any law of the Commonwealth” (quoting *In re Catering Club Liquor License No. CC-4837 Issued to Fulton Post, Inc.*, 438 A.2d 662, 663 (1981))); *see also LeSueur-Richmond Slate Corp.*, 666 F.3d at 266.

Plaintiffs’ *Burger* challenge also relies on the absence of appropriate temporal limitation on searches of funeral establishments. The point is well taken, but we believe the absence of such restrictions is not fatal to the FDL. Time limitations, along with those related to the scope and location of a search, are key to restricting inspectors’ discretion. *See Burger*, 482 U.S. at 703. Accordingly, courts reviewing [17] regulatory search schemes under *Burger* generally look to whether the statutes and regulations at issue place adequate temporal limits on government officers’ ability to conduct searches of private property. Here, neither Section 16(b) of the FDL nor relevant Board regulations establish any such limitations – *e.g.*, by requiring that officers conduct inspections during normal business hours.

However, context matters and courts have consistently upheld statutes permitting administrative searches in the absence of time restrictions where such limitations would frustrate the underlying

governmental interest. See *United States v. Vasquez-Castillo*, 258 F.3d 1207, 1212 (10th Cir. 2001) (upholding regulatory inspection scheme on commercial carriers and noting that “trucks operate twenty-four hours a day”) (internal quotation marks omitted); *Crosby v. Paulk*, 187 F.3d 1339, 1347 (11th Cir. 1999) (upholding statute authorizing inspections of properties where alcohol was sold and permitting Georgia officers to “enter upon the licensed premises . . . at any time” (emphasis omitted) (quoting O.C.G.A. § 3-2-32)); *United States v. Dominguez-Prieto*, 923 F.2d 464, 470 (6th Cir. 1991) (noting “limitation [on searches of commercial carriers] would . . . render the entire inspection scheme unworkable and meaningless”).

Obviously, the concerns that lead to the regulation of funeral facilities do not disappear at the close of business, nor is the need for regulatory compliance restricted to business hours. In fact, just the opposite may be true. It is quite reasonable for the state to assume that owners of funeral businesses will be particularly careful to avoid disturbing or offending visitors and family members who are already grieving the loss of a loved one. However, the health concerns that underlie much of the FDL’s regulatory scheme do not dissipate when those visitors and family members leave the funeral home. Death is obviously not restricted to normal business hours and a funeral facility must continually maintain the corpse until it is finally removed. Therefore the state has a strong interest in ensuring that the funeral business complies with applicable regulations 24 hours a day, 7

days a week. Limiting regulatory inspections to business hours would not advance that interest.

[18] In mounting a facial challenge to the FDL, Plaintiffs must persuade us that “there is no set of circumstances” under which the FDL’s inspection scheme may be applied constitutionally. *See Mitchell*, 652 F.3d at 415-16. Plaintiffs have failed to do so. As we have just explained, the very fact that death is not restricted to normal business hours or workdays belies any suggestion that administrative searches of funeral parlors should be so restricted. Given the totality of the FDL’s warrantless administrative inspection scheme, we hold that the statute adequately limits the discretion of government officers.<sup>9</sup>

#### **D. Dormant Commerce Clause**

The Commerce Clause of the U.S. Constitution grants Congress the power to “regulate Commerce . . . among the several States.” U.S. Const. Art. I, § 8, cl.3. “This clause has an implied requirement – the Dormant Commerce Clause – that the states not ‘mandate differential treatment of in-state and out-of-state economic interests that

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<sup>9</sup> In addition, we note that nothing in the record suggests that Board officers have conducted inspections of funeral homes outside of normal business hours. Indeed, the Board asserts – and the Plaintiffs concede – that because government inspectors are only paid for work performed between 8:30 a.m. and 5:00 p.m., administrative inspections have exclusively taken place during those hours.

benefit the former and burdens the latter.’” *Keystone Redev. Partners, LLC v. Decker*, 631 F.3d 89, 107 (3d Cir. 2011) (quoting *Granholm v. Heald*, 544 U.S. 460, 472 (2005)). Accordingly, it is “[a]xiomatic . . . that a state cannot impede free market forces to shield in-state businesses from out of state competition.” *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 210 (3d Cir. 2002) (“*Cloverland I*”).

Our dormant Commerce Clause inquiry begins with determining whether the FDL discriminates against interstate commerce in either purpose or effect. See *Am. Trucking Ass’n, Inc. v. Whitman*, 437 F.3d 313, 319 (3d Cir. 2006). If so, the discriminatory restrictions must then survive heightened scrutiny to survive the Plaintiffs’ Commerce Clause challenge. *Am. Exp. Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 372 (3d Cir. 2012). [19] Heightened scrutiny requires the State to “‘demonstrate (1) that the statute serves a legitimate local interest, and (2) that this purpose could not be served as well by available nondiscriminatory means.’” *Freeman v. Corzine*, 629 F.3d 146, 158 (3d Cir. 2010) (quoting *Am. Trucking Ass’n, Inc.*, 437 F.3d at 319).

If we determine that heightened scrutiny is inappropriate because the FDL’s provisions do *not* discriminate in favor of in-state interests, we then must balance interests pursuant to *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). *Pike* balancing is necessary because “[s]tates may not impose regulations that place an undue burden on interstate commerce,

even where those regulations do not discriminate between in-state and out-of-state businesses.” *United States v. Lopez*, 514 U.S. 549, 579-80 (1995). The *Pike* balancing inquiry requires that we determine “whether the [law’s] burdens on interstate commerce substantially outweigh the putative local benefits.” *Freeman*, 629 F.3d at 158 (quoting *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 462 F.3d 249, 258 (3d Cir. 2006) (alterations omitted) (“*Cloverland II*”). Here, the District Court concluded that several of the FDL’s provisions unconstitutionally shielded Pennsylvania funeral establishments from out-of-state competition in violation of the Commerce Clause. In explaining why we disagree with that conclusion we will separately discuss each of the allegedly discriminatory provisions.

### **1. Restrictions on Ownership and Alienability of Funeral Establishments**

The Plaintiffs first argue that FDL’s limits on the ownership of funeral establishments in Pennsylvania violate the dormant Commerce Clause. The first challenged restriction that we will discuss is referred to as the “one-and-a-branch” limitation. It restricts licensees to possessing an ownership interest in one funeral establishment with only a single “branch” location. 63 Pa. Stat. Ann. §§ 479.8(a)-(e).

The second limitation that is challenged under the dormant Commerce Clause arises from a *set* of

provisions governing funeral licensing requirements in Pennsylvania. [20] These provisions generally restrict ownership of an interest in funeral establishments to individuals and entities that had a license before 1935. *See id.* §§ 479.8(a)-(c). However, as we explained earlier, notwithstanding this limitation, these ownership provisions allow the estate of a deceased licensee or surviving spouse to receive a license to continue the business of the deceased licensee. Similarly, immediate family members may hold a deceased funeral director's stock in a restricted corporation upon death of the licensee.

The District Court did not independently analyze the one-and-a-branch limitation in concluding that these “ownership restrictions” violated the dormant Commerce Clause. We will nevertheless examine the constitutionality of each of the ownership restrictions.

***a. One-and-a-Branch Provision***

The one-and-a-branch provision states that “[l]icensees authorized to conduct a funeral practice . . . may practice at one principal place and no more than one branch place of business.” *Id.* § 479.8(e). Other provisions, in Section 8 of the FDL, similarly restrict business entities' ownership interests. *See id.* §§ 479.8(a), (b), (d). The Plaintiffs allege that these provisions unconstitutionally prohibit out-of-state interests from operating a funeral business at more than two locations. Plaintiffs claim that the unconstitutionality results from the resulting inability to

“cluster”<sup>10</sup> facilities so that they can more effectively compete with in-state funeral directors.

We begin our analysis by asking “whether [the State law] discriminates on its face against interstate commerce.” *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). The answer to that question is as obvious as it is straightforward. Despite Plaintiffs’ attempt to conjure up a discriminatory impact on out-of-state funeral owners, it is clear from the text of the [21] statute that the challenged provisions impose the same limitation on out-of-state funeral directors *and* those in Pennsylvania. There is simply no distinction under the FDL between in-state and out-of-state interests or impact. The restriction burdens both to the same extent. Any burden that results from these limitations affects *all* licensed individuals who possess an ownership interest in a funeral business operated in Pennsylvania regardless of the state of residency of any of its owners.

Our dormant Commerce Clause inquiry only considers whether the impact of the limitation falls

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<sup>10</sup> Plaintiffs define “clustering” as the sharing of employees and equipment between multiple locations. Plaintiffs’ Br. at 26. Plaintiffs contend that the prohibition on clustering – *i.e.*, limiting the extent to which the services of a funeral director can be shared across a cluster of funeral homes – means that a firm attempting to cluster in Pennsylvania is required to hire more personnel at greater expense. *See Heffner*, 866 F. Supp. 2d at 396.

equally upon in-state and out-of-state funeral directors; if so, there is clearly no discrimination in favor of Pennsylvania operators. See *Sixth Angel Shepherd Rescue, Inc. v. West*, 477 F. App'x 903, 907 (3d Cir. 2012) (noting that, under the dormant Commerce Clause analysis, “we ask whether a challenged law discriminates against interstate commerce . . . [but a]bsent discrimination for the forbidden purpose . . . the law will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.”) (quoting *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338-39 (2008)) (internal quotations and citations omitted).

By way of example, a Pennsylvania resident who is a licensed funeral director in Pennsylvania and a Maryland resident who is a licensed funeral director in Pennsylvania are similarly barred from owning an interest in more than two funeral establishments in Pennsylvania. In-state funeral parlor owners who want to achieve an economy of scale through “clustering” face the same obstacles as out-of-state owners who want to cluster.<sup>11</sup>

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<sup>11</sup> The Plaintiffs describe clustering as “the primary competitive advantage of [ ] out-of-state competitors.” Plaintiffs’ Br. at 25. Although the record contains evidence that supports the alleged consumer benefits flowing from an economy of scale business model, the record does not support the contention that the FDL’s interposition of an obstacle to clustering unilaterally advances the interest of Pennsylvania funeral establishments.

We realize, of course, that the vast majority of individuals who apply for and obtain a Pennsylvania funeral directing license will probably reside in-state in order to practice their trade. Indeed, like the one-and-a-branch provision, many of the FDL's requirements may render that choice all but inevitable. However, that does not elevate the resulting choice to the level of unconstitutional coercion under the dormant Commerce Clause. The funeral [22] service "industry," involving the internment and cremation of consumers' loved ones, is by nature a highly localized enterprise. So long as a State's regulation operates evenhandedly as to both in-state and out-of-state actors seeking to enter such an industry, we do not subject it to heightened scrutiny under dormant Commerce Clause analysis. *See Am. Trucking Assocs., Inc.*, 545 U.S. at 437 (in upholding Michigan's annual fee assessed on trucks engaged in intrastate commercial freight, the court noted the disputed provision "taxe[d] purely local activity; it does not tax an interstate truck's entry into the State nor does it tax transactions spanning multiple States"); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987) (holding Indiana statute regulating acquisition of corporation stock did not merit heightened scrutiny because it had "same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana").

Accordingly, we hold that the one-and-a-branch restriction does not discriminate against out-of-state interests, and we thus reject the Plaintiffs' contention that we should subject the applicable provisions of

the FDL to heightened scrutiny. *See McBurney v. Young*, 133 S. Ct. 1709, 1719 (2013) (noting dormant Commerce Clause jurisprudence “is driven by a concern about ‘economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors’” (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 268, 273-74 (1988))).

Having determined that the one-and-a-branch limitation does not discriminate against out of state interests, we need only determine whether it can withstand scrutiny under the *Pike* balancing test. *See Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008). We believe that it does. The “incidental burdens” that we must assess under *Pike* consist of “the degree to which the state action incidentally discriminates against interstate commerce relative to intrastate commerce.” *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 406 (3d Cir. 1987). As we have just explained, the FDL’s one-and-a-branch restriction imposes the very same burdens on Pennsylvania funeral directors as it imposes on out-of-state interests. Thus, the regulation here is a burden on commerce without discriminating against *interstate* commerce. *See Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 826-27 (3d Cir. 1994) (“[W]here the burden on out-of-state interests rises no higher than that placed on competing in-state interests, it is a burden on *commerce* rather than a burden on *interstate* commerce.”) (emphasis in original).

[23] ***b. Licensing Restrictions***

The Plaintiffs contend that the FDL's restrictions on who may obtain a funeral director license violate the dormant Commerce Clause. Usually, a funeral establishment in Pennsylvania may be owned by a licensed funeral director who, in turn, may operate the business as a sole proprietorship, a partnership (with one or more licensed funeral directors), or a restricted business corporation established for the sole purpose of providing funeral services. General business corporations are barred from owning a funeral home in Pennsylvania unless they are able to obtain one of 76 existing "pre-1935" licenses issued before the ban on corporations went into effect. The law carves out limited exceptions and allows certain unlicensed individuals and entities – namely, the spouses, children, grandchildren, surviving spouse, or estate of a deceased licensed funeral director – to own and operate funeral homes in Pennsylvania. However, they may only do so if they employ a full-time licensed funeral director as supervisor. 63 Pa. Stat. Ann. § 479.8(a).

The District Court agreed with the Plaintiffs' contention that this scheme effectively bans out-of-state entities from owning funeral homes within Pennsylvania and subjected the ownership restrictions to heightened scrutiny. The Court then ruled that the restrictions could not survive the resulting inquiry. Alternatively, the Court found that even if heightened scrutiny was not appropriate, the FDL's licensing restrictions could not survive *Pike*

balancing. *See Heffner*, 866 F. Supp. 2d at 387. We disagree with both conclusions.

Any individual or entity can obtain the required license to operate a funeral home in Pennsylvania as long as certain requirements are satisfied. None of those requirements mandate state residency or citizenship. *See id.* at 388 (noting “an out-of-state individual may obtain a Pennsylvania funeral license by complying with the requirements for applicants”). Similarly, the statutory exceptions to the rule that only licensed individuals may own funeral homes in Pennsylvania provide that surviving family members of a deceased funeral director may own interests in a restricted business corporation regardless of their state of residency.

Concomitantly, a general business corporation that does not own a “pre-1935” license is ineligible for a license [24] regardless of where it is domiciled. Therefore, we cannot agree that the FDL’s ownership provisions “erect a barrier” protecting in-state interests from out-of-state competition that would trigger heightened scrutiny. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951); *see also Keystone Redev. Partners, LLC*, 631 F.3d at 108.

The limitation on licensing also survives the *Pike* balancing test. As noted above, when we engage in *Pike* balancing, we consider whether any incidental burdens that the FDL’s ownership and license restrictions place on the flow of interstate commerce outweigh the statute’s putative local benefits. *See*

*Norfolk S. Corp.*, 822 F.2d at 405-06. Here, Plaintiffs again posit that the FDL's ownership restrictions burden interstate commerce by requiring out-of-state interests to be licensed in order to own or operate funeral homes in Pennsylvania while excepting deceased licensed funeral directors' families from that obligation. The Board articulates three countervailing benefits of these restrictions: (1) disfavoring ownership of funeral homes by unlicensed individuals or corporations; (2) advancing the public interest in the continued operation of a funeral home after the licensee's death; and (3) alleviating the financial loss to survivors who, on the death of a licensed director, might find themselves with a funeral home which they could neither operate nor sell at a fair price.

The situation here is analogous to that which confronted the Court of Appeals for the Fourth Circuit in *Brown v. Hovatter*, 561 F.3d 357 (4th Cir. 2009). There, the court rejected a dormant Commerce Clause challenge to Maryland's Morticians and Funeral Directors Act. That statute, like the FDL, required all individuals who desired to practice mortuary science in Maryland be licensed by the State's Board of Morticians. Md. Health Occ. Code § 7-301(a). Only the surviving spouses or executors of the estates of deceased licensed individuals could own a funeral establishment without a license. *Id.* §§ 7-310(c)(2), 7-308, 7-308.1. Maryland's law also prohibited licensing corporations but carved out an exception for corporations grandfathered under an earlier version of the statute. *Id.* § 7-310. The plaintiffs in

*Brown* also argued that they should be able to own and operate funeral establishments without being [25] individually licensed or going through general purpose corporations. *Brown*, 561 F.3d at 360.

In rejecting that argument, the Court explained:

Any person – out-of-state or in-state – may obtain a license to practice mortuary science and own and operate a funeral establishment in Maryland, and there is no limit on the number of licenses that the State may issue. Likewise, with respect to the [] grandfathered corporations owning licenses, any person or corporation, out-of-state or in-state, may own the stock.

*Id.* at 364. After surveying the alleged restrictions that Maryland placed on licenses, the *Brown* Court concluded that “entry into the Maryland funeral services market is limited only by the choices of the individual as to how best to allocate his or her time and resources.” *Id.*

Were we to substitute “Pennsylvania” for “Maryland” in the above-quoted text, we could easily adopt the Fourth Circuit’s description of the operation of Maryland’s Morticians Act as our analysis of the corresponding provisions of the FDL. Contrary to the Plaintiffs’ characterization of the effect, the FDL’s licensing and ownership restrictions affect in-state and out-of-state players equally.

The Plaintiffs highlight four alleged “significant differences” between the Maryland Morticians Act

and the Pennsylvania FDL in an attempt to distinguish *Brown*. They argue: (1) Maryland does not allow ownership by unlicensed spouses, children, and grandchildren of funeral directors and their trusts; (2) unlike Maryland, Pennsylvania allows corporate ownership of funeral homes through RBCs; (3) Maryland does not limit the number of funeral homes that may be owned, whereas Pennsylvania's one-and-a-branch restriction limits ownership to two locations; and (4) Maryland does not allow the "Pinkerton rule," a well-recognized (and Board-acknowledged) way to circumvent the FDL's limitations that allows a licensee to "own" more than two locations by ceding his or her stock in other homes to third parties while retaining ownership over the establishments' assets.

[26] These purported differences are neither significant nor persuasive. The first claim is only partially correct – Maryland allows the executors and surviving spouses of deceased licensed funeral directors to own and operate a funeral establishment. *See* Md. Health Occ. Code §§ 7-310(c)(2), 7-308, 7-308.1. The fact that Maryland does not extend similar benefits to the children and grandchildren of licensed funeral directors is of little import. The second distinction is no less relevant to our analysis. We do not agree with the level of importance that the Plaintiffs ascribe to Pennsylvania's choice to allow restricted business corporations to own funeral homes within the State because that provision of the FDL applies equally to in-state and out-of-state interests. Indeed, the provision appears to *expand* access to the relevant

market rather than contracting it as the Plaintiffs claim. Moreover, we have already explained why the third purported distinction (Pennsylvania's one-and-a-branch limitation) does not excessively burden interstate commerce. Finally, that licensees – whether they reside in-state or out-of-state – may avail themselves of the “Pinkerton rule” or other existing “end-runs” to circumvent the FDL's express requirements says nothing about the constitutional validity of those provisions for purposes of a dormant Commerce Clause analysis. The fact that some potential owners of funeral homes can circumvent the goals of the FDL through the Pinkerton mechanism also fails to establish a scheme that favors Pennsylvania businesses and residents. The Pinkerton end-run operates the same way for in-state and out-of-state businesses and residents.

Under the FDL, any individual – out-of-state or in-state – may apply for and obtain the applicable license as long as they satisfy general requirements relating to citizenship, professional education, and experience. *See* 63 Pa. Stat. Ann. §§ 479.3(a)-(f). Once an applicant satisfies these requirements, that individual – whether he or she resides in Pennsylvania or elsewhere – may be licensed as a “Pennsylvania funeral director” and is entitled to the same benefits that the FDL grants all other licensees regardless of state of residence. The unlicensed surviving spouse of a deceased funeral director who resides in Ohio but routinely commutes to Pennsylvania to operate a funeral establishment that s/he owned, for example,

is statutorily entitled to the same license under Section 479.8(a) as the surviving spouse of a funeral director residing in-state.

To be sure, this scenario likely represents the exception and not the norm; as this record attests, the vast majority of funeral directors who obtain a license to practice in Pennsylvania will no doubt choose to reside in the Commonwealth because of convenience or economic necessity. However, this does not evidence any burden on interstate commerce nor discrimination against out-of-state operators. Rather, there is nothing on this record to suggest that this is a reflection of anything other than the nature of the [27] funeral business. “The practice of mortuary science is,” after all, “inherently a local profession.” *Brown*, 561 F.3d at 363.

Moreover, as we have explained, “virtually all state regulation involves increased costs for those doing business within the state, including out-of-state interests doing business in the state. . . . In this absolute sense, virtually all state regulation ‘burdens’ interstate commerce.” *Norfolk S. Corp.*, 822 F.2d at 406. Thus, our examination of a statute’s burden on interstate commerce must focus on whether regulatory scheme results in an *excessive* burden on interstate commerce. That inquiry is informed by whether a State has “unjustifiably [ ] discriminate[d] against or burden[ed] the interstate flow of articles of commerce.” *Or. Waste Sys., Inc. v. Dep’t of Envi. Quality of State of Or.*, 511 U.S. 93, 98 (1994).

We do not believe that the licensing requirements of the FDL run afoul of that limitation. The State has made a rational decision that consumers in need of funeral services are better served by licensed individuals who, in the usual case, are not shielded by the cloak of corporate ownership. *Cf. N.D. State Bd. of Pharma. v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 166-67 (1973) (“‘A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it.’” (quoting *Louis K. Liggett Co. v. Baldrige*, 278 U.S. 105, 114-15 (1928))); *see also Brown*, 561 F.3d at 367. We cannot “accept [the] notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. . . . [T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.” *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127-28 (1978); *see also McBurney v. Young*, 667 F.3d 454, 469 (4th Cir. 2012) (rejecting dormant Commerce Clause challenge where state law “prevent[ed] [plaintiff] from using his ‘chosen way of doing business,’ but [did] not prevent him from engaging in business in the [State]”).

Similarly, although Pennsylvania has carved out limited exceptions to its own rule by allowing unlicensed family members to participate in the ownership of a funeral home, those exceptions – enacted with the twin purposes of [28] ensuring that a funeral establishment continues to serve the community after the death of a licensed funeral director and protecting

the deceased's director's family – do not impose burdens (excessive or otherwise) on the flow of interstate commerce. We therefore conclude that the District Court erred in ruling that the FDL's licensing and ownership restrictions violate the dormant Commerce Clause.

## **2. Preparation Room Requirement**

Section 7 of the FDL provides that “every establishment in which the profession of funeral directing is carried on shall include a preparation room, containing instruments and supplies for the preparation and embalming of human bodies.” 63 Pa. Stat. Ann. § 479.7. The Plaintiffs claim that this provision violates the dormant Commerce Clause by protecting established in-state funeral homes at the expense of out-of-state interests seeking to enter the market. According to Plaintiffs, the preparation room requirement deprives out-of-state competitors of any competitive advantage that they could otherwise gain from consolidating embalming operations in one centralized facility from which they could service other locations.<sup>12</sup>

Here again, the Plaintiffs' challenge ignores the fact that any impediments arising from the preparation room requirement burden *all* funeral directors

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<sup>12</sup> The Plaintiffs do not allege that the FDL's preparation room requirement is discriminatory on its face, but in its operation.

operating in Pennsylvania. Out-of-state entities are not specifically targeted, deprived of a competitive advantage, nor afforded a competitive advantage compared to Pennsylvania businesses. See *Cloverland II*, 462 F.3d at 263; see also *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 49 (2d Cir. 2007). Indeed, to the extent that the preparation room requirement has an effect on interstate commerce, it is incidental at most. Consequently, the provision will only violate the dormant Commerce Clause if it does not survive *Pike* balancing – *i.e.*, if its burdens on interstate commerce “clearly outweigh” its putative local benefits. See *Dep’t of Revenue of Ky.*, 553 U.S. at 353.

[29] The “burden” that the preparation room requirement imposes on interstate commerce consists of the cost of equipping each funeral establishment with a preparation room and the resulting impediment that arises from requiring “centralized” embalming facilities. We do not doubt that these burdens can be significant.<sup>13</sup> However, they are not so significant as to “clearly outweigh” the State’s asserted interests in minimizing the time between death and embalming, reassuring customers that the remains of their loved ones will be in the funeral home’s custody at all times, minimizing the possibility of accidents in-transit between embalming facilities, and ensuring accountability.

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<sup>13</sup> The Plaintiffs estimate the costs of establishing a preparation room to be approximately \$220,000 to a funeral home during its first year.

Moreover, although the Plaintiffs make much of the State's apparent admission that the preparation room requirement is either unnecessary or unduly burdensome, Plaintiffs fail to realize that the concession is without constitutional significance. Specifically, the Plaintiffs point to a 2008 legislative initiative in which the Board advocated for the repeal of the preparation room requirement because of the economic benefits of dispensing with the policy. The Plaintiffs also highlight a 1994 Audit Report, which said that requiring each funeral home to have its own preparation room was "burdensome and unnecessary" and noted the resulting additional costs to funeral directors and consumers. J.A. 846.

There are two reasons why this concession lacks the constitutional significance that Plaintiffs attach to it. First, the recommendation that the preparation room requirement be repealed appears to have resulted from the requirement's intrastate economic impact. The Report is therefore not particularly helpful to our focus on the burdens on *interstate* commerce as required under *Pike*. See *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 430 (1994) ("[L]ocal burdens are not the focus of the dormant Commerce Clause. . ."). Second – and more importantly – neither the Board's views in the above-referenced 2008 legislative initiative nor the Audit Report's recommendation to repeal the preparation room requirement were enacted into law. Thus, notwithstanding any reservations that some [30] Pennsylvania officials might have expressed in the

past, the preparation room requirement remains the law of Pennsylvania.<sup>14</sup>

### **3. Place of Practice and Full-Time Supervisor Requirement**

Section 7 of the FDL provides that a “license shall authorize the conduct of the [funeral directing] profession at the particular place of practice thereon and no other.” 63 Pa. Stat. Ann. § 479.7. Somewhat confusingly, this section also provides that a funeral director is free to “assist another duly licensed person, partnership or corporation[.]” Presumably, this applies to assisting at another branch location. *Id.* In addition, Section 8(e) mandates that each branch location must retain a licensed funeral director as a

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<sup>14</sup> In addition, the opinions that the Board may have expressed in the past in its capacity as an administrative arm of the Commonwealth may inform judicial inquiry into whether the full-time supervisor requirement excessively burdens interstate commerce, but it does not end it. The 2008 legislative initiative simply does not have the force of Commonwealth law. Unlike a statute or Board-issued regulation, it does not embody official Commonwealth policy, but only the views that the Board saw fit to communicate to the Pennsylvania legislature at a particular time. *See Shannon v. United States*, 512 U.S. 573, 584 (1994) (“[C]ourts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point.” (quoting *Int’l Bhd. of Elec. Workers, Local Union 474 v. NLRB*, 814 F.2d 697, 712 (1987) (alterations omitted))); *see also Abrego v. Dow Chem. Co.*, 443 F.3d 676, 686 (9th Cir. 2006) (per curiam) (discounting importance of legislative silence “coupled with a sentence in a legislative committee report untethered to any statutory language”).

“full-time supervisor.” *Id.* 479.8(e). However, a funeral director may not supervise more than one location. *Id.* § 479.2(11). In Counts V and VI of the amended complaint, the Plaintiffs alleged that both the FDL’s “place-of-practice” restrictions and full-time supervisor requirement violate the dormant Commerce Clause. Once again, the District Court agreed. *See Heffner*, 866 F. Supp. 2d at 397-99.

The Plaintiffs claim that these provisions facially discriminate against out-of-state interests and must therefore be subjected to heightened scrutiny. They allege that, under the place-of-practice provision, a funeral director who practices at one location in another state would be precluded from practicing in Pennsylvania because that would constitute practicing at a second location. According to the Plaintiffs, a [31] funeral director who manages a location in another state would be similarly barred from obtaining a funeral supervisor license in Pennsylvania. Plaintiffs’ argument is supported by a letter from the Board denying a New Jersey applicant’s request for a funeral supervisor license on these grounds. J.A. 1455.

We decline to adopt Plaintiffs’ reasoning as to these provisions. We recognize that the FDL’s place-of-practice restriction and full-time supervisor requirement compel a funeral director to relinquish one operating license in favor of another, should he or she wish to supervise another location. § 479.2(11). However, we disagree that this provision facially discriminates against out-of-state interests. Having to

surrender an out-of-state license to practice in Pennsylvania is simply the result of the operation of the one-and-a-branch rule, and the limits it places on being an owner and/or supervisor of a funeral home. Moreover, Pennsylvania residents *also* have to surrender an existing license in order to operate more than the two establishments allowed under the restriction. Thus, it makes no difference where the funeral homes or owners are located.

### **E. Substantive Due Process**

The Fourteenth Amendment Due Process Clause prohibits the states from “depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV, § 1. The prohibition has both a procedural and substantive component. *See Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Plaintiffs have continually alleged that several of the FDL’s provisions violate their right to substantive due process.

Unless a legislative enactment abridges “certain fundamental rights and liberty interests,” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), we apply a more lenient “rational basis” inquiry, *Roe v. Wade*, 410 U.S. 113, 173 (1973), in determining the statute’s constitutionality. Here, Plaintiffs concede that we should apply rational basis review to their substantive due process challenge.

Under rational basis review, “a statute withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature could rationally conclude was served by the statute.” *Alexander v. Whitman*, 114 F.3d 1392, 1403 (3d Cir. 1997) (quoting *Sammon v. N.J. Bd. of Med. Exam’rs*, 66 F.3d 639, 645 (3d Cir. 1995)). We have repeatedly warned that rational basis review is by no means “toothless” – “[a] necessary corollary to and implication of rationality as a test is that there will be situations where proffered reasons are not rational.” *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 112 n.9 (3d Cir. 2008); *see also Murillo v. Bambrick*, 681 F.2d 898, 905 n.15 [32] (3d Cir. 1982). Nevertheless, rational basis review allows legislative choices considerable latitude. *See FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993). A governmental interest that is asserted to defend against a substantive due process challenge need only be plausible to pass constitutional muster; we do not second-guess legislative choices or inquire into whether the stated motive actually motivated the legislation. *See United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (“Where . . . there are plausible reasons for Congress’ action, our inquiry is at an end. It is . . . ‘constitutionally irrelevant whether this reasoning in fact underlay the legislative decision’. . . .” (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960))).

Thus, as we recently explained, “the rationality requirement [is] largely equivalent to a strong presumption of constitutionality.” *Connelly v. Steel Valley Sch. Dist.*, 706 F.3d 209, 213 (3d Cir. 2013) (quoting Laurence H. Tribe, *American Constitutional Law* § 16-2, at 1442-43 (2d ed. 1988)).

### 1. “One-and-a-Branch” Limitation

In addition to the dormant Commerce Clause challenge discussed above, the Plaintiffs also attack the one-and-a-branch limitation on substantive due process grounds. The Board argues that the limitation advances five legitimate state interests. Those interests are: (1) diversifying the ownership of funeral establishments; (2) preventing a single firm from dominating a local market through “clustering”; (3) limiting the damage to consumers and a community from the possible failure of a single firm; (4) promoting familiarity and accountability between funeral directors and their consumers; and (5) preventing licensees from being “spread too thin.” We perceive no substantive difference in the first three goals and will treat them as the same legislative objective for purposes of our analysis.<sup>15</sup>

These goals are clearly legitimate. “[A] state has a legitimate interest in protecting the health, safety and welfare of its citizens through regulation of the

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<sup>15</sup> Diversification is merely one of the ways that the Commonwealth is trying to advance the second and third objectives.

funeral profession[;]” *Brown*, 561 F.3d at 368 (quoting *Guardian Plans*, 870 F.2d at 126), and the Pennsylvania legislature could have reasonably concluded that these objectives advance those interests. Accordingly, the one-and-a-branch limitation will survive rational basis review unless the State legislature could not rationally conclude that the provision furthered these ends.

The Plaintiffs make several arguments to support their contention that the one-and-a-branch restriction does not reasonably advance the State’s stated objectives. For example, they claim that restricting the number of locations that a licensee may own (to two) does not rationally prevent a funeral director from being “spread too thin,” since s/he may still have to perform thousands of funerals a year at the locations that are licensed. The Plaintiffs also note that a funeral director could effectively own a potentially unlimited number of homes by employing loopholes like the so-called “Pinkerton rule,” thereby allowing a single firm to *de facto* dominate a local market and thus undermine the goal of limiting the damage to consumers when a firm that is “too big to fail” does, in fact, fail.<sup>16</sup>

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<sup>16</sup> As we explained above, the “Pinkerton rule” refers to the practice of allowing a licensee to circumvent the one-and-a-branch restriction by transferring his or her stock in a funeral establishment to another entity or individual while retaining ownership over the establishment’s assets. Since the Board has recognized that the FDL does not restrict who may own or lease

(Continued on following page)

[33] However, the one-and-a-branch limitation is not constitutionally infirm merely because its response to legitimate governmental concerns is imprecise and imperfect. “[U]nder the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means.” *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 639 (1993). Therefore, the one-and-a-branch limitation can survive our substantive due process inquiry even though it neither targets all applicable threats nor succeeds in preventing all of them. Despite the limitation’s imperfection, the State could have rationally concluded that limiting licensees to owning funeral businesses at no more than two locations would limit the number of consumers that a director could service and avoid the problems that could arise when a funeral director is “spread too thin.” All that is necessary is that the selected means is rationally linked to the stated ends. *See Stretton v. Disciplinary Bd. of Supreme Court of Pa.*, 944 F.2d 137, 146 (3d Cir. 1991) (“A state is permitted to take steps . . . that only partially solve a problem without totally eradicating it.”).

Similarly, the fact that Pennsylvania’s current statutory and regulatory scheme does not prevent

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the assets necessary to operate a funeral home, this “loophole” would presumably allow a licensee to *de facto* “own” an unlimited number of funeral homes within the Commonwealth.

licensees from sidestepping the limitation by seizing upon loopholes such as the “Pinkerton rule” is not constitutionally fatal. “A legislature need not . . . risk [ ] losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.” *Parker v. Conway*, 581 F.3d 198, 202 (3d Cir. 2009) (quoting *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 809 (1969)). We therefore conclude that the FDL’s one-and-a-branch limitation easily weathers scrutiny under rational basis review.

## **2. Licensing Restrictions**

The Plaintiffs also raise a substantive due process challenge to the other restrictions in the FDL that we have discussed above as part of our dormant Commerce Clause discussion. Specifically, the Plaintiffs argue that the State acted irrationally in limiting ownership of funeral homes to licensed funeral directors while barring general business corporations from obtaining the required license. 63 Pa. Stat. Ann. § 479.8(a). Here, as before, the Plaintiffs highlight the FDL’s “exceptions,” which allow the administrators of a deceased licensee’s estate and his or her surviving spouse and family members to possess an ownership interest in a funeral establishment under specific circumstances, whether or not they possess a funeral

directors' license.<sup>17</sup> Plaintiffs contend that these exceptions belie the Board's asserted interest in promoting consumer protection, accountability, competency, trust, and accessibility. Rather, [34] according to Plaintiffs, these exceptions demonstrate that the licensing requirement is not rationally related to those objectives.

The argument incorrectly presupposes that Pennsylvania's response to its stated objectives had to be limited to addressing a single objective at a time. An otherwise rational legislative response to a given concern cannot be invalidated under the Due Process Clause merely because the chosen solution creates other problems while addressing the original concern. Rather, legislatures are generally free to consider and balance several interests in carrying out their legislative responsibilities. *See, e.g., Salazar v. Buono*, 130 S. Ct. 1803, 1817 (2010) (noting "Congress's prerogative to balance opposing interests"); *Dennis v. United States*, 341 U.S. 494, 539-40 (1951) ("How best to reconcile competing interests is the business of legislatures. . . ."); *see also Pace Res., Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1035 (3d Cir. 1987) (noting "process of democratic political decision-making often

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<sup>17</sup> As explained, administrators of a licensee's estate may possess an ownership interest for a maximum of three years. Widows and widowers may own an interest in a funeral home for an indefinite period so long as they remain unmarried. Section 8(b)(4) of the FDL allows immediate family members of a deceased licensed funeral director or shareholder to own shares of an RBC.

entails [] accommodation of competing interests”). Accordingly, where, as here, a State does not infringe upon fundamental rights or interests, it may address multiple or even competing objectives as long as its actions are rationally related to legitimate legislative objectives.

