RECORD NO. 12-3591

In The

United States Court of Appeals

For The Third Circuit

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 MEMEMORIAL FUNERAL HOME, INC.; WELLMAN FUNERAL ASSOCIATES INC., doing business as Forest Park Funeral Home; EAST HARRISBURG CEMETERY & CREMATORY, doing business as Esat Harrisburg Cemetery & Crematory; ROBERT LOMISON; CRAIG SCHWALM; GREGORY J. HARVILLA; BETTY FREY,

Plaintiffs – Appellees,

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,

Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 12-3591

Heffner, et al.

v.

Murphy, et al.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

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The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

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4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

/s/ Robert McNamara
(Signature of Counsel or Party)

Dated: 02/21/2013

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INTEREST OF *AMICUS CURIAE*

The Institute for Justice (IJ) is a nonprofit public-interest law firm that litigates in support of greater judicial protection for individual rights, including rights that are not presently deemed fundamental—such as private-property ownership and occupational freedom—and are therefore subject to rational-basis review. As part of this advocacy, IJ has an interest in ensuring that federal courts understand, and properly apply, the U.S. Supreme Court's rational-basis jurisprudence. In addition, IJ frequently litigates cases challenging protectionist funeral-industry restrictions similar to those at issue in this case, and thus has an interest in ensuring that rational-basis review is employed properly in this context.

All parties in this case have consented to the filing of this amicus brief.[1]

SUMMARY OF ARGUMENT

Much of this case involves the rational-basis test. Specifically, seven of the ten issues raised on appeal involve substantive due-process claims that turn on *which* rational-basis test this Court chooses to apply. One conception of the rational-basis test is so deferential as to be no test at all—a mere rubber stamp of government action. But there is another rational-basis test: the test actually applied by federal courts, including the U.S. Supreme Court, when adjudicating rational-

[1] Counsel for the parties in this matter did not author this brief in whole or in part. No person or entity other than the Institute for Justice, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

basis cases. Under that test, plaintiffs have prevailed in fully 15% of modern rational-basis cases decided by the U.S. Supreme Court from 1970 to 2012. Thus, as *amicus* IJ explains below, the rational-basis test is a genuine (though deferential) standard, requiring true judicial scrutiny.

Underpinning much of the brief of Appellants (hereinafter the "Board"), as well as the briefs of *amici* funeral-directors associations supporting the Board, is the argument that rational-basis review is a pre-ordained charade, not a meaningful form of judicial review. The Board's brief is thus an extended plea for judicial abdication and total deference, no matter how arbitrary the legislature's enactments, nor how improper the purpose of those enactments.

But the conception of the rational-basis test as a judicial rubber stamp cannot be squared with the controlling rational-basis precedents of the U.S. Supreme Court, in which plaintiffs have prevailed in 18 out of 118 rational-basis cases from 1970 to 2012. These cases cannot be reconciled with the complete absence of scrutiny advocated by the Board and its supporting *amici*.

Rational-basis review is not meaningless, particularly in the context of protectionist funeral-industry restrictions. Four of five federal cases have employed rational-basis review to strike down similar protectionist funeral-industry restrictions on who may sell a casket to consumers. Courts in those cases have collectively rejected over a dozen hypothetical justifications, just as the

district court did here. Most recently, the Fifth Circuit, in a model of rational-basis review that should be applied here, upheld a district court decision striking down a protectionist Louisiana funeral-industry restriction on who may sell a casket.

Many of the arguments made by the Board and *amici* funeral-directors associations boil down to the claim that Pennsylvania's Funeral Director Law ("FDL") requirements may be sustained for protectionist reasons, such as "having a local business owned by local people." Mem. Op. & Order ("Op.") 47, 69, ECF No. 182; *see also, e.g.*, *Amicus Curiae* Br. of Pa. Funeral Dirs. Ass'n ("PFDA Br.") 33 (quoting the PFDA's chief operating officer on the benefits of the FDL to current Pennsylvania funeral directors). Unfortunately for the Board and its friends in the funeral-director cartel, the weight of authority is firmly against them on this point. The United States Supreme Court and the Fifth, Sixth, and Ninth Circuits have rejected the proposition that pure economic protectionism is a legitimate government interest, and rightly so. Our Constitution is designed to protect life, liberty, and property, not to give government the arbitrary power to protect favored special interests from competition without any legitimate public-interest justification.

ARGUMENT

This brief proceeds in three sections. First, *amicus* IJ demonstrates that the rational-basis test, as applied by the U.S. Supreme Court and other federal courts,

is a meaningful standard of review conducted in light of actual evidence, and not a rubber stamp of government conduct. Second, *amicus* IJ shows how other federal courts, including a recent decision by the Fifth Circuit, apply the rational-basis test to strike down protectionist funeral-industry regulations similar to those at issue in this case. Finally, to illustrate how to apply the actual rational-basis test—as distinct from the caricature offered by the Board and its supporting *amici*—*amicus* IJ will explain why there is no rational basis for the FDL's preparation-room requirement.

