

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

ERNEST HEFFNER, et al.,	:	
Plaintiffs,	:	
	:	
v.	:	No. 4: 08-CV-990
	:	Judge Jones
DONALD MURPHY, et al.,	:	Electronically Filed
Defendants	:	

**BRIEF OF THE PENNSYLVANIA FUNERAL
DIRECTORS ASSOCIATION AS *AMICUS CURIAE***

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INTRODUCTORY COMMENT ON THE STATUS OF THIS CASE

The Pennsylvania Funeral Directors Association (PFDA) submits this Brief addressing the basic governing principles on issues of interest to PFDA.¹

To this point, the Court has accepted Plaintiffs' bare allegations that various rules unduly burden interstate commerce or are arbitrary and capricious or provide no benefits. *See* Motion to Dismiss Opinion at 22-26. Now, Plaintiffs must move from *assertions* to *facts* and, in this context, to *undisputed* facts.

But Plaintiffs' burden is higher yet. Because of the deference owed legislative judgments, Plaintiffs must rule out – reduce to propositions no rational person could possibly accept – each and every proffered beneficial purpose of the provisions under attack. They come nowhere near that mark.

I. PFDA: A RED HERRING IN THE LITIGATION AND IRRELEVANT TO CONSTITUTIONAL ANALYSIS

PFDA, the largest trade association representing participants in the funeral and death industry in Pennsylvania, is the *bete noire* of this litigation. Plaintiffs' Amended Complaint (¶¶ 70-169), Statement of Facts (FF 58-127), and Brief (7-14)

¹ The Court has stated that nothing Plaintiffs seek would “prevent PFDA’s members from continuing to practice funeral directing as they currently do nor legally compel them to engage in any conduct that they do not wish to take.” Slip Op. at 7. PFDA agrees as to certain challenges, *e.g.*, prep room requirement and food service limitations. But other aspects of Plaintiffs' Complaint are quite different, seeking to rewrite the scope of the practice of “funeral directing” and to water down consumer protection provisions. PFDA’s Brief focuses on those later provisions. As a non-party, PFDA could not shape the factual record on issues regarding it, and defendants did not necessarily have an interest in doing so. PFDA respectfully requests that the Court recognize that reality as it evaluates evidence relating to PFDA.

each begins with a vitriolic fusillade aimed at PFDA, as if it, not defendants, was the wrongdoer. The efforts to blacken PFDA either fall into the “so what” category or are mischaracterized and/or selectively presented. Before PFDA delves into the latter, it briefly discusses three points.

1. The attacks on PFDA are irrelevant to every claim. Even were the assertions correct (and undisputed), they would not change the Court’s constitutional analysis nor even be facts relevant to that determination. Just because a Complaint asserts certain facts does not make them relevant to the claims presented. The “PFDA facts” are not.

This is so even as to allegations of “regulatory capture,” whatever that means.² At issue in this matter are *legislative*, not *regulatory*, actions. Plaintiffs seek to invalidate *statutes*, not *regulations*. In fact, PFDA has been adverse to the Board.³ Moreover, it is simplistic and wrong to analyze “regulatory capture” in terms of who is aligned with whom, without considering the merits of the particular issues being contested.

² Prior to 1983, the Board was composed of five funeral directors and the Commissioner of Professional and Occupational Affairs. The Act of Dec. 22, 1983, P.L. 354, No. 88, § 7, added two “public” members and the Director of the Attorney General’s Bureau of Consumer Protection. Funeral directors thus hold a bare 5-4 majority on the Board. In contrast, the Board of Medicine has seven professional members out of 11, the Dental Board ten out of 14; the Veterinary Board six out of nine. See 63 P.S. §§ 422.3(a); 121.1(a), and 485.4(a).

³ See *Cornerstone Family Services, Inc. v. BOPA*, 802 A.2d 37 (Pa. Commw. 2002), *aff’d* 842 A.2d 918 (2004); and *PFDA v. SBFDA*, 494 A.2d 67 (Pa. Commw. 1985), *aff’d*, 511 A.2d 763 (Pa. 1986).

2. PFDA's lobbying actions are constitutionally protected. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). "[T]he whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Noerr*, 365 U.S. at 137. The actor's motives are irrelevant, even if anti-competitive;⁴ "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." *Id.* at 139. Certainly, those activities do not lose their protected status or become support for an asserted legal violation merely because they are successful. Plaintiffs ask the Court to take a substantial jurisprudential leap in using protected actions as grist for rulings of unconstitutionality.