Throughout this litigation, the Board has consistently reasoned that the exceptions to the FDL’s licensing requirement address Pennsylvania’s distinct interest in protecting the livelihood of a licensed director’s surviving family members and the interests of the community in a funeral home’s continued operation following the death of the owner. It is not at all difficult to see how the licensing exceptions that the Plaintiffs have chosen to attack address that legitimate governmental interest – albeit imperfectly. In upholding Maryland’s Mortician’s Act against a similar Due Process challenge in *Brown v. Hovatter*, the Court explained “exemptions” to Maryland’s licensing requirement that allowed unlicensed surviving spouses and executors of deceased licensed morticians to possess an ownership in funeral establishments as follows:

[C]orporations that historically held licenses in the funeral business were allowed to continue to hold licenses because the General Assembly wanted to protect reliance interests of family members. For a similar reason, spouses of deceased licensees are exempted from being licensed to allow the spouse, who presumably was already involved in the

affairs of the business, to continue the business. The Act also provides an exemption for executors of licensees, allowing the temporary operation of the funeral establishment to wind down the affairs of the business. The fact that the General Assembly created these rational exemptions does not undermine the overall rationality of the Morticians Act based on its relationship to a legitimate government purpose.

561 F.3d at 369.

We agree. As in *Brown*, the Pennsylvania legislature was free to consider the reliance interests of communities throughout the state as well as [35] those of the deceased funeral directors' family in crafting the limitations contained in the FDL. The means chosen is a rational (though perhaps imperfect) means of achieving those ends, and Section 8(a) of the FDL does not violate substantive due process.<sup>18</sup>

### **3. “Place-of-practice” and Full-Time Supervisor Requirement**

As explained above, a license issued pursuant to the FDL only authorizes a licensee to practice at one primary location and one branch location; each

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<sup>18</sup> For the same reasons, we also reject the Plaintiffs' claim that Section 8(e) of the FDL is unconstitutional. That provision provides that a licensed shareholder of an RBC may bequeath his or her shares or stock in the restricted corporation to immediate family members.

location must have its own full-time and licensed supervisor. 63 Pa. Stat. Ann. §§ 479.7, 479.8(e). The District Court concluded that both provisions denied Plaintiffs' right to substantive due process because the Board's asserted interests in ensuring "competency, public health, accountability, and competition [were] not rationally related to the [FDL's] restrictions. . . ." *Heffner*, 866 F. Supp. 2d at 400.

On appeal, the Plaintiffs concede the State has a legitimate concern in safeguarding these interests, but they argue that the legislature could not have rationally believed that the place-of-practice restriction and full-time supervisor requirement would serve that purpose.<sup>19</sup> Once again, we disagree.

We haven't repeatedly stressed the obvious; Pennsylvania clearly has a legitimate interest in protecting consumers who must venture into the potentially

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<sup>19</sup> The Plaintiffs correctly note that the Board has not articulated benefits or legitimate purposes that *specifically* underlie the place-of-practice restriction in its briefing to us. Plaintiffs' Br. at 35. However, the Board's brief does assert that the FDL's "operational provisions" – which it defines to include the FDL's place-of-practice restriction, full-time supervisor requirement, preparation room requirement, and restrictions on food service – are all in place to further "a variety of legitimate interests such as quality assurance, accountability, and health and safety." Appellant's Br. at 16. In any case, we note that, as the party challenging the Commonwealth's statute, the Plaintiffs bear the burden of refuting "every *conceivable* basis which might support it," *Beach Commc'ns, Inc.*, 508 U.S. at 315 (emphasis added), not just those that the Commonwealth may assert, see *Connolly*, 706 F.3d at 216.

exploitative market for funeral services. *See Brown*, 561 F.3d at 368. As the Court explained in *Kleese v. Pa. State Bd. Of Funeral Dirs.*, 738 A.2d 523, 526 (Pa. Cmwlth. 1999), “[g]enerally, the time in which the consumer seeks the services of a funeral establishment is a very emotional and vulnerable time as a loved one has most likely just passed away leaving the consumer vulnerable and more susceptible to being deceived or cheated.” Limiting licensees to one primary location and one branch, each with its own licensed supervisor, clearly helps to protect against funeral directors being “spread too thin” to provide personal, caring, and sensitive services to those who are mourning the loss of a loved one. Funeral businesses clearly must operate with a sensitivity and personalized service unlike few other business we can think of, and Pennsylvania’s legislature can hardly be faulted for imposing restrictions that are intended to address the unique concerns in that industry.

[36] Likewise, the place-of-practice requirement is a rational means of advancing accountability by ensuring that a funeral director is more readily accessible to answer questions from grieving and particularly vulnerable consumers. The requirement of a full-time supervisor is so obviously reasonable as to negate the need for in-depth discussion or inquiry. We merely note that the Pennsylvania General Assembly could have rationally believed that requiring a licensed funeral director to oversee each funeral home advances the goal of maintaining professional

standards at funeral establishments, and, by extension, safeguards public health, safety, and welfare. It also increases the likelihood that vulnerable consumers will be able to readily communicate with someone who is responsible for providing services for a deceased loved one. It is reasonable to assume that the individuals who have met the State's licensing requirements are much better equipped to supervise funeral home operations than an unlicensed entrepreneur would be. *Cf. Guardian Plans Inc.*, 870 F.2d at 126 (noting legislature "could have rationally determined that keeping the arrangement of funerals in the hands of licensed funeral professionals would benefit the public by ensuring competence in funeral arrangement").

We are similarly unpersuaded by the Plaintiffs' suggestion that a funeral home that routinely performs 1,000 funerals each year and another that performs only twenty-five would each comply with the requirement so long as they hired a *single* supervisor. That reality does not alter the result of our rational basis review. The State could have adopted a different scheme that would have required funeral homes that routinely perform a high volume of funerals each year to retain multiple supervisors. However, as we explained above, "[a] legislative policy decision about where [] line[s] should be drawn . . . [is] not legally relevant under substantive due process jurisprudence." *Alexander*, 114 F.3d at 1406 (quoting *Sammon*, 66 F.3d at 647).

#### 4. The Preparation Room Requirement

The Plaintiffs also argue that requiring each funeral home to include a preparation room for on-site embalming is irrational because neither the FDL nor the Board's regulations require that a funeral establishment actually use this room.<sup>20</sup> According to Plaintiffs, the preparation room requirement is not practical and it hinders funeral directors' ability to prepare bodies in a more cost-effective centralized location. Plaintiffs explain that centralizing this service would achieve economies of scale that would benefit consumers and allow funeral directors to service other locations as part of a "cluster." Plaintiffs contend that requiring each funeral home to have its own preparation room (which may not even be used) thus imposes significant expense on consumers with little (if any) corresponding benefit. The District Court agreed that "there is no rational relationship between providing access to preparation rooms and requiring that funeral homes expend unnecessary funds on the same when the Board [has] recognize[d] that many existing preparation rooms remain [ ] [37]

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<sup>20</sup> Pennsylvania law does not require that all deceased remains be embalmed. Instead, families can choose whether or not to embalm a deceased person. *See, e.g.*, 49 Pa. Code § 13.201(6)(i) ("Human remains held 24 hours beyond death shall be embalmed or sealed in a container that will not allow fumes or odors to escape or be kept under refrigeration, if this does not conflict with a religious belief or medical examination.").

unused, and . . . costs are merely passed on to consumers.” See *Heffner*, 866 F. Supp. 2d at 402.

The Board once again asserts several purportedly legitimate interests that support this requirement. The Board claims that this requirement: (1) minimizes the time between death and embalming, leading to better results; (2) reassures families regarding the safeguarding of their loved ones; (3) minimizes the possibilities for accidents in transit and mix-ups at separate embalming facilities; and (4) ensures that the funeral director with whom the family communicates is directly accountable for the results of his/her work.

The record contains an uncontested expert report which shows that Pennsylvania’s requirement of an on-site embalming preparation room at each funeral establishment is consistent with the regulatory scheme of at least eighteen other states – each of which had a similar requirement as of the latter-half of 2010.<sup>21</sup> See J.A. 635; see also *Powers v. Harris*, 379 F.3d 1208, 1212-13 (10th Cir. 2004) (noting Oklahoma had similar preparation room requirement as of date case decided). Although a majority of states have

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<sup>21</sup> According to the Board’s submissions, the following states, in addition to Pennsylvania, all required funeral homes to each contain a preparation room as of late 2010: Alabama, Arizona, Connecticut, Delaware, Georgia, Idaho, Massachusetts, Mississippi, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, South Dakota, Tennessee, and Wyoming. J.A. 635.

chosen not to adopt this approach and either allow funeral directors to “cluster” embalming operations under an economy of scale model or exempt certain funeral establishments from having a preparation room, the costs or benefits of these approaches are beyond the parameters of our due process inquiry. A chosen legislative scheme need not be the most efficient or even the most practical to be reasonable under the Due Process Clause. *See Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487-88 (1955) (“[A] law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”). Moreover, the rationale advanced by the Board to support the preparation room requirement seems so patently reasonable as to eliminate the need for much discussion. *See Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963). As long as the State has chosen a rational method of addressing its concerns, our inquiry is at an end. *See id.* (“[I]t is up to legislatures, not courts, to decide on the wisdom and utility of legislation.”).

Indeed, even if we credit the Plaintiffs’ assertion – and the Board’s concession in the 2008 legislative materials that many preparation rooms built to comply with the FDL are never actually used for embalming – the result of our rational basis review would be the same. The Constitution does not protect against inefficient, wasteful, or meaningless legislation. “[A] law may exact a needless, wasteful requirement

in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the [] requirement.” *Id.* at 487. Consequently, we hold that the District Court erred in concluding that the separate embalming room requirement violates the Plaintiffs’ right to substantive due process.

### **5. Restriction on Serving Food**

[38] In addition to the preparation room requirement, Section 7 of the FDL also prohibits funeral establishments from serving “food or intoxicating beverages.” 63 Pa. Stat. Ann. § 479.7. The provision does allow funeral establishments to serve customers non-alcoholic beverages, but only in “a separate room not used for the preparation of funeral service.” *Id.*

The District Court concluded that this restriction also violated substantive due process. *See Heffner*, 866 F. Supp. 2d at 403-04. The Court based its ruling, in part, on a proposed 2009 regulation in which the Board recommended repeal of these restrictions. The District Court explained its rejection of the Board’s argument that the food prohibition furthered the government’s legitimate interest in promoting public health as follows: “[the Board] fail[ed] to explain how the use of [] chemicals in one part [of the facility] . . . would necessarily contaminate other areas of the establishment providing food service . . . ” *Id.* at 404. The Court relied on the fact that bodies are prepared in one area of a funeral establishment and food is served elsewhere. Ultimately, the District Court

concluded that the restriction did not survive rational basis review because: (1) the fact that non-alcoholic *beverages* could be served but food could not presented a “distinction without a difference,” *id.*, and (2) it was irrational for the FDL to allow food to be served in certain areas within the same structure so long as those areas were not designated as parts of a “funeral establishment,” *id.*

On appeal, the Board reiterates its position that “public health” is a legitimate government interest justifying the FDL’s ban on food service at funeral establishments. The Board argues that the legislature could have reasonably concluded that food should not be served where the embalming of human bodies is occurring. The Board also argues that the ban on serving food furthers the government’s interest in upholding the unique nature and solemnity of funeral services.

Whether one agrees with the Board’s position, and assuming *arguendo* that the Board’s reasoning is erroneous, it is exceedingly difficult to understand how it could be viewed as unreasonable. The first prong of the rational basis test is easily satisfied by the Board’s asserted interest in public health.<sup>22</sup> *See*

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<sup>22</sup> Because we believe that the Commonwealth’s asserted interest in protecting public health is legitimate, we do not pass judgment on whether the Board’s second asserted interest – *i.e.*, “preserving the unique nature and solemnity of the funeral service” – also qualifies as a legitimate government interest under substantive due process review. *See N.J. Retail Merchs.*

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*Watson v. Maryland*, 218 U.S. 173, 176 (1910) (“It is too well settled to require discussion . . . that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health.”). We fail to see anything irrational in the legislative decision to prohibit the service of food and alcoholic beverages in areas designated as “funeral establishments” under the FDL.<sup>23</sup> It may well be that the legislature’s concern [39] had more force in an earlier time when refrigeration and sanitation were not as developed as they are today, outdoor temperatures could more readily affect sanitation as well as food storage and preservation, and attitudes about serving and consuming alcohol were nowhere near as liberal. Thus, the passage of time, and the advanced technology used in modern air conditioning and ventilation systems suggest that the Pennsylvania General Assembly may want to revisit the need for some of these restrictions as the Board has suggested.

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*Ass’n*, 669 F.3d at 398 (noting statute “will pass rational basis examination” where one of several stated purposes was not legitimate “as long as it was not the only legitimate purpose underlying the legislation”).

<sup>23</sup> Indeed, the authority of states to regulate and tightly restrict the availability of alcohol is far too evident to require either citation or discussion, and Pennsylvania’s restrictions on the availability of alcohol are particularly strict. *See generally* 47 Pa. Stat. §§ 4-491-494. However, such tight controls (of which the FDL is but one example) do not rise to the level of a due process violation.

However, there is a fundamental difference between legislative enactments that may be archaic and those that are irrational for purposes of our substantive due process inquiry. These restrictions may now be overly cautious, but excess caution does not rise to the level of a due process deprivation if it is reasonably intended to advance a legitimate governmental interest. It is not up to a court to determine if the State has struck the *perfect* balance of advantage and disadvantage in addressing its interest, nor should we compel legislatures to reexamine restrictions that may seem better suited for an earlier time. *See Heller v. Doe*, 509 U.S. 312, 321 (1993) (“[C]ourts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends.”). The Constitution is not a lever that we can use to overcome legislative inertia. This restriction, though perhaps antiquated, is nevertheless sufficiently reasonable to survive rational basis review.

## **6. Trust Requirement**

Funeral directors in Pennsylvania routinely sell and provide “pre-need” funeral services – *i.e.*, services selected in advance of a person’s death. *See generally Walker v. Flitton*, 364 F. Supp. 2d 503 (M.D. Pa. 2005). Because these contracts require advance payment for goods and services associated with funeral homes, Pennsylvania (like many other states)

imposes trust requirements on pre-need sellers.<sup>24</sup> Specifically, the FDL requires that a funeral director who enters into a pre-need contract deposit 100% of the proceeds accepted for “funeral services,” such as embalming, into an escrow account or trust. 63 Pa. Stat. Ann. § 479.13(c).<sup>25</sup>

[40] This trust arrangement is confusing because another statute, the Pennsylvania Future Interment Act (“FIA”), only requires that 70% of the sales price of funeral-related property – *e.g.*, caskets, vaults, or urns – be held in trust. *Id.* § 480.1. This creates an obvious problem for funeral directors who provide pre-need services. In an attempt to reconcile the tension in these statutes, the Board took the position that funeral directors were only required to hold in

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<sup>24</sup> See generally Judith A. Frank, *Preneed Funeral Plans: The Case for Uniformity*, 4 Elder L.J.1, 7-8 (1996) (discussing trust arrangement as “most common form of funding” in preneed funeral contract context and collecting States’ statutes establishing trust requirement).

<sup>25</sup> In relevant part, the FDL states:

No person other than a licensed funeral director shall, directly or indirectly, or through an agent, offer to or enter into a contract with a living person to render funeral services to such person when needed. If any such licensed funeral director shall accept any money for such contracts, he shall . . . either deposit the same in an escrow account in, or transfer the same in trust to, a banking institution in [Pennsylvania], conditioned upon its withdrawal or disbursement only for the purposes for which such money was accepted.

63 Pa. Stat. Ann. § 479.13(c).

trust 70% of the sales price customers paid for pre-need funeral *merchandise*, but that they had to hold 100% of pre-need monies for other “funeral services” in trust.

In *Pennsylvania Funeral Directors Ass’n v. Bd. of Funeral Directors*, 494 A.2d 67 (Pa. Cmwlth. 1985), *aff’d mem.*, 511 A.2d 763 (Pa. 1986) (“*PFDA*”), the Commonwealth Court of Pennsylvania disagreed with the Board’s position and held that the FIA “did not abrogate the one hundred per cent trust requirement in . . . the [FDL].” *Id.* at 72. The Board thereafter adopted the view that a merchandising company that is not itself a licensee but is nevertheless owned in part by a licensed funeral director may trust at the FIA-prescribed rate of 70%, so long as the company is not used to evade the FDL’s requirements.

In challenging the trusting provisions, Plaintiffs argue that requiring licensed funeral directors to hold in trust 100% of pre-need monies received does not further the State’s asserted interest in consumer protection, and the District Court agreed. *See Heffner*, 866 F. Supp. 2d at 423. However, the fact that Pennsylvania’s statutory scheme restricts individuals whom the State has certified as experts, while exempting unlicensed merchants, does not necessarily result in an irrational (and therefore unconstitutional) scheme. As the Commonwealth Court explained in *PFDA*, Pennsylvania’s legislature could have reasonably “believed that the public’s perception of funeral directors as licensed professionals necessitated stricter standards to protect consumers.” 494 A.2d at 71.

In addition, the Board correctly notes that the trust requirements also pass constitutional muster under the separate interpretation that it has adopted and endorsed. See *Skilling v. United States*, 130 S. Ct. 2896, 2929 (2010) (“[E]very reasonable construction must be resorted to, in [41] order to save a statute from unconstitutionality.” (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895))). As we have just explained, after *PFDA* was decided, the Board adopted the view that funeral directors with an ownership interest in a merchandising company may sell pre-need funeral property if their company is owned and operated “separate and apart” from a funeral home or establishment. Plaintiffs concede that the Board explained its position in a 1991 memorandum, which outlined a series of factors that could be used to determine whether a merchandising company’s operations are sufficiently separate from those of a funeral establishment. J.A. 1144-45.<sup>26</sup>

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<sup>26</sup> Among the factors outlined in a memo authored by then-Board prosecutor Kathleen Grossman are:

[A]re the pre-need sales merchandising corporations . . . operated *separate and apart* from the funeral business. . . . ? Are there two sets of bookkeeping records kept? Separate advertising signs? Do the corporations display signs for public view at all? Which businesses display signs? Are there separate entrances? How is the building set up, i.e., a common vestibule leading to separate suites?

J.A. 1145.

Moreover, the potential for consumer abuse and fraud in any scheme that allows merchants to accept payment for goods and services that will not be tendered until some future date is painfully obvious. This is especially true where, as here, the date for the vendor's performance may well be decades after accepting payment. Requiring proceeds accepted under such an arrangement to be placed in trust is not only logical, but imperative if vulnerable consumers are to be protected from the unscrupulous (or financially "strapped") vendor. *Cf. Nat'l Funeral Servs., Inc. v. Rockefeller*, 870 F.2d 136, 143 n.11 (4th Cir. 1989) (relying upon attorney solicitation Supreme Court cases to uphold West Virginia's ban on door-to-door and telephone solicitation for funeral pre-need contracts and noting that, "[i]n both [contexts], an advocate trained in the art of persuasion is trying to convince an emotionally vulnerable layperson that he needs professional services"). The requirements of the FDL and FIA are reasonable standing alone. The Board's attempt to resolve the tension between [42] those two statutes may be awkward or even strained, but it is not unreasonable and it is consistent with Pennsylvania's legitimate public interest.<sup>27</sup> Accordingly,

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<sup>27</sup> Indeed, although we do not hold that resolution of the tension between the 100% requirement in the FDL and the 70% requirement in the FIA necessitates it, the Commonwealth could rationally have argued that the dangers inherent in the deferral of performance that is endemic in pre-need contracts requires that 100% of the contract price be placed in trust to ensure performance under the contract.

we part with the District Court's conclusion that the trust requirement results in a constitutional deprivation.

## **F. First Amendment**

The Plaintiffs claim that the FDL's restrictions on commercial speech violate the First Amendment. It is long-settled that the First Amendment protects commercial speech. *See Va. Bd. of Pharma. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). Several arguments are subsumed in the Plaintiffs' First Amendment challenge, and we will discuss the merits of each of these claims in turn.

### **1. Restriction on Use of Trade Names**

Subject to limited exceptions,<sup>28</sup> Section 8 of the FDL requires that funeral homes operate under the name of the current funeral director or that of a predecessor. *See* 63 Pa. Stat. Ann. §§ 479.8(a), (b), (d), 479.9(a).<sup>29</sup> For example, if a hypothetical funeral

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<sup>28</sup> Section 9 of the FDL excepts funeral homes owned by "grandfathered" pre-1935 corporations from this requirement. 63 Pa. Stat. Ann. § 479.9(a).

<sup>29</sup> Even in that circumstance, funeral homes owned by a sole proprietor or partnership that operate under the name of a predecessor funeral director must disclose the name of the current owner in advertising. *Id.* § 479.8(a). Funeral homes owned by an RBC or professional (pre-1935) corporation that operate under a predecessor's name must similarly disclose the name of the home's licensed supervisor. *Id.* §§ 479.8(b), (d).

director named “Jane Smith” purchased the “Johnson Funeral Home,” she would only be able to continue to operate the establishment under its current name or as the “Smith Funeral Home.” The Plaintiffs claim that this restriction on the use of trade names violates the First Amendment.

***a. Applicability of Central Hudson & Gas Electric Corp.’s Test***

At the outset, the parties dispute whether we should assess the merits of the First Amendment claim under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), or whether *Friedman v. Rogers*, 440 U.S. 1 (1979), controls.

In *Friedman*, the earlier of these two cases, the Supreme Court upheld a Texas law that proscribed the practice of optometry under a trade name. *See Friedman*, 440 U.S. at 3-4. The Court distinguished the use of trade names from other types of “commercial speech” such as product or service advertisements [43] by explaining that while the latter are “self-contained and explanatory,” a trade name will generally have “no intrinsic meaning.” *Id.* at 12. The Court then stated that because “ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public.” *Id.* at 12-13. Given the State’s “substantial” interest in “protecting

the public from the deceptive and misleading use of [ ] trade names” and the Court’s conclusion that the restriction only had “incidental effect on the content of the commercial speech involved,” the Supreme Court rejected the plaintiffs’ challenge. *Id.* at 15-16. Not surprisingly, Pennsylvania urges us to apply *Friedman* because it is more favorable to the State’s position than *Central Hudson*.

However, *Friedman*’s applicability and continued viability is not as clear as the Commonwealth would have us believe because the Court subsequently adopted a more detailed test for limitations on commercial speech in *Central Hudson*. There, the Court explained that a court considering the validity of a restriction on commercial speech must first ask whether the commercial speech concerns unlawful activity or is misleading. 447 U.S. at 566. If the speech is neither, the reviewing court must then determine “whether the asserted governmental interest is substantial.” *Id.* If it is, the third and fourth prongs of the *Central Hudson* inquiry require a court to respectively inquire “whether the regulation directly advances the governmental interest asserted” and whether the regulation is “more extensive than is necessary to serve that interest.” *Id.*

In subsequent cases, the Supreme Court has provided additional guidance by explaining that – in the professional services context – commercial speech that is *actually* misleading “may be prohibited entirely,” *In re R.M.J.*, 455 U.S. 191, 203 (1982), while

*potentially* misleading speech may be regulated but not entirely curtailed, *id.*

Although Pennsylvania does not urge us to wholly disregard the *Central Hudson* test, it does suggest that *Friedman* is sufficiently on point to resolve our inquiry in the Commonwealth's favor and that we should avoid parsing through the four prongs of *Central Hudson*. The State's argument goes too far.

As noted, *Friedman* predated the four-part *Central Hudson* test and the latter distinction between commercial speech that is "actually misleading" and that which is "potentially misleading." See *Wine & Spirits Retailers v. Rhode Island*, 481 F.3d 1, 8 (1st Cir. 2007) ("Since its decision in *Friedman*, the Court has made a doctrinal refinement, distinguishing in the professional services context between commercial speech that is inherently or actually misleading and commercial speech that is only potentially misleading."). Accordingly, even where *Friedman* applies, federal courts commonly conduct an analysis within the framework of the more "refined" and nuanced test set forth in *Central Hudson*. See *Alexander v. Cahill*, 598 F.3d 79, 95-96 (2d Cir. 2010) (considering *Friedman*'s applicability to challenge against certain New York restrictions on attorney advertising as part of *Central Hudson* test); *Wine & Spirits Retailers*, 481 F.3d at 8-9 (same).<sup>30</sup> Our inquiry

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<sup>30</sup> Thus, the *Central Hudson* test would not apply if the Commonwealth could show that the use of trade names in the  
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will be thus be guided by the more recent decision in *Central Hudson*.

[44] ***b. The Central Hudson Test***

As noted, *Central Hudson*'s threshold requirement is that the regulated speech concern lawful activity and not be misleading. Here, there is neither evidence nor allegation that the use of trade names in the funeral industry would either mask or facilitate illegal activity. Instead, Pennsylvania heavily relies on *Friedman* to suggest that the use of trade names presents "numerous" opportunities for deception of the public – *e.g.*, by keeping a trade name despite staff changes and freeing proprietors from relying on their personal reputation to attract business.

We agree that *Friedman* underscored "the significant possibility that trade names will be used to mislead the public" in the context of invalidating Texas's ban on trade names in the field of optometry. *Friedman*, 440 U.S. at 12. However, the Board's argument ignores the record that the Court's analysis was based on in *Friedman*. *See Friedman*, 440 U.S. at

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funeral industry is either unlawful or inherently misleading. *See Wine & Spirits Retailers*, 481 F.3d at 8 ("It is not always necessary . . . to deal with each of the test's four parts. In framing the inquiry, the threshold question is whether 'the commercial speech concerns unlawful activity or is misleading.' If so, the inquiry ends there: 'the speech is not protected by the First Amendment.'" (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002))). The Board has not made such a showing.

13 (“The concerns of the Texas Legislature about the deceptive and misleading uses of optometrical trade names were not speculative or hypothetical, but were based on experience in Texas with which the legislature was familiar. . .”). Indeed, as other courts have noted when considering challenges to an across-the-board ban on the use of trade names, in *Friedman* Texas “marshaled substantially strong[] and [] specific evidence supporting its prohibition on trade names” in the field of optometry. *Alexander*, 598 F.3d at 96. There has been no such showing here.

Moreover, while *Friedman* provides *some* support for the Commonwealth’s position, the lack of record support for its parade of hypothetical horrors suggests caution before concluding that trade names in the funeral industry are sufficiently misleading to rest our analysis upon *Friedman*. Instead, we conclude that the assignment of trade names to funeral homes is, at best, potentially misleading, and we must therefore consider the remaining prongs of the *Central Hudson* test.

Obviously the Board’s asserted government interest in providing accurate information to the public is “substantial.” See *Friedman*, 440 U.S. at 15-16 (noting State’s interest in protecting public from deceptive and misleading use of trade names in optometry industry is “substantial and well demonstrated”). However, the FDL’s ban on the use of trade names in the funeral industry cannot survive the limitations imposed under *Central Hudson*. Under its requirements, “the government must demonstrate

that the challenged law ‘alleviates’ the cited harms ‘to a material degree.’” *Pitt News v. Pappert*, 379 F.3d 96, 107 (3d Cir. 2004) (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995) (alterations omitted)).

That requirement is inconsistent with a statutory scheme that is fatally “underinclusive.” See *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (“Exemptions from an otherwise legitimate regulation. . . [m]ay diminish the credibility of the government’s rationale for restricting speech in the first place.”); see also *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 905 (9th Cir. 2009) (“To put it in the context of the *Central Hudson* test, a regulation [45] may have exceptions that ‘undermine and counteract’ the interest the government claims it adopted the law to further; such a regulation cannot ‘directly and materially advance its aim.’” (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995))).

The restrictions on commercial speech here are so flawed that they cannot withstand First Amendment scrutiny. Indeed, the District Court correctly identified the pivotal problem concerning the FDL’s proscription at *Central Hudson*’s third step: by allowing funeral homes to operate under predecessors’ names, the State remains exposed to many of the same threats that it purports to remedy through its ban on the use of trade names. See *Heffner*, 866 F. Supp. 2d at 408. A funeral director operating a home that has been established in the community, and known under his or her predecessor’s name, does not rely on his or her own personal reputation to

attract business; rather, the predecessor's name and reputation is determinative. Nor does a funeral home operating under a former owner's name provide transparency or insight into changes in staffing that the Board insists is the legitimate interest that the State's regulation seeks to further.

Moreover, unlike in *Friedman*, there is nothing in the record here to even suggest that the use of trade names in the funeral industry has either mislead or deceived the public to a greater degree than using a predecessor's name, and the Board does not suggest otherwise. Thus, we agree with the District Court that the FDL's trade name ban is irrevocably "pierced" by the type of "exemptions and inconsistencies" that the Supreme Court has in found fatal to First Amendment scrutiny.<sup>31</sup> *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 190 (1999); see also *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995); *Cincinnati v. Discovery Network*,

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<sup>31</sup> Because we conclude that the FDL's proscription on the use of trade names does not pass *Central Hudson's* third step, we need not discuss the fourth "narrow-tailoring" prong. We note, however, that the Supreme Court has recognized that the third and fourth prongs of the test complement each other and has observed that the four factors of the analysis are "not entirely discrete." See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001); *Greater New Orleans Broad. Ass'n, Inc.*, 527 U.S. at 183, 188; see also *Metro Lights, L.L.C.*, 551 F.3d at 904 (noting "[i]t has not always been clear how [inquiry into a regulation's 'fit'] differs with respect to the last two steps of the *Central Hudson* analysis").

*Inc.*, 507 U.S. 410, 424-26 (1993); *Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

## **2. Payment on Commissions to Unlicensed Salespeople**

The second issue that the Plaintiffs attack on First Amendment grounds concerns the constitutionality of Section 11(a)(8) of the FDL. In relevant part, that section provides that a funeral director or funeral home's license may be suspended if a licensee pays unlicensed employees commissions on sales for pre-need funeral arrangements. *See* 63 Pa. Stat. Ann. § 479.11(a)(8). The Board has implemented this restriction by promulgating regulations prohibiting payment of "any gratuity" or "valuable consideration" to unlicensed employees. In Count XIII of the Plaintiffs' amended complaint, they argue that this restriction is unconstitutional because it prohibits anyone but a licensed funeral director from communicating with customers about services or merchandise. *See Walker v. Flitton*, 364 F. Supp. 2d 503, 503, 507 (M.D. Pa. 2005) (holding that the First Amendment precludes a prohibition on unlicensed employees and [46] agents from interacting with customers). The Plaintiffs allege that this restriction on commissions similarly violates the First Amendment under the reasoning in *Central Hudson*. We disagree.

Here again, the Commonwealth's articulated interest in consumer protection is undoubtedly substantial. "The whole premise behind earning a commission is that the amount of sales [ ] increase[s] the

rate of pay.” *Parker v. NutriSys., Inc.*, 620 F.3d 274, 284 (3d Cir. 2010) (internal quotation marks and citation omitted). It is therefore eminently reasonable for a legislature to want to protect consumers from dealing directly with salespeople who have a financial interest in “upselling” more expensive or unnecessary merchandise and services than are appropriate for a given consumer’s situation or resources. *See Walker*, 364 F. Supp. 2d at 520 (recognizing “substantial governmental interest in protecting the general public as it relates to the dissemination of information regarding, and the purchasing of, preneed funerals.”).

The potential for this evil to manifest itself in the context of sales personnel being rewarded for exploiting the need to afford a loved one a “proper” or “respectful” burial or memorial is too obvious to require elaboration. Customers looking to purchase funeral arrangements and services are clearly among the most vulnerable consumers to be found in any marketplace.

We therefore have little difficulty in concluding that this restriction easily satisfies the third *Central Hudson* prong. Section 11(a)(8) “directly and materially” advances the State’s asserted interest by removing the financial incentive that salespersons would have to oversell pre-need funeral services.

We realize that the consumer protection afforded by this statutory scheme is imperfect. For example, it still allows salaries or bonuses to be influenced by the

volume or amount of sales, and this may still incentivize the unscrupulous sales person to prey upon the unwary and vulnerable consumer. However, this flaw does not suggest that the protection is so underinclusive that it imposes an unconstitutional restriction on commercial speech. Salespersons in the funeral industry are obviously as entitled to compensation as any other sales persons, and any compensatory scheme may favor those who sell more goods and/or services than their colleagues. Perhaps because such realistic considerations limit the potential effectiveness of any such scheme, the Supreme Court has explained that “[its] commercial speech cases establish that localities may stop short of fully accomplishing their objectives without running afoul of the First Amendment.” *Discovery Network, Inc.*, 507 U.S. at 442; *see also Metromedia, Inc. v. San Diego*, 453 U.S. 490, 511 (1981) (upholding San Diego’s proscription on offsite billboard advertising and rejecting plaintiffs’ argument that ban was underinclusive because it did not also cover onsite advertising). We therefore believe that the FDL’s ban on payment of commissions to unlicensed sales people is a constitutional remedy that is sufficiently tailored to satisfy *Central Hudson*.<sup>32</sup>

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<sup>32</sup> The only alternative that would eliminate any room for upselling would be mandating a flat compensation for all employees. Assuming such a scheme would be legal, it would prevent businesses from rewarding those employees who show extraordinary dedication to their jobs by doing the “little things”

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[47] **G. Contract Clause**

Finally, the Plaintiffs contend that the Board's interpretation of the FDL's trust provisions violates the Constitution's Contract Clause by impairing pre-need contracts between the Plaintiffs and their customers.

The Contract Clause provides that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts.” U.S. Const. art. I, § 10, cl. 1. To show a Contract Clause violation, a plaintiff must demonstrate that a change in state law effectively altered a contractual obligation. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). Our Contract Clause inquiry must consider “[(1)] whether there is a contractual relationship, [(2)] whether a change in law impairs that contractual relationship, and [(3)] whether the impairment is substantial.” *Id.* If all three questions are answered affirmatively, we must then “inquire whether the law at issue has a legitimate and important public purpose and whether the adjustment of the rights to the contractual relationship was reasonable and appropriate in light of that purpose.” *Transp. Workers Union Local 290 v. SEPTA*, 145 F.3d 619, 621 (3d Cir. 1998).

The premise for the Plaintiffs' Contract Clause argument is that the post-*PFDA* regime, whereby funeral directors who receive money in the sale of

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that employers rarely require but nevertheless expect from employees.

pre-need merchandise may trust funds at the FIA rate of 70% if their operations are separate from those of a funeral establishment, is not the actual state of the law. According to the Plaintiffs, the Board has recently reversed its stated position and currently requires 100% of all pre-need sales of merchandise to be held in trust if the corporation selling the goods is owned in whole or in part by a licensed funeral director. The Plaintiffs largely base their claim on a regulation that the Board proposed in August 2007 but later withdrew and never enacted. *See* 37 Pa. Bull. 4643, 4646 (Aug. 25, 2007) (“A preneed funeral contract may not incorporate a contract for funeral merchandise entered into by a person or entity other than a funeral director.”).

The Plaintiffs argue that the Board’s proposed interpretation requiring 100% trust of all funds paid as compensation for pre-need funeral services be put in trust impaired the Plaintiffs’ contractual obligations with existing consumers. The Board initially allowed licensed funeral directors to own corporations that sold pre-need merchandise as long as those corporations were wholly separate from funeral homes. The Plaintiffs claim that they relied on that interpretation only to have their expectations frustrated when the Board proposed a regulation banning this practice in August 2007.

The Plaintiffs’ Contract Clause arguments fail as a matter of law for two obvious reasons. First, the Plaintiffs have not even shown that there was a change in state *law*. Just as we discussed earlier, the

Plaintiffs’ articulation of the current state of the law in Pennsylvania is based on a proposed regulation [48] that the Board never formally prescribed. *See* 37 Pa. Bull. 4643, 4646 (Aug. 25, 2007). Indeed, the record shows – and the Plaintiffs concede – that the Board withdrew this proposal in December 2009, and it never took effect. Thus, the Plaintiffs have not shown even a threshold action that could be characterized as a burden on their contractual obligations with consumers.