I. THE RATIONAL-BASIS TEST IS A GENUINE, MEANINGFUL STANDARD OF REVIEW.

As the Board portrays it, rational-basis review is a mere charade. The Board spends five consecutive pages reciting familiar rational-basis boilerplate from *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993), and similar cases, and peppers similar quotations throughout its brief.[2] Br. for Appellant 26-30, 39-41, 45, 47-48 (hereinafter "Bd. Br.") *Amici* supporting the Board invoke similar language. PFDA Br. 31-32; *Amicus Curiae* Br. of Nat'l Funeral Dirs. Ass'n ("NFDA Br.") 11-12. The purpose of these recitations is to persuade this Court that "rational-basis review" is code for "the government always wins."

[2] *Amicus* IJ does not dispute the existence of U.S. Supreme Court *dicta* describing, in sweeping terms, the deference required by the rational-basis test. Rather, *amicus* IJ contends that this *dicta*, taken at face value, cannot be squared with the actual holdings of the U.S. Supreme Court and other federal courts in rational-basis cases.

But this caricature of rational-basis review fails to explain how or why the U.S. Supreme Court and other federal courts including the Third Circuit (and courts within the Third Circuit, such as the district court below), have repeatedly ruled for plaintiffs in cases contested under rational-basis review since the 1970s. It also runs directly counter to the holding of this Court explicitly rejecting the claim "that under rational basis review, the government always wins."[3] *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 112 n.9 (3d Cir. 2008) (further noting that "were that the case, our review of issues under this standard would be equivalent to no review at all. A necessary corollary to and implication of rationality as a test is that there will be situations where proffered reasons are not rational."). The account of rational-basis review presented by the Board and its supporting *amici* is purposefully incomplete, cherry-picking language from cases where plaintiffs have lost, while ignoring those cases where government action has been struck down under the rational-basis test. Looking at rational-basis case law as a whole, rather than the cases selectively chosen by the Board, reveals an underlying logic to

[3] This Court has also repeatedly rejected the notion that rational-basis review is "toothless." *See, e.g.*, *Murillo v. Bambrick*, 681 F.2d 898, 905 n.15 (3d Cir. 1982) (noting that although the deference accorded to legislators under the rational-basis test has sometimes been described in very strong terms, total deference has never been required, and citing several examples of cases where statutes were struck down under rational-basis review); *accord N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 398 (3d Cir. 2012); *Schumacher v. Nix*, 965 F.2d 1262, 1269 (3d Cir. 1992); *see also In re Asbestos Litigation*, 829 F.2d 1233, 1253 (3d Cir. 1987) (Hunter, J., dissenting) ("[N]either are we required to give our stamp of approval to classifications that are arbitrary or wholly insubstantial.").

rational-basis review; this logic supports the district court's finding that the plaintiffs met their burden of showing that many of the FDL's requirements are irrational.

Plaintiffs prevail in rational-basis cases when they adduce evidence and provide reasoning establishing that there is no logical connection between the challenged statutory scheme and any plausible legitimate rationale. Once the plaintiff has eliminated every plausible legitimate rationale, and the only plausible reason for the law is illegitimate, courts do not hesitate to strike down the offending law. In addition, courts analyze claims subject to rational-basis review in light of record evidence and are not bound to accept *post hoc* rationalizations for government classifications when those rationalizations find no footing in the facts of the case.

A. Plaintiffs Prevail in Rational-Basis Cases When They Establish That There Is No Logical Connection Between the Challenged Law and Any Legitimate Government Interest.

Courts typically invalidate statutes under rational-basis review in two circumstances: (1) when there is no logical connection between the challenged law and any legitimate government interest; and (2) when the proffered justifications

for a law are a pretext and the government is attempting to advance an illegitimate interest.[4] This Circuit has long recognized this two-part test.[5]

1. No Logical Connection Between Statute and Purported Rationale.

A statute fails rational-basis review when it lacks a logical connection with any proffered rationale. In *Zobel v. Williams*, for example, new residents of Alaska challenged a state program that distributed state oil money to residents in 1980 based on length of state residency since 1959. 457 U.S. 55, 56-57 (1982). Alaska asserted two reasons for distributing state oil money in a way that bestowed a retrospective cash windfall on longtime residents: (1) encouraging additional people to move to sparsely populated Alaska; and (2) giving residents a stake in the prudent management of oil reserves.[6] *Id.* at 61.

