#### No. 11-30756

#### UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ST. JOSEPH ABBEY, ET AL.

Plaintiffs - Appellees

v.

PAUL CASTILLE, ET AL.

Defendants - Appellants

\_\_\_\_\_

# APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

\_\_\_\_\_

#### BRIEF FOR AMICI CURIAE THE INTERNATIONAL CEMETERY, CREMATION AND FUNERAL ASSOCIATION AND THE FUNERAL CONSUMERS ALLIANCE IN SUPPORT OF APPELLEES AND AFFIRMANCE

\_\_\_\_\_

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Defendants - Appellants

**CERTIFICATE OF INTERESTED PERSONS** 

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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#### **RULE 29 STATEMENTS**

This brief of *amici curiae* is submitted with the consent of all parties to this appeal and pursuant to Fed. R. App. P. 29 and Fifth Cir. R. 29.

The brief was not authored, in whole or in part, by counsel for any of the parties to this appeal. No party's counsel has contributed money that was intended to fund the preparation or submission of this brief. No person—other than the *amici curiae*, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief.

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#### **INTEREST OF AMICI CURIAE**

Amicus International Cemetery, Cremation and Funeral Association ("ICCFA") is a voluntary trade association founded in 1887 with over 7,200 members. ICCFA's membership includes nonprofit, for-profit, religious, and municipal cemeteries, funeral homes, crematories, and memorial retailers. The association's activities include tracking federal and state legislation affecting the death-care industry and promoting education within and about the industry. ICCFA also takes an active role in advancing the public interest on funeral-industry issues. ICCFA promotes consumer choice, the pre-arrangement of funeral and burial decisions, and open competition among providers of death-care services, and has created more than two dozen model guidelines advocating state legislation on a variety of consumer-related issues.

Amicus Funeral Consumers Alliance ("FCA") is a 501(c)(3) nonprofit organization incorporated in 1978, which grew out of its predecessor-in-interest, a nonprofit founded in 1963. FCA is a federation of more than 80 voluntarily affiliated local nonprofit consumer education groups around the country with a total membership of individual consumers in the hundreds of thousands. The organization is run democratically and does not allow funeral- or burial-related vendors to participate in its governance. FCA's mission is to educate consumers about their legal rights when purchasing funeral, cremation, and burial

arrangements, and to protect funeral consumers from misleading, deceptive, or fraudulent commercial practices. The organization was a key participant in the enactment of the Federal Trade Commission's Funeral Industry Practices Trade Regulation (the "Funeral Rule") and in the rule's 1994 amendment. FCA believes that freedom of choice in funeral purchases is foundational to consumers' ability to arrange and purchase funerals that are meaningful, dignified and affordable. To that end, FCA advocates for federal and state regulations that allow for vibrant competition in the funeral and burial business while adequately shielding grieving families from deceptive practices.

As representatives of trade and consumer interests within the death-care industry, *amici* have a direct interest in this case. The law at issue makes it a crime for retailers of funeral merchandise and others in the death-care industry who are not licensed funeral directors to market and sell caskets within the state of Louisiana. The judgment of this Court will significantly impact consumer choice and retailer competition within the industry.

#### **ARGUMENT**

Louisiana's law restricting the in-state sales of caskets to licensed funeral directors is an anti-consumer, anti-competitive relic of a by-gone era. The law merely continues the historical practice of using licensing requirements to protect the funeral director industry against market competition without any public purpose. There is no plausible consumer-protection justification for the limitations imposed by the law. As the district court correctly found, "[T]here is nothing in the licensing procedures that bestows any benefit to the public in the context of the retail sale of caskets." (USCA5 at 901.) In fact, the law affirmatively harms Louisiana consumers and Louisiana entrepreneurs, such as Appellees, who would provide greater choice and lower prices in the marketplace.

I. THERE IS A HISTORICAL RECORD OF PRIVATE ECONOMIC PROTECTION BY AND FOR THE FUNERAL DIRECTORS INDUSTRY, A PRACTICE THAT IS CONTINUED BY THE CHALLENGED PORTIONS OF THE LOUISIANA LAW.