Second, even if the Plaintiffs could show that the Board’s proposed regulation had the force of law, the Board’s reinterpretation of the FDL would not implicate the Contract Clause. “The Supreme Court has made clear that the language of the Contract Clause (*i.e.*, “pass any . . . law”) means that the clause applies only to exercises of legislative power.” *Mabey Bridge & Shore, Inc. v. Schoch*, 666 F.3d 862, 874 (3d Cir. 2012). While the Clause’s application is by no means limited to the formal enactments of a State’s legislature,<sup>33</sup> “[t]he Supreme Court has rejected the

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<sup>33</sup> We recently explained that “[t]here is no simple formula for determining whether a government act is an exercise of legislative authority.” *Mabey Bridge & Shore, Inc.*, 666 F.3d at 874. However, Supreme Court cases offer some guidance. A government act will “bear [ ] the hallmarks of legislative authority when it ‘changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.’” *Id.* (quoting *Ross v. State of Oregon*, 227 U.S. 150, 163 (1913)). Conversely, “an act is likely *not* legislative when ‘its purpose was not to prescribe a new law for the future, but only

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argument that the Contract Clause is violated when there is a new interpretation of an antecedent state statute.” *Id.* at 875.

Here, the Plaintiffs accuse the Board of reversing its own interpretation and application of longstanding FDL provisions. Such a reversal is simply not the kind of “exercise of legislative authority” that the Contract Clause proscribes. *See id.* (holding Pennsylvania Department of Transportation’s interpretation and application of law that had been in force for over 30 years “did not exercise legislative authority subject to scrutiny under the Contract Clause”).

### **III. Conclusion**

For the foregoing reasons, we reverse the District Court’s judgment striking down the FDL’s warrantless inspection scheme on Fourth Amendment grounds. We also reverse the District Court’s judgments concerning the Plaintiffs’ dormant Commerce Clause challenges to certain provisions of the FDL. We reverse as well the District Court’s conclusions that the disputed FDL provisions violate the substantive component of the Due Process Clause. We also reverse the District Court’s ruling that the Board’s actions unconstitutionally impair the Plaintiffs’ private contractual relations with third parties in violation of the Constitution’s Contract Clause. We

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to apply to a completed transaction laws which were in force at the time.” *Id.* (quoting *Ross*, 227 U.S. at 163).

will affirm the District Court's ruling that Pennsylvania's ban on the use of trade names in the funeral industry runs afoul of First Amendment protections, but reverse its ruling that the ban on the payment of commissions to unlicensed salespeople violates the Constitution. Finally, we remand to the District Court to modify its order in accordance with this opinion.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ERNEST F. HEFFNER, : No. 08-cv-990  
et. al, :  
Plaintiffs :  
v. : Hon. John E. Jones III  
DONALD J. MURPHY, :  
et. al, :  
Defendants. :

**MEMORANDUM AND ORDER**

**May 8, 2012**

**THE BACKGROUND OF THIS ORDER IS AS  
FOLLOWS:**

Pending before this Court is Defendants' Motion for Summary Judgment, (doc. 117), Plaintiffs' cross motion for summary judgment, (doc. 137), and Defendants' Motion to Strike. (Doc. 163). For the following reasons, Plaintiffs' motion for summary judgment shall be granted in part and denied in part, Defendants' motion for summary judgment shall be granted in part and denied in part, and Defendants' motion to strike shall be denied.

## I. Procedural History

Plaintiffs<sup>1</sup> initiated the instant action by lodging a massive Complaint against the Defendants<sup>2</sup> on May 20, 2008 alleging claims pursuant to 42 U.S.C. § 1983<sup>3</sup> and 28 U.S.C. § 2201<sup>4</sup> for deprivations of

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<sup>1</sup> The named Plaintiffs are: Ernest F. Heffner; Harry C. Neel; Bart H. Cavanagh, Sr.; John Katora; Brian Leffler; Rebecca Ann Wessel; Mark Patrick Dougherty; Cynthia Lee Finney; Nathan Ray; Todd Eckert; Ben Blascovich; Matthew Morris; Greg Achenbach; Karen Eroh; William Pugh; William Sucharski; John McGee; Amber M. Scott; Arika Haas; Nicholas Wachter; David Halpate; Patrick Connell; Eugene Connell; Matthew Connell; James J. Connell, Jr.; Jefferson Memorial Park, Inc.; Jefferson Memorial Funeral Home, Inc.; Wellman Funeral Associates, Inc. D/b/a Forest Park Funeral Home; East Harrisburg Cemetery Company d/b/a East Harrisburg Cemetery & Crematory; Robert Lomison; Craig Schwalm; Gregory J. Havrilla; and Betty Frey (collectively “Plaintiffs”).

<sup>2</sup> The named Defendants are: Donald J. Murphy; Joseph A. Fluehr III; Michael J. Yeosock; Bennett Goldstein; James O. Pinkerton; Anthony Scarantino; Basil Merenda; Michael Gerdes; Peter Marks; and C.A.L. Shields (collectively “Defendants”).

<sup>3</sup> This statute states, in pertinent part, “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .” 42 U.S.C. § 1983 (1996).

<sup>4</sup> This provision states, in relevant part, “In a case of actual controversy within its jurisdiction any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and

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rights secured by the United States Constitution and the Pennsylvania Constitution.<sup>5</sup> (Doc. 1). On July

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effect of a final judgment or decree and shall be reviewable as such.” 28 U.S.C. § 2201 (1993).

<sup>5</sup> The Complaint contains the following counts:

Count I – Plaintiffs Heffner, Cavanagh, Patrick Connell, Eugene Connell, James Connell, Katora, Leffler, Wessel, Dougherty, Finney, Ray, Eckert, Blascovich, Morris, Achenbach, Eroh, Pugh, Sucharski, McGee, Scott, Haas, Wachter, Halplate, and Jefferson Memorial Funeral Home, Inc. v. All Named Defendants alleging Fourth Amendment violations as a result of 63 Pa. Stat. Ann. § 479.16(b).

Count II – Plaintiffs Heffner Cavanagh, Patrick Connell, Eugene Connell, Sucharski, Leffler, Jefferson Memorial Park, Inc., Jefferson Memorial Funeral Home, Inc., Robert Lomison, and Wellman Funeral Associates v. All Named Defendants alleging deprivations of rights secured by the Substantive Due Process Clause, Commerce Clause, and Article I § 1 of the Pennsylvania Constitution as a result of 63 Pa. Stat. Ann. § 479.8(a), (b), (d), and (e).

Count III – Plaintiffs Neel, Havrilla, Lomison, Schwalm, Frey, Wellman, Scott, Haas, and Wachter v. All Named Defendants alleging deprivations of rights secured by the Substantive Due Process Clause, Equal Protection Clause, Commerce Clause, and Article I § 1 of the Pennsylvania Constitution as a result of 63 Pa. Stat. Ann. § 479.8(a), (b), and (d).

Count IV – Plaintiffs Scott, Haas, and Wachter v. All Named Defendants alleging deprivations of their rights secured by the Substantive Due Process Clause, Equal Protection Clause as a result of 63 Pa. Stat. Ann. § 479.8(a), (b), and (d).

Count V – Plaintiffs Heffner, Cavanagh, Katora, Leffler, Ray, Eckert, Blascovich, Morris, Achenbach, Eroh, Pugh, Haas, Wachter, Halpate, and Wellman v. All Named Defendants alleging deprivations of the rights secured by the Substantive Due Process Clause, Commerce Clause and Article I § 1 of the Pennsylvania Constitution as a result of 63 Pa. Stat. Ann. § 479.8(e).

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Count VI – Plaintiffs Heffner, Cavanagh, Patrick Connell, Eugene Connell, Mathew Connell, James J. Connell, Jr., Katora, Leffler, Wessel, Dougherty, Finney, Ray, Eckert, Blascovich, Morris, Achenbach, Eroh, Pugh, Sucharski, McGee, Scott, Haas, Wachter, and Halpate v. All Named Defendants alleging deprivations of rights secured by the Substantive Due Process Clause and Article I § 1 of the Pennsylvania Constitution as a result of 63 Pa. Stat. Ann. § 479.2(11).

Count VII – Plaintiffs Heffner and Cavanagh v. All Named Defendants alleging deprivations of the rights secured by the Substantive due Process Clause and Article I § 1 of the Pennsylvania Constitution as a result of 63 Pa. Stat. Ann. § 479.7.

Count VIII – Plaintiffs Heffner Cavanagh Patrick Connell, Eugene Connell, Matthew Connell, James J. Connell, Jr., Katora, Leffler, Wessel, Dougherty, Finney, Ray, Eckert, Blascovich, Morris, Achenbach, Eroh, Pugh, Sucharski, McGee, Scott, Haas, Wachter, Halpate, Havrilla, Neel, and Jefferson Memorial Funeral home, Inc. v. All Named Defendants alleging deprivations of the rights secured by the Substantive Due Process Clause and Article I § 1 of the Pennsylvania Constitution as a result of 63 Pa. Stat. Ann. § 479.7.

Count IX – Plaintiffs Heffner, Sucharski, Sucharski Cremation Service, Inc., and Jefferson Memorial Park, Inc. v. All Named Defendants alleging deprivations of the rights secured by the First Amendment Free Speech Clause and the Pennsylvania Constitution as a result of 63 Pa. Stat. Ann. § 479.8(a), (b), and (d).

Count X – All Plaintiff Funeral Directors v. All Named Defendants alleging deprivations of the rights secured by the Substantive Due Process Clause and Equal Protection Clause as a result of 63 Pa. Stat. Ann. § 479.10(b).

Count XI – Plaintiffs Lomison, Schwalm, East Harrisburg, and Jefferson Memorial Park, Inc. v. All Named Defendants alleging deprivations of the rights secured by the substantive Due Process Clause, Free Speech Clause, Contract Clause as a result of interpretations of the Funeral Director Law and Regulations that preclude properly licensed crematories that are not licensed

(Continued on following page)

25, 2008, the Defendants filed a Motion to Dismiss Plaintiffs' Complaint. (Doc. 11). Following full briefing of the motion, and oral argument on December 15, 2008, we issued a memorandum and order granting in part and denying in part Defendants' motion. (*See* Doc. 32 at 30-32). After numerous motions to extend the trial term were granted, the Pennsylvania Funeral Directors Association filed a Motion to Intervene on March 9, 2010, (doc. 50), which we subsequently denied on June 25, 2010, 2010 WL 2606520. (Doc. 80).

On August 25, 2010, Plaintiffs filed a Motion for Leave to File an Amended Complaint. (Doc. 91). We

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funeral establishments from contracting with the general public to provide cremation services for either at need or pre-need.

Count XII – Plaintiffs Heffner, Cavanagh, Patrick Connell, Eugene Connell, Matthew Connell, James J. Connell, Jr., Katora, Leffler, Wessel, Dougherty, Finney, Ray, Eckert, Blascovich, Morris, Achenbach, Eroh, Pugh, Sucharski, McGee, Scott, Haas, Wachter, Halpate, and Jefferson Memorial Funeral Home, Inc. v. All Named Defendants alleging deprivations of the rights secured by the Substantive Due Process Clause, Equal Protection Clause, Free Speech Clause, Contract Clause, and the Pennsylvania Constitution as a result of interpretations of the Funeral Director Law and Regulations to preclude licensed funeral directors from having a legal interest in a merchandise company that sells funeral merchandise either at need or pre-need; or having a legal interest in a company that performs cremations unless those companies are licensed as funeral establishments.

Count XIII – All Plaintiffs v. All Defendants challenging the legality of 63 Pa. Stat. Ann. § 479.11(a)(8) and 49 Pa. Code § 13.202(5).

Count XIV – All Plaintiffs v. All Named Defendants requesting injunctive relief and continuing jurisdiction from this Court.

granted the motion on November 5, 2010, (doc. 100), and Plaintiffs filed an Amended Complaint on November 9, 2010. (Doc. 101).<sup>6</sup> The Pennsylvania Funeral

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<sup>6</sup> The amended complaint contains the following counts:

Count I – Plaintiffs, Heffner, Cavanagh, Patrick Connell, Eugene Connell, Matthew Connell, James Connell, Katora, Leffler, Wessel, Dougherty, Finney, Ray, Eckert, Blascovich, Morris, Sucharski, McGee, Scott, Haas, Wachter, Halpate, and Jefferson Memorial Funeral Home, Inc. v. All Defendants (Warrantless, Limitless Inspections).

Count II – Plaintiffs, Heffner, Cavanagh, Patrick Connell, Eugene Connell, Sucharski, Leffler, Jefferson Memorial Park, Inc., Jefferson Memorial Funeral Home, Inc., Robert Lomison, and Wellman Funeral Associates, Inc., d/b/a Forest Park Funeral Home v. Defendants (Undue Restriction on Ownership).

Count III – Plaintiffs, Neel, Havrilla, Lomison, Schwalm, Frey, Wellman, Scott, Haas and Wachter v. Defendants (Undue Restriction on Ownership to Licensed Funeral Directors).

Count IV – Plaintiffs, Scott, Haas and Wachter v. Defendants (Ownership Restrictions Violate Equal Protection of the Law).

Count V – Plaintiffs, Heffner, Cavanagh, Katora, Leffler, Ray, Eckert, Blascovich, Morris, Haas, Wachter, Halpate and Wellman Funeral Associates, Inc. D/b/a Forest Park Funeral Home v. Defendants (Undue Restriction on Place of Practice).

Count VI – Plaintiffs, Heffner, Cavanagh, Patrick Connell, Eugene Connell, Matthew Connell, James J. Connell, Jr., Wellman, Katora, Leffler, Wessel, Dougherty, Finney, Ray, Eckert, Blascovich, Morris, Sucharski, McGee, Scott, Haas, Wachter and Halpate v. Defendants (Undue Requirement of “Full Time” Supervisor).

Count VII – Plaintiffs, Heffner, Cavanagh, and Wellman v. Defendants (Undue Requirement that Every Establishment Include a Prep Room).

Count VIII – Plaintiffs, Heffner, Cavanagh, Patrick Connell, Eugene Connell, Matthew Connell, James J. Connell, Jr.,

(Continued on following page)

Directors Association (“PFDA”) filed a Motion for Leave to File an Amicus Brief on June 20, 2011, (doc. 111), which we granted on June 22, 2011. (Doc. 112). On July 19, 2011, the parties filed a Stipulation of Dismissal of Count X of the Amended Complaint, agreeing to dismiss the same with prejudice. (Doc. 113). Thereafter, on August 10, 2011, Defendants filed the instant Motion for Summary Judgment and brief in support thereof. (Docs. 117, 126). On August 15,

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Katora, Leffler, Wessel, Dougherty, Finney, Ray, Eckert, Blascovich, Morris, Sucharski, McGee, Scott, Haas, Wachter, Halpate, Havrilla, Neel and Jefferson Memorial Funeral Home, Inc. v. Defendants (Undue Restriction on Food).

Count IX – Plaintiffs, Heffner, Sucharski, McGee, and Jefferson Memorial Park, Inc. v. Defendants (Infringement on Commercial Speech).

Count X – All Plaintiff Funeral Directors v. Defendants (Arbitrary Restrictions on Continuing Education Course Availability). This Count was dismissed with prejudice by stipulation of the parties on July 19, 2011. (Doc. 113).

Count XI – Plaintiffs, Lomison, Wellman, Schwalm, East Harrisburg and Jefferson Memorial Park, Inc. v. Defendants (Unlawful Interference with Trade).

Count XII – Plaintiffs, Heffner, Cavanagh, Patrick Connell, Eugene Connell, Matthew Connell, James J. Connell, Jr., Katora, Leffler, Wessel, Dougherty, Finney, Ray, Eckert, Blascovich, Morris, Sucharski, McGee, Scott, Haas, Wachter, Halpate, and Jefferson Memorial Funeral Home, Inc. v. Defendants (Unlawful Restriction on Ownership of Merchandise Company).

Count XIII – All Plaintiffs v. Defendants (Challenge to Section 11(a)(8) of the Funeral Directors Law and Section 13.202(5) of the Regulations).

Count XIV – All Plaintiffs v. Defendants (Request for Injunctive Relief and Continuing Jurisdiction).

2011, Plaintiffs filed the instant cross Motion for Summary Judgment and supporting brief. (Docs. 137, 140).

In addition, on August 23, 2011, we granted the International Cemetery, Cremation and Funeral Association leave to file an amicus curiae brief in support of Plaintiffs' motion for summary judgment. (Doc. 142). On October 12, 2011, the National Funeral Directors Association ("NFDA") filed a motion for leave to file an amicus curiae brief regarding the cross motions for summary judgment. (Doc. 152). We granted the motion in part on October 17, 2011 to the extent we limited petitioners to twenty (20) pages and directed them not to expand the factual record given the potentially duplicative nature of petitioner's filing with that of the PFDA. (Doc. 155).

Defendants filed a brief in opposition to Plaintiffs' motion for summary judgment on October 21, 2011. (Doc. 158). They also filed the instant Motion to Strike, (doc. 163), and brief in support thereof, (doc. 164), on the same day. Plaintiffs filed a brief in opposition to Defendants' motion for summary judgment on October 21, 2011. (Doc. 168). Plaintiffs filed a brief in opposition to Defendants' motion to strike on November 4, 2011, (doc. 173), and on November 10, 2011, Defendants filed a reply brief in further support of their motion for summary judgment. (Doc. 176). Plaintiffs filed a reply brief in further support of their motion for summary judgment on November 11, 2011. (Doc. 177). Defendants also filed a reply brief in

further support of their motion to strike on November 17, 2011. (Doc. 179).

Therefore, the pending motions have been fully briefed and are ripe for disposition.

## **II. Standard of Review**

Summary judgment is appropriate if the record establishes “that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). Initially, the moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The movant meets this burden by pointing to an absence of evidence supporting an essential element as to which the non-moving party will bear the burden of proof at trial. *Id.* at 325. Once the moving party meets its burden, the burden then shifts to the non-moving party to show that there is a genuine issue for trial. Fed. R. Civ. P. 56(e)(2). An issue is “genuine” only if there is a sufficient evidentiary basis for a reasonable jury to find for the non-moving party, and a factual dispute is “material” only if it might affect the outcome of the action under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

In opposing summary judgment, the non-moving party “may not rely merely on allegations of denials in its own pleadings; rather, its response must . . . set out specific facts showing a genuine issue for trial.”

Fed. R. Civ. P. 56(e)(2). The non-moving party “cannot rely on unsupported allegations, but must go beyond pleadings and provide some evidence that would show that there exists a genuine issue for trial.” *Jones v. United Parcel Serv.*, 214 F.3d 402, 407 (3d Cir. 2000). Arguments made in briefs “are not evidence and cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion.” *Jersey Cent. Power & Light Co. v. Twp. of Lacey*, 772 F.2d 1103, 1109-10 (3d Cir. 1985). However, the facts and all reasonable inferences drawn therefrom must be viewed in the light most favorable to the nonmoving party. *P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848, 852 (3d Cir. 2006).

Summary judgment should not be granted when there is a disagreement about the facts or the proper inferences that a factfinder could draw from them. *Peterson v. Lehigh Valley Dist. Council*, 676 F.2d 81, 84 (3d Cir. 1982). Still, “the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; there must be a *genuine* issue of *material* fact to preclude summary judgment.” *Anderson*, 477 U.S. at 247-48.

### **III. Factual Background**

#### **A. Parties**

Plaintiffs Ernest F. Heffner (“Heffner”) and Nathan Ray are licensed funeral directors in York, PA. Plaintiff Betty Frey (“Frey”) is an associate of

Heffner and is not a licensed funeral director. Plaintiff Harry C. Neel (“Neel”) is the President of Plaintiff Jefferson Memorial Funeral Home, Inc. and Plaintiff Jefferson Memorial Park, Inc., and has a principal place of business in Pittsburgh, PA. Plaintiff Bart H. Cavanagh, Sr. (“Cavanagh”) is a licensed funeral director in Norwood, PA. Plaintiff John Katora (“Katora”) is a licensed funeral director in Lewisberry, PA. Plaintiff Brian Leffler (“Leffler”) is a licensed funeral director in Avoca, PA. Plaintiffs Rebecca Ann Wessel (“Wessel”), Mark Patrick Dougherty (“Dougherty”), Amber M. Scott (“Scott”), and Cynthia Lee Finney (“Finney”) are licensed funeral directors in Pittsburgh, PA.

Plaintiffs Todd Eckert (“Eckert”) and Matthew Morris (“Morris”) are licensed funeral directors in Red Lion, PA. Plaintiff Ben Blascovich (“Blascovich”) is a licensed funeral director in Mill Hall, PA.<sup>7</sup> Plaintiff William Sucharski (“Sucharski”) is a licensed funeral director and owner of a duly approved crematory in Philadelphia, PA. Plaintiff John McGee (“McGee”) is a licensed funeral director in Philadelphia, PA. Plaintiffs Erika Haas (“Haas”) and Nicolas Wachter (“Wachter”) are licensed funeral directors in Milton, PA. Plaintiff David Halpate (“Halpate”) is a licensed funeral director in Renovo, PA. Plaintiffs Patrick Connell (“P. Connell”), Eugene Connell (“E. Connell”),

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<sup>7</sup> On March 30, 2010, Plaintiffs filed a Stipulation of Dismissal of Plaintiffs Achenbach, Eroh, and Pugh, and all of their claims asserted in the case *sub judice*. (Doc. 52).

Matthew Connell (“M. Connell”), and James J. Connell, Jr. (“J. Connell”) are licensed funeral directors in Bethlehem, PA.

Plaintiff Jefferson Memorial Park, Inc. (“Jefferson MP”) is a Pennsylvania corporation with a principal place of business in Pittsburgh, PA. Jefferson MP is a licensed cemetery and is the sole shareholder of Plaintiff Jefferson Memorial Funeral Home, Inc. (“Jefferson MFH”),<sup>8</sup> which is also a Pennsylvania corporation with a principal place of business in Pittsburgh, PA. Plaintiff Wellman Funeral Associates, Inc., d/b/a Forest Park Funeral Home (“Wellman”), is a Louisiana corporation with a principal place of business in Shreveport, LA.<sup>9</sup> Plaintiff East Harrisburg Cemetery Company, d/b/a East Harrisburg Cemetery & Crematory (“East HBG Cem.”) is a Pennsylvania corporation with a principal place of business in Harrisburg, PA.<sup>10</sup> Plaintiff Robert Lomison (“Lomison”)

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<sup>8</sup> Plaintiffs aver that Jefferson MFH is a “Pre-1935” corporation under the Funeral Director Law such that its stock can be owned by any person, regardless of whether the person is a licensed funeral director, or by any entity.

<sup>9</sup> Plaintiff Wellman is owned by an individual who is not a licensed funeral director in any state and who owns cemeteries and a crematory in Pennsylvania. Plaintiff Wellman, however, is precluded under the Funeral Director Law from owning a funeral home in Pennsylvania.

<sup>10</sup> Plaintiff East HBG Cem. is a properly licensed cemetery and crematorium, but, as a result of Defendants’ interpretation and enforcement of the Funeral Director Law, is currently precluded from marketing and selling cremation packages to the public.

owns and operates the William Howard Day Cemetery (“WHD Cem.”), East HBG Cem., and Wellman. Plaintiff Craig Schwalm operates a crematory and cemetery and is the Vice President and General Manager of East HBG Cem. Plaintiff Gregory J. Havrilla is not a licensed funeral director, but is the General Manager of Jefferson MFH.

Defendant Donald J. Murphy (“Murphy”) is an appointed consumer member of the Pennsylvania State Board of Funeral Directors (the “Board”). Defendants Mike Gerdes (“Gerdes”), Joseph A. Fluehr III (“Fluehr”), Michael J. Yeosock (“Yeosock”), Bennett Goldstein (“Goldstein”), James O. Pinkerton (“Pinkerton”), and Anthony Scarantino (“Scarantino”) are members of the Board. Defendant Basil Merenda (“Merenda”) is the Commissioner of the Bureau of Professional and Occupational Affairs, and is a member of the Board.<sup>11</sup>

Defendant Peter Marks (“Marks”) is the former Executive Deputy Chief Counsel for the Bureau of Professional and Occupational Affairs. Defendant Marks oversaw a unit that made prosecutorial decisions, and oversaw investigations and prosecutions of individuals subject to various licensing laws, including the Funeral Director Law. Defendant C.A.L. Shields (“Shields”), is the former Director of the Bureau of Enforcement and Investigation (“BEI”),

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<sup>11</sup> The Defendants set forth above are sued in their official and individual capacities.

and oversaw all investigations conducted by the Bureau of Professional and Occupational Affairs. Defendants Marks and Shields are sued solely in their former official capacities.

## **B. Factual Background**

The parties and the Court are all too intimately familiar with the facts undergirding this sweeping and multi-faceted case. Therefore, for the purposes of deciding the various motions, we shall simply make a generalized statement of the facts.<sup>12</sup> We shall refer to or address specific facts in our discussion only as they become necessary for resolution of the pending motions.

The Funeral Director Law (the “FDL”) was enacted in 1952 to, purportedly, “provide for the better protection of life and health of the citizens of this Commonwealth by requiring and regulating the examination, licensure and registration of persons and registration of corporations engaging in the care, preparation and disposition of the bodies of deceased persons. . . .”<sup>13</sup> (Doc. 101 ¶ 45 (citing 63 PA. STAT. ANN. § 479.1 (1952))). The Board is the administrative

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<sup>12</sup> Since our factual recitation is merely a broad overview of the basis for the instant litigation, it is generally taken from Plaintiffs’ amended complaint.

<sup>13</sup> The Plaintiffs allege that while the FDL has been amended numerous times since its ratification in 1952, it nonetheless has failed to address changes in the law, generally, and changes in the death care industry, in particular.

entity charged with enforcement of the FDL.<sup>14</sup> (*Id.* ¶ 46 (citing § 479.16(a))). In particular, the Board is “empowered to formulate necessary rules and regulations not inconsistent with this act for the proper conduct of the business or profession of funeral directing and as may be deemed necessary or proper to safeguard the interests of the public and the standards of the profession.” (*Id.* ¶ 50). To this end, the Board has promulgated regulations (the “Funeral Regulations”) to implement the dictates of the FDL.<sup>15</sup> 49 PA. CODE § 12.1 *et seq.*

Plaintiffs aver that although the FDL and Regulations have not undergone significant change since their initial implementation, the funeral directing industry has experienced massive changes since that time, a result of which has been increased competition in the industry. (Doc. 101 ¶¶ 61-69). Plaintiffs assert that the rise in competition has not been warmly received by established funeral directors. (*Id.* ¶ 70). Thus, Plaintiffs contend that the Board’s current interpretation of the FDL and Regulations, which in some instances completely contradicts its past interpretations, is driven by an anti-competitive attitude that is aimed towards appropriating an even larger

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<sup>14</sup> Per the Funeral Law, the Board itself is composed of nine members, five of which are licensed funeral directors. 63 PA. STAT. ANN. § 479.16(a).

<sup>15</sup> The Plaintiffs contend that, similar to the Funeral Law, the Funeral Regulations have not been substantially modified to reflect societal changes.

market share, if not an absolute monopoly, for established funeral directors.<sup>16</sup> (*See id.* ¶¶ 71-73). The Plaintiffs assert that these interpretations violate both the federal and state constitutions in various ways. We will delve into the specifics of these averments in relation to the instant Motions in the following section.

#### **IV. Discussion**

Plaintiffs' cross motion for summary judgment presents their arguments for summary judgment by count number, while Defendants' brief first lodges threshold arguments for dismissal that would, if accepted by this Court, obviate the need to reach the merits of each count. For ease of reference, we shall first address the larger threshold issues raised by Defendants' brief, and then proceed to analyze the parties' respective arguments by count as presented in Plaintiffs' brief.

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<sup>16</sup> In fact, Plaintiffs aver that the PFDA, a trade association comprised of licensed funeral directors in the Commonwealth, is the anti-competitive force driving the present interpretations of the FDL. (*Id.* ¶¶ 74-76). In this vein, Plaintiffs maintain that over the past two to three decades numerous professional members of the Board have been high ranking officers of the PFDA. (*Id.* ¶ 78). Indeed, it is Plaintiffs' belief that no professional appointed to serve on the Board in the last decade has been confirmed over the objection of the PFDA. (*Id.* ¶¶ 79-80). Therefore, Plaintiffs assert that "unless you are 'anointed' by PFDA to serve on the Board, you will not . . . serve on the Board." (*Id.* ¶ 80).

## A. Threshold Issues

### 1. Jurisdiction

At the outset, Defendants contend that this Court lacks jurisdiction over several claims. (Doc. 126 at 24). They argue that based on the Commonwealth Court of Pennsylvania’s decision in *Bean v. State Board of Funeral Directors*, where the court held that the Board had jurisdiction to initially adjudicate the matter, this Court should abstain from adjudicating this matter pending a decision from the Board. (*Id.* 26). Defendants also claim that Cavanagh recently sent the Board a letter requesting clarification concerning a cremation business he wants to pursue. (*Id.*). After being informed that, with his consent, the issue would be designated as a Petition for Declaratory Order, Defendants claim that James Kutz (“Kutz”), attorney for Plaintiffs, informed the Board that his client did not wish to pursue the issue as a Petition for Declaratory Order and requested that the issue be withdrawn. (*Id.*). They assert that based on the above, Plaintiffs should be compelled to utilize the process for adjudication of such issues through the Board, and consequently, this Court should abstain.

In response, Plaintiffs argue that Defendants fail to identify the “several claims” over which the Court lacks jurisdiction. (Doc. 168 at 23). Moreover, they claim that Defendants’ lone citation to *Bean* is an insufficient legal basis for the Court to abstain from deciding the case *sub judice*. They also maintain the

*Bean* court did not hold that the Board has power to issue a declaratory judgment, but that the court therein had jurisdiction over the declaratory judgment action and it was proper to invoke the primary jurisdiction doctrine to benefit from the Board's expertise in this area. (*Id.* at 28).

Furthermore, Plaintiffs claim that even if Defendants' contention is accepted, plaintiffs suing under § 1983 are not required to exhaust state remedies. (*Id.* at 29 (citing *Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982))). They argue that to the extent Defendants' assertions are construed as standing or ripeness arguments, the Court has already determined that Plaintiffs have standing. Defendants also contend that funeral directors should not be required to file a lawsuit against the Board to obtain a clear interpretation of the FDL. (*Id.* at 35 (citing *Walker v. Flitton*, 364 F. Supp. 2d 503, 517 n.15 (M.D. Pa. 2005) ("beyond merely initiating adjudications, the Law tasks the Board with enacting binding regulations that interpret the Law so that funeral directors can have a better understanding of what is permitted."))).

We ultimately agree with Plaintiffs and find that the discussion in our prior memorandum and order ruling on Defendants' motion to dismiss dealt with most of the arguments Defendants advance herein. Notably, in that opinion we found that unlike the regulations at issue in *Chiropractic America v. Lavecchia*, 180 F.3d 99, 104 (3d Cir. 1999), which were complex and recently enacted, the Funeral Laws and Regulations, as noted by Plaintiffs, are extremely

antediluvian and incomprehensive. (Doc. 32 at 13-14). We also highlighted the 1994-95 Legislative Audit Committee Report (“Audit Report”) which found that the “Board’s regulation of the funeral directing profession . . . is complicated by a statute that is outdated and in need of comprehensive revision.” (*Id.*, Ex. 1 at 25). We further recognized the Board’s admission that a number of its regulations were devoid of purpose or value. (*See generally id.*).<sup>17</sup> Finally, we emphasized that Plaintiffs had cast doubt upon the coherence of the scheme, alleging that Defendants had, in the not so distant past, interpreted the same regulations inconsistently. (*Id.* ¶¶ 88-93). Therefore, we find that in the absence of more compelling case

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<sup>17</sup> Additionally, seven years ago in *Walker* we resolved a similar issue involving the Board and the Funeral Laws and Regulations. In that case, we held the following: (1) that a prohibition against all solicitation and contact by anyone other than licensed funeral directors regarding preneed funeral services violated unlicensed salespersons’ commercial speech rights; and (2) that individuals who are licensed as insurance agents but not as funeral directors, and who are also employees or agents of funeral directors, may interact with consumers for the purpose of having their employer sell preneed funeral services and plans. During oral argument on December 15, 2008, we became aware of a contention by Plaintiffs that the Board was presently attempting to circumvent the *Walker* holdings by preventing agents and employees licensed as insurance agents, but not licensed as funeral directors, from collecting commissions from funeral directors for their preneed funeral sales. While we do not accept this assertion as factual, nonetheless, such alleged recalcitrance only gives credence to Plaintiffs’ assertion that the Funeral Laws and Regulations do not qualify as a comprehensive and coherent regulatory scheme.

law suggesting we should abstain from deciding the instant motions until after Plaintiffs obtain a decision from the Board, or that Plaintiffs were obligated to submit the constitutional claims they raise herein first to the Board, we decline to abstain.

## 2. State Law Claims

Defendants next argue that Plaintiffs' claims grounded in the Pennsylvania Constitution are duplicative and lack merit. (Doc. 126 at 26-27). They assert that because Plaintiffs' state law constitutional claims do not qualify as one of the nine negligence claims for which the General Assembly has waived immunity, that Defendants enjoy immunity for all such claims. (*Id.* at 27 (citing 42 PA. CON. STAT. § 8522(b))). Regarding Plaintiffs' claim for monetary damages in Count XII, Defendants maintain that there is no private right of action for monetary damages under Article I of the Pennsylvania Constitution. (*Id.*). They contend that the Eleventh Amendment has been interpreted by the Supreme Court to preclude suits against a state or its agencies in federal court by citizens of that state, or by citizens of other states. (*Id.* at 28 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985); *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 98 (1984); *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974))). Defendants also assert that the Eleventh Amendment's jurisdictional bar is not dependent upon the nature of the relief requested, and thus is applicable to suits seeking money damages and equitable relief. (*Id.*

(citing *Pennhurst*, 465 U.S. at 117 (“[t]he reasoning of our recent decisions on sovereign immunity thus leads to the conclusion that a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when – as here – the relief sought and ordered has an impact directly on the State itself.”))).

On the other hand, Plaintiffs claim that suits seeking declaratory and injunctive relief to prohibit officials from enforcing an unconstitutional statute are not barred by state sovereign immunity. (Doc. 168 at 35-36 (citing *Benkoski v. Wasilweski*, 2007 U.S. Dist. LEXIS 66315, at \*18 (M.D. Pa. Sept. 7, 2007) (“Suits which seek to compel *affirmative action on the part of state officials* or to obtain money damages or to recover property from the Commonwealth are within the rule of immunity; suits which simply seek to restrain state officials from performing affirmative acts are not within the rule of immunity.”) (emphasis in original))). They also highlight that the Court has already dismissed Plaintiffs’ state law claims for injunctive and equitable relief against Defendants sued in their official capacities, but allowed claims against Defendants sued in their individual capacities to proceed. (*Id.* at \*36).

As noted in our December 22, 2008 memorandum and order, we granted Defendants’ motion to dismiss to the extent Plaintiffs’ complaint sought injunctive relief and equitable relief from Defendants sued in their official capacities for violations of state law. (Doc. 32 at 31). However, we denied the motion to the

extent Plaintiffs sought injunctive and equitable relief from Defendants sued in their individual capacities for violations of state law. (*Id.*). Moreover, we reserved the right to revisit the issue of Plaintiffs' request for monetary relief from Defendants sued in their official and individual capacities for violations of state law. We also noted that as to the availability of injunctive or equitable relief, such relief can be obtained against Defendants sued in their individual capacities.<sup>18</sup> However, such relief cannot be obtained against individuals sued in their official capacities. *Pennhurst v. Halderman*, 465 U.S. 89 (1984).

As a result, the remaining issue for the Court to determine is whether Plaintiffs may seek monetary relief from Defendants sued in their official and individual capacities for violations of state law. We note that although few federal courts have discussed this issue, and it does not appear that the Supreme Court of Pennsylvania has ruled upon whether the Pennsylvania Constitution provides a cause of action for damages for state constitutional violations, a number of Pennsylvania district courts have opined on the viability of such claims on a case by case basis. *See Aquino v. County of Monroe*, 2007 U.S. Dist.