3. PFDA's executive and legislative branch lobbying is indistinguishable from the actions of comparable entities, in Harrisburg, other state capitals, and Washington, DC. PFDA a 501(c)(6) organization, has as its purpose promoting "the common business interest" of its members. *See* IRC Reg. 1.501(c)(6)-1; and *IRC 501(c)(6) Organizations*, <http://www.irs.gov/pub/irs-tege/eotopick03.pdf>

⁴ Plaintiffs suggest repeatedly (*e.g.*, Brief at 1, 12, 57-59, 65, 79) that the FDL provisions are "anti-competitive" and "create[] a state-imposed cartel." Plaintiffs do not, however, assert an anti-trust claim. States have the right to prefer more or less competition, *Parker v. Brown*, 317 US 341 (1943); (1985), and that decision does not raise Due Process concerns.

(501(c)(6). The Amended Complaint, ¶ 3, asserts that “PFDA actively represents its members’ interests in matters involving Pennsylvania’s regulation of funeral directors and funeral services.” PFDA’s response: “darn right.”

To nobody’s surprise, plaintiffs do pretty much the same. The PCCFA aggressively lobbied IRRC on the *Walker* regulations. *See* Defs.’ Exh. 20 (Jewett Dep.) at 70-71 (recounting interactions with Heffner et al) and Defs.’ FF 137.

Unremarkably, ICCFA's website, <http://www.iccfa.com/governmentlegal/advocacy-efforts/iccfa-speaking-you>, advises:

ICCFA does what no cemetery or funeral home can do alone: We speak for the entire industry. Congress looks to us when an expert on our industry is needed.

PFDA has advocated what it views as the requirements of the FDL; often that view has prevailed in Court.⁵ PFDA has aggressively supported mandatory 100% trusting of pre-need funds paid to funeral directors and the judicial rejection of efforts, by Plaintiffs and those allied with them, to evade it.⁶

Also in the “so what” category is the assertion that Board members are, or

⁵ *See* cases in footnote 3 above.

⁶ *PFDA v. SBFD, supra*, establishes the 100% trusting requirement for funds received by funeral directors, although efforts continue to structure transactions to evade the requirements. No party contends that this trusting requirement is unconstitutional.

have been, funeral directors and PFDA members.⁷ Given the high percentage of funeral directors who belong to PFDA, that result is predictable. The same would be true as to any professional society/licensing board when many or most licensees are members. Moreover, it is typically persons who are active in a trade association and knowledgeable on issues concerning that profession who want to be on a regulatory Board.⁸ It is the Governor's responsibility to nominate qualified members and the Senate's to confirm/reject them.

PFDA next corrects errors on certain topics that Plaintiffs discuss, typically at length, in their submissions. Although PFDA believes these matters are irrelevant, Plaintiffs' anti-PFDA efforts are central to their strategy and PFDA will not allow these erroneous assertions to go uncontested.

A. Unichoice and Mr. Leibensperger

Plaintiffs spend far more ink than makes any sense (Statement of Facts, FF 69-74, 93, 708-11, and Brief, p. 8, 11-12, and 172, n. 42) discussing the assertedly errant ways of Unichoice Cooperative, Inc, a for-profit corporation related to

⁷ Plaintiffs make the "dog-bites-man" assertion (FF 85, citing to Benjamin Shimberg, apparently "a recognized authority on occupational licensing") that "licensing boards are typically made up predominantly of members of the licensed professions, often with ties to professional associations." If that fact had any legal significance, all licensing boards should be invalidated. The universality of this practice reflects the broad legislative judgment, that having persons who practice the profession making regulatory decisions is a good thing.

⁸ As an example, the president of the Board of Medicine, Carol Rose, MD, was formerly President of the Medical Society. See http://www.portal.state.pa.us/portal/serveRecordpt/community/medicine/19103/February_2010/698165.

PFDA.⁹ The real facts (which minimally create a genuine dispute) follow.

As preneed business grew, PFDA, in 1998, created within Unichoice the SecurChoice Pre-need Trust. SecureChoice pools funds from funeral directors, PNC Bank serves as fund trustee, and Unichoice handles various back office functions. Both PNC and Unichoice charge for their services.