There is a long history of state funeral licensing boards being used to protect the interests of funeral directors. The great majority of state laws governing the licensing and practice of funeral directors were initiated by the National Funeral Directors Association ("NFDA") and its various state-level affiliates. *See generally* Josh Slocum & Lisa Carlson, *Final Rights: Reclaiming the American Way of Death* 19–24 (2011) (hereinafter Slocum). As one historian and friend of the funeral industry and the NFDA has written, the goal has been to establish an

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exclusive, licensed industry by "securing the passage of laws" restricting admission to funeral service. *Id.* at 22 (quoting William M. Lamers, *A Centurama of Conventions: A Review of All The Convention of NFDA Focusing on The Words and Deeds of Funeral Service Practitioners* 4 (1981)).

In the 1970s, the Federal Trade Commission ("FTC") took note of the economic protectionism behind these practices. The FTC's Bureau of Consumer Protection highlighted the tension between a funeral director's "public relations image" and his "economic self-interest":

[The funeral director's] public relations image emphasizes his duties as a professional serving people at a time of particular desperation. His economic self-interest puts him in a different role: he is a salesman of goods and services to these same people; and, if he wants to prosper or even survive, he must move his high profit lines.

Bureau of Consumer Protection, FTC, Funeral Industry Practices, Proposed Trade Regulation Rule and Staff Memorandum 3 (1975). The funeral director industry, the Bureau observed, used "the professional image [to] fight anything that would interfere with it or . . . come between it and the customer." *Id.* at 4.

The industry had systematically "[e]liminat[ed] low cost alternatives to the standard funeral through the control of laws, regulations, and codes of ethics," *id.*, including laws to restrict the sale of funeral merchandise, Bureau of Consumer Protection, FTC, *Funeral Industry Practices, Final Staff Report to the FTC and* 

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Proposed Trade Regulation Rule (16 CFR Part 453) 119 (1978). Importantly, these "many restrictive state regulations operate[d] not to provide badly-needed information or weed out the unqualified or unscrupulous, but to insulate licensed funeral directors from the pressures of competition." Id. at 103. Thus, for example, the funeral directors industry "vigorously opposed" the elimination of the Colorado Board of Mortuary Sciences in 1977, even though the State had determined that "there [wa]s no actual health threat associated with the disposition of dead human bodies" and therefore no public-health reason for the Board. *Id.* at 110–11 & n.28. The Board was abolished, but the Colorado Funeral Directors Association has persisted in its efforts to protect its economic interests. In 2007, it requested licensing requirements be imposed across the funeral industry, including on "any business that provides funeral goods and services." Colorado Department of Regulatory Affairs, 2007 Sunrise Review: Funeral Service Practitioners 5 (2007).

Along with other abuses, the use of state licensing boards by the funeral director industry led the FTC in 1982<sup>1</sup> to promulgate the Funeral Rule, which remains in effect today. The rule requires itemized price disclosures and forbids other unfair and deceptive practices. 16 C.F.R. § 453.1 *et seq.*; 47 Fed. Reg. 42,260 (Sept. 24, 1982). In 1994, the FTC reviewed the rule, which had

<sup>&</sup>lt;sup>1</sup> Issued in 1982, the Funeral Rule became fully effective in 1984. 59 Fed. Reg. 1,592, 1,592 & n.2 (Jan. 11, 1994).

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encouraged third-party casket sellers to enter the market, and amended it to further prohibit funeral directors from charging "casket handling fees" for the use of third-party caskets. 59 Fed. Reg. 1,592, 1,596 (Jan. 11, 1994). The FTC rejected the NFDA's arguments for repeal, *id.* at 1,596–98, noting the testimony of state legislators and officials "indicating that . . . [state-level] reform was unlikely in their or other states *because of industry opposition*." *id.* at 1,600 (emphasis added). In 2008, the FTC again refused to repeal the rule. 73 Fed. Reg. 13,740 (Mar. 14, 2008).