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<sup>18</sup> “The Eleventh Amendment bars a suit against state officials when ‘the state is the real, substantial party in interest.’” *Pennhurst*, 465 U.S. at 104 (quoting *Ford Motor Co. v. Dep’t of Treasury*, 323 U.S. 459, 465 (1945)). Thus, a state cannot be a “real party in interest” when its employee is sued in his or her *individual* capacity. Thus, these claims are not barred by the Eleventh Amendment.

LEXIS 37872, at \*5 (M.D. Pa. 2007) (noting that where there is no ruling currently available from the state's highest court on a matter of state law, the district court "must predict how that court would resolve [the relevant] issues should it be called upon to do so."). The *Aquino* court stated that the factors a district court should consider in predicating how a state's highest court would rule on a particular issue, include: "(1) state Supreme Court decisions in related areas; (2) 'decisional law' of intermediate state courts; (3) opinions of federal courts of appeals and district courts applying state law; and (4) decisions from other jurisdictions that have discussed the issues before the court." *Id.* at \*6-7.

After reviewing the decisions of Pennsylvania intermediate state courts and Pennsylvania district courts, we find that most courts have found that a cause of action for monetary relief against defendants sued in their individual capacity for violations of state law does not exist. For example, in *R.H.S. v. Allegheny County Department of Human Services, Office of Mental Health*, the court held that "neither statutory authority, nor appellate case law has authorized the award of monetary damages for a violation of the Pennsylvania Constitution." 936 A.2d 1218, 1225-26 (Pa. Commw. Ct. 2007) (quoting *Jones v. City of Phila.*, 890 A.2d 1188, 1208 (Pa. Commw. Ct. 2006)). Furthermore, in *Underwood v. Beaver County Children and Youth Services*, the Western District of Pennsylvania noted that Pennsylvania law lacks a statutory parallel to 42 U.S.C. § 1983 and its provision

of a damages cause of action for federal constitutional violations. 2007 WL 3034069 at \*2 (W.D. Pa. 2007). In fact, the court recognized, “[t]he great majority of our sister courts that have decided the issue have concluded that money damages are not available.” *Id.* at \*2. Expressing a similar sentiment, the Eastern District of Pennsylvania stated, “[t]he Supreme Court of Pennsylvania has not ruled on the issue of whether there is a private cause of action for damages under the state constitution, and the federal courts in this Circuit that have considered the issue have concluded that there is no such right under the Pennsylvania Constitution.” *Ryan v. Gen. Mach. Prods.*, 277 F. Supp. 2d 585, 595 (E.D. Pa. 2003). Therefore, we shall grant Defendants’ motion to the extent Plaintiffs are precluded from seeking money damages from Defendants sued in their individual or official capacity for alleged violations of state law.

## **B. Substantive Counts**

### **1. Count I: Fourth Amendment**

In Count I of the Amended Complaint, Plaintiffs challenge Section 16(b) of the FDL pursuant to the Fourth Amendment. Section 16(b) provides, in pertinent part:

The board shall appoint an inspector or inspectors. . . . Inspectors . . . shall have the right of entry into any place, where the business or profession of funeral directing is carried on or advertised as being carried on, for the purpose of inspection and for the

investigation of complaints coming before the board and for such other matters as the board may direct.

63 PA. STAT. ANN. § 479.16(b). Plaintiffs argue the inspections conducted pursuant to Section 16(b) are warrantless and generally unannounced. (Doc. 140 at 29). They note the Supreme Court has held that “warrantless searches are generally unreasonable, and that this rule applies to commercial premises as well as homes.” (*Id.* (citing *Marshall v. Barlow’s Inc.*, 436 U.S. 307, 312 (1978))).

Plaintiffs acknowledge that when “the privacy interests of the owner [of a ‘pervasively’ regulated industry] are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment.” (*Id.* (citing *New York v. Burger*, 482 U.S. 691, 702 (1987))). However, they claim that “[i]n regulated industry cases, warrantless searches are still presumptively unreasonable and the government retains the burden of justifying its disregard for the warrant requirement.” (*Id.* at 30 (citing *Balelo v. Baldrige*, 724 F.2d 753, 771-72 (9th Cir. 1984) (citing *Marshall*, 436 U.S. at 312-13))). They emphasize that a warrantless inspection in a pervasively regulated industry is valid under the Fourth Amendment only if three factors are satisfied: (1) “there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made,” (2) “the warrantless

inspections must be necessary to further the regulatory scheme,” and (3) “the statute’s inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.” (*Id.* (citing *Burger*, 482 U.S. at 702-03)).

Under the first element, Plaintiffs maintain that in determining whether a particular business is pervasively regulated “the proper focus is on whether the regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.” (*Id.* at 30-31 (citing *Burger*, 482 U.S. at 705 n.16)). Here, they assert the purpose and scope of inspections under the FDL is undefined and that the Audit Report found that the FDL “does not address the specific purpose of funeral home inspections,” (*id.* at 32 (citing Plaintiffs’ Record “Pl. R.” at 127)), but grants inspectors the authority to enter funeral homes “for the purpose of inspection” and “for such other matters as the board may direct.” (*Id.* (citing 63 PA. STAT. ANN. § 479.16(b))).

Furthermore, Plaintiffs claim that the Board’s regulations do not add any limits on inspectors’ authority or address what will be inspected or how frequently inspections will occur. (*Id.* (citing 49 PA. CODE Ch. 13)). They contend there are no published policies or procedures regarding the scope of inspections, and one Board member, Goldstein, has said that the frequency, nature, and extent of an inspection

is “usually up to the inspector.” (*Id.* at 32 (citing Pl. R. at 1316)). Additionally, Plaintiffs state that while inspectors complete an inspection checklist, the checklist is not published or made available to licensees prior to inspection, and it is often the subject of frequent change. (*Id.* at 33). They further claim that a review of checklists from the years 1986, 1990, 1996, 2005, 2009, and the current form, demonstrates substantial differences in the information sought from funeral directors by inspectors. (*Id.*). Plaintiffs cite the deposition testimony of John Katora who testified that he “hold[s] his breath every time an inspector shows up” because the scope of the inspection “depends on who shows up and . . . what mood they’re in.” (*Id.* at 35 (citing Pl. R. at 6468-69)). They also complain of the unbridled discretion inspectors exercise in deciding whether a violation has occurred and in deciding how to classify such violations. Plaintiffs contend that neither the FDL nor the Board’s regulations establish a schedule or frequency for inspections. For example, Plaintiffs highlight David Halpate’s testimony that the funeral home he has supervised for the last eleven years was inspected in 2001, 2004, 2008, and 2009. (*Id.* at 36 (citing Pl. R. at 6623, 6627-28)).

As a result, Plaintiffs argue that the inspections they are subjected to under the FDL are too irregular and lacking in scope or definition to be considered part of a “pervasive” regulatory plan. (*Id.* at 37). They cite the Supreme Court’s decision in *Burger* for the proposition that “the sheer quantity of pages of statutory

material is not dispositive” of whether an industry is pervasively regulated, rather, “the proper focus is on whether the regulatory presence is sufficiently comprehensive and detailed.” (*Id.* at 38 (citing 482 U.S. at 705)).

As to the second element, Plaintiffs argue that no substantial governmental interest justifies warrantless inspections of funeral homes. (*Id.*). They claim that while laws such as the FDL were concerned with public health when they were enacted, the Audit Report that “advances in mortuary science and health regulation have virtually eliminated the public health risks associated with preparation and disposition of the deceased,” and that “[c]urrent medical opinion is that dead bodies pose little or no risk to the general public.” (*Id.* (citing Pl. R. at 20)). Furthermore, Plaintiffs highlight the Audit Report’s statement that there is “no epidemiological evidence showing funeral homes and funeral service workers as a source of disease transmission.” (*Id.* at 39 (citing Pl. R. at 23)). The Audit Report also found that the Board “does not appear to perform functions that are essential to protecting public health and safety.” (*Id.*). Finally, Plaintiffs maintain that as many funeral homes are both businesses and residences, and because the provision of funeral services involves deeply personal choices for customers, that permitting inspectors to enter the premises at any time constitutes an unreasonable intrusion into the expectation of privacy to which funeral homes, and their customers, are entitled. (*Id.* at 39-40). They also contend that Defendants

have not presented any evidence of consumer harm from pre-need sales. (Doc. 168 at 44).

Regarding the third element, Plaintiffs argue that warrantless inspections in the funeral industry are unnecessary because the nature of the business is not akin to other industries where the Supreme Court has found warrantless inspections necessary. They note that unlike chop shops, where “stolen cars and parts often pass quickly through an automobile junkyard,” (doc. 140 at 40 (citing *Burger*, 482 U.S. at 710)), funeral homes are unable to cure deficiencies as quickly or as easily as those in other industries. Plaintiffs argue that hanging licenses and preparation room tables are not as transient as items such as stolen car parts, thus, warrantless inspections are even less justified in this context. (Doc. 168 at 46). They cite *United States v. Biswell* where the Court found warrantless inspections unnecessary for fire marshals because:

the mission of the inspection system was to discover and correct violations of the building code, conditions that were relatively difficult to conceal or to correct in a short time. Periodic inspection sufficed, and inspection warrants could be required and privacy given a measure of protection with little if any threat to the effectiveness of the inspection system there at issue.

(Doc. 140. at 40-41 (citing 406 U.S. 311, 316 (1972))). Additionally, Plaintiffs claim that even if funeral home directors, upon learning of an impending inspection, attempt to bring their facility into compliance,

the overall goal of the FDL will be furthered. In fact, Plaintiffs contend, unannounced and warrantless inspections can prove to be counterproductive, as in the case of Plaintiff Halpate and the Connell Funeral Home, who were prosecuted, publicly reprimanded, and fined \$1,000 after requesting that an inspector wait for the responsible person to arrive to conduct the inspection. (*Id.* at 43).

Finally, Plaintiffs assert that the warrantless inspection scheme must fail because it does not provide an adequate substitute for a warrant. (*Id.* at 45). They compare section 16(b) of the FDL to a Pennsylvania Game Commission regulation that the court in *Showers v. Spangler* found violated the constitution. In that case, the regulation provided that the records and premises of taxidermists “shall be open to inspection upon demand of an officer of the Commission” and further required that taxidermists “answer, without evasion, questions that may be asked by a representative or officer of the Commission.” (*Id.* at 45-46 (citing 957 F. Supp. 584 (M.D. Pa. 1997))). Notably, the court found that the regulation’s “failure to limit the inspecting officer’s discretion through careful limitations of place and scope render it unconstitutional.” (*Id.* at 46 (citing *Showers*, 957 F. Supp. at 591-92)).

Plaintiffs emphasize that section 16(b), similar to the Game Commission regulation found to be unconstitutional in *Showers*, fails to define the frequency, purpose, or scope of inspections. (*Id.*). They claim that inspections are not subject to any purpose but are left to the inspector’s discretion, causing great disparity

between some funeral homes, which are inspected with some regularity, while others are seldom inspected, with many years lapsing in between. Plaintiffs argue that the discretion of inspectors under the FDL is far greater than the discretion permitted through the regulation at issue in *Showers*, which the court found violated the Fourth Amendment. (*Id.* at 46-47).

In response, Defendants claim that the Pennsylvania funeral profession is, in fact, pervasively regulated. (Doc. 158 at 16). They cite *Marshall v. Barlow's, Incorporated* for the proposition that “[t]he businessman in a regulated industry in effect consents to the restrictions placed upon him.” (*Id.* (citing 436 U.S. 307, 313 (1978))). Defendants also cite *New York v. Burger* where the Court stated, “in light of the regulatory framework governing his business and the history of regulation of related industries, an operator of a junkyard engaging in vehicle dismantling has a reduced expectation of privacy in this ‘closely regulated’ business.” (Doc. 158 at 18-19 (citing 482 U.S. 691, 707 (1987))). They further emphasize the Court’s holding in *Donovan v. Dewey* where the Court explained:

[t]he greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that an owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual’s home, and that this privacy interest may, in certain

circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections.

(Doc. 126 at 113) (citing 452 U.S. 594, 598-99 (1981); *see also New York v. Burger*, 482 U.S. at 710 (noting that to be “effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential” and that “the prerequisite of a warrant could easily frustrate inspection”). Moreover, they claim that the funeral industry has been highly regulated since the mid 1890s and the current FDL, including section 16(b), has regulated applications, qualifications, and examinations for licensure, operational restrictions, defined services that constitute the profession of funeral directing, outlined a process for enforcement against licensees, established a Board to administer the FDL through fines, penalties, and revocation, governed the renewal of licenses, and provided for the generation of fees since 1952. (*Id.* at 114) (citing *Heffner Funeral Chapel and Crematory, Inc. v. Dept. of State, BPOA*, 824 A.2d 397 (Pa. Commw. Ct. 2003); 63 PA. STAT. ANN. §§ 479.2-479.20).

As to the first element, Defendants claim that Plaintiffs misconstrue the *Burger* Court’s explanation of this factor, and the element as described by the Court is that “there must be a ‘substantial’ government interest that informs the regulatory scheme pursuant to which the inspection is made.” (Doc. 158 at 19 (citing 482 U.S. at 702)). As a result, “Defendants claim the question is not whether there

is a substantial justification for the inspection, but whether there is a substantial government interest in regulating the profession.” (*Id.* at 20). They argue that because funeral directing involves pre-need trusting and the purchase of life insurance products, in addition to the care, preparation, sanitization, and disposition of possibly infectious human dead bodies with chemicals, that Pennsylvania has a substantial interest in regulating this industry. (Doc. 126 at 115).

Regarding the second element, Defendants maintain that inspections are necessary to further Pennsylvania’s interests. (Doc. 158 at 21). They claim unannounced inspections not only ensure that appropriate equipment is installed, but that it is functioning properly. (*Id.* at 22 (citing Counter-Statement of Material Facts “CSMF” ¶ 191)). Additionally, Defendants highlight that because the FDL requires 100% trusting of pre-need money, and since consumers are provided with a general price list, that an inspection of such documents is appropriate to ensure consumers are not being overcharged. (*Id.* at 23 (citing 49 PA. CODE § 13.224)). For example, they claim that inspectors examine the following during visits to funeral homes: whether the license is displayed in an appropriate public place, whether the preparation room is in good order, and whether documents, such as pre-need contracts, at-need contracts, and statements of goods and services, are accurate. (Doc. 126 at 117 (citing SMF ¶ 621)).

Although Defendants contend Plaintiffs admitted that unannounced inspections are proper and reasonable in time, place, and scope, the exhibit they cite for this point merely states Dr. Cyril Wecht's expert opinion that "I believe such facilities should be approved and inspected periodically by appropriate governmental agencies." (Pl. R. at 411). Notably absent from Dr. Wecht's opinion is the matter of whether these inspections should be unannounced and warrantless. Thus, it is clear from a plain reading of Dr. Wecht's expert report that Defendants have provided a strained interpretation of his opinion and Plaintiffs' opposition to warrantless inspections.

Finally, Defendants claim that based on the FDL and the admissions of Plaintiffs, the unannounced inspections are limited and reasonable. (*Id.* at 24). They highlight section 16(b) which provides that inspectors "shall have the right of entry into any place, where the business or profession of funeral directing is carried on or advertised as being carried on, for the purpose of inspection and for the investigation of complaints coming before the board and for such other matters as the board may direct." (*Id.* at 24 (citing 63 PA. STAT. ANN. § 479.16(b))). Defendants also cite the deposition testimony of Sucharski who said, "I'm a proponent of unannounced inspections and I think it's important . . . [I]t's a good thing to come unannounced and observe things and just see normal cleanliness and operational procedures." (Doc. 118 ¶ 630).

The Fourth Amendment states, in relevant part, "The right of the people to be secure in their persons,

houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause.” U.S. CONST. amend. IV. Count I asserts that 63 PA. STAT. ANN. § 479.16(b) violates the Fourth Amendment.<sup>16</sup>

As at the dismissal stage, Defendants rely upon the Supreme Court’s decision in *Donovan v. Dewey*, wherein the Court stated,

[L]egislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment. . . . The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that an owner of commercial property enjoys . . . differs significantly from the sanctity accorded an individual’s home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections.

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<sup>16</sup> This provision authorizes the Board to appoint inspectors who have the right to enter “any place, where the business or profession of funeral directing is carried on or advertised as being carried on, for the purpose of inspection and for the investigation of complaints coming before the Board and for such other matter as the Board may direct.” 63 PA. STAT. ANN. § 479.16(b).

[A] warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined so that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.

452 U.S. 594 (1981). *See also* *U.S. v. Biswell*, 406 U.S. 311 (1972) (upholding validity of warrantless inspections authorized by the Gun Control Act); *Colonnade Catering Corp. v. U.S.*, 397 U.S. 72 (1970) (upholding the validity of warrantless inspections of businesses in the alcoholic beverage industry).

However, we again find that Plaintiffs appropriately highlight the *Biswell/Colonnade* Doctrine, which only permits warrantless searches within the context of a regulatory scheme *if* certain safeguards are set forth to, *inter alia*, limit the discretion of the inspecting officers and limit the time, place, and scope of the inspections. *See Burger*, 482 U.S. at 702-03. In particular, according to the test set forth in *New York v. Burger*, warrantless inspections in pervasively regulated industries are only valid under the Fourth Amendment if three factors are satisfied. 482 U.S. at 702-703. While we recognize the *Burger* Court held, “where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may

well be reasonable within the meaning of the Fourth Amendment,” the Court proceeded to instruct that three criteria must be met: (1) “there must be a ‘substantial’ government interest that informs the regulatory scheme pursuant to which the inspection is made;” (2) “the warrantless inspections must be ‘necessary to further [the] regulatory scheme;’” and (3) “the statute’s inspection program, in terms of the certainty and regularity of its application, [must] provide a constitutionally adequate substitute for a warrant.” *Burger*, 482 U.S. at 702-03.

Here, we find that Defendants have failed to raise a genuine issue of material fact in proving that unannounced and warrantless inspections of funeral homes satisfy the standard established by the *Burger* Court. Concerning the first element, we find Defendants’ contention that the Commonwealth has a substantial interest in regulating the profession simply because the industry has been highly regulated since the mid 1890s, and because the current version of the FDL has been in place since 1952, to be insufficient to justify warrantless and unannounced inspections. While the interest to regulate that informs the regulatory scheme may be substantial standing alone, we find such interests to inadequately justify warrantless and unannounced inspections. To reiterate and expand upon what the *Burger* Court emphasized:

the sheer quantity of pages of statutory material is not dispositive of [whether a particular business is ‘closely regulated’], . . . the proper focus is on whether the regulatory

presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.

*Burger*, 482 U.S. at 705 n.16. Therefore, we find that Defendants have failed to raise a genuine issue of material fact in proving that “the warrantless inspections [are] ‘necessary to further the regulatory scheme’” at issue under the second element. *See Burger*, 482 U.S. at 702-03.

Despite Defendants’ assertion that unannounced inspections are necessary to ensure that equipment is not only installed, but is functioning properly, we find it probable that the motivation to become compliant with regulations in anticipation of a scheduled inspection, only to drift back into noncompliance following an inspector’s departure from the premises, is a less likely occurrence in the funeral directing industry than in industries where the Supreme Court has found warrantless and unannounced inspections necessary. *See Burger*, 482 U.S. at 710 (“[b]ecause stolen cars and parts often pass quickly through an automobile junkyard, ‘frequent’ and ‘unannounced’ inspections are necessary in order to detect them.”). For example, Defendants admit that inspectors generally monitor compliance with requirements such as whether the license is displayed in an appropriate public place, whether the preparation room is in good order, and whether documents, such as pre-need and at-need contracts, and statements of goods and services,

are accurate. We find it difficult to conceive of an exigency that would justify a warrantless inspection for such items. Moreover, we are unable to discern a potential motive on behalf of funeral directors that would induce them to place a funeral license in a public place, properly maintain a preparation room, or accurately record pre-need or at-need contracts, but subsequently remove a license, revert to disorder in a preparation room, or to dishevel administrative records simply because an inspection has passed.

Furthermore, we do not find that regulation of the funeral industry is akin to the unannounced inspections of automobile junkyards in *Burger*, because the transient nature of items in the automobile industry are not analogous to the fixed location of a funeral home and the items to be inspected therein. Simply put, funeral homes are not on wheels. Moreover, even if the governmental interest in regulating funeral directing was found to be similar to the exigencies posed by the facts in *Burger*, the Court therein found that such inspections were justified because the inspection was limited in “time, place, and scope” to impose “appropriate restraints upon the discretion of the inspecting officers.”<sup>17</sup> 482 U.S. at 711

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<sup>17</sup> Specifically, the inspecting officers in *Burger* were statutorily permitted to only conduct inspections “during the regular and usual business hours,” and “inspections [could only be made] of vehicle-dismantling and related industries,” and “the permissible scope of these searches is narrowly defined: the inspectors may examine the records, as well as any vehicles or parts of vehicles which are subject to the record keeping

(Continued on following page)

(citing *United States v. Biswell*, 406 U.S. 311, 315 (1972)). Here, we find that a plain reading of section 16(b) provides few if any limitations on the time, place, and scope of inspections that would limit the discretion of inspecting officers. See 63 PA. STAT. ANN. § 479.16(b); (see also Pl. R. at 1316) (Board member Goldstein testifying that frequency, nature, and extent of an inspection is “usually up to the inspector”). Plaintiffs also cite the deposition testimony of John Katora who noted that the scope of an inspection depends on who shows up and that what they look for has changed over the years. (Pl. R. at 6468-69).

In addition, the Supreme Court stated in *Donovan v. Dewey*:

[w]here Congress has authorized inspection but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply. . . . a warrant may be necessary to protect the owner from the unbridled discretion of executive and administrative officers, by assuring him that reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular establishment.

452 U.S. 594, 599 (1980). Therefore, despite Defendants’ citation to the deposition testimony of a few funeral directors indicating that they do not oppose

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requirements of this section and which are on the premises.” *Burger*, 482 U.S. at 711 (internal marks and citations omitted).

unannounced inspections, the mere existence of a handful of funeral directors who consider such inspections unobjectionable, and possibly even beneficial, is insufficient to overcome the clear lack of statutory or regulatory guidelines imposing restrictions on the time, place, and scope of inspections that would provide certainty and regularity throughout the inspection process. The lack of such parameters perpetuates unbridled discretion of administrative officers and fails to provide a “constitutionally adequate substitute for a warrant.” See *Burger*, 482 U.S. at 702-03; see also *Showers*, 957 F. Supp. at 591-92 (finding that the failure of a Pennsylvania Game Commission regulation governing taxidermists “to limit the inspecting officer’s discretion through careful limitations of place and scope render[ed] it unconstitutional.”). As a result, the instant provision fails to constitute a “sufficiently comprehensive and defined [statute such] that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.” *Burger*, 482 U.S. at 703 (quoting *Donovan*, 452 U.S. at 600).

Accordingly, we find that Defendants have failed to raise a genuine issue of material fact as to the second and third elements of the *Burger* criteria set forth above. Therefore, we shall grant Plaintiffs’ motion to this extent and deny Defendants’ motion as to the same.

**2. Count II: Undue Restriction on Ownership & Count III: Undue Restriction on Ownership to Licensed Funeral Directors**

**a. Counts II & III – Commerce Clause**

Plaintiffs next challenge the FDL's provision restricting a funeral director to possessing an ownership interest in one entity operating a funeral home, such as a sole proprietorship, partnership, or a professional corporation, plus one "branch" location associated with that entity. (Doc. 140 at 48 (citing 63 PA. STAT. ANN. § 479.8(a), (d), (e))). They claim that the FDL's restriction of ownership to two locations violates the Commerce Clause. (*Id.* at 59). Plaintiffs note that the Third Circuit in *Tri-M Group, LLC v. Sharp* stated, "[t]he dormant Commerce Clause prohibits the states from imposing restrictions that benefit in-state economic interests at out-of-state interests' expense" and "[s]tates cannot impede free market forces to shield in-state businesses from out-of-state competition, and, notably, state laws that discriminate against out-of-state businesses by forcing them to surrender whatever competitive advantages they may possess are especially suspect." (*Id.* at 60 (citing 638 F.3d 406, 426-27 (3d Cir. 2011))). They contend that in analyzing a dormant Commerce Clause issue, a court first considers whether heightened scrutiny applies, and if not, whether the law is invalid under the balancing test of *Pike v. Bruce Church, Incorporated*. (*Id.* (citing 397 U.S. 137 (1970))).

Additionally, Plaintiffs argue, “[h]eightedened scrutiny applies when a law discriminates against interstate commerce in its purpose or effect.” (*Id.* (citing *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 462 F.3d 249, 261 (3d Cir. 2006) (“*Cloverland II*”))). They assert there are two types of discrimination that can trigger heightened scrutiny. Under the first, plaintiffs may demonstrate that the challenged state statute forces producers in other states “to surrender whatever competitive advantages they may possess.” (*Id.* at 61 (citing *Cloverland II*, 462 F.3d at 261)). As to the second, a plaintiff “may show that the object of the law is local economic protectionism, in that it disadvantages out-of-state businesses to benefit in-state ones.” (*Id.* (citing *Cloverland II*, 462 F.3d at 262)). Moreover, they emphasize, “there is no requirement that discrimination must be the primary purpose or effect of the challenged state law.” (*Id.* (citing *Cloverland II*, 462 F.3d at 261 n.14)). Finally, if the purpose or effect of the state law is not discrimination against interstate commerce, and it is found that the statute “regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental,” the court will then analyze the statute under the *Pike* balancing test and ask “whether the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” (*Id.* at 61-62 (citing *Cloverland II*, 462 F.3d at 263 (quoting *Pike*, 397 U.S. at 142))).

In the case *sub judice*, Plaintiffs argue that the discriminatory purpose of the FDL's ownership restrictions is clear from the exemptions crafted to favor Pennsylvania family-owned funeral homes. (*Id.* at 62). For example, they maintain that the only way for an out-of-state entity to enter the funeral directing industry in Pennsylvania is to pay a de facto tariff through the purchase of an exorbitantly priced pre-1935 license.<sup>18</sup> On the other hand, an unlicensed spouse, child, grandchild, widow, or estate of a Pennsylvania funeral director may own a funeral home in Pennsylvania. (*Id.* at 62). They contend the Third Circuit has held that laws burdening out-of-state business interests, but which are inapplicable to in-state interests, constitute "blatant" and "overt" evidence of discrimination. (*Id.* (citing *Cloverland II*, 462 F.3d at 265)). In addition, they claim the Supreme Court has held that the Commerce Clause is violated not only when a state prohibits out-of-state interests from entering the market, but when it grants in-state

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<sup>18</sup> Plaintiffs emphasize that prior to 1935, funeral directing licenses were issued to both individuals and corporations. However, when the legislature restricted licensure to individuals, the corporations that held existing licenses sued to retain the right to operate under these licenses. As a result, there are a limited number of grandfathered "pre-1935" licenses, which currently consist of fifty-six (56) active pre-1935 licenses and twenty-one (21) inactive pre-1935 licenses. In addition, Plaintiffs contend that many of the FDL's restrictions are inapplicable to pre-1935 corporations. For instance, Plaintiffs suggest there are no limitations concerning who may own a corporation that holds a pre-1935 license or on the number of pre-1935 corporations an individual entity may own. (Doc. 140 at 50).

interests access to the market on preferential terms. (Doc. 168 at 55). Moreover, Plaintiffs argue that even restrictions seemingly applicable to Pennsylvania funeral directors are easily circumvented by transferring interests in funeral businesses to family members through an RBC license. (Doc. 140 at 63).<sup>19</sup> They compare the instant case to *Jones v. Gale* where plaintiffs, owners of interests in Nebraska farms, filed a Commerce Clause challenge against a Nebraska ballot initiative prohibiting corporations from owning farms in the state while exempting from the restriction corporations owned by Nebraska farmers or their families. (*Id.* at 63-64 (citing 470 F.3d 1261 (8th Cir. 2006))). In that case, the court found that the initiative was facially discriminatory because it prohibited ownership of farms by corporations, but not by Nebraska family farm corporations. (*Id.*). Plaintiffs emphasize that like the ballot initiative in *Jones*, the FDL prohibits ownership of funeral homes by non-licensees, but this prohibition does not apply to in-state funeral directors and their families. (*Id.* at 64).

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<sup>19</sup> Plaintiffs note that a funeral home license may be awarded to a restricted business corporation (“RBC”) incorporated for the purpose of engaging in funeral directing. (*Id.* at 48). They claim that the stock of an RBC may be owned by: (i) a Pennsylvania licensed funeral director; (ii) the spouse, children, or grandchildren of a Pennsylvania licensed funeral director; or (iii) a trustee or custodian for the spouses, children, or grandchildren of a licensed funeral director. (*Id.* at 48-49).

In addition, Plaintiffs challenge the assertion that the FDL is not discriminatory since its restrictions apply to in-state interests, because, as just noted, the restrictions do not apply to Pennsylvania funeral directors and their families. They further claim that in deciding whether to apply heightened scrutiny, “it is immaterial whether the statute or ordinance also burdens some in-state businesses.” (*Id.* at 65 (citing *Cloverland II*, 462 F.3d at 262)). Consequently, Plaintiffs argue that the FDL’s incidental burdens on in-state funeral directors cannot save it from its discriminatory effect because if the restrictions “protect incumbent in-state dealers not only from out-of-state competitors, but also from in-state ones . . . , that simply exacerbates their protectionist effect.” (*Id.* at 65 (citing *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 214 (3d Cir. 2002) (“*Cloverland I*”))).

Furthermore, Plaintiffs argue that even if the Court finds the statute to be facially neutral, the FDL is still subject to heightened scrutiny because of its discriminatory effect. (*Id.* at 66 (citing *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994) (noting that a state regulation “had the same effect as a tariff or customs duty – neutralizing the advantage possessed by lower cost out-of-state producers” and was thus unconstitutional))). They claim the FDL produces a discriminatory effect because its prohibition on the ownership of more than two funeral

homes precludes clustering of the same, thereby preventing a reduction in costs that would result from eliminating needless duplication of preparation rooms, equipment, and employees at each location. (*Id.* at 67). Additionally, Plaintiffs highlight that the discriminatory effect of the FDL is exemplified by the large number of small, family-owned funeral homes in Pennsylvania, compared to states of similar or greater size which have far fewer funeral homes. (*Id.* at 70). For example, they highlight the conclusion of their expert Dr. Harrington that “the fraction of very small funeral homes in states like Pennsylvania is due to anticompetitive funeral regulations, not the preferences of consumers for this type of funeral home.” (*Id.* at 72 (citing Pl. R. at 337)). Therefore, Plaintiffs maintain that Defendants’ contention, that a corporation wishing to expand into Pennsylvania need only acquire a corporation holding a pre-1935 license, is evidence of the discriminatory effect of the FDL.

Finally, Plaintiffs argue that even if the Court decides that the FDL regulates out-of-state and in-state interests even-handedly, the ownership restrictions of the FDL should be invalidated under the *Pike* balancing test because the burden is clearly excessive in relation to any putative local benefit. (*Id.* at 74). Following a recitation of the statutory prerequisites to becoming a licensed funeral director, Plaintiffs contend the burdens are particularly oppressive given the fact that in-state family members of funeral directors are exempt from such educational requirements. (*Id.* at 75-76). Again, they claim that the restrictions

on out-of-state corporate ownership of Pennsylvania funeral homes, limiting them to the purchase of pre-1935 RBCs, also prevents the few out-of-state corporations that enter the market through the effective payment of a tariff from lowering prices for consumers by clustering and achieving economies of scale in the provision of funeral services. (*Id.* at 77-79). On the other hand, they assert that the only local benefit identified by Defendants is “having a local business owned by local people.” (*Id.* at 82). To this, Plaintiffs maintain that “preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits.” (*Id.* at 82-83 (citing *Healy*, 512 U.S. at 205)). As a result, they claim that the only benefit conferred by the FDL is one strictly prohibited by the Commerce Clause.

While Defendants argue that more funeral homes reduce the cost for consumers, Plaintiffs counter that an excessive number of small funeral homes performing fewer funerals actually increases the price because such establishments are forced to raise prices for the few funerals they perform. (*Id.* at 84). Moreover, Plaintiffs claim that each of the non-licensed individuals permitted to own a funeral home pursuant to an FDL exception are required to employ a licensed funeral director. Therefore, they argue that this requirement, and not the ownership restrictions that effectively discriminate against out-of-state individuals and corporations, provides accountability in the industry. (*Id.* at 85). Also, restricting ownership to

licensees does not eliminate absentee owners because unlicensed individuals are still permitted to make temporary funeral arrangements. (*Id.* at 86 (citing 63 PA. STAT. ANN. § 479.13(d))).

At the outset, regarding the ownership restriction issue, Defendants contend that all of the individually named Plaintiffs in Counts II and III lack standing to challenge the FDL under the Commerce Clause because they are all Pennsylvania residents. Therefore, because they contend Plaintiff Wellman, a Louisiana corporation, is the only Plaintiff with standing as to these claims, Wellman's position is the only one Defendants contest herein. We disagree with Defendants that the appropriate comparison is between Wellman, the only out-of-state party named in Counts II and III, and a Pennsylvania corporation. Defendants rely on *United Haulers Association, Incorporated v. Oneida-Herkimer Solid Waste Authority* where the Supreme Court stated, "of course, any notion of discrimination assumes a comparison of substantially similar entities" and that under a dormant Commerce Clause analysis, a publicly owned solid waste facility is different from a privately owned solid waste facility. 550 U.S. 330, 342 (2007). However, here we are not confronted with a public and private entity, rather, we have private corporations and individuals aligned as Plaintiffs, and both have the right to own funeral licenses through sole proprietorships, partnerships, or professional corporations. Contrary to Defendants' position, we find that for purposes of our Commerce Clause analysis, both the

individually-named Plaintiffs in Counts II and III, and the corporate Plaintiffs named therein, are treated the same under the Commerce Clause. Thus, we find Defendants' attempt to again challenge the standing of individual Plaintiffs in Counts II through III to be unavailing. Furthermore, to the extent Defendants premise their opposition to Plaintiffs' motion on the theory that the appropriate comparison is between Plaintiff Wellman and a Pennsylvania corporation, and not between Wellman and the alleged advantages enjoyed by private individuals in Pennsylvania, we find such approach unduly constricting.

As to Count II, Defendants claim that the named Plaintiffs lack standing to assert a dormant Commerce Clause challenge against provisions of the FDL. (Doc. 158 at 82). For example, they argue that Plaintiff Wellman is a Louisiana corporation, and thus the appropriate inquiry is whether the FDL treats Wellman differently than any Pennsylvania corporations. Defendants assert that just as a Pennsylvania corporation can own stock in a pre-1935 RBC, Wellman can also enter the Pennsylvania market in this way. (*Id.* at 83). They claim Plaintiffs' argument regarding its alleged restriction from clustering in Pennsylvania fails to demonstrate, through specific figures, a comparison of the costs from Louisiana, where clustering has occurred, with the costs of operating in Pennsylvania, where they allege clustering cannot occur. (*Id.* at 86-87). Defendants contend that based on *Cloverland II*, Plaintiffs were obligated to prove that clustering would provide them with a

competitive advantage that is effectively stifled by the one-and-a-branch provision. Additionally, Defendants challenge Dr. Harrington's conclusion that there is a close relationship between the challenged provisions of the FDL and the large number of small, family-owned funeral homes. (*Id.* at 87).

Defendants also counter Plaintiffs' argument under the *Pike* balancing test. They argue that contrary to Plaintiffs' assertions, there are no additional burdens on Plaintiff Wellman compared with the requirements applicable to a Pennsylvania corporation seeking a funeral license. (*Id.* at 90). Defendants further claim that many of the Plaintiffs herein cluster funeral establishments, and that such establishments charge consumers more for funeral services. (*Id.* at 91 (citing SMF ¶¶ 405-07)). According to Defendants, limiting Pennsylvania funeral directors to one-and-a-branch promotes competition by reducing the ability of any one business to dominate the market. (*Id.*).

Regarding Count III, Defendants claim that Plaintiff Wellman provides no evidence he is being treated differently from a Pennsylvania corporation concerning his ability to own a Pennsylvania funeral establishment. (*Id.* at 95). They further claim that nothing in the FDL requires immediate family members of funeral directors who are given stock in a RBC, to be from Pennsylvania. As a result, they claim there is no violation of the dormant Commerce Clause. Moreover, Defendants reiterate Plaintiffs' failure to provide actual evidence of the competitive advantage obtained from clustering. (*Id.* at 97).