[4] There is a third, less frequent, basis for invalidation under rational-basis review: where the government's proffered justifications—such as saving public money—are so wildly out of proportion with the harm caused by the statute that no rational legislator would accept them. *See, e.g.*, *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336 (1989); *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

[5] *See Del. River Basin Comm'n v. Bucks Cnty. Water & Sewer Auth.*, 641 F.2d 1087, 1092-93 (3d Cir. 1981) ("When reviewing a classification under the rationality test, then, a court must conduct a two-step analysis. First, it should identify the purposes of the statute and assure itself that these purposes are legitimate; ordinarily, this inquiry will involve examination of statements of purpose and other evidence in the legislative history. Second, having identified the governmental purposes, the court must determine whether the classification is rationally related to the achievement of these goals.")

[6] The State also asserted that the distinction served "to reward citizens for past contributions" to the State, which the Supreme Court had previously held was not in itself a legitimate state interest. *Id.* at 63.

The Supreme Court held that neither reason provided any logical support for the law. *Id*. at 62. First, if the goal were to encourage *new* people to move to Alaska, it was illogical to distribute oil money under a scheme that awarded far more money to long-term residents than newcomers. *See id*. In other words, a prospective policy of rewarding all Alaskans going forward from 1980 would have been logical, but not a policy retrospectively rewarding residents based on the duration of their pre-1980 residency. Second, if the goal were to preserve resources going forward, a prospective policy of making all residents stakeholders would have been rational, but not a backwards-looking distinction based on past residency. *See id.* at 62-63. Thus, when a rational-basis challenge goes beyond a mere policy disagreement and identifies fundamental irrationalities in a proffered justification for a law, courts simply do not credit those rationales. Where every asserted rationale is logically refuted, courts should, and do, strike down the challenged law.[7]

[7] *See also Quinn v. Millsap*, 491 U.S. 95, 108 (1989) (ability to grasp politics not logically connected to land ownership); *Allegheny Pittsburgh Coal Co.*, 488 U.S. at 345 (disparities in tax rates so enormous as to be illogical); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449-50 (1985) (home being too big not logical basis for permit denial when identical homes routinely granted permits); *Williams v. Vermont*, 472 U.S. 14, 24-25 (1985) (encouraging Vermont residents to make in-state car purchases not logical basis for tax on car that Vermont resident purchased out-of-state before becoming Vermont resident); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977) (ability to grasp politics not logically connected to land ownership); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (stimulating the agricultural economy not logically connected to whether

2. No Legitimate Government Interest.

Courts also invalidate challenged statutes under rational-basis review when the law is plausibly advancing only illegitimate government interests such as economic protectionism or irrational animus towards a disfavored group. For example, in *City of Cleburne v. Cleburne Living Center, Inc.*, the city of Cleburne denied a building permit for a group home for the mentally handicapped even though it granted building permits for other similar residential uses that did not involve the mentally handicapped. 473 U.S. 432, 437 (1985). The Supreme Court rejected five hypothetical rationales for the permit denial—such as a purported concern about liability for the misbehavior of the mentally handicapped—because none of them had any ring of plausibility. *Id.* at 448-50. After rejecting every proffered rationale as implausible, the Supreme Court was left with the obvious: the city of Cleburne was simply trying to exile the mentally handicapped. Because

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people in a household are related or unrelated); *Mayer v. City of Chicago*, 404 U.S. 189, 196-97 (1971) (if inability to pay is no basis to deny transcript to felony defendant, then inability to pay is no logical basis for denying transcript to misdemeanant); *Turner v. Fouche*, 396 U.S. 346, 363-64 (1970) (no rational interest in underlying property-ownership requirement for political office); *Pa. Bd. of Prob. & Parole*, 513 F.3d at 112 & n.9 (subjecting out-of state sex offenders to community notification without providing equivalent procedural safeguards as are provided to in-state sex offenders is not rationally related to protecting its citizens from sexually violent predators, and noting that: "[P]ut simply, every reason proffered by the Commonwealth for its disparate treatment of Doe in this case is meritless, and hence irrational."); *Deibler v. City of Rehoboth Beach*, 790 F.2d 328, 333-35 (3d Cir. 1986) (no rational interest in requirement for candidates for local office to be nondelinquent taxpayers).

it held that irrational animus toward the mentally handicapped does not provide any legitimate basis for government policy, the Supreme Court invalidated the building-permit denial. Thus, when a law serves no legitimate government interest, courts should, and do, strike those laws down.[8]

B. Courts Consider Evidence Adduced by Plaintiffs to Negate Hypothetical Rationales, Particularly in Cases Where There Is Strong Evidence of an Illegitimate Government Interest.