Unichoice is a cooperative and thus pays dividends to its members, who are any funeral director who uses its services.¹⁰ Dividends, over its 13 years of operations, have exceeded \$1 million, payable pro-rata to all members, who have totaled as high as 350. Pls.' R. 2931-33. The dividends/member, even when totaled over 13 years, are *de minimis*.¹¹ See also <http://www.unichoice.org/about.html>.

Plaintiffs then segue (Brief at 171-72) from Unichoice to the sad tale of Domer Leibensperger, a licensed funeral director. The Board fined Mr. Leibensperger \$89,000 via a Consent Agreement for taking payments, ranging

⁹ Unichoice is often described, inaccurately, as PFDA's "affiliate." PFDA does not own Unichoice nor do they have common ownership/officers, the usual indicia for affiliates.

¹⁰ Plaintiffs assert (FF 93) that Pinkerton, Yeosock, and Fluehr are "also members of ... Unichoice," as if membership were exclusive and meaningful. It is neither.

¹¹ Assuming equal annual distributions, annual dividends would approximate \$75,000. Assuming even 250 members, the average distribution/member/year would be \$300. Much ado about nothing is an apt summary. Any litigant before the Board who believes the receipt of dividends results in bias in a matter, should move to recuse the Board member. Beyond that, the dividends have no relevance to this lawsuit.

from \$150-\$300/contract, from the entity holding preneed dollars, with the payment coming from those funds. Plaintiffs (Brief at 172, n. 42) view these payments as no different “except perhaps ... in the scale of operation” than those Unichoice receives for the services it provides; Plaintiffs all but accuse Ms. Ryan of deliberately misrepresenting Mr. Leibensperger so as to steer his trust monies to Unichoice. Brief at 172, n. 42. Ms. Ryan pointed out the salient differences:

UniChoice ... is a third-party contracted company to do the day-to-day administration of a bundle of trusts from a variety of funeral homes, for which, if [PNC] weren't paying [Unichoice], PNC would be paying someone else to do. The offense for which Mr. Leibensperger was prosecuted and for which he ultimately agreed to pay a fine was for taking, for lack of a better word, a kickback, on monies that were required under the funeral law to be trusted 100 percent. That is not permitted under the funeral director law, and ... Mr. Leibensperger was not doing anything for that.

Pls.' R. 3028, 3044. Mr. Leibensperger's decision to place monies with UniChoice had “absolutely nothing to do with [Ms. Ryan's] representation.” *Id.* at 3044.

Plaintiffs' support for Mr. Leibensperger is in keeping with their aggressive efforts to avoid and evade 100% trusting requirements. It is entirely irrelevant here.

B. The Meeting With Sen. Tomlinson's Staff

Plaintiffs discuss at length (FF 105-126 and Brief at 11-14) a 2005 meeting involving Sen. Tomlinson's chief of staff that has nothing to do with the merits and is intended for no purpose other than to tar PFDA. Kathleen Ryan, PFDA COO, describes the meeting as fitting squarely within the legislature's proper oversight function of administrative agencies.

[PFDA CEO] Mr. Eirkson had ... made concerns known to [Sen. Tomlinson's chief of staff] and the Senator about the lack of response, the failure to recognize complaints being filed with the Department, the timing of those complaints, the action that was taken when the complaints were done.^[12] And as a result, at least of his concerns as well as my understanding [of] concerns of others, a meeting was scheduled in the Senator's office.

I was the first one to arrive at this meeting ... [Sen. Tomlinson's Chief of Staff] made it explicitly clear to me before going into the meeting that no specific cases would be discussed and that is how I conducted myself.

Pls.' R. at 2813, 2888. Plaintiffs expound at length that various persons should not have attended the meeting; the accurate answer is that it depends on what happened at the meeting. But neither PFDA, the defendants nor the prosecutors who attended set the guest list. Pls.' R. 2888.

¹² Apparently the "captive agency" was unaware of its capture.