The Commerce Clause in Article I, § 8 of the United States Constitution provides, “Congress shall have the Power . . . to regulate Commerce . . . among the several States.” While this clause speaks in terms of Congress’ affirmative grant of power to regulate commerce, it has also been interpreted as an implied limitation on the power of states to impose additional burdens on interstate commerce. *Dept. of Revenue of Ky. v. Davis*, 128 S.Ct. 1801, 1808 (2008) (“The modern law of what has come to be called the dormant Commerce Clause is driven by concern about ‘economic protectionism’ – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”).

When analyzing a dormant Commerce Clause issue, courts first determine “whether heightened scrutiny applies, and, if not, then we determine whether the law is invalid under the *Pike v. Bruce Church, Inc.*, 397 U.S. 383, 390 (1970), balancing test.” *Am. Express Travel Related Servs. v. Sidamon-Eristoff*, 2012 U.S. App. LEXIS 129, at \*25-26 (3d Cir. Jan. 5, 2011). A court will apply heightened scrutiny when a law “discriminates against interstate commerce” in its purpose or effect.” *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 462 F.3d 249, 261 (3d Cir. Jan. 5, 2006). If heightened scrutiny applies, the party challenging the statute bears the burden of demonstrating the existence of discrimination, at which point the burden shifts to the state to prove that “the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means.” *Id.* at 261 (citing

*Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 576 (1986)) (“When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry”). In *Cloverland* the Third Circuit stated, “[i]n determining whether heightened scrutiny should be applied instead of the *Pike* test, ‘the critical consideration is the overall effect of the statute on both local and interstate activity,’ with special attention paid to whether a ‘facially neutral’ state law ‘has the effect of eliminating a competitive advantage possessed by out-of-state firms.’” 462 F.3d at 263. If heightened scrutiny is applied, the State must prove: (1) “that the statute serves a legitimate local interest,” and (2) “that this purpose could not be served as well by available non-discriminatory means.” *Am. Trucking Ass’ns v. Whitman*, 437 F.3d 313, 319 (3d Cir. 2006). In *Pike v. Bruce Church*, the Supreme Court established the test to use in analyzing a Commerce Clause challenge not subject to heightened scrutiny and noted that “[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” 397 U.S. 137, 142 (1970).

Thus, our first task is to determine whether heightened scrutiny applies. Here, we find that

Plaintiffs have presented sufficient factual evidence to demonstrate that the purpose or effect of the ownership restrictions in the FDL is to discriminate against out-of-state competitors. The burdensome nature of the FDL's ownership restrictions is demonstrated by the exemptions crafted to favor Pennsylvania family-owned funeral homes by providing for ownership by untrained and unlicensed individuals who are required to employ a full-time licensed funeral director to supervise the facility. *See* 63 PA. STAT. ANN. § 479.8(a). As previously noted, the FDL allows in-state interests, through unlicensed spouses, children, grandchildren, widows, or the estate of a Pennsylvania funeral director, to own a funeral home in Pennsylvania and operate the same through a licensed funeral director employed on a full-time basis. (*Id.* at 62); *see* 63 PA. STAT. ANN. § 479.8(a) ("Upon the death of a licensee, the board shall issue a license and renewal thereof to his estate, only for a period not exceeding three (3) years, or widows or widowers of deceased licensees without time limitations, as long as they remain unmarried, providing the widow or widower, the executor or administrator of the estate of the deceased licensee's heirs, informs the board, of the intent to continue practice, within ten (10) days and applies within thirty (30) days for a certificate of licensure. . . . The practice carried on by a licensee's estate, widow or widower shall be under the supervision of a licensed funeral director employed on a full time basis."). The exception from licensed funeral home ownership provided in section 479.8(a) for widows, widowers, children, grandchildren, and heirs

of a licensed funeral home director demonstrates the discriminatory effect of the FDL's ownership restrictions by exempting this class of individuals from the extensive educational prerequisites demanded of those seeking to become licensed funeral home directors. *See Tri-M Grp., LLC v. Sharp*, 638 F.3d 406, 426-27 (3d Cir. 2011) (“The dormant Commerce Clause ‘prohibits the states from imposing restrictions that benefit in-state economic interests at out-of-state interests’ expense, thus reinforcing ‘the principle of the unitary national market.’”). Through the creation of numerous exceptions to licensed funeral home ownership for the surviving family members and heirs of licensed funeral directors, the FDL has shielded in-state businesses from out-of-state competition by effectively limiting the avenues by which an out-of-state firm may enter the Pennsylvania funeral market.

Moreover, while an out-of-state individual may obtain a Pennsylvania funeral license by complying with the requirements for applicants, the only way for an out-of-state corporation to enter the funeral directing industry in Pennsylvania is to find and pay for a rare, pre-1935 license. *Id.* (“States ‘cannot impede free market forces to shield in-state businesses from out-of-state-competition,’ and, notably, ‘state laws that discriminate against out-of-state businesses’ by forcing them to ‘surrender whatever competitive advantages they may possess’ are especially suspect.”). Out-of-state entities that simply desire the opportunity to operate funeral homes in the same manner

permitted by widows, widowers, children, grandchildren, or heirs of licensed funeral directors who are permitted to operate the same through the supervision of a licensed funeral director are prohibited from doing so by the instant section of the FDL. For example, under the current provisions of the FDL an out-of-state corporation cannot acquire a funeral home license, unless it purchases shares in a pre-1935 funeral corporation, and subsequently hires a licensed funeral director to manage the establishment. However, an unlicensed in-state widow, widower, child, grandchild, heir, or estate of a Pennsylvania licensed funeral director is permitted to own a funeral home license and operate such an establishment, through entities other than a RBC, by simply hiring a licensed funeral director to supervise and management the establishment.

Even if heightened scrutiny did not apply, the asserted interest in allowing such individuals to continue operation of the funeral home and ensure that pre-need funerals and at-need funerals are performed, while admittedly a legitimate local interest, is outweighed by the burdensome nature of the ownership restrictions requiring that other individuals seeking to enter the funeral market become licensed, or that corporations wishing to do the same acquire the assets of a pre-1935 corporation. Furthermore, and to reiterate, the currently permitted practice of Pennsylvania funeral directors transferring shares of RBCs to family members also demonstrates the extent to which this statutory scheme discriminates

against out-of-state individuals and entities and instead promotes local interests. Section 479.8(b) states, in relevant part, “[s]uch license shall be valid only if the following conditions exist at the time of issuance of the license and continue in effect for the license period: . . . (4) All of its shareholders are licensed funeral directors or the members of the immediate family of a licensed funeral director or a deceased licensed funeral director who was a shareholder in the corporation at death.” Again, the exception for a licensed funeral director’s immediate family has the effect of discriminating against firms, both inside and outside of Pennsylvania, that desire to own shares of an RBC but are precluded from doing so unless such entities acquire the stock of a pre-1935 corporation. *See Cloverland*, 462 F.3d at 262 (“In deciding whether a state law discriminates against out-of-state businesses, it is immaterial whether the statute or ordinance also burdens some in-state businesses.”).

Thus, even if heightened scrutiny were inapplicable, we nevertheless find that under the *Pike* balancing test, Plaintiffs have established that the burdens imposed on out-of-state firms seeking to enter the Pennsylvania funeral industry are excessive when compared to the purported local interests that Defendants contend are advanced by the instant provisions of the FDL.

Accordingly, we shall grant Plaintiffs’ motion to the extent of their Commerce Clause argument pertaining to Counts II and III, and deny Defendants’

motion as to the same. While we recognize that this ruling is dispositive, for the sake of completeness, we will proceed to analyze Plaintiffs' due process arguments as well.

**b. Count II: Substantive Due Process – “One-and-a-Branch”**

Plaintiffs also argue in Count II that the FDL's ownership and bequest restrictions violate the Due Process Clause. (*Id.* at 87 (citing *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000) (“[A] legislative act will withstand substantive due process challenge if the government identifies a legitimate state interest that the legislature could rationally conclude was served by the statute.”))). They claim “a court applying rational-basis review . . . must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.” (*Id.* at 89 (citing *Kelo v. City of New London*, 545 U.S. 469, 491 (2005); *see also W. Va. Univ. Hosp., Inc. v. Rendell*, 2007 U.S. Dist. LEXIS 81901, at \*23 (M.D. Pa. Nov. 5, 2007) (“[e]ven under the deferential rational basis standard, state laws discriminating against out-of-state residents and businesses have been viewed with particular skepticism by the courts.”))). They highlight the Board's recognition that one of the changes needed regarding the FDL is that “there be no limit on the number of funeral establishments that a person owns.” (*Id.* at 91 (citing Pl. R. 200)). Plaintiffs also allege that contrary to

Defendants' assertions, the FDL does not promote competition and fails to provide the accountability and competency that Defendants purport it does. (*Id.* at 93).

Moreover, Plaintiffs claim that Defendants' only explanation for the rational relationship between the FDL and the prevention of market domination is that such "decentralized market structure" is "further[ed] by the FDL." (Doc. 168 at 96 (citing *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("even in the ordinary . . . case calling for the most deferential standards, we insist on knowing the relation between the classification adopted and the object to be obtained")))). They also contend Defendants' assertion that restricting funeral directors to one-and-a-branch limits the number of funerals a director may perform, is incorrect. For example, Board member Goldstein owns the maximum of two funeral homes and performs approximately 1,800 funerals annually, while Plaintiff Heffner and his wife own twelve (12) funeral homes and only handle 900 funerals per annum. (*Id.* at 97-98 (citing Pl. R. at 1267-68, 1271-72; 5510-11)). Plaintiffs argue that the absence of a rational relationship between the FDL's ownership restriction and its purported goal of preventing market domination is also belied by the fact that funeral directors may effectively own an unlimited number of funeral homes by transferring RBC licenses to family members. (*Id.* at 99). Therefore, they maintain that limiting a funeral director to two locations does not necessarily prevent him from obtaining a dominant market share.

In response, Defendants argue that none of the Plaintiffs in Count II have standing to challenge the one-and-a-branch provision because none of them currently own or operate a branch funeral home. (Doc. 158 at 37). We find this argument to be disingenuous. Simply because some Plaintiffs have not yet availed themselves of the opportunity to own or operate a branch location does not negate the fact that we previously found Plaintiffs to in fact have standing to challenge these portions of the FDL since “the threat of prosecution to [Plaintiffs] is not imaginary or speculative.” (Doc. 32 at 16). Therefore, we reject outright and decline to revisit this argument further.

Moreover, despite Defendants’ contention that the FDL does not permit family members of a licensed funeral director to own stock in an unlimited number of Pennsylvania funeral homes, Plaintiffs nevertheless allege that Mrs. Heffner owns stock in numerous RBCs.<sup>20</sup> (Doc. 168 at 97 (citing Pl. R. at

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<sup>20</sup> Notably, the FDL provides that one of the prerequisites for a valid RBC is that:

[a]ll of its shareholders are licensed funeral directors or the members of the immediate family of a licensed funeral director or a deceased licensed funeral director who was a shareholder in the corporation at death. For the purposes of this paragraph ‘members of the immediate family’ shall mean (i) spouse, (ii) children, (iii) grandchildren, (iv) a trustee or custodian who holds shares for the benefits of such spouse, children or grandchildren.

63 PA. STAT. ANN. § 479.8(b)(4).

(Continued on following page)

5510-11 (Ernest Heffner deposition stating as follows: “**Q:** Second thing is, my wife, who is not a licensed funeral director, and I own and operate 12 funeral homes, 11 in Pennsylvania and one in the State of New York; is that correct? **A:** Correct”)). Defendants also contend that the highly localized market for funeral establishments provides a rational basis for the one-and-a-branch provision. (Doc. 158 at 40 (citing SMF ¶¶ 408-11, 414-26)). They also claim that

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The FDL also states:

[n]o licensed funeral director shall be eligible to apply for more than one restricted corporate license or own shares in more than one restricted corporation. Nor shall any licensed funeral director who obtains a restricted corporate license or holds shares in a restricted corporation have any stock or proprietary interest in any other funeral establishment, except a branch place of practice as authorized by subsection (e). . . .

*Id.* § 479.8(b). Still, Plaintiffs highlight, there is no restriction on the number of RBCs, and the shares of the same, that the family members of a Pennsylvania licensed funeral director may hold. (Doc. 140 at 35).

As in their commerce clause argument above, Plaintiffs contend that the FDL’s limitation of RBC ownership to licensed funeral directors, in conjunction with the wide exception carved out for the family members of licensed funeral directors, discriminates against out-of-state interests and, under a due process analysis, is not rationally related to a legitimate state interest. Moreover, they emphasize that the exception practically swallows the rule and any rational relationship to a legitimate state interest is belied by the reality that funeral directors easily circumvent the FDL’s restrictions by transferring ownership shares to family members while continuing to manage the day-to-day operations of the facility.

allowing ownership of more than two locations in a market could result in market domination, thereby reducing competition and consumer choice. (*Id.*). Defendants further argue that allowing funeral directors to own more than one-and-a-branch could spread funeral directors too thin, and that the funeral industry in Pennsylvania is comprised of smaller business with a personal connection to the community. (*Id.* at 40-41). All of these reasons, they assert, constitute legitimate state interests rationally related to the provisions at issue.

The Fourteenth Amendment states, in relevant part, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .” U.S. Const. amend. XIV. Both parties agree that the right to practice one’s profession, the right involved in all of Plaintiffs’ substantive due process counts, is not a “fundamental right.” *Meier v. Anderson*, 692 F. Supp. 546, 550 (E.D. Pa. 1988). When a fundamental right is not implicated, the “rational basis standard” is employed for resolving substantive due process challenges. *Lawrence v. Texas*, 539 U.S. 558, 588 (2003). According to this standard, substantive due process rights have not been violated if the laws or regulations at issue are rationally related to a legitimate government interest. *Id.* at 578.

The legitimate state interests highlighted by Defendants are not rationally related to the FDL’s

restriction on ownership for funeral directors to one-and-a-branch. We pause here to repeat the Board's own remarkable admission that one of the changes needed to the FDL is "[t]hat there be no limit on funeral establishments that a person owns. . . ." (Pl. R. at 200). Additionally, we find Defendants' contention that restricting a funeral director to one-and-a-branch necessarily limits the number of funerals that can be conducted, and prevents funeral directors from being stretched too thin, to lack support in the record. As previously referenced, Plaintiffs assert that Board member Goldstein owns the maximum of two funeral homes and performs approximately 1,800 funerals annually, while Plaintiff Heffner and his wife own twelve (12) funeral homes and only handle 900 funerals. (Doc. 168 at 97-98 (citing Pl. R. at 1267-68, 1271-72 (Bennett Goldstein deposition testimony); 5510-11 (Ernest Heffner deposition testimony))). This example obliterates Defendants' thread-bare argument. We also agree with Plaintiffs that the rationality of this provision is further called into question by a funeral director's ability to transfer shares of a RBC to family members, while continuing to provide services through the very same facility.

Therefore, we shall grant Plaintiffs' motion regarding their substantive due process claim in Count II and deny Defendants' motion as to the same.

**c. Count III: Substantive Due Process – Ownership by Licensees**

Similarly, Plaintiffs contend that Defendants' alleged rational basis for restricting ownership of funeral homes to licensed funeral directors is not related to a legitimate state interest. (Doc. 168 at 103). They maintain that restricting ownership of funeral homes to licensed funeral directors does not promote the goals of consumer protection, accountability, competency, trust, and accessibility because the state's requirements for operation of a funeral home are applicable regardless of who owns the establishment. (*Id.* at 104). For example, they note that funeral homes owned by licensed funeral directors, unlicensed widows, unlicensed executors, unlicensed family members, or an unlicensed pre-1935 corporation are all held to the same standard of conduct. (*Id.*). Moreover, they claim that in the case of an unlicensed widow possessing a funeral home license, Pinkerton testified that no consumer protection concerns are raised because the Board can revoke the widow's license or the license of the funeral director supervising the home. (*Id.*) (citing Pl. R. at 979-82) ("It is a widow's license that can be revoked. A widow's license can be revoked, so it goes to the individual licensed funeral director, the supervisor of that facility to the widow's license."). Thus, they claim Defendants' assertion that permitting unlicensed individuals to own funeral homes "would make it more difficult for the Commonwealth to ensure that those who had been disciplined as funeral directors did not

return to own such business because, by not having a license, there would be no way for the Commonwealth to regulate participation in the profession,” is disingenuous and not rationally related to a legitimate government interest. (*Id.* at 105) (citing Doc. 126 at 40). They also highlight that no provisions of the FDL prohibit a funeral director from “hiding” behind the corporate form of the RBC and only making sporadic visits to their funeral homes. (*Id.* at 106).

In addition, Plaintiffs claim that Defendants’ reliance on *Brown* is misplaced because in that case fifty-eight (58) Maryland corporations issued licenses prior to 1945 were grandfathered under the current law in order to “protect reliance interests of family members.” (*Id.* at 107 (citing *Brown v. Hovatter*, 561 F.3d 357, 369 (4th Cir. 2009))). They emphasize that Maryland’s requirement that a corporate license be continuously renewed since 1945 lends support to the asserted legislative intent to protect the reliance interests of family members. (*Id.* (citing MD. CODE ANN. HEALTH OCC. § 7-309(b)(2))). Plaintiffs also note that Maryland law requires a surviving spouse who acquires a deceased spouse’s funeral home license to pass an examine on state funeral law. (*Id.* at 108 (citing MD. CODE. ANN. HEALTH OCC. § 7-308(b))). However, in Pennsylvania, a surviving spouse is not required to possess knowledge about funeral directing. (*Id.* (citing Pl. R. at 167)). Finally, Plaintiffs claim

that the “wind-down”<sup>21</sup> period in Maryland is only six months, compared to three years in Pennsylvania. (*Id.* at 109 (citing Md.Code Ann. Health Occupations, § 7-308.1(g); 63 PA. STAT. ANN. § 479.8(a))). They argue that the FDL’s restriction of ownership to licensed funeral directors is illogical in light of the multitude of exceptions, including pre-1935 corporations, estates, widows, children, and grandchildren, that practically swallow the rule. (*Id.* at 110). As a result, Plaintiffs maintain that the FDL’s restriction is not rationally related to the alleged legitimate government interest.

In an attempt to counter these arguments, Defendants assert that the FDL requires licensed funeral establishments to be owned through a sole proprietorship, partnership, widow/executor license,

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<sup>21</sup> Maryland law provides that “[w]ithin 6 months of the issuance of the surviving spouse license, the applicant must taken the written Maryland State law examination administered by the Board under § 7-304(b), (c), (d)(1), (e), and (f) of this subtitle.” Under the FDL:

[u]pon the death of a license, the board shall issue a license and renewal thereof to his estate, only for a period not exceeding three (3) years, or widows or widowers of deceased licensees without time limitations, as long as they remain unmarried, providing the widow or widower, the executor or administrator of the estate of the deceased licensee’s heir or heirs, informs the board, of the intent to continue practice, within ten (10) days and applies within thirty (30) days for a certificate of licensure.

63 PA. STAT. ANN. § 479.8(a).

RBC, or a pre-1935 corporation. (Doc. 126 at 36) (citing 63 PA. STAT. ANN. § 479.8(a), (b), and (d)). They also reiterate that there are exceptions, including the ability to transfer stock of an RBC to immediate family members, and ownership of a pre-1935 corporation. (*Id.*). Defendants claim that Plaintiffs fail to analyze whether the requirements of licensed ownership are rational, and instead focus on comparing various groups and the existence of exceptions to licensed funeral home ownership in attempting to allege a substantive due process claim. (Doc. 158 at 42-43 (citing *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 166-67 (1973))). They argue that nothing in the FDL prohibits a person or corporation from acquiring the assets of a funeral establishment, and that Plaintiffs could enter the funeral industry in this way. (*Id.* at 43). Defendants also claim that in order to operate, an RBC must be licensed and its stock must be held by a licensed funeral director. (*Id.* at 44 (citing 49 PA. CODE § 13.185 (requiring approval of the board after ownership is changed and before operations can begin))).

Likewise, Defendants maintain that requiring licensure as a condition of ownership allows the Commonwealth to establish requirements and prerequisites for participation in the profession and to control the industries' operational practices, including, among others, trusting of pre-need monies and caring for the dead at a time when survivors are grief-stricken. (Doc. 126 at 40). Defendants assert that allowing unlicensed individuals or corporations to own funeral

homes would make it difficult for the Commonwealth to regulate the industry. (*Id.*). For example, they argue that in the case of a widow operating a funeral home, discipline can be taken against such individuals because that person is a licensee. (*Id.* at 40-41). Defendants further claim that the winding-down of a funeral home operated by way of a sole proprietorship, partnership, or an RBC by a widow or executor, is a legitimate state interest rationally promoted by the FDL. (*Id.* at 42-43).

As in Count II, we find that the subject statute is not rationally related to the asserted state interest identified by Defendants. The limitation of ownership to licensees appears particularly arbitrary given the exception allowing untrained and unlicensed widows, widowers, and heirs of licensed funeral directors to continue operating a funeral home for up to three years, or in the case of widows and widowers, for an unlimited duration provided they remain unmarried, while at the same time otherwise limiting ownership to licensed funeral directors. The reality that the FDL permits such individuals to operate a funeral establishment by employing a full-time licensed funeral director to act as a supervisor, but prohibits other individuals or entities from doing the same, demonstrates that the restriction on ownership to licensees is not rationally related to the legitimate state interest of ensuring competency and accountability in the funeral industry.

In addition, Defendants' own contentions in their supporting and opposition briefs appear contradictory.

In their supporting brief, Defendants claim that one of the exceptions to licensed funeral home ownership is the transfer of stock in an RBC to immediate family members. (Doc. 126 at 36). However, in their opposition brief, Defendants claim that “in order to continue operations, the RBC must remain licensed and the stock of the RBC must be owned by a licensed funeral director.” (Doc. 158 at 44). Defendants’ equivocation on this issue reflects the contradictory position assumed by them herein and again demonstrates the lack of a rational relationship between the FDL’s restriction of ownership to licensees and the stated goals of regulating, disciplining, and overseeing the funeral industry. Moreover, Defendants’ purported interest in providing a wind-down period for family-owned funeral homes fails to justify the restriction upon ownership to licensees, because unlicensed entities and individuals owning funeral homes could be required to employ a supervising funeral director to oversee operations during a wind-down period in the same way that widows or widowers are required to do so. Therefore, we find that the instant ownership restriction is not rationally related to the asserted governmental interest.

Accordingly, we shall grant Plaintiffs’ motion regarding their substantive due process claim in Count III and deny Defendants’ motion as to the same.

### 3. Count IV: Ownership Restrictions – Substantive Due Process<sup>22</sup>

Plaintiffs also argue that the FDL’s ownership restrictions, and its restriction on the bequest of a funeral home, should be invalidated as a violation of the Due Process Clause. (Doc. 140 at 87). They contend that here, the Commonwealth has acknowledged that the FDL is designed to protect a discrete group of family-owned funeral homes. (*Id.* at 89). Furthermore, Plaintiffs highlight Defendants’ admission that the purpose of the instant provision is to ensure that “local business is owned by local people.” (*Id.* at 90 (citing *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985) (finding state’s “aim to promote domestic industry is purely and completely discriminatory” and “constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent.”))). Moreover, Plaintiffs once again highlight the

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<sup>22</sup> Although Plaintiffs apparently premise Count IV upon the Due Process and Equal Protection Clauses, (*see* doc. 101 ¶ 237), in their supporting brief they couch their arguments concerning this claim in terms of the Commerce Clause and the Due Process Clause, with little reference to an Equal Protection claim. (*See* Doc. 140 at 33-72; Doc. 168 at 32-95). As a result, we shall only address Plaintiffs’ arguments regarding Count IV as briefed and to the extent they are grounded in the Commerce Clause and the Due Process Clause. Given the voluminous filings in this case, it seems apropos to remind the parties that “Judges are not like pigs, hunting for truffles buried in briefs, in the universe of legal precedent, or the record on summary judgment.” *Smith v. Central Dauphin School Dist.*, Slip Copy, 2007 WL 2262936 at \*6 (M.D. Pa. Aug. 6, 2007).

Board's own conclusion that one of the changes needed to the FDL is that "there by no limit on [the number of] funeral establishments that a person owns." (*Id.* at 91 (citing Pl. R. at 200)). Plaintiffs reiterate their claim that the legitimate state interests identified by Defendants, including protecting local funeral homes, competition, accountability, competency, and public health, are not rationally related to the FDL's instant restriction and that Defendants fail to provide an explanation demonstrating such rational relationship. (*Id.* at 91-92).

Additionally, Plaintiffs contend that Defendants' suggestion that the FDL promotes competition is at odds with its stated goal of protecting Pennsylvania funeral directors from competition. (*Id.* at 93). They also attack Defendants' assertion that the FDL promotes accountability and competency when the statutory scheme allows the family, widows, estates of funeral directors, and pre-1935 corporations to own funeral homes without requiring that they first obtain any knowledge, skill, or training in the industry. (*Id.* at 93). Plaintiffs assert that the Board's ability to hold a funeral home accountable is unrelated to the identity of the owners of the funeral home since the Board directs enforcement against an establishment's license, the supervisor of the funeral home, or the funeral directors that are employed by the funeral home. (*Id.* at 94). Furthermore, they claim that the ownership restrictions bear no rational relation to public health concerns since untrained relatives of a

funeral director, or those owning shares of a pre-1935 corporation, can also own a funeral home. (*Id.* at 96).

Finally, Plaintiffs claim that the ownership restrictions of the FDL prohibit funeral directors without spouses or children from passing ownership of the funeral home to siblings, cousins, life partners, business partners, or other non-licensees. (Doc. 168 at 111). They note Defendants' only reply is that unmarried, childless funeral directors can avail themselves of alternative dispositional options other than those options available to married, child-rearing funeral directors. In addition, Plaintiffs dismiss Defendants' suggestion that childless funeral directors who wish to bequeath a funeral home simply obtain a pre-1935 corporation, because such an option, they claim, would cost a funeral director tens of thousands of dollars just to confer the same benefit that funeral directors who are married or have children can confer for free. (*Id.* at 112). They claim that the issuance of an estate license upon the death of an unmarried, childless funeral director is not the same as bequeathing a license to a surviving spouse or child because an estate license is only valid for three years and cannot be transferred to an unlicensed heir. (*Id.*).

In countering these assertions, Defendants claim that invalidating this provision of the FDL would not provide the named Plaintiffs to this court with any relief because neither Haas nor Wachter has attempted to own a licensed funeral home, whether it be in the form of a sole proprietorship, partnership, professional corporation, RBC, or a pre-1935

corporation. (Doc. 158 at 47-48). Furthermore, they claim that their challenge to the FDL's restriction on bequeathing assets of a funeral home is premature because none of these individuals yet have a will. (*Id.* at 48 (citing SMF ¶¶ 226, 233)). Defendants contend that because the Court dismissed all equal protection claims at the dismissal stage that Count IV should consequently be dismissed. Finally, they assert that as with Plaintiffs' substantive due process claim in Count III, Plaintiffs' attempt to prove an equal protection claim by comparing themselves to licensed funeral directors who created RBC's is inapt. (*Id.*).

Applying the rational basis standard, we find that Plaintiffs have demonstrated that the purported justification for the provisions of the FDL limiting the bequest of a funeral home to surviving spouses and children is not rationally related to the legitimate state interests that Defendants highlight. We also find that the FDL's restriction upon the bequest of a funeral home by an unmarried and childless funeral home director to another individual, while married funeral directors with children are afforded the opportunity to bequeath such assets to a surviving spouse or children, is not rationally related to a legitimate state interest. Therefore, we shall grant Plaintiffs' motion to this extent and deny Defendants' motion as to the same.

**4. Count V: Undue Restriction on Place of Practice & Count VI: Undue Requirement of “Full Time” Supervisor**  
**a. Commerce Clause**

Plaintiffs further argue that the FDL’s place of practice restriction and full-time supervisor requirement violate the Commerce Clause. (Doc. 140 at 97-99 (citing 63 PA. STAT. ANN. § 479.7, § 479.8(e))). They claim that the restrictions discriminate against out-of-state interests in both purpose and effect because, for example, a funeral director who practices at one location in another state cannot practice in Pennsylvania because this would constitute practicing at a second location, which is not a Pennsylvania branch. (*Id.*). Likewise, a funeral director who supervises a funeral home in another state cannot be a full-time supervisor of a Pennsylvania funeral home. (*Id.* at 99-100 (citing Pl. R. at 10552-53 (noting that Leonard Terranova was denied an application seeking a license as a funeral supervisor because he was already managing a funeral home in New Jersey, a position equivalent to a funeral supervisor in Pennsylvania))).

In addition, Plaintiffs claim that the place of practice restriction and full-time supervisor provision discriminate against out-of-state interests by eliminating the competitive advantage that could be achieved through clustering. (*Id.* at 100). They argue that the FDL prohibits clustering because it precludes sharing of personnel between multiple locations. The result, Plaintiffs contend, is that a firm attempting to cluster in Pennsylvania is required to

hire more personnel at greater expense. (*Id.* at 101). They cite Dr. Harrington's expert report where he opined that "these provisions limit the extent to which the services of a funeral director can be shared across a cluster of funeral homes, dramatically reducing the potential savings from clustering funeral homes." (*Id.* (citing Pl. R. at 343 (David Harrington expert report))). Notably, Plaintiffs highlight a legislative initiative submitted to the Governor on behalf of the Board, which stated:

Because many funeral homes have a very low call volume and it is not economically feasible to have a funeral director employed on a full-time basis, the Board would like to amend the [FDL] to authorize the Board to permit a funeral director to supervise more than one funeral establishment where the combined call volume is sufficiently small so that the supervising funeral director would be available at all supervised locations as needed.

(*Id.* at 101-02 (citing Pl. R. at 3237 (State Board of Funeral Directors Legislative Initiative))). However, they maintain that the draft legislation was crafted to allow only a licensed funeral director to supervise a principal funeral home and that establishment's branch, thus limiting firms outside of Pennsylvania that are attempting to cluster in Pennsylvania from achieving desirable economies of scale. (*Id.* at 102-03).

Plaintiffs claim that even if the place of practice restriction and full-time supervisor requirement are determined to be non-discriminatory, these provisions must nevertheless be invalidated under the *Pike* balancing test. They assert that the burdens imposed on funeral directors and consumers as a result of these requirements are substantial. For example, Plaintiffs highlight Dr. Harrington's report where he concluded that the place of practice restriction and full-time supervisor requirement cost Pennsylvania consumers \$550 per funeral. (*Id.* at 104 (citing Pl. R. at 351(Dr. Harrington's expert report))). Moreover, funeral homes are compelled to increase the price of each funeral they perform because the limitations on funeral directors traveling to different funeral homes reduces the number of funerals each establishment is able to conduct. They also emphasize the Board's acknowledgment that a funeral home is required to employ a full-time supervisor "even if there is no business available to justify the employment." (*Id.* (citing Pl. R. at 3238 (State Board of Funeral Directors Legislative Initiative))).

In comparison to the substantial burdens on funeral directors, Plaintiffs claim, the benefits conferred are weak or non-existent. (*Id.*). They argue that Defendants' reliance on competency, public health, accountability, and competition, as justifications for the law, are insufficient to support the burdens placed on funeral directors. (*Id.*). Specifically, Plaintiffs contend that the restrictions fail to ensure that there are a sufficient number of funeral directors at funeral

homes to complete the work, and in fact, the provisions actually hinder such goals by limiting the locations where a funeral director can practice. Pointing to the disparate impact of such regulations, they claim that for Plaintiff Heffner's funeral home in Renovo, Clinton County, this requires staffing a full-time supervisor for a home that performs 25-35 funerals per year, while for Board member Goldstein's funeral home in Philadelphia, it fails to ensure that adequate personnel are staffing his home which performs approximately 1,000 funerals per year. (*Id.* at 105-106 (citing Pl. R. at, 6597 (David Halpate deposition); 1268-69, 1274. 5392 (Heffner deposition))). As a result, Plaintiffs maintain that the restrictions fail to ensure competency in the profession.

Plaintiffs further claim that a funeral director's attention to health concerns is unrelated to the number of funeral homes where he can practice, but is related to an individual's skill and workload at a particular location. (*Id.* at 107). Concerning accountability, they highlight that funeral directors are subject to the same professional standards regardless of where, or at how many locations, the funeral director practices. (*Id.* at 107). Finally, they argue that prohibiting a funeral director from practicing at more than a principal location and a branch site inhibits competition. (*Id.*). Plaintiffs contend that simply because the place of practice restrictions apply to all funeral homes in Pennsylvania does not alleviate the burden on interstate commerce because, as the *Carbone* court stated, an ordinance is "no less discriminatory

because in-state or in-town processors are also covered.” (Doc. 168 at 115 (citing *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 391 (1994))). Furthermore, they highlight that in *BPOA v. Hunsicker*, the Board recognized the tension between the ostensibly contradictory provisions of the FDL, which prohibit a funeral director from practicing at a location other than the one listed on his license, and the provision permitting funeral directors to assist other funeral directors. (*Id.* at 117). Despite the Board’s finding that Hunsicker did not violate the FDL, they contend that Plaintiffs herein legitimately fear prosecution for practicing extensively at a third location when the FDL fails to define what constitutes acceptable levels of “assistance.”

Defendants respond that Plaintiffs’ facial argument, that a funeral director who practices at more than one location in another state cannot practice in Pennsylvania, is without merit. (Doc. 158 at 98-99). Specifically, they claim Plaintiffs admit that they have practiced funeral directing in a number of locations without prosecution by the Board. (*Id.* (citing SMF ¶¶ 450-58)). Additionally, Defendants argue that the FDL expressly authorizes reciprocal licensure of funeral directors with other states, which permits funeral directors to practice at locations in Pennsylvania and in other states. (*Id.* at 99 (citing 63 PA. STAT. ANN. § 479.13(a))). They highlight that 63 PA. STAT. ANN. § 479.13(a) states “no person shall practice as a funeral director as defined herein, in this Commonwealth unless he holds a valid license so to do as

provided in this act.” (*Id.*). Defendants further emphasize that the FDL does not regulate the practice of funeral directing in other states, and thus does not prevent Plaintiffs from practicing in other states so long as they satisfy the requirements of those states.

Defendants argue that Wellman, for example, has not provided any support for its position that it enjoys a competitive advantage over a Pennsylvania corporation because it can cluster resources in Louisiana. (*Id.* at 101). They also challenge Dr. Harrington’s conclusion that restrictions on the locations where a funeral director may practice are statistically relevant in reaching his conclusion that Pennsylvania consumers pay more for funeral services. Under the *Pike* balancing test, Defendants contend that there are no burdens because the FDL does not restrict the number of locations at which a Pennsylvania licensed funeral director may practice. Furthermore, Defendants claim that the definition of full-time supervisor illustrates that funeral directors may perform other tasks, provided any additional activities do not substantially interfere with or prevent the supervision of the funeral establishment that he or she supervises. (Doc. 126 at 48 (citing 63 PA. STAT. ANN. § 479.2(11))).

We find Defendants’ unsubstantiated attempts to claim that Plaintiffs are permitted to practice funeral directing at more than one principal location and a branch location, or at any location other than those listed on the funeral director’s license, to once again be rather uncandid. The FDL provides specifically, in section 479.7, that “[a] license shall authorize the

conduct of the profession at the particular place of practice designated therein and no other, . . .” 63 PA. STAT. ANN. § 479.7. While we do not find that the instant provision discriminates against out-of-state interests in its purpose or effect to the same extent as the provisions dealing with restrictions upon ownership to licensees, we nevertheless find under the *Pike* balancing test that the alleged legitimate state interests are outweighed by the burdens on out-of-state interests. For example, the Board itself recognized that there is clearly an inherent contradiction between the FDL’s prohibition of a funeral director practicing at a location other than that listed on his or her license, and the provision permitting one funeral director to assist another funeral director. (Doc. 136-1 at 139-46 (citing *BPOA v. Hunsicker* (finding on the facts of this case that a licensed funeral director’s assistance at another funeral establishment not identified on his license did not cause his conduct to become “the conduct of a separate funeral establishment.”))). Thus, the Board’s own recognition that the FDL requires clarification in this area so that in-state and out-of-state interests are not burdened by the threat of prosecution for engaging in the practice of funeral directing at a separate funeral establishment, illustrates the burdens placed upon out-of-state interests seeking to engage in funeral directing in Pennsylvania. (See Pl. R. at 10552-53 (noting that Leonard Terranova was denied an application seeking a license as a funeral supervisor because he was already managing a funeral home in New Jersey, a position equivalent to a funeral supervisor in Pennsylvania)).