The Louisiana law at issue is merely another example of anti-consumer, protectionist practices by the funeral director industry. The law defines "funeral directing" to include "the purchase of caskets or other funeral merchandise, and retail sale and display thereof." La. Rev. Stat. § 37:831(37). As a consequence, only licensed funeral directors may lawfully sell caskets to the public, *id.* § 37:848(A), and caskets may only be sold at state-licensed funeral establishments, *id.* § 37:842(D).

Because there are considerable barriers to becoming a licensed funeral director and funeral establishment, this scheme provides funeral directors significant protection against competition from third-party casket retailers. A licensed funeral director must, among other requirements: have passed 30 credit-hours at an accredited university; have completed a one-year, full-time

apprenticeship; and have passed the International Conference of Funeral Service Examining Boards administered examination. *Id.* § 37:842; La. Admin. Code tit. 46, part XXXVII, § 903(3)–(5). A licensed funeral establishment must, among other requirements, be managed by a Louisiana-licensed funeral director and have "embalming facilities for the sanitation, disinfection, and preparation of a human body." La. Rev. Stat. § 37:842(D)(3). All of these requirements must be met to the satisfaction of the Louisiana State Board of Embalmers and Funeral Directors before a Louisiana business can legally sell a casket to a Louisiana consumer.

While there may be good and sound reasons for the sensible regulation of embalmers and funeral directors, none is furthered by this law. Requiring a funeral director's license to sell caskets is like decreeing that only electricians can sell light bulbs or only dentists can sell toothpaste. The sale of caskets, though related to the provision of funeral services, is distinct from the more technical aspects of funeral directing, embalming, and cremation, the regulation of which is not at issue in this case. That economic protectionism is at the heart of this type of law is simply beyond dispute. Even the one court upholding such a scheme acknowledged: "[D]ishing out special economic benefits to certain in-state industries remains a

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favored pastime of state and local governments." *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004).<sup>2</sup>

The challenged law grants funeral directors a monopoly over the in-state retail sale of caskets and serves only to curtail ordinary competition that might otherwise moderate prices for consumers. In fact, the law targets one of the very consumer benefits that the FTC's Funeral Rule has fostered—the entry of third-party casket sellers into the market. And just as the FTC noted in reaffirming the rule in 1994, the funeral director industry maintains a strong hold over the state legislative process. Even today, nearly all state funeral licensing boards remain dominated by funeral directors. Slocum 19. Twice the Abbey sought to change the law through the legislative process, and twice the funeral directors industry rallied to kill the bill. (Br. of *Amicus Curiae* La. Funeral Dirs. Ass'n at 3; *see also* USCA5 at 445; USCA5 at 713:15–714:10, 714:25–715:3, 715:13–:20.)

# II. GRANTING LICENSED FUNERAL DIRECTORS A MONOPOLY OVER THE IN-STATE SALE OF CASKETS CANNOT PLAUSIBLY BE JUSTIFIED AS CONSUMER PROTECTION.

The Louisiana law at issue only restricts Louisiana residents' access to *instate* third-party retailers. (*See* USCA 5 at 908–09.) Currently, no state other than Louisiana enforces a ban on the sale of caskets by third-party merchants. (USCA5

<sup>&</sup>lt;sup>2</sup> Every other court to consider this type of licensing scheme has struck down the challenged law. *See Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 434 (S.D. Miss. 2000); *Peachtree Caskets Direct, Inc. v. St. Bd. of Funeral Serv. of Ga.*, No. 1:98-CV-3084, 1999 WL 33651794 (N.D. Ga. Feb. 9, 1999).

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at 909.) Indeed, caskets are now bought and sold over the Internet through retailers such as Wal-Mart.<sup>3</sup> The Louisiana law does not prohibit the purchase of such caskets; it only criminalizes the sale of caskets by Louisiana third-party retailers. Louisiana residents are free to purchase caskets over the Internet and have them shipped to their homes from any other state.