C. The Model Incorporation Kit

Another irrelevant discourse (FF 674-79, and Brief at 167-68) involves PFDA's "Model Incorporation Kit for Pennsylvania Merchandise Corporations." That discussion ends with Plaintiff Cavanagh's ridiculous assertion (FF 679, Brief at 168), presented as an undisputed fact, that PFDA supports 100% trusting "so that funeral directors will not do [preneed]." How, one wonders, can that "fact" be reconciled with PFDA's promotion of the SecurChoice Pre-Need Trust. If necessary to establish a genuine dispute between Mr. Cavanagh's speculation and the facts, *see* Pls.' R. 2895 (PFDA thinks that trusting is "important for consumers ... [b]ecause it ensures that the money the consumer gives to the funeral director is there for the purpose for which it was deposited.")

Regarding the Model Incorporation Kit, PFDA corrects Plaintiffs' mischaracterizations and explains the impetus for PFDA's action:

A. [B]ecause there were a given number of funeral directors in the Commonwealth that had established these merchandise companies and had been doing business through them for some period of time, Mr. Eirkson was questioned by some of our members to say, well, if they can do it why can't we do it? Mr. Eirkson then went to . . . counsel ... [a]nd ultimately this model[] [in]corporation kit was prepared by someone and made available to our members. ... Not one of our members ever used it, adopted it, took any interest in it.

Pls.' R., 2905-06. The incorporation kit itself is not in the record, thus the Court cannot compare the arrangement described there to what Plaintiffs seek to do.

Without that “best evidence,” the inquiry amounts to nothing.

The law is clear: 100% of all monies provided for the pre-need purchase of services and merchandise, if sold by a licensed funeral director, must be trusted. 63 P.S. § 479.13(c); *PFDA v. SBFD, supra*; *Givnish v. Commw., State Board of Funeral Directors*, 578 A.2d 545 (Pa. Commw. 1990).

Plaintiffs assert (FF 676, Brief at 168) that PFDA “now takes the position that 100% of preneed sales must always be trusted” and that “PFDA’s position [on trusting]... has changed.” Again, PFDA sets the record straight. First, PFDA’s position is not that “100% of preneed sales must always be trusted” but “100 percent trusting *for funeral directors*” (Pls.’ R., 2895), a short hand way of stating that funeral directors can create a merchandising company but that company must be distinct from the funeral establishment and any transaction which it enters into must be clearly separate from transactions subject to the FDL. *See* 49 Pa. Code § 13.224(f). Second, PFDA’s position “has been and is” that “100 percent trusting for funeral directors” is required.” Pls.’ R. at 2895. *See also Id.* at 2916 (“100 percent of the consumer's money needs to be in the account It’s not about building the pre-need book for the funeral home.”)

D. Failure to Amend the FDL

Plaintiffs note early (Brief at 3) and often that the FDL was enacted many years ago and suggest that the 1952 FDL remains in place because PFDA wants it to. Indeed, one of Plaintiffs' major themes is that issues identified in the 1994 Legislative Audit remain unaddressed, and that PFDA is the reason. There is a very different reality.

Shortly after the Audit, State Rep. Buxton introduced a bill, Defs.' Exh. 8, that was supported by PFDA and AARP and that attempted "to address many of the issues ... raised in that report." Pls.' R. 2915. "[T]he legislation was ultimately torpedoed by people from ... PCCFA, some of the Plaintiffs in this case," including lead plaintiff Heffner. *Id.*

Rep. Stetler introduced a second FDL replacement bill in 2002, Defs.' Exh. 84, which PCCFA supported and PFDA opposed.¹³ And there is the recipe for an impasse: "two powerful groups that are opposed to each other," each able to block legislation but not to enact it. Pls.' R. 2926-28. PFDA and PCCA/Plaintiffs share responsibility for the failure to replace the FDL. The same impasse has impacted promulgation of "*Walker*" regulations.¹⁴

¹³ PFDA opposed it because, *inter alia*, it contained provisions that immunized funeral directors' prior illegal conduct. Pls.' Record 2924.

¹⁴ Defendants' FF 140-43 discuss how plaintiffs thwarted what defendants thought was an agreement on "*Walker* regulations."

II. STATE REGULATION OF PROFESSIONS AND OCCUPATIONS

A funeral, and its memories, may provide great comfort, or discomfort, in the short and long term. Learning at a time of need that pre-need arrangements are not as promised worsens an already difficult time. Even more so than weddings, there is no redo. As the public health aspects of funeral directing have receded somewhat, the consumer protection aspects have increased. It is thus important to view this challenge within its context – state regulation of occupations and professions – and recognize that provisions quite analogous to those challenged are a common part of the tools that states use to regulate professions generally.