Although the government has no affirmative evidentiary burden and may invoke purely hypothetical reasons for a challenged law, *e.g.*, *Heller v. Doe*, 509 U.S. 312, 319-20 (1993), that does not mean that evidence is irrelevant in rational-basis review. Plaintiffs may carry their burden of negating every plausible basis for a law by adducing evidence that the law is irrational. It is commonplace for courts conducting a rational-basis analysis to refer to record evidence in concluding that a purported justification for a law is too implausible to credit. For example, in *City of Cleburne*, the government posited that junior-high students from across the street might tease the mentally handicapped, but the Supreme

[8] *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (no legitimate interest in criminalizing consensual adult homosexual acts); *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (no legitimate interest in anti-gay animus); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985) (no legitimate interest in dividing bona fide state residents into different classes); *Zobel*, 457 U.S. at 64 (no legitimate interest in creating permanent classes of bona fide residents); *Moreno*, 413 U.S. at 534 (no legitimate interest in anti-hippie animus); *id.* at 535 n.7 ("traditional morality" rationale constitutionally dubious); *Pa. Bd. of Prob. & Parole*, 513 F.3d at 112 (no legitimate interest in discriminating against out-of-state sex offenders more than in-state sex offenders).

Court rejected the plausibility of this based on evidence that the junior high school had thirty mentally handicapped students. *Cleburne*, 473 U.S. at 449.[9]

As a practical matter, the use of evidence and reasoning to refute asserted rationales is particularly prevalent in cases in which the most plausible explanation for a law is an illegitimate government interest such as pure economic protectionism.[10] This is because the purpose of judicial deference in the rational-basis context is to ensure that courts do not improperly intrude on the legitimate prerogatives of legislatures. Rational-basis review was never intended to be a

[9] *See also Plyler*, 457 U.S. at 230 (record evidence cited to refute the government's assertion that perhaps illegal-alien children are less likely to remain in-state); *Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002) (public-health justification for restricting who can sell a casket refuted by evidence that retailers do not handle remains); *Del. River Basin Comm'n*, 641 F.2d at 1098 (declining to engage in "sheer speculation" to save a statute under rational-basis review); *cf. Schumacher*, 965 F.2d at 1273 n.19 (citing *Moreno* and rejecting an equal protection rational-basis claim in part because "there is no evidence that Pennsylvania enacted Rule 203(a)(2)(ii) intentionally to harm its attorneys who are graduates of unaccredited law schools, and it is clear that Pennsylvanian's reciprocity interest is legitimate").

[10] Pure economic protectionism—protecting private economic interests from competition without an independently valid public purpose—is not a legitimate government interest. *See Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878-83 (1985) (invalidating a law designed to protect local insurance companies from out-of-state competition using rational-basis analysis under the Equal Protection Clause—not the Commerce Clause—because it was naked economic favoritism with no rational connection to any valid public purpose); *St. Joseph Abbey v. Castille*, 700 F.3d 154, 161 (5th Cir. 2012); *Merrifield v. Lockyer*, 547 F.3d 978, 992 n.15 (9th Cir. 2008); *Craigmiles*, 312 F.3d at 224; *but see Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004) (finding economic protectionism legitimate, and observing that "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments").

smokescreen for those seeking to commandeer the public power of government for purely private ends. *See, e.g.*, *City of Cleburne*, 473 U.S. at 448. Indeed, this Circuit has repeatedly noted that, "[a] substantive due process violation is established if 'the government's actions were not rationally related to a legitimate government interest' or 'were in fact motivated by bias, bad faith or improper motive.'" *SB Bldg. Assocs., L.P. v. Borough of Milltown*, 457 Fed. Appx. 154, 156 (3d Cir. 2012) (quoting *Sameric Corp. of Del., Inc. v. City of Philadelphia*, 142 F.3d 582, 590 (3d Cir. 1998)).

II. FOUR OF FIVE FEDERAL CASES—INCLUDING CASES DECIDED BY THE FIFTH AND SIXTH CIRCUITS—HAVE STRUCK DOWN SIMILAR PROTECTIONIST FUNERAL-INDUSTRY CASKET REGULATIONS UNDER THE RATIONAL-BASIS TEST.

In affirming the district court, this Court will be following a trail blazed by four other federal courts in striking down protectionist funeral-industry laws restricting who can make caskets, including the Fifth and Sixth Circuits.[11] The lesson of these cases is that federal appellate and district courts are meaningfully engaged when applying rational-basis review, and do not simply rationalize why

[11] *See St. Joseph Abbey v. Castille*, 700 F.3d 154 (5th Cir. 2012); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434 (S.D. Miss. 2000); *Peachtree Caskets Direct, Inc. v. Ga. State Bd. of Funeral Servs.*, No. 1:98-cv-3084-MHS, 1999 WL 33651794 (N.D. Ga. Feb. 9, 1999). The sole outlier is *Powers*, which found the challenged regulatory scheme protectionist, but nevertheless found that "intra-state economic protectionism, absent a violation of a specific federal statutory or constitutional provision, is a legitimate state interest." 379 F.3d at 1222.

the government wins, but award or affirm judgment for plaintiffs when they have negated every plausible justification for a challenged law. Most recently, the Fifth Circuit upheld a district court's ruling striking down Louisiana's protectionist restriction governing who can sell a casket to the public, forcefully concluding that "[t]he great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for naked transfers of wealth." *St. Joseph Abbey v. Castille*, 700 F.3d 154, 165 (5th Cir. 2012).