There is no plausible consumer-protection justification for a scheme that imposes a blanket prohibition on the sale of caskets by third-party merchants, much less one that restricts only in-state third-party casket retailers. In 1984, the Funeral Rule created a market for third-party casket retailers by requiring funeral homes to allow their customers to buy caskets elsewhere. The FTC has credited that market with increasing competition and providing consumers with lower-priced options for funeral goods and services. 59 Fed. Reg. 1,592, 1,599; 73 Fed. Reg. 13,740, 13,743. In 2008, the FTC retained the Funeral Rule as to funeral directors, but expressly refused to extend it to cover third-party merchants, finding "[t]he record . . . bereft of evidence indicating significant consumer injury caused by third-party sellers." 73 Fed. Reg. 13,740, 13,745. This is consistent with

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<sup>&</sup>lt;sup>3</sup> A search for "casket" on <u>walmart.com</u> found 15 caskets available for home delivery, including to homes in Louisiana. They come in a variety of styles and colors and range in price from \$995.00 to \$3,199.00. <u>www.walmart.com</u> (Dec. 7, 2011).

<sup>&</sup>lt;sup>4</sup> The FTC's most recent annual statistics on consumer complaints do not specifically identify those complaints, if any, relating to third-party casket retailers. In 2010, the FTC collected approximately 1.3 million consumer complaints, of which 339 related to funeral services or merchandise of any type. Federal Trade Commission, *Consumer Sentinel Network Data Book* 

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*amici*'s experience. *Amici* receive consumer complaints related to the funeral industry each year, and in every year since the Funeral Rule's inception there have been few if any complaints directed at third-party casket retailers.<sup>5</sup>

There is nothing distinctive about Louisiana burials that could plausibly suggest Louisianans require special protection from third-party retailers. Louisiana does not regulate the construction, sealing, or use of caskets—only their retail sale. Indeed, the dead may be buried in caskets they have made at home or no casket at all. (USCA5 at 909.) Correspondingly, Louisiana licensing requirements do not require funeral directors to receive any specialized training related to caskets. (USCA5 at 914.) Given this scheme, there is no argument that caskets sold by third-party retailers could somehow be particularly deficient or harmful to Louisiana consumers. "[T]he only difference between the caskets is that those sold by licensed funeral directors are systematically more expensive." *Craigmiles*, 312 F.3d at 226.

Nor is there reason to believe that Louisiana consumers are uniquely vulnerable to *in-state* third-party retailers. Like other states, Louisiana has generally applicable laws in place to protect consumers from unscrupulous retailers. Louisiana's *Unfair Trade Practices and Consumer Protection Law*, for

for January–December 2010 (2011) (collecting complaints received by the FTC and by several other entities such as Better Business Bureaus).

<sup>&</sup>lt;sup>5</sup> There are approximately 2.4 million deaths in the United States each year.

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example, declares "[u]nfair methods of competition and unfair or deceptive acts or

practices in the conduct of any trade or commerce" to be unlawful. La. Rev. Stat.

§ 51:1405. Absent the challenged law, Louisiana entrepreneurs would be free to

do only what is done throughout the country and over the Internet: engage in the

retail sale of caskets subject to generally applicable consumer protection statutes.

**CONCLUSION** 

For the foregoing reasons, amici respectfully request that the Court affirm

the judgment of the district court.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)** 

The undersigned attorney certifies that:

1. This brief complies with the type-volume limitations of Fed. R. App. P.

32(a)(7)(B) because this brief contains 2,428 words, excluding the parts of the

brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P.

32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this

brief has been prepared in a proportionally spaced typeface using Microsoft Office

Word 2003 and in 14 point Times New Roman font.

Dated: December 19, 2011 /s/ Matthew Addison Draper

Counsel of record for Amici Curiae

**CERTIFICATE OF SERVICE** 

I hereby certify that on December 19, 2011, I electronically filed the

foregoing with the Clerk of Court using the CM/ECF System, which will send

notice of such filing to all parties through their registered attorneys of record.

/s/ Matthew Addison Draper

Counsel of record for Amici Curiae