We agree with the Board admission as just noted, and in fact find this area to be strikingly obscure. Therefore, we conclude that the burden imposed by the current statutory scheme, to the extent it renders unclear what activities can and cannot be prosecuted under the statute, outweighs the purported state interests. Given the Board's own recognition that requiring a full-time licensed funeral director to act as a supervisor at each funeral home makes little sense, we decline to find that the Board's interest in furthering the goals of competency, public health, accountability, and competition are sufficiently strong to outweigh the attendant burden on out-of-state interests imposed by this requirement.

Accordingly, we shall grant Plaintiffs' motion as to their commerce clause arguments in Counts V and VI, and deny Defendants' motion concerning the same. While we recognize that this ruling is dispositive, for the sake of completeness, we will proceed to analyze Plaintiffs' due process arguments as well.

#### **b. Due Process**

Similarly, Plaintiffs contend that the place of practice restriction and the full-time supervisor requirement are not rationally related to a legitimate government interest. (Doc. 140 at 108). As above, they claim that Defendants fail to explain how the subject regulations concerning where a funeral director may practice are rationally related to, or further the stated goals of, competency, health, accountability,

and competition in the industry. Plaintiffs also highlight that the exception in the FDL from the full-time supervisor requirement for sole proprietorships and partnerships demonstrates that the restrictions are not rationally related to the goals Defendants present. (*Id.* at 110). Despite Defendants' contention that sole proprietors and partners themselves supervise the funeral home, Plaintiffs again note the case of Terranova, who surrendered his RBC license and obtained a sole proprietor license in the same name. The significance is that under the RBC, a funeral home is required to have a full-time supervisor, while under a sole proprietorship, there is no such requirement. Thus, Terranova was able to continue managing a funeral home in New Jersey while at the same time owning and operating a funeral home in Pennsylvania as a sole proprietor. Although he was initially denied a supervisor's license for his RBC in Pennsylvania, because he was already managing a New Jersey funeral home, he was nevertheless able to circumvent the supervisor requirement by surrendering his RBC license and instead registering his Pennsylvania funeral home as a sole proprietor, which does not include the supervisor requirement. (*Id.* at 111).

Furthermore, Plaintiffs highlight that Defendants merely provide a rational basis for requiring supervision of facilities, not for restricting supervisors to one funeral home or requiring a full-time supervisor even when the volume of business fails to justify the same. They also argue that if a funeral director

can simply “assist” at additional locations, the benefits Defendants claim are furthered by the FDL in limiting funeral directors to two locations, are illusory. (Doc. 168 at 125).

In response, Defendants argue that the FDL permits a licensed funeral director to provide services in multiple places and for multiple funeral establishments. (Doc. 126 at 45). They cite section 479.7 which states:

[t]his provision shall not prevent a person licensed for the practice of funeral directing from assisting another duly licensed person, partnership or corporation in the conduct of the profession in an approved funeral establishment nor shall it prevent a person licensed for the practice of the profession from conducting a funeral at a church, a private residence of the deceased, or an approved funeral establishment.

(*Id.* at 45 (citing 63 PA. STAT. ANN. § 479.7)). As a result, they claim that § 479.8(e) does not prevent licensed funeral directors from working at other funeral homes, but only limits the licensee to two physical establishments, namely, the principal and branch places of business. (*Id.* at 45). Defendants note that Plaintiffs such as Heffner and Cavanagh, licensed funeral directors employed by funeral homes with multiple locations, have not been prosecuted for providing services at multiple locations. They point to the Board’s previous decision in *BPOA v. Hunsicker*

as evidence that the Board has already decided the issue of practicing at multiple locations.

Similar to our commerce clause analysis above, we find that Defendants' asserted goals of competency, public health, accountability, and competition are not rationally related to the restrictions contained in the FDL pertaining to place of practice and full-time supervisors. Accordingly, we shall grant Plaintiffs' motion to this extent and deny Defendants' motion as to the same.

**5. Count VII: Undue Requirement that Every Establishment Include a Prep Room**

**a. Commerce Clause**

Plaintiffs also claim that the FDL's requirement that every funeral home have a separate embalming preparation room violates the Commerce Clause. (Doc. 140 at 112). They note that section 479.7 states:

[E]very establishment in which the profession of funeral directing is carried on shall include a preparation room, containing instruments and supplies necessary for the preparation and embalming of dead human bodies and be constructed in accordance with sanitary standards prescribed by the board, for the protection of the public health.

(*Id.* (citing 63 PA. STAT. ANN. § 479.7)).

Consistent with their earlier arguments, Plaintiffs maintain that the FDL's requirements concerning preparation rooms burden competitors seeking to enter the Pennsylvania funeral industry and perpetuate the protection of small, family-owned funeral homes. (*Id.*). They highlight the Board's recognition that "[t]here is a significant trend in the industry to consolidate embalming operations, resulting in many funeral establishments never actually using the preparation room." (*Id.* at 113 (citing Pl. R. at 536)). Thus, Plaintiffs assert that the FDL discriminates against out-of-state competition by constricting their ability to employ a centralized embalming facility and instead mandating that every location have a separate preparation room, regardless of whether it will be used. (*Id.* at 113-14 (citing *Tri-M Group, LLC v. Sharp*, 638 F.3d 406, 428 (3d Cir. 2011) ("[S]tatutes that increase out-of-state competitors' costs are subject to heightened scrutiny."))). Plaintiffs also cite the Audit Report which noted "[a]ccording to the PFDA, the cost to construct and equip a preparation room to meet Board standards is \$40,000 to \$50,000. . . ." (*Id.* at 114 (citing Pl. R. at 171)). Plaintiffs argue that to build and equip a new preparation room today would cost between \$193,000 to \$223,000. (*Id.* (citing Pl. R. at 5620, 9416-20, 5809)). In addition, they claim the Board noted that allowing the use of a centralized preparation room was one of the modifications needed to the FDL, and that "[n]ot every funeral home needs a preparation room as required by existing law. A centralized embalming facility makes a lot more sense, according to the way this

business is conducted today.” (*Id.* at 115 (citing Pl. R. at 201, 242)). They also note the Board’s recognition that eliminating this requirement would “reduce costs of doing business without substantially impairing protection of the public.” (*Id.* at 116 (citing Pl. R. at 536)).

Notwithstanding the Board’s recognition that the requirement should be altered, Plaintiffs highlight that the Board’s proposed legislation would only permit a principal funeral establishment and its branch location to share a centralized embalming facility. (*Id.* at 117). Thus, they assert that the proposed amendment would only perpetuate the protectionist scheme already advanced by the FDL. (*Id.* at 118). In addition, Plaintiffs maintain that the same list of legitimate state interests that Defendants previously asserted are furthered by this provision, are inadequate in light of the excessive burden on out-of-state interests. (*Id.* at 119). In particular, they contend that the requirement of a preparation room does not ensure competency or accountability. Plaintiffs highlight the inequity of allowing funerals to be conducted at churches and private residences, where there are no preparation rooms, but requiring that every funeral home be equipped with one even if it is never used. (*Id.* at 121 (citing 63 PA. STAT. ANN. § 479.7)).

Defendants counter these assertions by claiming that because funeral directors take precautions to protect themselves from diseases possibly carried by the deceased body, and since they employ toxic and hazardous chemicals to disinfect, sanitize, and prepare

the dead, that it is rational, reasonable, legitimate, and necessary to require that every funeral home have access, on site, to a preparation room. (Doc. 126 at 51-53). They claim such requirement guarantees that a licensed funeral director will have access to the facilities needed to prepare the dead and that such person will bear responsibility for the quality and condition of the preparation room. (*Id.* at 53). In addition, Defendants argue that many states have a similar requirement. (*Id.*).

As above, the Board's own positions contradict the arguments asserted herein by Defendants.<sup>23</sup> In light of the Board's recognition that requiring every funeral home to maintain and equip a preparation room is unnecessary, and that allowing the use of centralized facilities has already become commonplace and would reduce costs in the industry without adversely affecting the public interest, we again find that Defendants' purported interest in requiring every funeral home to maintain and equip a preparation

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<sup>23</sup> Simply put, Defendants' arguments are once again rendered unavailing by the Board's meandering and illogical positions. Dead bodies are daily being embalmed at one location and then flown, sometimes intercontinentally, to another location. At times the remains may even change planes en route to their final destination. All of this is the result of what we presume are long distance, coordinated logistical arrangements made by both licensed funeral directors and others, and reflect the realities of business, commerce, and modern transportation modalities. The Defendants' arguments appear to presume the handling of dead bodies in a manner more consistent with the practices of the nineteenth century than those of the twenty-first century.

room is outweighed by the burden this places upon out-of-state interests. In particular, and as noted, Plaintiffs indicate that the cost of constructing and equipping a preparation room could be as much as \$190,000 to \$220,000. As Defendants have failed to demonstrate that the public interest in requiring each funeral home to equip and maintain a preparation room outweighs the burdens placed upon out-of-state interests by the same, we find that this requirement also runs afoul of the Commerce Clause.

Thus, we shall grant Plaintiffs' motion as to their commerce clause argument in Count VII, and deny Defendants' motion concerning the same. While we recognize that this ruling is dispositive, for the sake of completeness, we will proceed to analyze Plaintiffs' substantive due process arguments as well.

#### **b. Substantive Due Process**

Plaintiffs also contend, under the Due Process Clause, that mandating a preparation room is meaningless if it is never used, and that such a requirement does not ensure that a funeral director personally embalms the body at that facility. (Doc. 168 at 132). They argue that Defendants fail to provide a justification for not extending the repeal of this restriction beyond the principal and branch locations in order to allow three or more funeral homes to share a centralized facility. (*Id.* at 133). Plaintiffs focus on the Board's acknowledgment of the "significant trend" in the funeral industry toward centralized embalming

facilities. (*Id.*). They claim that requiring funeral homes to expend substantial sums of money for construction and maintenance of a separate preparation room, while acknowledging the industry trend toward centralized embalming facilities, represents irrationality in its most extreme. (Doc. 140 at 124-25). Plaintiffs maintain that despite their admission that having access to a preparation room is rational, reasonable, and legitimate, such recognition does not necessarily mean that a preparation room is required at every funeral home in the Commonwealth. (*Id.* at 125). They contend there is no rational relationship between providing access to preparation rooms and requiring that funeral homes expend unnecessary funds on the same when the Board recognizes that many existing preparation rooms remain largely unused, and when such costs are merely passed on to consumers.

Defendants raise the same response in opposition as in the previous section. Here again, it does not move us. As a result, we find that given the Board's admission that requiring each funeral home to equip and maintain a preparation room is unnecessary, and that the use of centralized embalming facilities can be employed without harm to the public or the services provided, that any interest Defendants have in maintaining a preparation room at each funeral home is

not rationally related to the requirement at issue herein.<sup>24</sup>

Consequently, we shall grant Plaintiffs' motion as it relates to their substantive due process argument in Count VII, and deny Defendants' motion as to the same.

## **6. Count VIII: Undue Restriction on Food**

Plaintiffs also move for summary judgment on their claim that the FDL imposes an undue restriction upon food in funeral homes. (Doc. 140 at 126). They highlight section 479.7 which states, “[n]o food or intoxicating beverages shall be served in any funeral establishment in which the profession of funeral directing is carried on. Beverages, if served, must be restricted to a separate room not used for the preparation and conduct of a funeral service.” (*Id.* (citing 63 PA. STAT. ANN. § 479.7)). Plaintiffs also contend that the Board previously directed former Board counsel Thomas Blackburn to draft a regulation eliminating the food prohibition. (*Id.* at 127). They claim that the regulatory analysis for the proposed regulation stated, “[a]lthough food and beverages should not be served in the preparation room, there is no reason

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<sup>24</sup> While we find for the Plaintiffs on this issue based on the facts before us, we express no opinion as to whether any limitation on centralized embalming facilities is per se unconstitutional.

why the service of food should be completely prohibited in a funeral establishment.” (*Id.* (citing Pl. R. at 3531, 3587)). Plaintiffs point to Dr. Wecht who testified that “[f]rom a public health perspective, I find no medical or scientific merit in the argument that serving food at a funeral home would constitute a potential public health risk” and “[d]istinguishing between foods and beverages in this manner is obviously illogical” because hygiene concerns attributable to food would also apply to beverages. (*Id.* at 129 (citing Pl. R. at 412-413)). Plaintiffs also highlight that funerals which host open-casket viewing may be held in a church, and the same facility may host a reception that includes food. (*Id.* at 130).

In addition, they claim that the only rationale for the restriction provided by Defendants are quotations from Board members regarding their personal position against food service in funeral homes. (*Id.* at 131-32 (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 267 (1957) (noting that due process must be “founded on something much deeper and more justifiable than personal preference.”))). Moreover, Plaintiffs note that the exception Board member Pinkerton attempted to create for families who bring food into a funeral home is insufficient to save the statute and establish a rational basis for the same. (*Id.* at 133 (citing Pl. R. at 1037-38; 2288-89 (Commissioner Merenda testifying that his understanding of the statute is that a family can bring food into a funeral home, but a funeral director cannot provide food to the family))). In sum,

Plaintiffs argue that section 7 of the FDL provides for a complete prohibition on food in funeral homes.

In response, Defendants argue that the Board has never disciplined anyone for bringing food into a funeral establishment. (Doc. 126 at 54-55). They contend that nothing in the FDL prohibits funeral directors from owning or operating a food service or catering business on the same parcel of land or in a building connected to a funeral home so long as the food is not served in an area designated as part of the “funeral establishment,” defined as the “place or premise approved by the State Board of Directors wherein a licensed funeral director conducts the professional practice of funeral directing including the preparation, care and funeral services for the human dead.” (*Id.* at 55-56 (citing 63 PA. STAT. ANN. § 479.2(6))). Moreover, Defendants claim that rooms or areas of a building can be excluded from the definition of “funeral establishment,” and these areas can be utilized to provide such food services.

Defendants further note that so long as funeral directors satisfy the applicable health and food safety laws, providing food services in an area other than that designated as part of the “funeral establishment” is permissible. (*Id.* at 56). They contend a rational basis exists for prohibiting food service in areas designated as part of the “funeral establishment” because funeral directors embalm dead human bodies and employ toxic and hazardous materials posing a health risk to others based on the viruses, bacteria, and other pathogens that a dead body may carry. (*Id.*

at 57). Finally, Defendants maintain that all of the Plaintiffs, except for JMFH, lack standing. (Doc. 158 at 56).

Here, as above, we find the Board's own recognition in proposed regulatory amendments that "there is no reason why the service of food should be completely prohibited in a funeral establishment" to be indicative of the lack of a rational relationship between this restriction and the purported state interest. (Pl. R. at 3531, 3587). Furthermore, despite Defendants' claim that Plaintiffs are currently permitted to provide food services in areas connected to and even under the same roof as a funeral establishment, so long as those areas are not designated as part of the funeral establishment, this explanation fails to explain why prohibiting food services in funeral establishments is rationally related to the asserted state interests. Although Defendants cite a funeral directors' responsibility to embalm dead human bodies with toxic and hazardous chemicals as the legitimate state interest underlying the prohibition of such services, they nevertheless fail to explain how the use of such chemicals in one part of the "funeral establishment" would necessarily contaminate other areas of the establishment providing food service that have nothing to do with preparation of dead bodies.

In addition, we find Defendants' contention that funeral directors are already permitted to serve food in areas under the same roof or connected to "funeral establishments," provided such areas satisfy state

and local health and food safety regulations, to inherently contradict their purported rationale for the instant prohibition. Defendants' logic seems to suggest that if rooms A and B were next to each other under the same roof, and room A, a preparation room, was part of the licensed "funeral establishment," but room B was not, that a funeral director could provide food services in room B. The same rationale would preclude room B from being used for food service if room B were simply characterized as a room where "the professional practice of funeral directing, including the preparation, care and funeral services for the human dead" was conducted. *See* 63 PA. STAT. ANN. § 479.2(6). Although we quite obviously understand the reason for precluding food services in the same rooms where preparation of the human dead takes place, we presume that some rooms in a "funeral establishment," particularly those employed for general "funeral services for the human dead," include rooms other than the preparation or embalming rooms and include rooms in which dead bodies are never present. Thus, we find that under the hypothetical above, room B could reasonably be included in the area licensed as a "funeral establishment," when in reality deceased bodies are never cared for in such rooms. Hence, any rational relationship between the FDL's restriction on food service in such areas, and preventing potential contamination of food from toxic or hazardous chemicals, appears strained. In addition, we find the distinction between allowing beverages in "a separate room not used for the preparation and conduct of a funeral service," while permitting a

room under the same roof as a “funeral establishment” to serve food, but which is not licensed as an area where “preparation, care and funeral services for the human dead” are conducted, to constitute a distinction without a difference.

Therefore, we shall grant Plaintiffs’ substantive due process claim in Count VIII and deny Defendants’ motion regarding the same.

### **7. Count IX: Infringement on Commercial Speech**

Plaintiffs also move for summary judgment claiming that the FDL’s restriction on funeral home names violates the First Amendment. (Doc. 140 at 136). They highlight that the FDL permits a funeral home to be operated under the name of the current licensed funeral director or the name of a predecessor funeral director. (*Id.* at 137 (citing 63 PA. STAT. ANN. §§ 479.8(a), (b), (d), 479.9(a); 49 PA. CODE § 13.158a)). Plaintiffs emphasize that only a sole proprietorship or partnership utilizing a predecessor name is required to disclose the name of the current owner when advertising. (*Id.* (citing 63 PA. STAT. ANN. § 479.8(a))). On the other hand, corporate funeral homes operating as an RBC, professional corporation, or a pre-1935 corporation, which employ a predecessor name, are only required to disclose the name of the home’s supervisor. (*Id.* (citing 479.8(b), (d), (d), 479.9; 49 PA. CODE §§ 13.83-84)). Finally, a funeral home operating through a widow or estate license must maintain the

predecessor's name of the funeral home. (*Id.* (citing 49 PA. CODE § 13.158a)).

Plaintiffs note that the FDL's ban on trade names is evaluated under the four-prong test of *Central Hudson*, which asks first "whether the commercial speech concerns unlawful activity or is misleading." (*Id.* at 138 (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980))). If the speech is not unlawful or misleading, the second prong is "whether the asserted governmental interest is substantial." (*Id.* (citing *Central Hudson*, 447 U.S. at 566)). Assuming it is, the third step asks "whether the regulation directly advances the governmental interest asserted," and the fourth step evaluates "whether it is not more extensive than is necessary to serve that interest." (*Id.* (citing *Central Hudson*, 447 U.S. at 566)).

Regarding the first element, Plaintiffs contend there is nothing inherently misleading about trade names. (*Id.* at 139 (citing *Pub. Citizen Inc. v. La. Atty. Disciplinary Bd.*, 632 F.3d 212, 219 (5th Cir. 2011))). They maintain that conducting business under a trade name is no more deceptive than operating under a predecessor's name because registration of trade names requires more disclosure. (*Id.* at 140). Plaintiffs further argue that Defendants provide no evidence demonstrating that trade names are deceptive. (*Id.* at 141 (citing *Alexander v. Cahill*, 598 F.3d 79, 95 (2d Cir. 2010) (striking ban on attorney trade names given the "dearth of evidence . . . that consumers have, in fact, been misled."))). They maintain that

the mere fact fictitious names do not identify the owner of the funeral home fails to render the same inherently misleading under the first element. (Doc. 168 at 141).

As to the second element, Plaintiffs assert that the only substantial interests Defendants highlight are “providing accurate and not misleading information to the public” and “consumer protection.” (Doc. 140 at 142 (citing *Edenfield v. Fane*, 507 U.S. 761, 7683 (1993) (“[T]he *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions. Neither will we turn away if it appears that the stated interests are not the actual interests served by the restriction.”))). They claim that the interests asserted are actually contrary to the instant restriction. For example, Plaintiffs maintain that allowing a funeral home to operate under a predecessor name, without disclosing the current owner, fails to promote accountability or consumer protection. They note Chairman Yeosock’s testimony that the interest promoted by the predecessor provision is to allow a current owner to retain the goodwill of the prior funeral home. (*Id.* at 143-44 (citing Pl. R. at 780)). Plaintiffs imply that while this makes logical sense from an owner’s perspective, it also eviscerates Defendants’ arguments regarding accountability.

Regarding the third element, Plaintiffs claim that the State has failed to prove that the FDL’s ban on trade names directly advances the purported goals of ensuring accurate information or consumer

protection. (*Id.* at 144-45). They claim Defendants' argument that prohibiting the use of trade names prevents chains like SCI from buying small, family-owned funeral homes, and subsequently misleading consumers by using the family name, lacks merit and does not prove that the statute directly advances the asserted interests. (*Id.* at 145 (citing Pl. R. at 9618-20, 9584)). For example, Plaintiffs claim that SCI purchased Defendant Pinkerton's funeral home and operates it under the name of Orion C. Pinkerton Funeral Home, Inc. (*Id.*). They also highlight that a number of Board members operate funeral homes that have retained the name of a predecessor corporation, or funeral corporations whose names are comprised of numerous pre-1935 funeral corporations merged together. (*Id.* at 146-47 (citing Pl. R. at 1310-13) (Goldstein explaining that no one named Rosenberg, Raphael, or Sacks owns or works at the funeral home bearing the name "Goldsteins', Rosenberg's, Raphael-Sacks, Inc.")). Significantly, Plaintiffs contend, no consumers are harmed by the use of fictitious names because establishments are encouraged to provide high quality services to maintain the reputation and goodwill associated with their name.

Plaintiffs highlight the prosecution of William Sucharski who operated Delaware Valley Cremation Center ("DVCC"), and was charged with the unlicensed practice of funeral directing and aiding and abetting DVCC based upon the use of the DVCC name. (*Id.* at 148). They claim that Sucharski lost the goodwill he established over the course of many years

operating as DVCC, because the Board required that he cease and desist from engaging in funeral directing under the DVCC name. (*Id.* at 149). They also note the case of Jefferson Memorial Park, which, after acquiring a pre-1935 license, constructed a funeral home on cemetery property and wished to include Jefferson in its name. (*Id.* at 151 (citing Pl. R. at 5724-25)). To do so, the cemetery conducted a statewide search for a funeral director named Jefferson. After that failed, it convinced Jan Beichler, the funeral director who was to supervise the funeral home, to change her last name to Jefferson. (*Id.* (citing Pl. R. at 5716)). She agreed, and after she changed her last name the cemetery sold her one share of stock in the funeral home and applied to change its name from the David G. Frankenfeld Funeral Home to Jefferson Memorial Funeral Home, which the Board subsequently granted.<sup>25</sup> (*Id.*). Thus, Plaintiffs contend that such irrational results demonstrate that the prohibition on trade names does not directly further a substantial governmental interest. (*Id.*).

Finally, as to the fourth element, Plaintiffs argue that a ban on trade names fails because the total prohibition is more extensive than necessary. (*Id.* at 152 (citing *Pitt News v. Pappert*, 379 F.3d 96, 108 (3d Cir. 2004) (noting that the fourth prong of *Central Hudson* “does not requirement government to use the

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<sup>25</sup> This example would be comedic were the matter *sub judice* not so critical.

least restrictive means to achieve its goals, but it does demand a reasonable fit between the legislature's ends and the means chosen to accomplish those ends."))). They argue that the prohibition on trade names excludes the marketing of accurate and honest information. For example, Plaintiffs contend that the Board already possesses the power to suspend, revoke, or refuse to grant or renew a license if an applicant or licensee provides the public with false or misleading information. (*Id.* at 153 (citing 63 PA. STAT. ANN. § 479.11(a)(4))). Moreover, in order to obtain approval for a name change an applicant must submit to the Board letterhead, a statement of funeral home goods, and a telephone listing, all of which display the name of the funeral home. (*Id.* at 153-54 (citing 49 PA. CODE §§ 13.91, 13.117)). Finally, the Board must approve any name change. (*Id.* at 154).

To counter, Defendants rely on *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, where the Court found that requiring an attorney to disclose to clients that they may have to bear certain expenses if their case is lost did not restrict commercial speech but "required [attorneys] to provide somewhat more information than they might otherwise be inclined to present." (Doc. 126 at 73-73) (citing 471 U.S. 626, 637, 650 (1985)). They highlight that the *Zauderer* Court concluded, "in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s]

or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.’” (*Id.* at 74 (citing *Zauderer*, 471 U.S. at 651)). Defendants also cite *Kleese v. Pennsylvania State Board of Funeral Directors* for the proposition that a disclosure requirement, such as one directing that a funeral establishment include the name of the supervising funeral director in its advertisements, does not violate a businesses’ commercial free speech rights because such regulations are “reasonably related to the state’s interest in preventing deception of consumers.” (*Id.* (citing 738 A.2d 523, 526-27 (Commw. Ct. 1999))).

Concerning the first element of the *Central Hudson* test, Defendants assert that this test only applies to lawful or non-misleading speech. (Doc. 126 at 85). Thus, they argue that because section 479.8(a, b, d) requires disclosure of truthful information, including that an owner identify themselves in advertising, the use of fictitious names would yield misleading speech. (*Id.*). Defendants contend that since *Central Hudson* does not apply to false or misleading speech, it is inappropriate to apply the same to the trade name restriction in the FDL. For example, Defendants argue that the fictitious name Sucharski employed, Delaware Valley Cremation Society (“DVCS”), is misleading, because it does not identify Sucharski and suggests that the “society” has a membership or is comprised of an organized group of individuals or entities working together. (Doc. 158 at 120-21). They also contend that the use of “Delaware Valley”

misleadingly suggests approval by the Board of Sucharski's geographic exclusivity in this region.

As to the second element, Defendants claim that the State has a substantial interest in consumer protection, accountability, and accurate disclosure of information concerning the name of the licensed funeral director that owns the funeral establishment. (Doc. 126 at 86). Allowing fictitious names, they argue, would obscure the identity of the owner of the funeral establishment. (*Id.* at 87). Regarding the third element, Defendants assert that requiring funeral directors to identify who is responsible for the facility advances the State's interest in consumer protection, because it allows Defendants to monitor the funeral industry and enforce the FDL. (*Id.* at 89-90).

Concerning the fourth element, Defendants maintain that the *Central Hudson* test does not require the State to use the least restrictive means, but only requires that there be a "reasonable fit between the legislature's ends and the means chosen to accomplish those ends." (*Id.* at 91 (citing *Walker*, 364 F. Supp. 2d at 524)). They emphasize that because personal liability is imposed on funeral directors operating through a sole proprietorship or a partnership, that this requirement is rational. (*Id.* at 91).

In the case *sub judice*, we find that the restriction on trade names in the FDL violates *Central Hudson*. As to the first element, we agree with Plaintiffs that there is nothing inherently misleading about a trade name. Additionally, we conclude there is little

difference between conducting business under a predecessor name or a trade name, as neither name indicates to the public who currently owns or operates the funeral establishment. The only suggestion Defendants make regarding the potentially misleading character of fictitious names is that regional names, such as “Delaware Valley Cremation Center,” may improperly suggest to consumers that DVCC is the exclusive cremation center in this region. Given the prevalence of regional names or descriptions in other businesses and industries, we find the likelihood to be quite low that a consumer would infer, on the basis of name alone, that a funeral establishment is the exclusive service provider in that region. Aside from their argument that identifying a funeral home owner in the establishment’s name provides for ease of oversight, Defendants fail to present sufficient factual evidence demonstrating that the omission of a funeral director’s name necessarily creates a false or misleading communication to consumers.

As to the second element, while we agree with Defendants that “providing accurate and not misleading information to the public,” and consumer protection, are substantial interests, we find that under the third and fourth elements of *Central Hudson* Defendants fail to demonstrate that the FDL’s restrictions directly advance these goals and are, importantly, “no more extensive than necessary to serve [those] interests.” See *Central Hudson*, 447 U.S. at 566. Notably, Defendants fail to suggest how such restrictions directly advance these goals when funeral homes are

permitted to operate under a predecessors' name and are permitted to conduct business under the names of former owners. Moreover, the fact that some funeral directors have developed creative methods to bypass this requirement highlights the failure of the FDL's restrictions on the use of trade names to directly advance the interests above. In addition, it is clear that the instant requirements are more extensive than necessary to serve the interests of consumer protection and accuracy in advertising. For example, any funeral home attempting to change its name must already have the change approved by the Board, (*see* Pl. R. at 9993 (Application for Change of Name or Location for Funeral Establishments); 49 PA. CODE § 1391(a)), and funeral home corporations operating under a fictitious name are required to register with the Board the name of a licensed funeral director who will serve as the establishment's full-time supervisor. Thus, the restriction on the use of trade names, in light of the existing safeguards in the FDL regarding names changes, appears more extensive than necessary in promoting Defendants' stated interests.<sup>26</sup>

Accordingly, we shall grant Plaintiffs' motion as to its First Amendment claim for infringement of

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<sup>26</sup> Again, we recognize that some restrictions on the use of trade names may pass constitutional muster, and we express no opinion on the validity of such regulations should the same be promulgated in the future. Our holding herein is limited to our evaluation of the current version of the FDL, and thus we reiterate our finding that the same is clearly injurious to Plaintiffs' commercial free speech rights under the First Amendment.

commercial speech in Count IX, and deny Defendants' motion as to the same.

### **8. Count XI: Unlawful Interference with Trade**

Plaintiffs also move for summary judgment on grounds that the FDL's restrictions on cremation violate the Commerce Clause, the First Amendment, and the Due Process Clause. (Doc. 140 at 154). They highlight that for decades cemeteries provided cremation services to the public, and have been subject to regulation by the Pennsylvania Real Estate Commission with authority under the Real Estate Licensing and Registration Act (the "Real Estate Act"). (*Id.* (citing 63 PA. STAT. ANN. § 455.101 *et seq.*)). The Real Estate Commission is charged with enforcing laws related to "cemeteries and cemetery companies." (*Id.* (citing 63 PA. STAT. ANN. § 455.406)). The act defines "cemetery" as "[a] place for the disposal or burial of deceased human beings, by cremation or in a grave, mausoleum, vault, columbarium or other receptacle." (*Id.* (citing 63 PA. STAT. ANN. § 455.201)). Plaintiffs claim that nothing in the Real Estate Act or the Real Estate Commission's regulations requires licensure as a funeral director or funeral establishment as a prerequisite to providing cremation services to the public. (*Id.* at 155).

Furthermore, they highlight that the Department of Environmental Protection ("DEP") regulates the permitting process applicable to constructing,

operating, and modifying new and existing crematories. (*Id.* (citing 36 Pa. Bulletin 3724 (July 15, 2006); Pl. R. at 10570-79)). Plaintiffs argue that a crematory must comply with workplace safety standards, (*id.* at 156 (citing Pl. R. at 10575-77)), health laws and zoning laws, (*id.* (citing 35 P.S. § 1121)), and annual inspections of crematories conducted by DEP. (*Id.* (citing Pl. R. at 8895-98)). They emphasize that nothing in the DEP's regulations requires that cremations only be provided to the public by a licensed funeral director or licensed funeral establishment. (*Id.*). The Future Interment Act ("FIA") also permits anyone to sell "personal property" or "personal services to be used in connection with the interment of a deceased human being" on a pre-need basis provided 70% of the sale price is placed in trust. (*Id.* at 157 (citing 63 PA. STAT. ANN. § 480.1 *et seq.*)).

Plaintiffs argue that given this regulatory framework, the Board has historically stated that cremation does not fall within the purview of the FDL. (*Id.* at 157 (citing Board meeting minutes, Pl. R. at 10009-51)). They claim that despite the Board's recognition that the FDL does not cover cremation services, and despite its "requesting that this Law be revisited by the Legislature to . . . broaden its influence upon a larger industry than the licensed funeral director," (*id.* at 157-58 (citing Pl. R. at 236)), no amendments to the FDL have been promulgated that include cemeteries and crematories within the purview of the FDL. Instead, they note, the Board has simply begun prosecuting anyone who offers cremation services to

the public without a funeral director's license because traditional funeral homes feel threatened by the competition. (*Id.* at 158). As a result, Plaintiffs maintain that the Board only permits cemeteries and crematories to offer cremation services to funeral directors, and effectively prohibits anyone but a licensed funeral director from offering such services to the public. (*Id.* at 159 (citing Pl. R. at 628-30, 1544-46, 2067-70, 2398-99, 2402-05, 3062-63, 4930)). It is against this backdrop that Plaintiffs raise their Commerce Clause, First Amendment, and Due Process challenges. We shall address each in turn.

#### **a. Commerce Clause**

Plaintiffs contend the FDL requires that the cremation market be diverted to in-state funeral homes. (*Id.* at 160). They assert that requiring all cremation services to be funneled through a licensed funeral director is similar to *C & A Carbone, Incorporated v. Town of Clarkstown*, where the Court held that a flow control ordinance requiring all solid waste in a town to be deposited at a local transfer station violated the Commerce Clause. (*Id.* (citing 511 U.S. 383 (1994))). The *Carbone* Court acknowledged:

what makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it. With respect to this stream of commerce, the flow

control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town. The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.

(*Id.* at 160-61 (citing *C & A Carbone, Inc.*, 511 U.S. at 390-91)). Here, Plaintiffs contend, the FDL channels cremation services through in-state funeral homes to the detriment of out-of-state crematories, cemeteries, and funeral homes because it requires that cremation services only be provided through licensed Pennsylvania funeral directors. (*Id.* at 161). Plaintiffs maintain that the requirement is not saved by virtue of its application to in-state cemeteries and crematories because, as the Court concluded in *Carbone*, it made no difference that in-state interests were also burdened by the flow control ordinance. (*Id.*).

Additionally, Plaintiffs compare the instant restriction to provisions found to be discriminatory in *Tri-M*. In that case, the Third Circuit found that a Delaware law, which required a contractor to hold a Delaware resident business license and maintain a permanent place of business in the state in order to pay apprentices on public works projects less than the prevailing wage, violated the Commerce Clause. (*Id.* at 161-62 (citing *Tri-M Grp., LLC v. Sharp*, 638 F.3d 406, 427-28 (3d Cir. 2011))). They also highlight the *Tri-M* court's holding that "States cannot require an out-of-state firm to become a resident in order to

compete on equal terms.” (*Id.* at 162 (citing *Tri-M*, 638 F.3d at 428)).

Plaintiffs claim that the FDL requires cremation firms to expend substantially more money in contracting with a licensed funeral director or a licensed funeral establishment. (*Id.* at 162). As the cremation industry’s competitive advantage is its more simple and less expensive process than that of traditional funeral homes, Plaintiffs argue that the Board’s restriction significantly increases costs for such firms.

In addition, Plaintiff argue that even if heightened scrutiny does not apply, the burdens imposed on cremation providers are clearly excessive under the *Pike* balancing test. (*Id.* at 163). For example, they claim that the only way for an out-of-state crematory to expand into Pennsylvania is to acquire a pre-1935 license. (*Id.* (citing Pl. R. at 3128-29)). Plaintiffs also assert that the average savings consumers experience in switching from a traditional funeral service to cremation is \$4,875. (*Id.* (Pl. R. at 353)). They note that if cremation providers were permitted to market their services directly to consumers, the lower costs for cremations would cause funeral homes to reduce the costs of traditional funerals in order to remain competitive. (*Id.* at 164).

Plaintiffs contend that the interest Defendants claim to have in regulating cremations, including ensuring that medical devices such as pacemakers are removed prior to cremation, are already furthered by existing DEP regulations requiring the same. (*Id.*

at 165). Illustrating that such interests are baseless, they contend the Board subsequently acknowledged that removal of pacemakers and other medical devices is not part of a funeral director's formal education or training. (*Id.* at 166 (citing Pl. R. at 571, 845, 1262, 1358, 1078-79)). Furthermore, Plaintiffs argue that Defendants' interest in consumer protection and accountability fails to justify the regulation, because funeral directors do not possess special education or training related to cremation services that prepares them to better protect the public. (*Id.* at 167 (citing Pl. R. at 563-64 (noting Chairman Yeosock's deposition testimony wherein he stated "we were told . . . the crematory handles it," referring to whether he received any formal training or education regarding cremation))).