In *St. Joseph Abbey*, the Fifth Circuit first rejected the Louisiana Board of Funeral Director's claim that economic protectionism is a legitimate government interest, explaining that "neither precedent nor broader principles suggest that mere economic protection of a pet industry is a legitimate governmental purpose" but is instead "aptly described as a naked transfer of wealth." *Id*. at 161. The court then turned to examine the State Board's claims that the restrictions were rationally related to a legitimate government interest, noting that "the State Board cannot escape the pivotal inquiry of whether there is such a rational basis, one that can now be articulated and is not plainly refuted by the Abbey on the record compiled by the district court at trial." *Id*. at 162. This follows the same two-step test for analyzing rational-basis challenges described *supra* in Part I(A).

The *St. Joseph Abbey* decision illustrates how courts do not allow the government to simply invoke a generic government interest such as "public health and safety." Instead, they look at whether there is a logical connection between the law and a specific objective, querying the record evidence. In its examination of whether there was a rational connection between the law and the purported rationales, the Fifth Circuit focused on the State Board's blanket claim that the restriction promoted consumer welfare by ensuring that casket retailers everywhere were experts in caskets.[12] *Id*. The court rejected the premise of this claim—that a casket is complicated and selling one requires expertise—because if this premise were true, then Louisiana law would have standards for caskets, but it does not: "the State Board's argument obscures the actual structure of the challenged law. No provision mandates licensure requirements for casket retailers or insists that a casket retailer employ someone trained in the business of funeral direction. . . . No

[12] The court also rejected the State Board's public health and safety rationale, explaining: "[W]e doubt that a rational relationship exists between public health and safety and restricting intrastate casket sales to funeral directors. Rather, this purported rationale for the challenged law elides the realities of Louisiana's regulation of caskets and burials and causes us to doubt its rationality. That Louisiana does not even require a casket for burial, does not impose requirements for their construction or design, does not require a casket to be sealed before burial, and does not require funeral directors to have any special expertise in caskets makes us doubt that a relationship exists between public health and safety and limiting intrastate sales of caskets to funeral establishments." *Id*. at 165.

rule addresses casket retailers or imposes requirements for the sale of caskets beyond confining intrastate sales to funeral homes."[13] *Id*. at 162-63.

The Fifth Circuit also found no logical connection between Louisiana's interest in making funeral directors be available to families and requiring that only funeral directors sell caskets. The court noted that Louisiana law requires that "[funeral home] customers pay funeral directors a non-declinable service fee, which contractually binds a funeral director to assist the customer with funeral and burial logistics, including . . . casket selection, even if the customer does not purchase the casket from the funeral director." *Id*. at 163. The Fifth Circuit also credited the district court's findings that funeral-director training "does not include instruction on caskets, or how to counsel grieving customers." *Id*.

The Fifth Circuit also found it "doubtful that the challenged law is rationally related to policing deceptive sales tactics," crediting the district court's findings to the contrary, as well as FTC findings that "the record [is] 'bereft of evidence indicating significant consumer injury caused by third-party sellers' and . . .that third-party sellers do not have the same incentive as funeral home sellers to engage in deceptive sales tactics." *Id*. at 163-64. The court further noted that, even if such implausible harms were assumed *arguendo* to be true, "there is a disconnect between restricting casket sales to funeral homes and preventing consumer fraud

[13] The arguments advanced by the Board and its supporting *amici* in the present case suffer from a similar weakness. *See, e.g.*, *infra* Part III.

and abuse. Putting aside the fact that funeral homes, not independent sellers, have been the problem for consumers with their bundling of product and 400% markups of caskets, Louisiana's Unfair Trade Practices and Consumer Protection Law already polices inappropriate sales tactics by all sellers of caskets." *Id*. at 164. Ultimately, noting "the disconnect between the post hoc hypothesis of consumer protection and the grant of an exclusive right of sale to funeral homes," the Fifth Circuit rejected the claim of a rational basis for consumer-protection, finding "[t]hat grant of an exclusive right of sale adds nothing to protect consumers and puts them at a greater risk of abuse including exploitative prices." *Id*. at 164-65.