Finally, they highlight that the only involvement of licensed funeral directors consists of dropping the body off at the cemetery or crematory, often by unlicensed staff or contract services, and subsequently receiving the remains back after the cremation has been conducted. (*Id.* at 167 (citing Pl. R. at 569-75, 872-76, 1278-79, 1375-78)). Specifically, Plaintiffs maintain that consumer protection and accountability are not promoted by a funeral director merely transporting bodies to and from a crematory. (*Id.* at 168-69). They further contend that while requiring licensure of cremation providers may advance some public interests, Defendants fail to explain how licensing cremation providers as *funeral directors* protects such interests, aside from channeling virtually

every aspect of the death care industry completely through funeral directors. (Doc. 168 at 150).

To counter these assertions, Defendants argue that the FDL does not prevent corporations or individuals from selling cremation services. (Doc. 158 at 112). However, they concede that the FDL does limit crematories to providing cremation services to licensed funeral directors and licensed funeral establishments. (*Id.*). Defendants cite two Pennsylvania Commonwealth Court cases for the proposition that selling, on a pre-need basis, services and packages that include cremating a body constitutes the practice of funeral directing and thus cannot be performed without a licensed funeral director or a licensed funeral establishment. (*Id.* (citing *Pre-Need Family Services Eastern Region v. Bureau of Prof'l and Occupational Affairs*, 904 A.2d 996 (Pa. Commw. Ct. 2006); *Cornerstone Family Servs., Inc. v. Bureau of Prof'l and Occupational Affairs*, 802 A.2d 37 (Pa. Commw. Ct. 2002))). Defendants claim that because a crematory's business model includes retrieving a body from the place of death, the completion of paperwork, including death certificates, authorizations from county coroners, sanitizing the body, discussing with the family whether cremation is still the desired disposition, the actual cremation, and returning the remains, that the appellate courts of Pennsylvania correctly found such services to be similar, or the same, as those provided by funeral directors and funeral establishments. (*Id.* at 113).

Defendants further claim that if unlicensed groups were permitted to sell pre-need services directly to the public, there would be no regulation requiring trusting of pre-need monies since such individuals and entities would not be subject to the FDL. (*Id.* at 114). On the other hand, under the FDL, 100% of all pre-need monies received by a funeral director or licensed funeral establishment must be placed in trust. (*Id.* (citing 63 PA. STAT. ANN. § 479.13(c))). They argue such lack of oversight does not meet the State's legitimate interest in consumer protection and accountability.

Additionally, Defendants claim that the instant requirement is distinct from *Carbone* because Pennsylvanians can be cremated in any state, and the FDL does not require that a person be cremated in Pennsylvania, or by a Pennsylvania licensed funeral director or funeral establishment. (*Id.* at 115). Regarding Plaintiffs' argument that the requirement discriminates against out-of-state interests in its effect, Defendants assert that Plaintiffs fail to provide any particular facts demonstrating an alleged competitive advantage they could enjoy that is precluded by the FDL.

Here, we agree with Defendants that Pennsylvania's appellate courts have provided guidance to us by holding that cremation service providers fall within the scope of funeral directing. While this fact does not preclude us from finding that the restrictions placed upon cemeteries and crematories under the FDL as a result of these decisions violate the Commerce

Clause, it is instructive to our finding that the State has a legitimate interest in regulating the cremation industry. Regarding heightened scrutiny, we do not find that this standard applies as the regulations concerning cremation service providers, regardless of their location, do not discriminate against out-of-state crematories, but merely require that all cremation service providers affiliate with a licensed Pennsylvania funeral director.

As a result, we shall evaluate the subject regulations under the *Pike* balancing test. Under this standard, we find that the State's interest in regulating this area of the death care industry outweighs any purported burdens on out-of-state interests. The mere requirement that cemeteries and crematories in Pennsylvania, or out-of-state crematories wishing to provide cremation services in Pennsylvania, affiliate with a Pennsylvania licensed funeral director is amply justified by the State's interest in establishing threshold standards for the services noted above. Furthermore, we do not find that the instant case is most analogous to *Carbone* because unlike the flow control ordinance at issue therein, which required that all solid waste be channeled through a particular waste processing facility, nothing in the FDL precludes deceased Pennsylvanians from being transported to out-of-state crematories or requires that all deceased persons be cremated by a particular crematory. *See Carbone*, 511 U.S. 383.

Here, given the State's asserted interest in regulating, among other things, retrieval of a body from

the place of death, the completion of paperwork, including death certificates, authorizations from county coroners, sanitizing the body, discussing with the family whether cremation is still the desired disposition, the actual cremation, and returning the remains, we find that regulations requiring that cemeteries or crematories either be licensed to practice funeral directing in Pennsylvania, or contract with a licensed funeral director to provide such services, are not clearly excessive in relation to the putative local benefits. *See Pike*, 397 U.S. at 142.<sup>27</sup>

Despite this finding, we are constrained to recognize that the manner in which the Board began regulating the cremation industry appears, on its face, to involve a series of post-hoc regulations that

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<sup>27</sup> We believe that Plaintiffs oversimplify and generalize the task of retrieving dead bodies, which in many cases is a difficult and less than pristine endeavor. There is no evidence whatsoever that absent some oversight by the State via the FDL, other agencies such as the DEP and Real Estate Commission could appropriately regulate many of the aspects of cremation that involve handling human remains. While the example may appear extreme, we nonetheless are compelled to recall the horrific circumstances discovered at the Tri-State Crematory in Noble, Georgia, in 2002. There, over three hundred bodies that had been delivered for appropriate disposal were never cremated, but were instead found dumped on the site of the crematorium. Outrageous as this example may be, the ghastly incident was ultimately the product of a loophole that allowed the crematorium to operate without a license, which resulted in a failure to inspect the premises. Accordingly, we are exceedingly loath to declare the regulations in question, awkward and post hoc though some may be, unconstitutional.

essentially boot-strapped cremation service providers into the regulatory ambit of the FDL. Although such heavy-handed governance of the cremation industry appears somewhat backwards to the Court, under the *Pike* balancing test we are only called upon to determine whether the burdens on interstate commerce are clearly excessive in relation to the putative local benefits. As we have already concluded that the State's regulations are not clearly excessive in relation to the benefits accruing to the State, the fact that the Board has chosen a rather unorthodox method by which to regulate the same does not influence our analysis of the regulations under *Pike*.

Thus, because we find that Plaintiffs have failed to raise a genuine issue of material fact regarding this issue, we shall grant Defendants' motion to this extent and deny Plaintiffs' motion as to the same. While we recognize that this ruling is dispositive of the First Amendment claim interposed by Plaintiffs, in the interest of being comprehensive we will proceed to analyze that area as well.

#### **b. First Amendment**

Plaintiffs also claim that prohibiting cemeteries and crematories from advertising their services, discussing cremation with potential customers, and entering into contracts for the provision of such services violates their commercial speech rights under the First Amendment. As to the first *Central Hudson* element, they allege that cemeteries and crematories

legally perform cremations under regulations promulgated by the Real Estate Commission and the DEP. (Doc. 140 at 170). They note that the Board implicitly conceded this point by allowing crematories to provide cremation services to funeral directors and establishments. Thus, the only restriction imposed upon crematories is the prohibition on commercial speech itself. Plaintiffs highlight that in *Walker*, the Board argued that unlicensed individuals' communications with customers were not entitled to First Amendment protection because the Board had previously prosecuted such individuals for the unlicensed practice of funeral directing, and those prosecutions were upheld by state courts under the FDL. (Doc. 168 at 156). They emphasize this Court's finding that such circular reasoning is unpersuasive because "it would mean that government speech regulations can be protected from examination as to their constitutionality if a state court preemptively holds that the regulation does not violate a state law" and that "we are not estopped from evaluating the constitutionality of the Board members' actions simply because another court analyzed whether the Board violated state law under different facts." (Doc. 140 at 171 (citing *Walker*, 364 F. Supp. 2d at 519)). Thus, they argue that Defendants' analogous argument herein must fail, namely, that Plaintiffs' instant claim is precluded by the prior ruling of state courts upholding the Board's prosecution of the unlicensed sale of cremation services. (*Id.*).

Regarding the second element, Plaintiffs contend that Defendants' purported interest in "allowing funeral directing services to only be performed by licensed professionals who have received adequate education and training in this field" is not a substantial interest, because licensed funeral directors admittedly possess little education or training in cremation services. (*Id.*) They also argue that unlike in *Walker*, where we held that it is possible for an "unattached and unsupervised insurance salesperson who is not trained by a licensed funeral director" to pose a threat to consumers, here, in contrast, cemeteries and crematories seek to communicate directly to consumers concerning services they already provide under the authority of state law. (Doc. 168 at 157). Consequently, Plaintiffs contend that in this case, the funeral directors are more analogous to the hypothetical insurance salesperson in *Walker*, because the FDL forces cremation customers to interact with a funeral director who will not be the individual performing the cremation. (*Id.* at 157-58).

As to the third element, they argue that Defendants present no evidence of consumer harm from contracting for cremation services directly with cemeteries and crematories. (Doc. 140 at 172). On the other hand, Plaintiffs highlight that Defendants have not provided any evidence that requiring consumers to purchase cremation services directly from licensed funeral directors prevents consumer harm. (*Id.* (citing *Edenfield*, 507 U.S. at 770-71 (holding that a state

“must demonstrate . . . that its restriction will in fact alleviate [the harms] to a material degree.”))).

Concerning the fourth element, Plaintiffs maintain that the FDL’s complete prohibition on cemeteries and crematories interacting directly with customers is more extensive than necessary to achieve the State’s goals. (*Id.*). They claim that the Board did not attempt to utilize less restrictive means and instead shifted from an interpretation of the FDL that did not include regulation of the cremation industry, to one announcing a total ban on direct cremation services. (*Id.* at 172-73).

In response, Defendants argue that all of the Plaintiffs’ business models concerning this function of the industry violate the FDL because performing such services constitutes the unlicensed practice of funeral directing. (Doc. 126 at 80). They contend that permitting advertising and solicitation of business for such services would be misleading because Plaintiffs would be promoting services they are not licensed to provide. (*Id.* at 81). Defendants highlight that the FDL’s definition of “funeral director” includes:

any person engaged in the profession of a funeral director or in the care and disposition of the human dead, or in the practice of disinfecting and preparing by embalming the human dead for the funeral service, burial or cremation, or the supervising of the burial, transportation or disposal of deceased human bodies, or in the practice of

funeral directing or embalming as presently known.

(*Id.* at 87 (citing 63 PA. STAT. ANN. § 479.2(1))). As a result, they claim the State has a significant governmental interest in allowing only those who are licensed Pennsylvania funeral directors to practice in the industry. (*Id.* at 88). Defendants claim that since the profession involves not only the preparation of potentially infectious dead bodies, but also trusting of significant amounts of money for pre-need services, that the Commonwealth has a substantial interest in regulating cremation service providers. They cite our decision in *Walker* for the proposition that “an unattached and unsupervised insurance salesperson who is not trained by a licensed funeral director, and not acting as a funeral director’s agent or employee, could represent potential harm to consumers and thus trigger a significant governmental interest.” Defendants argue that since the FDL requires funeral directors to place 100% of pre-need monies in trust, that the FDL necessarily provides for greater consumer protection in this area. In addition, they assert that since the Plaintiffs in Count XI are not licensed funeral directors, they would be permitted to promise millions of dollars’ worth of future services, collect the money now, but avoid all trusting requirements. (*Id.* at 89).

As to the third element, Defendants argue that the State’s interests in consumer protection and accountability are directly advanced by the FDL’s limitation on cremation services to licensed funeral

directors, because preventing unlicensed individuals from practicing ensures that 100% of pre-need monies will be placed in trust. (*Id.* at 89-90 (citing *Walker*, 364 F. Supp. 2d at 524 (noting the demographics of funeral customers and concluding that the Board has an interest in regulating individuals who are not linked to a licensed funeral director and prohibiting the actual sale of pre-need funerals by unlicensed individuals absent the direct involvement of a licensed funeral director))).

Regarding the fourth element, Defendants argue that their position would not preclude crematories or cemeteries from advertising or soliciting business that they can legally perform. Instead, they contend that unlicensed persons and businesses cannot advertise or solicit for cremation services when they are unlicensed to perform the same. (*Id.* at 92). According to the appellate courts of Pennsylvania, Defendants claim, the FDL only prohibits direct sale to the public of pre-need services that include disposition of a deceased by cremation, as this falls within the definition of funeral directing. (Doc. 158 at 127-28).

Pursuant to the first *Central Hudson* element, we find that Plaintiffs' conduct does not concern unlawful or misleading conduct simply because the Commonwealth Court has previously upheld the Board's prosecution of the unlicensed sale of cremation services. However, regarding the second and third elements, we find that as aforestated Defendants have an interest in accountability and consumer protection and that such interests are advanced by regulations

that restrict cremation to licensed funeral directors or those who contract with them. Finally, under the fourth element, we find that the instant regulations are not more extensive than necessary, because the FDL only precludes the direct sale of pre-need services to the public that include cremation of the deceased as the ultimate disposition since this qualifies as the “practice” of funeral directing under section 13(a) and (c). *See* 63 PA. STAT. ANN. § 479.13(a) and (c).

Accordingly, we shall grant Defendants’ motion to this extent and deny Plaintiffs’ motion regarding the same.

### **c. Due Process**

Plaintiffs also contend that there is a lack of a rational relationship between the FDL’s prohibition on the sale of cremation services by anyone other than a licensed funeral director, and the state interests allegedly advanced by the subject regulations. (Doc. 140 at 173). In support of this contention, Plaintiffs rely on *St. Joseph Abbey v. Castille*, a case involving a Louisiana Board of Funeral Directors’ order that the monks of St. Joseph Abbey cease and desist from making wooden caskets because doing so, they concluded, violated a state law restricting the sale of caskets to funeral directors employed through a licensed funeral establishment. (*Id.* at 173 (citing 2011 U.S. Dist. LEXIS 79327 (E.D. La. July 21, 2011))). They claim that the court in *St. Joseph Abbey*

concluded that the state's reliance on local economic protectionism was misplaced. Plaintiffs highlight the same court's finding that while consumer protection and public health were legitimate state interests, there was no rational relationship between these interests and the prohibition in the regulation. (*Id.*).

Additionally, Plaintiffs note the *St. Joseph Abbey* court's finding that prohibiting casket sales by unlicensed funeral directors "restrict[s] competition and limit[s] casket sales to the licensed few, accomplishing just the opposite of protecting the consumer." (*Id.* (citing 2011 U.S. Dist. LEXIS 79327 at \*19)). They emphasize the court's conclusion that requiring caskets to be sold by funeral directors had no rational relation to consumer protection because Louisiana state law did not require funeral directors to possess education or training in caskets or grief counseling. (*Id.* at 175 (citing 2011 U.S. Dist. LEXIS 79327 at 22)). Finally, Plaintiffs highlight the court's finding that the Louisiana Board's asserted consumer interest was "actually aimed at customer service, which in and of itself is not a legitimate government interest." (*Id.* (citing *St. Joseph Abbey*, 2011 U.S. Dist. LEXIS 79327 at \*23)).

Similar to *St. Joseph Abbey*, Plaintiffs maintain that restricting competition and limiting choice fails to advance consumer protection. (*Id.*). Also, the sale of cremation services by crematories and cemeteries will not preclude funeral directors from offering such services. They further contend that as in the case above, nothing in the FDL requires funeral directors to be

trained in cremation. (*Id.* at 176). Plaintiffs argue that like the Louisiana Board, the Pennsylvania Board's concerns are primarily aimed at customer service and as a consequence it is not a legitimate subject of regulation. (*Id.*).

Furthermore, they maintain that Defendants fail to present any evidence of the public health risks associated with cemeteries and crematories performing cremations. Plaintiff note that the FDL does not address the public health aspects of cremation, and instead focuses on embalming, a service that few crematories are called on to perform. (*Id.* at 177). Finally, as to Defendants' contention that cemeteries and crematories would be exempt from all trusting requirements if the FDL is found inapplicable to them, Plaintiffs maintain that the FIA still governs the sale of merchandise and services, including pre-need, related to the interment of a body. (*Id.*). They claim that while Defendants suggest that many of these tasks are performed by funeral directors, such as identification, sanitization, removing pacemakers, and completion of legal documents, Defendants subsequently acknowledge that such tasks are actually performed by cemeteries and crematories on behalf of funeral directors. (Doc. 168 at 160).

On the other hand, Defendants argue that substantive due process challenges to executive interpretations are only cognizable where real property rights are violated by conduct that "shocks the conscience." (Doc. 126 at 62 (citing *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 141 (3d Cir. 2000))). Here, they argue, real

property is not implicated by Counts XI and XII. Defendants again note that the FDL prohibits anyone from engaging in the practice of funeral directing unless that person is licensed. (*Id.* at 63 (citing 63 PA. STAT. ANN. § 479.2(1))). However, they claim that the Plaintiffs to Count XI can perform cremation or cemetery services, (*id.* at 63 (citing 63 PA. STAT. ANN. § 479.13(a)(1))), and sell interment merchandise either at-need or pre-need under the FIA. (*Id.* at 64). Moreover, it does not shock the conscience to require licensure of individuals who sell and perform funeral directing services to the public. (*Id.* at 65). Regarding educational requirements, Defendants reiterate that funeral directors are required to undergo extensive training, including training to prevent the spread of infection and to deal with families during the grieving process. (*Id.* at 65 (citing 63 PA. STAT. ANN. § 479.13(a), § 479.15, § 479.3, § 479.5)).

Defendants highlight the FDL's requirement that funeral directors place 100% of all pre-need money in trust. (*Id.* at 66 (63 PA. STAT. ANN. § 479.13(c))). They contend that excluding Plaintiffs' stand-alone crematory business from the FDL would exempt them not only from licensure but also from the 100% trusting requirement. (*Id.* at 67). Defendants contend that arguments similar to those raised by Plaintiffs herein have been rejected by the Fourth Circuit in *Guardian Plans, Incorporated v. Teague*, where the court held that Virginia had a legitimate interest in protecting the health, safety, and welfare of its citizens through regulation of the funeral industry, and that a rational relationship existed between these goals and the

prohibition upon the sale of pre-need funeral arrangements by unlicensed individuals. (*Id.* at 68-69 (citing 870 F.3d 123, 126-27 (4th Cir. 1989))).

Additionally, Defendants argue that Plaintiffs' reliance on *St. Joseph* is misplaced because the court in that case was not presented with a challenge to pre-need services, and it found significant that the monastery only wished to sell caskets, a service that was not regulated under the Louisiana funeral statute. (Doc. 158 at 65). They further emphasize that nothing in the FDL prohibits Plaintiffs from providing cremation services to funeral directors and funeral establishments, but that the FDL and Pennsylvania appellate case law restrict them from selling pre-need services that include cremation as the method of disposition because this constitutes the practice of funeral directing. (*Id.* at 66-67 (citing *Pre-Need Family Servs. Eastern Region v. Bureau of Prof'l and Occupational Affairs*, 904 A.2d 996 (Pa. Commw. Ct. 2006); *Cornerstone Family Servs. Inc. v. Bureau of Prof'l and Occupational Affairs*, 802 A.2d 37 (Pa. Commw. Ct. 2002))). Defendants also contend that the FIA is inapplicable to Plaintiffs' cremation services because it only applies to the pre-need sale of interment merchandise or services, such as the sale of urns, caskets, and grave preparation, but not to the actual cremation of a body. (*Id.* at 69).

As we concluded above that the State's asserted interests in accountability and consumer protection are advanced by the instant regulations, we also find that there is a rational relationship between the same

under a due process analysis. Although, as noted above, our constitutional analysis is not bound by the Pennsylvania Commonwealth Court's decision in *Pre-Need Family Services Eastern Region v. Bureau of Professional & Occupational Affairs*, we find the court's determination therein, that services such as the pick-up and removal of bodies, storage and sheltering of the deceased, placement of the remains in a container, crematory fees, and the completion of paperwork constitute the "practice" of funeral directing, to influence our determination that the instant regulations are rationally related to a legitimate state interest. In addition, we agree with Defendants that Plaintiffs' reliance on *St. Joseph* is misplaced because the Louisiana court therein found that a restriction on the monastery's sale of caskets bore no rational relationship to "public health and safety" as the act failed to mention regulation of caskets. *See St. Joseph Abbey*, 2011 U.S. Dist. LEXIS 79327 at \* 24-25. Unlike the act at issue in *St. Joseph*, which failed to address the regulation of caskets, the cremation services provided by crematories and cemeteries has been interpreted by the Pennsylvania Commonwealth Court to constitute the "practice" of "funeral directing" under sections 13(a) and (c) of the FDL, and is therefore explicitly regulated by the same. *See* 63 PA. STAT. ANN. § 479.13(a) and (c); *Pre-Need Family Servs. Eastern Region v. Bureau of Prof'l and Occupational Affairs*, 904 A.2d 996, 1000 (Pa. Commw. Ct. 2006). As a result, Plaintiffs' comparison of the instant case to *St. Joseph* is inapt.

Therefore, we shall grant Defendants' motion to this extent and deny Plaintiffs' motion concerning the same.

**9. Count XII: Unlawful Restriction on Ownership of Merchandise Company**

Plaintiffs next move for summary judgment regarding the FDL's restriction upon ownership of merchandise companies on grounds that this limitation violates the First Amendment, the Due Process Clause, and the Contract Clause. By way of background for each of these arguments, Plaintiffs maintain that the FIA allows any individual or entity to contract for pre-need services "for the sale of personal property or for the furnishing of personal services to be used in connection with the interment of a deceased human being" provided 70% of the sales price is placed in trust. (Doc. 140 at 178 (citing 63 PA. STAT. ANN. §§ 480.1-2)). The seller is permitted to retain the remaining 30%. (*Id.*). Specifically, 63 PA. STAT. ANN. § 480.2(a) states:

[a]ny person entering into any such contract as the seller shall deposit into a merchandise trust fund, established for that purpose with a banking institution in the Commonwealth authorized to perform trust functions, as trustee of such fund, seventy percent of the retail price of the personal property or personal services so sold for future need.

63 PA. STAT. ANN. § 480.2(a). Conversely, § 479.13(c) of the FDL provides:

[n]o person other than a licensed funeral director shall, directly or indirectly, or through an agent, offer to or enter into a contract with a living person to render funeral services to such person when needed. If any such licensed funeral director shall accept any money for such contracts, he shall, forthwith, either deposit the same in an escrow account in, or transfer the same in trust to, a banking institution in this Commonwealth, conditioned upon its withdrawal or disbursement only for the purposes for which such money was accepted.

63 PA. STAT. ANN. § 479.13(c).

Plaintiffs note that previously the Board's position under the FIA, which was enacted after the FDL, was that funeral directors could trust 70% of pre-need sales. (*Id.* at 179). However, the PFDA disagreed and filed a declaratory judgment action against the Board and in *PFDA v. State Board of Funeral Directors*, the Pennsylvania Commonwealth Court held that a funeral director is subject to the greater trusting requirement for funeral services and merchandise contained in the FDL rather than the 70% trusting requirement in the FIA. (*Id.* (citing 494 A.2d 67 (Pa. Commw. Ct. 1985))).

Still, Plaintiffs argue that the question of whether a funeral director may possess an ownership interest in a merchandise company and sell merchandise through a company, trusted at 70%, was left unresolved. (*Id.*). They contend that in 1991, after a suit was filed against funeral directors who established

separate companies to sell merchandise, Board prosecutor Kathleen Grossman drafted a memorandum stating that the Board “has opined that there is no violation of funeral law or regulations when a corporation operating separate and apart from a funeral home (even if owned by a funeral director) sells pre-paid, pre-need merchandise and deposits 70%.” (*Id.* at 180 (citing Pl. R. at 255-56)). The memorandum further stated:

However, the key is: are the pre-need sales merchandising corporations . . . operated separate and apart from the funeral business located at the same location? Are there two sets of bookkeeping records kept? Separate advertising signs? Do the corporations display signs for the public view at all? Which businesses display signs? Are there separate entrances? How is the building set up, i.e., a common vestibule leading to separate suites?

(*Id.* (citing Pl. R. at 3134)). Plaintiffs assert that in reliance on this memo, known as the “Grossman Memo,” funeral directors began establishing separate companies to sell merchandise. They also highlight the PFDA’s creation in 1996 of the “Model Incorporation Kit for Pennsylvania Merchandise Corporations,” which provided members with the forms needed to establish a Pennsylvania merchandise corporation. (*Id.* at 181 (citing Pl. R. 2758-61, 2961-64, 3692-3769)). Moreover, Plaintiffs emphasize the PFDA’s advertisement of a fund for members to trust 70% of merchandise sales, which stated:

Today's preneed market is more challenging than ever. Everyone selling merchandise needs financial resources UPFRONT, in order to compete. That's why PFDA created the Pennsylvania Funeral Merchandise Trust. After careful legal research, a method has been established that allows a separate merchandising corporation to put 70 percent of the retail price of merchandise in trust under the terms of the Pennsylvania Future Interment Act – and makes 30 percent available to MEET THE COMPETITION with other merchandising companies.

(*Id.* at 181-82 (citing Pl. R. at 2961-66, 5304)). Plaintiffs maintain that the Board has more recently changed its position and now requires 100% trusting of pre-need sales. They contend that the opposition to separate merchandising companies was because “the Funeral Director’s Association wants the hundred percent trusting so that funeral directors will not do [preneed].” (*Id.* (citing Pl. R. at 5971); *see also* Pl. R. at 2916 (PFDA’s General Counsel testifying that PFDA believes funeral directors should not be permitted to sell preneed merchandise through a separate company because “they would have 30 percent of the money to use for purposes of marketing and to pay people to do pre-need.”)). They argue that without the 30%, funeral directors are forced to fund pre-need services out of their own pocket, and are therefore less likely to offer this service. (*Id.* at 183). Plaintiffs highlight Cavanagh’s testimony that this situation is what funeral directors want, to deal with an emotional customer proximate to a loved one’s death

rather “than with someone who can spend two weeks trying to decide what he wants to do.” (*Id.* at 183 (Pl. R. at 5954)). However, Plaintiffs highlight one of Defendants’ discovery responses as evidence that it is unclear whether establishing a separate merchandise company removes Plaintiffs from the 100% trusting requirement. In that response they stated:

Defendants do not oppose the ownership of merchandise companies by licensed funeral directors; however, separate companies must be set up to do this business. In that regard, the FDL requires 100% trusting of all pre-need monies received and the Future Interment Act requires only 70% trusting of pre-need monies. Keeping a bright-line distinction between these companies (and the goods/services provided by each) is legitimate and protects consumers, makes it easier for employees to know the applicable trusting requirements, and enhances the enforcement ability of the Board given the different trusting requirements.

(*Id.* at 186-87 (citing Pl. R. at 10284)). Plaintiffs also highlight the deposition testimony of numerous Defendants concerning whether a funeral director is permitted to own a merchandise company which trusts 70% of pre-need sales money. They contend that the answers varied widely from “I don’t know,” (*id.* at 187 (citing Pl. R. at 1322, 1402-03)), to “yes,” (*id.* (citing Pl. R. at 1216-17)), to “it depends,” (*id.* (citing Pl. R. at 2447-54)), to “whatever the law states,” (*id.* (citing Pl. R. at 2174-75)), to “better be careful . . . I’m getting

a little leary.” (*Id.* (citing Pl. R. at 1516, 1521)). The foregoing forms the background for Plaintiffs’ claims in Count XII. We shall address each argument in turn.

**a. First Amendment**

First, Plaintiffs argue that Defendants’ de facto prohibition on the communications of funeral directors with customers via a merchandise company violates the First Amendment and *Central Hudson*. (*Id.* at 188). They also contend that Defendants’ reliance on *PFDA v. State Board* is misplaced, because the court therein only decided whether the FIA exempted funeral directors from the FDL’s trusting requirements, and not whether a funeral director may have an ownership interest in a separate merchandise company which trusts at 70%. (*Id.*). Consequently, Plaintiffs assert that the court’s decision in *PFDA v. State Board* does not preclude this Court from deciding the constitutionality of the FDL’s restriction on funeral directors owning separate merchandise companies. (*Id.*).

As to the first element under *Central Hudson*, Plaintiffs maintain that Defendants again employ circular reasoning in asserting that it is unlawful for funeral directors to interact with customers through a merchandise company simply because the Board has decided that the FDL renders such activity unlawful. Contrary to Defendants’ contention, Plaintiffs claim it is nevertheless unclear whether it is unlawful for a funeral director to have an ownership interest in a

merchandise company that trusts at 70%. (*Id.*). Plaintiffs also cite to *In re R.M.J.* for the proposition that a state “may not place an absolute prohibition on certain types of potentially misleading information.” (Doc. 168 at 169 (citing 455 U.S. 191, 203 (1982))). Moreover, they contend Defendants’ acknowledgment that Plaintiffs may own merchandise companies implicitly concedes that there is a non-misleading way for Plaintiffs to do so. (*Id.*).

Regarding the second element, Plaintiffs argue that the only viable interest Defendants propose is ensuring proper trusting of pre-need monies. (Doc. 140 at 189). They note that Defendants’ reasoning proceeds as follows – funeral directors interacting with customers through a merchandise company yields improper trusting, thus, a prohibition on such interactions is justified by the State’s interest in prohibiting improper trusting. (*Id.*). Plaintiffs contend that the State lacks a substantial interest in prohibiting funeral directors from selling funeral goods through a merchandise company and trusting 70%, while other individuals and entities are permitted to do so. They highlight that funeral directors are required to complete training regarding the “selling of funeral service merchandise,” “counseling of families on the types of . . . merchandise available,” and “prepaid burial accounts.” (*Id.* (citing 49 PA. CODE § 13.28(2)(vi), (xii), (xiii))). As a result, Plaintiffs contend, funeral directors are trained in the marketing of funeral merchandise and the proper trusting of pre-need funds.

Plaintiffs also contend that Defendants' position concerning cremation services conflicts directly with their position regarding merchandise companies. Specifically, Defendants require that cremation services be provided through a licensed funeral director, when in fact they lack extensive training or education in this area and merely contract with a crematory or cemetery to provide such services. On the other hand, Defendants prohibit funeral directors from engaging in the pre-need sale of funeral merchandise despite the training they receive regarding the same. (*Id.* at 190). Plaintiffs suggest that the actual purpose behind the prohibition on separate merchandise companies is preventing funeral directors from using the retained 30% of sales funds "to pay people to do pre-need." (*Id.* (citing Pl. R. at 2916)).

Pursuant to the third element, Plaintiffs maintain that Defendants fail to produce any evidence of real harm stemming from funeral directors' interactions with customers through merchandise companies. (*Id.* at 191). They argue Defendants present no evidence that customers are confused or misled when purchasing goods from a merchandise company owned by a funeral director. (*Id.*). Therefore, Plaintiffs contend that prohibiting funeral directors from interacting with customers through merchandise companies does not directly promote any substantial consumer protection interests. (*Id.*). As to the fourth element, Plaintiffs contend that an outright ban on sales through merchandise companies owned by funeral directors is too broad to satisfy the requirement

that the regulation not be more extensive than necessary to promote the State's interest. (*Id.* at 191-92).

In response, Defendants argue that Plaintiffs fail to cite any provisions in the FDL that prohibit merchandise companies from advertising or soliciting. (Doc. 126 at 81). In fact, they argue that Plaintiffs are free to own and operate merchandise companies provided there are separate corporations and transactions. (*Id.*). Defendants claim that while Plaintiffs are permitted to advertise and solicit future interment business, they are prohibited from using a merchandise company to shift some of the funeral costs to the "other side of the ledger or to blur the transaction or to mislead consumers." (*Id.* at 82). They emphasize the Commonwealth Court's finding that a funeral director cannot circumvent the FDL by running the merchandise portion of a unified transaction through a "merchandise company," thereby disguising the true nature of the transaction. (*Id.* at 83).

As to the first element of *Central Hudson*, Defendants contend that while Plaintiffs may own a separate merchandise company, they are prohibited from using such business to mislead or confuse consumers by "muddy[ing] the transaction and avoid[ing] the distinct trusting requirements of the FDL and the FIA." (*Id.* at 85). In addition, they emphasize that soliciting funeral directing services without a license to do so, converting interment sales into funeral directing services, and advertising under a fictitious name that does not identify the owner, is unlawful and misleading. (*Id.* at 86).

Regarding the second element, Defendants reiterate the State's substantial governmental interest in consumer protection, accountability, and accurate disclosure of information. (*Id.* at 86 (citing *Walker*, 364 F. Supp. 2d at 519-20) (“there is a substantial governmental interest in (1) protecting the interests of the general public in its purchase of preneed funeral services, and (2) ensuring that consumers receive only accurate price lists when purchasing or shopping for preneed funeral services.”))). Moreover, they argue the State has a substantial interest in ensuring the accurate and lawful trusting of pre-need monies, and making certain that consumers are not misled or confused by a transaction that appears to be negotiated with a licensed funeral director, but in reality is not. (*Id.* at 89) (citing 63 PA. STAT. ANN. § 479.13 (100% trusting), § 480.2 (70% trusting)).

As to the third element, Defendants maintain that requiring the name of at least one licensed funeral director to be disclosed directly advances the goals of consumer protection and accountability because it clearly identifies the individual held accountable for any violations of the trusting requirements. (*Id.*). Concerning the fourth element, Defendants claim that a state regulation should be upheld if there is a “reasonable fit between the legislature’s ends and the means chosen to accomplish those ends.” (*Id.* at 91 (citing *Walker*, 364 F. Supp. 2d at 524)). They assert that requiring the use of a licensed funeral director’s name does not prohibit advertising by funeral establishments or solicitation of business. As

a result, Defendants maintain that preventing unlicensed funeral directors from contracting directly with consumers for funeral services is reasonable. They note that without a bright-line demarcation between funeral directors selling pre-need services, and unlicensed individuals selling interment merchandise, companies will mislead and confuse consumers. (*Id.* at 92).

Here, as to the first factor, we cannot find that Plaintiffs' communications to consumers through a merchandise company are illegal or misleading based on the Board's decision that Plaintiffs are permitted to own merchandise companies, but are prohibited from shifting funeral costs to the "other side of the ledger or to blur the transaction or to mislead consumers." (*See* Doc. 126 at 82). In the absence of evidence that Plaintiffs have in fact "blurred the lines," shifted transactions, or misled consumers, we find that Plaintiffs have satisfied the first element and Defendants have failed to demonstrate that Plaintiffs actively misled or confused consumers in this way.

As to the second element, while we recognize the State's substantial interest in accountability and consumer protection, we fail to see how this interest is directly advanced by regulations restricting Plaintiffs' communications to consumers when licensed funeral directors receive more training and education in this realm than unlicensed individuals. Moreover, Defendants' interest in ensuring that 100% of pre-need monies are placed in trust does not appear threatened. Plaintiffs are still required to maintain separate

corporations and transactions, and trust either 100% of pre-need monies or 70% of sales for future interment merchandise. *See* 63 PA. STAT. ANN. § 479.13, § 480.2(a). Concerning the fourth element, we find that preventing licensed funeral directors from communicating to consumers through merchandise companies is a more extensive prohibition than necessary to satisfy the State's interests.

Accordingly, we shall grant Plaintiffs' motion to this extent and deny Defendants' motion as to the same. While we recognize that this ruling is dispositive, for the sake of completeness, we will proceed to analyze Plaintiffs' due process arguments as well.

### **b. Due Process**

Plaintiffs also argue that no legitimate state interest is rationally furthered by prohibiting licensed funeral directors, who possess training in funeral merchandise and trusting requirements, from selling goods to the public and trusting at 70%. (Doc. 140 at 192). They claim that requiring funeral directors to undergo such training, and then restricting them from marketing the same, is irrational. Plaintiffs contend that the State, under the FIA, allows anyone except funeral directors to sell funeral merchandise and trust at 70%, despite the fact that funeral directors in Pennsylvania are required to complete education and training in funeral merchandise and trusting requirements. (Doc. 168 at 179).

On the other hand, Defendants claim that neither the FDL nor Defendants' interpretation of the same prohibits Plaintiffs from owning a separate company that sells merchandise. (Doc. 126 at 70) (citing 63 PA. STAT. ANN. § 479.8(b), (d) (only prohibiting licensees from owning other funeral establishments); 63 PA. STAT. ANN. § 480.1; 63 PA. STAT. ANN. § 480.2))). They also claim that requiring "separate and apart" transactions and "separate and apart" corporations does not shock the conscience and is in fact, wholly rational. For example, in highlighting the potential risk to consumers, Defendants highlight Plaintiff Heffner's business which, they contend, combines a customer's services and merchandise into a single contract and requires the customer to cut a single check to PNA, Heffner's business. They note that PNA has the same address, phone number, and fax number as the funeral establishment, and on the back of its form customers are informed that prices are not guaranteed. (*Id.* at 71 (citing CSMF ¶¶ 158-69)). Defendants claim that this is one example of the abuses that can occur if separate corporations and separate transactions are not required.

While we agree with Defendants that separate corporations and separate transactions are rationally related to the State's interest in consumer protection, we fail to see how the FDL's prohibition on licensed funeral directors selling goods to the public and trusting at 70%, provided such transactions are maintained separate and apart from other pre-need services, furthers the State's interests. This

limitation seems particularly suspect in light of the educational requirements concerning funeral merchandise and pre-need trusting that licensed funeral directors are required to complete.

As a result, we shall grant Plaintiffs' motion to this extent and deny Defendants' motion regarding the same.

### **c. Contract Clause**

Finally, Plaintiffs move for summary judgment on grounds that Defendants' shifting application of the FDL to funeral director ownership of merchandise companies violates the Contract Clause. The Contract Clause states, in pertinent part, "[N]o state shall . . . pass any . . . law impairing the obligation of contract." U.S. CONST., ART. I, § 10. Plaintiffs highlight that determining whether the Contract Clause has been violated is a three step inquiry. First, a plaintiff is required to demonstrate that it possesses a contractual right or obligation that was altered by the law. (Doc. 140 at 193 (citing *Nieves v. Hess Oil V.I. Corp.*, 819 F.2d 1237, 1243 (3d Cir. 1987))). Plaintiffs note that "[t]his inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." (*Id.* (citing *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992))). If a contract is impaired, the second step asks whether the governmental entity had a "significant and legitimate public purpose behind the

regulation, such as the remedying of a broad and general social or economic problem.” (*Id.* at 193-94 (citing *Nieves*, 819 F.2d at 1243)). Finally, should such a purpose be identified, the third step asks “whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation’s adoption.” (*Id.* (citing *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 412 (1983))).

Plaintiffs claim that the first element is satisfied here because they entered into pre-need merchandise contracts with consumers through merchandise companies that trusted at 70%. (*Id.* at 194). Moreover, the Board previously took the position that such contracts were permissible and its prosecutor even drafted a memorandum to that effect. Plaintiffs contend that after the Board’s August 2007 rulemaking, the Board decided that such contracts were unlawful and began investigations into merchandise companies and prosecutions of funeral directors. (*Id.*). They argue that under the Board’s new interpretation of the FDL, Plaintiffs may no longer retain 30% of the contract price, agreements may be subject to rescission, and they face a threat of potential prosecution. (*Id.*). Furthermore, Plaintiffs claim that “change in law” includes any “exercise of legislative power delegated by the legislature . . . having all the force of law.” (*Id.* at 195 (*Transp. Workers Union, Local 290 v. SEPTA*, 1996 U.S. Dist. LEXIS 10608, at \*9 (E.D. Pa. 1996); *Ross v. Oregon*, 227 U.S. 150, 162-63 (1913)

(holding that the Contract Clause “reach[es] every form in which the legislative power of a State is exerted, whether it be a constitution, a constitutional amendment, an enactment of the legislature, a by-law or ordinance of a municipal corporation, or a regulation or order of some other instrumentality of the State exercising delegated legislative authority.”))).

Under the second step, Plaintiffs argue that Defendants have presented no “significant and legitimate public purpose behind the regulation.” (*Id.* at 195). They maintain that Defendants have no legitimate interest in prohibiting consumers from interacting with merchandise companies owned by licensed funeral directors, who are trained in funeral merchandise and pre-need trusting, while permitting such interactions with companies owned by those who are unlicensed. (*Id.* at 196). Finally, even if Defendants can provide a legitimate purpose for the change in interpretation, Plaintiffs assert that the most recent interpretation of the FDL must fail because it is not based upon reasonable or appropriate conditions given the Board’s protectionist goals. (*Id.* at 196).

Defendants contend that contrary to Plaintiffs’ assertions, the FDL, or the Board’s interpretation of it, does not prohibit them from fulfilling such contracts. (Doc. 126 at 98). Moreover, they claim that whether a licensed funeral director can own a merchandise company has no relevance to whether any contracts between the company and consumers have been impaired under the Contract Clause. (Doc. 158 at 140). Defendants contend that the only litigants

raising cognizable arguments herein are Heffner, Cavanagh, and the Connells, and therefore, the claims of all other Plaintiffs must be rejected. They argue that any contracts for the sale of merchandise exist between the corporate entity and the consumer, and such corporate entities are not a party to this litigation. (*Id.* at 140-41). Finally, Defendants maintain that no existing contracts have been impaired by a legislative change. (*Id.* at 141).

We agree with Plaintiffs that Defendants' apparent equivocation regarding interpretation of the FDL has impaired contracts entered into by Plaintiffs under the first element. In particular, we find that inasmuch as there was a contractual relationship between Plaintiffs and consumers for pre-need merchandise contracts trusted at 70%, the Board's subsequent interpretation of the FDL impairs such contracts by requiring 100% trusting of all pre-need contracts. Furthermore, we find this impairment to be substantial because Plaintiffs' contracts may be subject to rescission and Plaintiffs themselves face a threat of prosecution. As to the second element, we find that Defendants fail to provide a legitimate state interest for prohibiting Plaintiffs from communicating with consumers regarding funeral merchandise and pre-need trusting, particularly when licensed funeral directors are required to complete education and training in these areas. Finally, pursuant to the third element, we find that even if Defendants had provided a legitimate purpose for the change in interpretation, such change does not appear to be based

on a reasonable condition given the Board's fluctuating interpretation of the same.

Therefore, we shall grant Plaintiffs' motion to this extent and deny Defendants' motion as to the same.

**10. Count XIII: Challenge to Section 11(a)(8) of the FDL and Section 13.202(5) of the Regulations.**

Plaintiffs also move for summary judgment on Count XIII which presents a First Amendment challenge to the FDL's prohibition on the payment of commissions by funeral directors to unlicensed salespersons. (Doc. 140 at 196). They highlight that in *Walker*, this Court held that the Board could not, pursuant to the First Amendment, prohibit unlicensed employees and agents of funeral directors from interacting with customers concerning pre-need sales. (*Id.*). Plaintiffs cite section 11(a)(8) of the FDL which provides:

(a) The board, by a majority vote thereof, may refuse to grant, refuse to renew, suspend or revoke a license of any applicant or licensee, whether originally granted under this act or under prior act, for the following reasons: . . . (8) Soliciting patronage other than by legitimate advertisement, or paying a commission or agreeing to pay a commission to any person or persons for soliciting or for business secured, or paying any gratuity to any person with intent to have such

person aid in securing business, or other similar unprofessional conduct.

(*Id.* at 197 (citing 63 PA. STAT. ANN. § 479.11(a)(8))). They further highlight the Board's regulations stating that unprofessional conduct includes: "Paying or extending an offer to pay or give to a person, agency, or group a commission or a valuable consideration for the solicitation or procurement of clientele." (*Id.* (citing 49 PA. CODE § 13.202(5))).

In addition, Plaintiffs highlight Defendants' discovery responses as proof that although they claim "not [to] oppose" commissions from insurance companies, (*id.* at 199 (citing Pl. R. 10284-85)), they contend that compensation should not be based on a percentage of the value of goods or services sold. (*Id.* at 200). They further claim that despite Defendants' assertion that they do not oppose commissions, the fact remains that the express language of the FDL prohibits commissions. For example, Defendants highlight the deposition testimony of Board member Murphy who stated that he did not agree with the discovery response provided because they conflict with section 11(a)(8) of the FDL. (*Id.* at 200 (citing Pl. R. at 1625-26 (noting "A. My trouble would be it appears in conflict with the statute that says they cannot. Q. Okay. A. Funeral directors cannot make such payments."))). They contend that Board member Gerdes also expressed skepticism regarding the payment of commissions because the goal of section 11(a)(8) is "preventing the overselling by a salesperson," and "if a salesperson is encouraged to oversell by whatever

commission structure is set up, that could be a problem with this section.” (*Id.* at 200-01 (citing Pl. R. at 2458-59)).

Under *Central Hudson*, Plaintiffs assert that unlicensed employees’ interactions with customers are protected, lawful, and not misleading. (*Id.* at 201 (citing *Walker*, 364 F. Supp. 2d at 517-19 (finding unavailing the Board’s conclusion that such speech was unlawful simply because the Board interpreted the FDL to render it so))). As to the second element, Plaintiffs contend that Defendants’ only purported interest in restricting the speech of an unlicensed employee of a funeral director is preventing a “conflict between the seller and the consumer” caused by payment of commissions on sales. (*Id.* at 202). They maintain that nothing about the unlicensed employees of funeral directors makes them more likely to harm consumers than funeral directors. Plaintiffs note that in rejecting a proposed rulemaking by the Board, 16A-4816, the IRRC stated:

In response to questions about consumer complaints, the Board reports . . . that from 1999 to 2008, while there were 420 complaints concerning possible unlicensed practice of funeral directing, only one case “involved a situation where a licensed funeral entity utilized an unlicensed individual to engage in preneed sales.” These statistics are consistent with the record in both *Ferguson* and *Walker* that indicated there was little to no record of consumer complaints or harm

related to the activities of unlicensed individuals and unlicensed employees.

(*Id.* (citing Pl. R. at 10356)). As a result, they contend the lack of any actual harm to consumers reveals that the Board's primary interest is economic protectionism, which is not a substantial state interest. (*Id.* at 203). Moreover, Plaintiffs maintain that even if the State's interest is substantial, the prohibition on paying commissions to unlicensed employees of funeral directors does not directly advance it. They argue that if Defendants do not oppose commissions paid by insurance companies or payments to unlicensed employees "per contract made; per contract entered into by the licensed funeral director; or for performance bonuses," that prohibiting compensation "premised on a percentage of the value of goods and services sold" will not prevent the potential for "up-selling" to consumers because such compensation structures pose the same incentive. (*Id.*). Concerning the fourth element of *Central Hudson*, Plaintiffs argue that the instant prohibition is more extensive than necessary and lacks a reasonable fit between the ends sought to be achieved and the means employed. (*Id.* at 203-04).

In response, Defendants argue that they have not violated the Court's holding in *Walker*. (Doc. 126 at 18). They claim that in *Walker*, we held that "under no circumstances may unlicensed individuals contract with consumers for the sale of preneed funerals, nor may they act as a 'funeral director' as defined in 63 PA. STAT. ANN. § 479.2(1)." (*Id.* at 19 (citing *Walker*, 364 F. Supp. 2d at 529)). Defendants contend that

every Plaintiff herein, be they a licensed funeral director or an unlicensed person who has sold funeral services and merchandise on a pre-need basis, has been paid all amounts they earned for such services and were never disciplined by the Board. (*Id.* at 20). Specifically, they maintain that compensation for such services has been paid through salaries, bonuses, and percentages on amounts sold or trusted, and commissions on insurance products sold to fund services and merchandise selected. Consequently, Defendants assert that Plaintiffs' argument, that the FDL prohibits them from being compensated, is baseless. (*Id.* at 21).

Moreover, Defendants claim that complying with the 100% trusting requirement for pre-need monies is impossible if money is taken off the top to pay commissions for unlicensed salespersons. (*Id.* at 22). They argue that Plaintiffs wish to expand *Walker* to use unlicensed pre-need salespersons, who are not employed or supervised by licensed funeral directors or licensed funeral establishments, and pay such persons commissions out of monies that are to be trusted. (*Id.* at 23). Defendants claim that Plaintiffs failed in the amended complaint to plead a violation of the First Amendment, a theory they now advance in their supporting and opposition briefs. (Doc. 158 at 133). Consequently, they claim that Plaintiffs' vague references to violations of the Constitution are insufficient.

In countering Plaintiffs' *Central Hudson* analysis, Defendants maintain that Plaintiffs' proposed

interactions with consumers fail the first element because the subject communications are unlawful speech not entitled to protection. (*Id.* at 137). For example, they claim that Heffner's transactions mislead consumers because they begin with communications with a funeral establishment, include review of funeral establishment materials, selection of funeral services and merchandise, are paid for by a single check written to a non-funeral establishment, and are confirmed by letters from the funeral establishment. (*Id.* at 137-38). Defendants contend that such commingled interactions are unclear and misleading to consumers. Concerning the remaining factors, they claim that despite Plaintiffs' arguments there are still other methods by which to compensate unlicensed salespersons, and that prohibiting commissions is directly advanced by the FDL's requirement that 100% of pre-need monies be trusted, and the restriction on non-licensees engaging in such contracts. (*Id.* at 138).

The Contract Clause states, in pertinent part, "[N]o state shall . . . pass any . . . law impairing the obligation of contract." In determining whether there is a violation of the Contract Clause,

[T]he threshold inquiry is whether the state law has substantially impaired a contractual relationship. If the state regulation does constitute a substantial impairment, the second step is to determine whether there is a significant and legitimate public purpose behind the regulation, such as the remedying of broad and general social or economic problems.

Once a legitimate public purpose has been identified, the court must address whether the adjustment of the parties' rights and responsibilities is based upon reasonable conditions and is of a character appropriate to the legislature's public purpose.

*Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707, 717 (3d Cir. 1985).

In *Walker v. Flitton*, we stated that Board members are not to "prohibit agents or employees of specific licensed funeral directors from providing accurate information to consumers regarding the sale of pre-need funeral plans and services. . . . [U]nder no circumstances may unlicensed individuals contract with consumers for the sale of pre-need funerals, nor may they act as a 'funeral director.'" *Walker*, 364 F. Supp. 2d at 529. A logical extension of this pronouncement, and implicit therein, is that these agents and employees can be compensated by licensed funeral directors for their services.<sup>28</sup>

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<sup>28</sup> We expressly highlight that our discussion of the *Walker* decision herein is not a revisiting of that holding, as both parties agree that agents can sell pre-need. Despite Defendants' attempt to characterize Plaintiffs' argument in Count XIII as a rehashing of *Walker*, we explicitly make clear that we believe Plaintiffs' argument is more nuanced. Simply put, the real issue presented *sub judice* is whether the FDL's restriction on compensation structures for unlicensed employees and agents of funeral homes who sell pre-need services is violative of the First Amendment. As a result, any attempts to construe the foregoing analysis as a review or revision of *Walker* are inappropriate.

As to Defendants' argument that Plaintiffs are precluded from raising a First Amendment claim in their supporting brief, when they failed to specify the same in their amended complaint, we find such argument to be unavailing in light of Defendants' failure to direct us to any case law supporting such proposition. Despite Plaintiffs' failure to specifically couch their claim in Count XIII as a First Amendment claim, we find that to dismiss this claim at this stage of the litigation, without rendering a decision on the merits, would be imprudent. As such, we shall proceed to analyze the same.

As to the first *Central Hudson* element, we disagree with Defendants that simply because the Board has formulated regulations prohibiting Plaintiffs from compensating unlicensed individuals by way of a commission structure, that the interactions of unlicensed employees with customers regarding pre-need services is necessarily unlawful or misleading. Regarding the second element, we previously acknowledged in *Walker* that the State has a substantial and appropriate interest in regulating unlicensed individuals' interactions with consumers concerning pre-need services. 364 F. Supp. 2d at 527. While we recognize this interest, Defendants fail to prove that they have a substantial interest in regulating the compensation structure for such individuals, and point to nothing but the possibility of consumer confusion from interactions with an unlicensed individual concerning pre-need services. Moreover, they fail to cite any examples affirmatively demonstrating

that such confusion has taken place or that consumers have been misled. Thus, we find that Defendants' argument fails under the second element.

Pursuant to the third element, we find Defendants' contention, that other methods for compensating unlicensed salespersons exist, merely serves to highlight that the subject regulation fails to serve the asserted goal of consumer protection. If consumer protection and the prohibition on "over-selling" of pre-need services is the State's primary interest, it seems that permitting other compensation structures for such salespersons fails to eliminate the possibility of "over-selling" and thus neglects to serve the interests Defendants seek to advance. Accordingly, under the fourth element, we similarly find that the instant regulation is more extensive than necessary to serve the alleged state interest.

Accordingly, we shall grant Plaintiffs' motion to this extent and deny Defendants' motion as to the same.

## **V. Conclusion**

For the foregoing reasons, we shall grant in part and deny in part Plaintiffs' motion for summary judgment, (doc. 137), and grant in part and deny in part Defendants' motion for summary judgment. (Doc. 117). In so doing, we note that taken as a whole, the statutory scheme of the FDL and the Board's interpretation of this clearly outdated law, evince the urgent need for the Board to finally clarify and

modernize the FDL, a request Plaintiffs, funeral directors, and cremation service providers have been requesting for some time. Additionally, while the Court recognizes the Board's previous hesitation, at best, and outright recalcitrance, at worst, to comply with our mandate following *Walker v. Flitton*, we take this opportunity to encourage its members to take a considered look at the provisions of the FDL highlighted herein in developing an appropriate approach to regulation of the funeral industry in Pennsylvania.

In reaching this point, we find Board member Murphy's statement regarding the contradictory provisions of the FDL governing food service, and the Board's attempt to reconcile the same, to serve as an apt characterization for what has apparently been the Board's position since the inception of this litigation, namely, that "trying to reconcile those two confusing or competing views proved to be an impossible task in this as well as the other parts of the regulation. So we're on hold until we get through with the present litigation to see if this gets in and clarification and. . . ." (Pl. R. at 1557:20-1558:3). Accordingly, at this juncture we admonish the Board to apply appropriate focus and craft, or clarify, regulations that appropriately govern the funeral industry in this, the twenty-first century.<sup>29</sup> The time for relying on

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<sup>29</sup> Our experience with the Board through this case and *Walker*, spans almost the ten year length of our judicial service. While we are certain that its members are upstanding and well-intentioned, we can only describe the Board as a whole as  
(Continued on following page)

antiquated and ever-changing interpretations of the FDL, which constitute nothing more than thinly-veiled attempts to maintain the status quo for established funeral directors and their families, or to confuse those honestly seeking to comply with the law, has passed, and it is well past time to provide meaningful guidance to those actively engaged in the noble and respected practice of funeral directing in this Commonwealth.

Given the disposition of the instant motions, and our finding that while many of the subject provisions fail to pass constitutional muster they may lend themselves to being redrawn in a way that does, we find that staying our mandate and providing the Board with an appropriate period of time to consider and possibly rectify the issues identified through this opinion is the most appropriate course of action.

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moribund. Time and again, in the face of the extreme scrutiny these lawsuits have generated, a clearly ossified Board has refused to revisit regulations that appear both obsolete and ultimately unconstitutional. We have endeavored to give the Board the widest possible berth to cure at least some of these defects, but to no avail. Astonishingly, as was the case with *Walker*, we conclude that the Board is virtually daring us to act in lieu of making these difficult decisions itself. If our surmise is correct, we have today filled the vacuum created by the Board's recalcitrance.

**NOW, THEREFORE, IT IS HEREBY ORDERED THAT:**

1. Plaintiffs' Motion for Summary Judgment (Doc. 137) is **GRANTED in part and DENIED in part** to the following extent:
  - a. The Motion is **GRANTED** to the extent of Plaintiffs' arguments regarding the following:
    - i. Count I – Fourth Amendment
    - ii. Count II – Undue Restriction on Ownership
    - iii. Count III – Undue Restriction on Ownership to Licensed Funeral Directors
    - iv. Count IV – Ownership Restrictions
    - v. Count V – Undue Restriction on Place of Practice
    - vi. Count VI – Undue Requirement of “Full Time” Supervisor
    - vii. Count VII – Undue Requirement that Every Establishment Include a Prep Room
    - viii. Count VIII – Undue Restriction on Food
    - ix. Count IX – Infringement on Commercial Speech

- x. Count XII – Unlawful Restriction on Ownership of Merchandise Company
  - xi. Count XIII – Challenge to Section 11(a)(8) of the FDL and Section 13.202(5) of the Regulations
- b. The Motion is **DENIED** to the extent of Plaintiffs’ arguments regarding the following:
- i. Count XI – Unlawful Interference with Trade
  - ii. Plaintiffs are precluded from seeking money damages from Defendants sued in their individual or official capacity for violations of state law.
2. Defendants’ Motion for Summary Judgment (Doc. 117) is **GRANTED in part and DENIED in part** to the following extent:
- a. The Motion is **GRANTED** to the extent of Defendants’ arguments regarding the following:
    - i. Count XI – Unlawful Interference with Trade
    - ii. Plaintiffs are precluded from seeking money damages from Defendants sued in their individual or official capacity for violations of state law.

- b. The Motion is **DENIED** to the extent of Defendants' arguments regarding the following:
- i. Count I – Fourth Amendment
  - ii. Count II – Undue Restriction on Ownership
  - iii. Count III – Undue Restriction on Ownership to Licensed Funeral Directors
  - iv. Count IV – Ownership Restrictions
  - v. Count V – Undue Restriction on Place of Practice
  - vi. Count VI – Undue Requirement of “Full Time” Supervisor
  - vii. Count VII – Undue Requirement that Every Establishment Include a Prep Room
  - viii. Count VIII – Undue Restriction on Food
  - ix. Count IX – Infringement on Commercial Speech
  - x. Count XII – Unlawful Restriction on Ownership of Merchandise Company
  - xi. Count XIII – Challenge to Section 11(a)(8) of the FDL and Section 13.202(5) of the Regulations

3. Defendants' Motion to Strike (Doc. 163) is **DENIED**.<sup>30</sup>
4. The mandates issued herein are **STAYED** for a period of ninety (90) days from the date of this Order, or more for good cause shown, pending the Board's reexamination and possible revision of the subject provisions in a manner consistent with this Memorandum and Order.
5. A conference call with all counsel to determine, *inter alia*, whether additional action by this Court will be necessary to enforce the mandates herein shall be conducted on August 8, 2012 at 10:00 a.m. Defendants' counsel **SHALL** initiate the telephone

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<sup>30</sup> In denying Defendants' Motion to Strike, we simply note that Defendants fail to provide the Court with any compelling justifications for excluding the vast majority of the information they seek to strike through their instant motion. Instead, Defendants' brief in support is comprised primarily of rehashed legal and factual arguments pulled, ostensibly, straight from their summary judgment briefs and presented in support of their assertion that Plaintiffs' expert reports should not be permitted to contradict their alleged admissions elicited during discovery. For example, Defendants argue that the 1994 Audit Report, the FTC Report, various meeting minutes, committee transcripts, proposed regulations, legislative initiatives, and more, should be stricken because such materials contain hearsay. (Doc. 164 at 5-7). However, as Plaintiffs highlight, such documents may be properly considered pursuant to Federal Rule of Evidence 803(8) under the public records and reports exception to the hearsay rule. (Doc. 173 at 10). As the Court has already devoted substantial judicial resources to deciding the cross motions for summary judgment, and because we find that Defendants' motion to strike lacks merit, we shall deny the same.

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conference call and join all other counsel prior to calling chambers. The Court's telephone number is 717-221-3986.

/s/ John E. Jones III  
Jones E. Jones III  
United States District Judge

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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 12-3591

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DONALD J. MURPHY; JOSEPH A. FLUEHR, III;  
MICHAEL J. YEOSOCK; BENNETT GOLDSTEIN;  
JAMES O. PINKERTON; ANTHONY SCARANTINO;  
BASIL MERENDA; MICHAEL GERDES; PETER  
MARKS; C.A.L. SHIELDS,

Appellants

v.

ERNEST F. HEFFNER; HARRY C. NEEL; BART H.  
CAVANAGH, SR.; JOHN KATORA; BRIAN  
LEFFLER; REBECCA ANN WESSEL; MARK  
PATRICK DOUGHERTY; CYNTHIA LEE FINNEY;  
NATHAN RAY; TODD ECKERT; BEN  
BLASCOVICH; MATTHEW MORRIS; WILLIAM  
SUCHARSKI; JOHN MCGEE; AMBER M. SCOTT;  
ERIKA HAAS; NICOLAS WACHTER; DAVID  
HALPATE; PATRICK CONNELL; EUGENE  
CONNELL; MATTHEW CONNELL; JAMES J.  
CONNELL, JR; JEFFERSON MEMORIAL PARK,  
INC; JEFFERSON MEMORIAL FUNERAL HOME,  
INC.; WELLMA FUNERAL ASSOCIATES INC.,  
doing business as Forest Park Funeral Home; EAST  
HARRISBURG CEMETERY & CREMATORY;  
ROBERT LOMISON; CRAIG SCHWALM; GREGORY  
J. HARVILLA; BETTY FREY

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**SUR PETITION FOR REHEARING EN BANC**

BEFORE: McKEE, *Chief Judge*,  
RENDELL, AMBRO, FUENTES, SMITH, FISHER,  
CHAGARES, JORDAN, HARDIMAN, GREENAWAY,  
Jr., VANASKIE, SHWARTZ *Circuit Judges* and  
GREENBERG, Senior Circuit Judge.\*

The petition for rehearing on behalf of Appellee in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for rehearing en banc is hereby **DENIED**.

**IT IS SO ORDERED.**

By the Court,

s/ Theodore McKee

Chief Judge

Date: March 17, 2014

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\* Judge Greenberg's vote is limited to panel rehearing only.

**CONSTITUTIONAL PROVISION**

U.S. CONST. AMEND. XIV, § 1

Section 1. [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

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**PENNSYLVANIA STATUTES**

63 P.S. § 479.2

Definitions

The following terms as used in this act shall, unless the context indicates otherwise, have the following meanings:

(1) The term “funeral director” shall include any person engaged in the profession of a funeral director or in the care and disposition of the human dead, or in the practice of disinfecting and preparing by embalming the human dead for the funeral service, burial or cremation, or the supervising of the burial, transportation or disposal of deceased human bodies, or in the practice of funeral directing or embalming as presently known, whether under these titles or designation or otherwise. The term “funeral director” shall also mean a person who makes arrangements for funeral service and who sells funeral merchandise to the public incidental to such service or who makes financial arrangements for the rendering of such services and the sale of such merchandise.

(2) The word “board” shall mean State Board of Funeral Directors in the Department of State.

(3) The word “department” shall mean the Department of State of this Commonwealth.

(4) The term “resident interne” shall mean any person operating under or with a funeral director for the purpose of learning the profession, to the end that he may become a licensed funeral director. The term

shall also include a student apprentice serving as such on the effective date of this act under any law repealed hereby.

(5) The term “student trainee” shall mean any person accepted for matriculation at a mortuary college or university specializing in mortuary subjects which have been approved by the American Board of Funeral Service Education, Inc.

(6) The term “funeral establishment” shall mean every place or premise approved by the State Board of Funeral Directors wherein a licensed funeral director conducts the professional practice of funeral directing including the preparation, care and funeral services for the human dead.

(7) The word “preceptor” shall mean a licensed funeral director under or with whom a resident interne is registered and operates.

(8) The term “school of embalming” shall mean a mortuary college, institute or university offering a course of actual class work in didactic and laboratory studies in a manner accredited by the American Board of Funeral Service Education, Inc.

(9) The term “profession” as used in this act shall mean the aggregate of all funeral service licensees and their duties and responsibilities in connection with the funeral as funeral directors licensed under this act.

(10) The term “advertisement” shall mean the publication, dissemination, circulation or placing

before the public, or causing directly or indirectly to be made, published, disseminated or placed before the public any announcement or statement in a newspaper, magazine or other publication, or in the form of a book, notice, stationery, circular, pamphlet, letter, handbill, poster, bill, calendar, sign, placard, cards, labels or tags or over any radio or television station whenever applicable to any rules and regulations approved by the board.

(11) The term “full-time supervisor” shall mean a licensed funeral director who is a registered supervisor of no more than one funeral establishment and who is accessible to serve the public at the funeral establishment which he is supervising and is not engaged in any activity, business or profession, including assisting other funeral directors, which substantially interferes with or prevents the supervision of the practice carried on by the funeral establishment which he supervises.

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63 P.S. § 479.7

Restrictions; preparation room

Original licenses under this act (1) shall be granted only to individuals, partnerships or corporations, (2) shall specify by name the person, partnership or corporation to whom they are issued, and (3) shall designate the particular place approved by the board at which the profession of funeral directing shall be carried on. A license shall authorize the conduct of

the profession at the particular place of practice designated therein and no other, and only by the particular person, partnership or corporation designated. This provision shall not prevent a person licensed for the practice of funeral directing from assisting another duly licensed person, partnership or corporation in the conduct of the profession in an approved funeral establishment nor shall it prevent a person licensed for the practice of the profession from conducting a funeral at a church, a private residence of the deceased, or an approved funeral establishment provided such person maintains a fixed place or establishment of his own approved by the board.

A licensed funeral director, partnership or corporation may move to a new place of practice, which shall be registered and approved by the board if the new place of practice meets all the requirements as set forth in the State Board's Rules and Regulations.

After the thirty-first day of August, one thousand nine hundred fifty-two, every establishment in which the profession of funeral directing is carried on shall include a preparation room, containing instruments and supplies necessary for the preparation and embalming of dead human bodies and be constructed in accordance with sanitary standards prescribed by the board, for the protection of the public health.

All areas within an approved establishment must be maintained in a proper and sanitary manner, as determined by the board or State and local ordinances wherever they apply, for the protection of the public.

No food or intoxicating beverages shall be served in any funeral establishment in which the profession of funeral directing is carried on. Beverages, if served, must be restricted to a separate room not used for the preparation and conduct of a funeral service. Any facility beyond the confines of such funeral establishment, but directly or indirectly operated by a funeral director for the service of refreshments or food shall be maintained in accordance with State and local health laws and regulations pertaining to public eating places for the protection of the public.

63 P.S. § 479.8

Conduct of business

**(a) Individuals and Partnerships.** Except as provided for in subsection (e) hereof, only one license shall be granted to or held by an individual, but two or more licensed funeral directors may operate a joint or partnership business at one place only. No funeral practice, whether conducted by an individual or a partnership, may be conducted under any other name than the name or last name of the individual or, if a partnership, the names or last names of all partners: Provided, however, That an individual or partnership may be conducted under the name of a predecessor funeral establishment if the name or names of the owner or partners appear as operator or operators on all signs, forms and advertising. No person not licensed under this act shall have any interest in the practice carried on by a licensed funeral director except as otherwise herein provided. Upon the death

of a licensee, the board shall issue a license and renewal thereof to his estate, only for a period not exceeding three (3) years, or widows or widowers of deceased licensees without time limitations, as long as they remain unmarried, providing the widow or widower, the executor or administrator of the estate of the deceased licensees heir or heirs, informs the board, of the intent to continue practice, within ten (10) days and applies within thirty (30) days for a certificate of licensure. Such notice shall be in writing. The practice carried on by a licensee's estate, widow or widower shall be under the supervision of a licensed funeral director employed on a full time basis. A licensee's estate, widow or widower shall not be denied a license because the deceased licensee operated a business in partnership with one or more other licensed funeral directors nor shall a widow or widower be denied the right to enter into a partnership with one or more of the licensed funeral directors with whom the deceased licensee was in partnership.

**(b) Restricted Corporate License.** A corporate license may be issued to a Pennsylvania corporation which is incorporated pursuant to the provisions of the act of May 5, 1933 (P.L. 364, No. 106), known as the "Business Corporation Law,"<sup>1</sup> by one or more licensed funeral directors specifically for the purpose of conducting a funeral directing practice. The name

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<sup>1</sup> 15 P.S. § 1001 et seq. (repealed); now deemed a reference to 15 Pa.C.S. Pt. II Subpt. B, known as the Business Corporation Law of 1988 (15 Pa.C.S.A. § 1101 et seq.) pursuant to 15 P.S. § 20206(a).

of such corporation shall contain the name or the last name of one or more of the licensed shareholders or the name of a predecessor funeral establishment. No licensed funeral director shall be eligible to apply for more than one restricted corporate license or own shares in more than one restricted corporation. Nor shall any licensed funeral director who obtains a restricted corporate license or holds shares in a restricted corporation have any stock or proprietary interest in any other funeral establishment, except a branch place of practice as authorized by subsection (e). Such license shall be valid only if the following conditions exist at the time of issuance of the license and continue in effect for the license period:

- (1) The corporation engages in no other business activity other than that of funeral directing and its certificate of incorporation should so specify.
- (2) It holds no shares of stock or any property interest in any other funeral establishment.
- (3) One or more of its principal corporate officers is a person licensed as a funeral director who shall also be a member of the board of directors of the corporation and shall not conduct any other funeral business.
- (4) All of its shareholders are licensed funeral directors or the members of the immediate family of a licensed funeral director or a deceased licensed funeral director who was a shareholder in the corporation at death. For the purposes of this paragraph "members of the immediate family" shall mean (i) spouse, (ii) children, (iii) grandchildren, (iv) a trustee

or custodian who holds shares for the benefit of such spouse, children or grandchildren.

(5) The corporation shall have filed a registry statement with the Secretary of the Commonwealth and thereafter have duly filed its Pennsylvania corporate tax returns and paid all taxes which have been assessed and as to which there is no contest.

(6) The corporation has, for each place of business operated by it, registered with the board the name of a licensed funeral director who will serve as a full-time supervisor of such place of business.

**(c) Notice of Corporate Noncompliance.** Any corporation holding a restricted corporate license which shall fail to comply with all of the provisions set forth in subsection (b)(1) through (5) shall immediately give notice to the board of such failure and set forth in such notice the nature of the failure to comply and such corporation shall have a period of sixty (60) days from the date of the event which results in failure to comply in which to cure the failure and at the end of such sixty (60) day period shall either supply documentary evidence in affidavit form of the basis upon which such failure has been corrected or shall surrender its license to the board and shall forthwith desist from the conduct of the business of funeral directing.

**(d) Professional Corporation License.** A corporate license may be issued to a Pennsylvania corporation which is incorporated pursuant to the provisions of the act of July 9, 1970 (P.L. 461, No. 160), known as

the “Professional Corporation Law,”<sup>2</sup> by one or more licensed funeral directors specifically for the purpose of conducting a funeral directing practice. No professional corporation may render funeral services unless it holds a professional corporation license issued pursuant to this subsection. The name of such professional corporation shall contain the name or the last name of one or more of the shareholders or the name of a predecessor funeral establishment. No professional corporation shall own shares of stock or any property interest in any other funeral establishment. Each professional corporation shall, for each place of business operated by it, register with the board the name of a licensed funeral director who will serve as full-time supervisor of such place of business. Nor shall any licensed funeral director who obtains a professional corporation license or holds shares in a professional corporation have any stock or proprietary interest in any other funeral establishment, except a branch place of practice as authorized by subsection (e): Provided, however, That any licensed funeral director who owned shares of more than one professional corporation prior to February 1, 1977, may maintain ownership of such shares and such corporations may be licensed.

**(e) Branch Place of Practice.** Licensees authorized to conduct a funeral directing practice whether

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<sup>2</sup> 15 P.S. § 2901 et seq. (repealed); now deemed a reference to 15 Pa.C.S. Ch. 29, relating to professional corporations (15 Pa.C.S.A. § 2901 et seq.) pursuant to 15 P.S. § 20206(e).

as an individual, partnership, professional corporation or restricted business corporation may practice at one principal place and no more than one branch place of business provided that a licensed funeral director is assigned as a full-time supervisor to such branch location, and provided that the facilities furnished at such branch location fully comply with all the provisions of this act and the rules and regulations promulgated by the board as amended from time to time. The board shall issue a separate license and require payment of a separate license fee for such branch location.

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