Similarly, *Craigmiles*, *Casket Royale*, and *Peachtree* applied the rational-basis methodology described *supra* in Part I and should further guide this Court. *Craigmiles* rejected at least six asserted justifications for requiring casket retailers to be licensed funeral directors, and did so because none of the purported rationales plausibly bore a logical connection to the law.[14] For example, Tennessee asserted that requiring casket retailers to be licensed funeral directors ensured that everyone who sells caskets is subject to the FTC Funeral Rule's price disclosures. 312 F.3d at 227. But *Craigmiles* rejected that rationale because the purpose of the Funeral

[14] *Craigmiles* considered, and rejected, six purported rationales: (1) preventing the spread of communicable diseases; (2) improving customer service; (3) preventing casket sellers from engaging in fraud or misrepresentation; (4) ensuring that the Funeral Rule applies to all casket sellers; (5) protecting pre-need casket buyers; and (6) ensuring that casket sellers are trained in grief. 312 F.3d at 225-28.

Rule was to prevent licensed funeral directors from using lump-sum pricing for funeral goods and services. *See id.* at 228. Logically, a person who sells only caskets cannot conceal the price of the casket from consumers, and certainly cannot conceal the casket price by lumping the casket in with funeral services such as the embalming of remains. *See id*. Upon determining that the challenged statute lacked any logical connection to even hypothetical rationales, the *Craigmiles* panel did exactly what the Supreme Court and other federal courts, including the Third Circuit, have done in dozens of successful rational-basis challenges: strike down the unconstitutional law.

Casket Royale also addressed each of seven asserted rationales for requiring casket retailers to be licensed funeral directors, and rejected every one because each lacked a logical connection with the challenged statute.[15] Similarly, *Peachtree* held that Georgia could not rationally assert that caskets are such a danger to public health and consumers that only state-licensed professionals may sell them, when neither statutes nor administrative regulations prescribed any standards for the construction and use of caskets. 1999 WL 33651794, at *1.

[15] *Casket Royale* considered, and rejected, at least seven asserted rationales for forcing casket retailers to become state-licensed funeral directors: (1) speeding up burials; (2) ensuring seller competence; (3) ensuring that the casket sale occurs where the burial will occur; (4) improving customer service; (5) improving product quality; (6) preventing solicitation of bodies; and (7) ensuring accountability of casket sellers. *Casket Royale*, 124 F. Supp. 2d at 438-40.

In sum, *St. Joseph Abbey*, *Craigmiles*, *Casket Royale*, *Peachtree*, and indeed the entire body of rational-basis case law, reflect two principles vital to deciding this case. First, the government does not prevail simply by uttering vague generalities about public health, safety, or welfare. Instead, when the government articulates a legitimate interest, there must be a factually plausible, logical connection between the articulated interest and the challenged law. Second, *St. Joseph Abbey*, *Craigmiles*, *Casket Royale*, and *Peachtree* did not rule for the plaintiffs because of mere disagreement with the policy preferences of the legislature. Instead, the plaintiffs established through an analysis of the statutory scheme and relevant evidence that there was no rational connection between any plausible government interest and a restriction on who may sell a casket. It was this absence of a rational connection between the challenged law and a legitimate government interest—not a policy disagreement—that was fatal to the regulatory scheme in those cases.

III. THE FDL'S PREPARATION-ROOM REQUIREMENT CANNOT SURVIVE GENUINE RATIONAL-BASIS REVIEW.

Applying the principles of rational-basis review described above, the district court correctly struck down multiple irrational and protectionist provisions of the FDL. However, rather than attempting to briefly address each of the challenged provisions, *amicus* IJ instead offers analysis of the Board's preparation-room requirement as an example of how the Board's protectionist regulations fail to

meet the rational-basis standard. *Amicus* IJ is currently litigating a case over Minnesota's similarly pointless preparation-room requirement, and thus has unique expertise to bring to bear on this discussion. *Amicus* IJ's focus on the preparation-room requirement should not be construed as an implicit concession that the other challenged requirements should stand. To the contrary, all of the challenged requirements are unconstitutional, as the district court ruled.

Section 7 of the FDL requires that every funeral home must have a "preparation room, containing instruments and supplies necessary for the preparation and embalming of human bodies." 63 Pa. Stat. Ann. § 479.7. Notably, funeral homes are not required to actually *use* these preparation rooms under the FDL, but merely to have such a room on the premises. *Id*. In addition, embalming is not legally required, nor are funeral homes required to do their own embalming. In sum, the challenged law requires funeral homes to build preparation rooms that they do not want, do not need, and will never use (because there is no requirement to do so). Thus, the rational-basis inquiry asks whether there is any logical connection between requiring entrepreneurs to build a literally useless room and a legitimate government purpose.

The FDL's preparation-room requirement fails on its face because it is self-evidently irrational to force business owners to build useless facilities. Under the record evidence—indeed, even just as a matter of logic—there is no difference

between a useless preparation room and no room at all. In fact, a useless preparation room is *considerably worse* than no room at all because building a superfluous facility channels resources from legitimate private and public objectives, such as providing consumers with the best price or building facilities that actually will be used to provide better service for consumers.

The Board and *amicus* NFDA claim that the fact that many states have some type of preparation-room requirement is evidence the laws are rational. Bd. Br. 46; NFDA Br. 10-11. But the constitutionality of a law is not dependent on how common it is; rather, it is whether the law can survive the appropriate level of judicial scrutiny. Here, there is a logical and factual disconnect between the preparation-room requirement and the purported benefits; the FDL requirement thus fails to survive rational-basis review, regardless of how prevalent similar protectionist laws are in other states.

The Board also offers a handful of hypothetical rationales for this requirement based on the "Gilligan Report," a report prepared by NFDA's counsel, which relies on the unfounded and illogical (given the factual record) assumption that the preparation-room requirement will minimize the distance or time that bodies are transported from the place of death to a preparation room.[16] Bd. Br. 46.

[16] Not surprisingly, given that the author of the "Gilligan Report" is also the author of the NFDA *amicus* brief, that brief also echoes and cites the "Gilligan Report," and claims that the benefits include: "reduc[ing] the shipment of bodies and risk of

Notably, however, none of the rationales offered by the Board address or even recognize the factual evidence established in the trial court demonstrating that these claimed transportation benefits are illusory. The record evidence established that, as even the Board itself admits, many of these preparation rooms go completely unused because funeral directors typically send all bodies to a single location—either one of their own funeral homes, another director's funeral home, or a centralized facility. Op. 88. The Board also admitted that there is a "significant trend" toward centralized embalming facilities in the industry. Op. 88. These critical facts, along with the absence of any requirement that funeral homes embalm bodies or do their own embalming, undermine all of the Board's claims that mandating the existence of a preparation room at every funeral home minimizes the transportation of remains. Plaintiffs correctly point out that unless a person dies at a funeral home, a funeral director must always transport his or her body to a preparation room. Pls.' Br. 41. Indeed, if a person dies at a funeral

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loss or damage, and to reassure families that the remains of their loved ones remain in the custody of the funeral home at all times." NFDA Br. 11. But these claims, taken directly from the "Gilligan Report," in contrast to the abstracted versions of these claims presented in the Board's brief, only serve to highlight how inappropriate it is to cite this report as providing a rational basis for the FDL. Notably, many FDL-required preparation rooms remain totally unused, and thus bodies are transported only to in-use preparation rooms or a centralized facility for embalming, in full compliance with the FDL, and the FDL *does not require* that bodies remain in the custody of the funeral home at all times. *See* Op. 88.

home with an unused preparation room, the body would *still* need to be transported to a funeral home with a preparation room that is in use.

There is also no logical connection between the preparation-room requirement and any government interest in minimizing the transportation of remains. First, it is implausible that the government has any such interest. Transporting remains is perfectly legal and there are no mileage restrictions. Second, remains are routinely transported every day between private homes, hospitals, funeral homes, centralized embalming facilities, and cemeteries. It is not logically conceivable that forcing funeral homes to build unused preparation rooms will have any impact on the amount that bodies are transported, much less that these useless rooms will reduce the transportation of bodies in a manner that could even theoretically improve public health. Thus, because there is no logical connection between unused preparation rooms and minimizing the transportation of remains, Plaintiffs have negated the proffered transportation rationale under the rational-basis test.

The other briefs of *amici* supporting the Board also miss the mark, defending a law that does not exist rather than the actual requirements of the FDL. The PFDA claims that, because of the court's order, "there is currently no requirement that funeral homes even offer, or have access to, prep room services, let alone provide those services in house." PFDA Br. 33. But the FDL never required

funeral homes to provide preparation-room *services* in-house, nor to *ever* even use the on-site preparation room. The PFDA also argues that the requirement is justified because "[o]ne cannot sensibly argue that the activities performed in preparation rooms are not part of the practice of funeral directing." PFDA Br. 32. This too falls flat: the question is not whether embalming or similar activities may be regulated, but whether each and every funeral home must have a preparation room, even if most are never used. Moreover, there is no requirement under the FDL that *any* activities be performed in an on-site preparation room.

The New Jersey State Funeral Directors Association claims that the preparation-room requirement is "a reasonable way to ensure accountability in the industry and to ensure compliance with all laws governing the handling of human remains," *Amicus Curiae* Br. of N.J. Funeral Dirs. Ass'n ("NJFDA Br.") 11, but fails to offer any specific explanation for how or why the requirement furthers these goals. Offering generic, vacuous statements about accountability is insufficient. There must be a demonstrable relationship, rooted in the evidence, between accountability and the requirement that funeral homes build preparation rooms that they do not want, do not need, and will not use.

The NJFDA also relies on hypothetical facts not in evidence, nor offered by the Board itself, that it claims justify the requirement. NJFDA Br. 12. The NJFDA claims that the preparation-room requirement is necessary for funeral

directors to do additional last-minute preparations that may be required just before a viewing. *Id*. This ignores the fact that many wakes or funerals are not held in funeral homes, but in locations far away from any preparation rooms, such as churches, cemeteries, and private homes. In such cases, last-minute "touch-ups" (such as fixing anything dislodged during travel) must be done on-site at the service. Whether or not every funeral home has a preparation room is entirely irrelevant to this process.

The NJFDA also claims that preparation rooms might be needed in emergencies such as severe storms or a mass-fatality event such as a plane crash. NJFDA Br. 12. Not only is this a vague and implausible claim which Plaintiffs have had no opportunity to negate, but it is also an utterly boundless argument.[17] Embalming bodies is not required prior to burial, and there is no reason to believe that embalming bodies would suddenly become a high priority during an emergency mass-casualty event. Moreover, under this theory, any regulation that is currently pointless might nonetheless be justified because, at some unknown

[17] It is improper to credit a factual argument raised for the first time while on appeal. If the Court finds this argument a plausible basis for upholding the law despite *amicus* IJ's arguments to the contrary, it should remand for discovery to give Plaintiffs an opportunity to negate these new claims, as required under rational-basis review. If "the burden is on the one attacking the legislative arrangement to negat[e] every conceivable basis which might support it," *Heller*, 509 U.S. 320-21, then Plaintiffs must have an opportunity to do so in order to accord them due process. As the record currently stands, there is no indication that Pennsylvania's response plans for a mass-fatality event even *consider* making use of presently-unused preparation rooms.

point in the future, government resources might theoretically be stretched beyond finite-but-unspecified limits, and potentially infinite demands might then be made of private parties to fill the gap.[18] It simply cannot be rational to require private parties to build otherwise pointless (and expensive) facilities simply because they might theoretically be commandeered by the government for any number of emergency purposes—overflow morgues, heat relief stations, cold food storage, storm shelters, triage centers, emergency polling stations, Selective Service offices—that may or may not have anything to do with the purported function of the facilities.

Rather than furthering any legitimate government interest, the preparation-room requirement is protectionist in nature, substantially raising the barrier to entry for opening a funeral home (or opening an additional funeral home) by imposing an entirely pointless (and expensive) requirement. As the trial court also noted, the estimated cost of constructing a preparation room ranges from an original lowball estimate of $40–50,000 to a more recent estimate of $193–223,000 at current prices. Op. 85. But at the same time that preparation-room costs have increased,

[18] Imposing a real and substantial financial burden on private parties for entirely speculative reductions in unknown government costs to address extremely rare hypothetical scenarios would also very likely fail under the third prong of rational-basis review: statutory requirements are invalidated where the government's proffered justifications—such as saving public money—are so wildly out of proportion with the cost imposed by the requirements that no rational legislator would accept them. *See supra* note 4.

consumers are increasingly opting for cremation over embalming (including for religious reasons and concerns about the environmental impact of embalming chemicals).[19] Accordingly, the demand for embalming (and thus, the need for preparation rooms where embalming is done) has decreased over time. Furthermore, even the Board admitted that, "eliminating this requirement would 'reduce costs of doing business without substantially impairing protection of the public.'" Op. 85. Given these facts, as well as the Board's admission that "allowing the use of centralized facilities has already become commonplace and would reduce costs in the industry without adversely affecting the public interest," Op. 87, the district court was correct to find that, on these facts, the preparation-room requirement was not rationally related to a legitimate government interest.

CONCLUSION

Despite the contentions of the Board and *amici* funeral-directors associations, the rational-basis test does not absolve courts of their obligation to engage in meaningful judicial review. Blind deference to legislative authority, however arbitrary, is not judging. Federal courts are not a mere rubber stamp for the legislative branch, but a meaningful check on legislative power. The district

[19] *See* National Funeral Directors Assocation, 2010 Selected Funeral Service Information and Statistics, *available at* http://www.nfda.org/surveys-a-reports-businessmangement/doc_download/730-funeral-service-information-and-statistics.html (noting increase in U.S. cremation rate from 24% in 1998 to 36% in 2008, and projecting that 59% of Americans who die in 2025 will be cremated).

court properly applied the rational-basis test to strike down the FDL's irrational and protectionist requirements, such as the preparation-room requirement, and should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of February, 2013.

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules contained in FRAP 32(a)(5)(A) for a brief produced with 14 point Times New Roman, proportional font. This brief contains 6,941 words, not including the Table of Contents and Table of Authorities, permitted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Robert J. McNamara
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I hereby certify on this 21st day of February, 2013, I caused this foregoing Brief of *Amicus Curiae* Institute of Justice to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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