1. State regulation of professions and occupations is a classic exercise of its police power. In *Dent v. West Virginia*, 129 U.S. 114, 122 (1889), the Supreme Court rejected a challenge to West Virginia’s Medical Practice Act, recognizing:

[t]he power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud. ... [I]t has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely; their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects... with which such pursuits have to deal.

Pennsylvania’s regulation of professions generally began in the early 20th

century.¹⁵ Interestingly, regulation of funeral directors began in 1895, *see* Act of June 7, 1895, P.L. 167.

State regulation of occupations and professions follows a common model, essentially as described in *Dent v. West Virginia*:

- ❖ A profession/occupation is defined, *i.e.*, given a “scope of practice”;
- ❖ Persons acting within that scope of practice must obtain a license and only licensees can practice the profession;
- ❖ Licensees must meet certain standards; and
- ❖ A Board with professional member representation is established.

As examples, both the Medical Practice Act and the Crane Operator Licensure Act define the regulated activity (63 P.S. § 422.2, defining “practice of medicine and surgery”; and § 2400.102, defining “crane”); require licensure and prohibit unauthorized/unlicensed practice (§ 422.10 and § 2400.501); establish licensure standards (§ 422.28 and § 2400.502); and have Boards with licensee representatives (§ 422.3 and § 2400.301).

Plaintiffs’ attacks strike at the heart of regulation, at the legislatively defined scope of practice. Thus, the ICCFA complains (Brief at 6) that “[a]s Plaintiffs have pointed out, Pennsylvania law ... holds that, unless a Pennsylvania funeral director receives compensation, one cannot die expecting to have his remains

¹⁵ Act of July 12, 1919, P.L. 933 (architects); Act of June 4, 1915, P.L. 809 (nurses); Act of March 30, 1917, P.L. 21 (optometrists); Act of June 3, 1911, P.L. 639 (physicians); Act of May 23, 1923, P.L. 351, No. 224 (dentists); and Act of May 25, 1921, P.L. 1131, No. 422 (engineers).

disposed.” And so it is that a person cannot have surgery, an X-ray or even a prescription without a physician’s involvement; or a tooth cleaned without a dentist’s. A state decision to regulate a profession reflects a considered judgment that activity within the scope of practice is important enough that only persons with certain credentials, and subject to state oversight, may perform it.

2. State regulation of professions is inherently limited to the state’s borders. First, a person, even if licensed elsewhere, must obtain a Pennsylvania license to practice here; there is no 50 state license and little in the way of reciprocal licensing. Licensing standards commonly vary somewhat from state-to-state, and persons may qualify for licensure in some, but not all, states.¹⁶

Second, a state’s authority extends only to its borders, relating (absent unusual circumstances) only to activity within its borders.¹⁷ Pennsylvania has no interest in the qualifications of a New Jersey dentist seeing Pennsylvania residents

¹⁶ For example, Pennsylvania allows “licensure by endorsement” of a physician “who does not meet the standard license requirements” but “has achieved cumulative qualifications which are ...equivalent ...” 49 Pa. Code § 17.2. New Jersey does not. Hospital health systems will have physicians licensed in Pennsylvania who cannot qualify in New Jersey.

¹⁷ Technology has made it possible to practice some forms of medicine, such as reading radiology scans, from afar, *i.e.*, telemedicine. In general, Pennsylvania requires a physician reading x-rays of a Pennsylvania patient who is resident in Pennsylvania (as opposed to being hospitalized in another state) to have a Pennsylvania license. This insures that Pennsylvania residents are treated by physicians who have satisfied what Pennsylvania deems the relevant qualifications. There is no such thing as tele-funeral directing.

in New Jersey and no police power authority to regulate that transaction.¹⁸ But, actually using a Pennsylvania license almost always requires a Pennsylvania presence. A New Jersey dentist gains no practical benefit from a Pennsylvania license without establishing a physical presence here. Pennsylvania's grant of licensure affirmatively welcomes a licensee to Pennsylvania.

3. A state's licensing standards apply equally to all applicants, with limited exceptions.¹⁹ Applicants from other states are routinely granted Pennsylvania licensure. But, and this is the central point, the standards do not vary based on the applicant's state, or country, of origin.

4. Licensing laws commonly restrict the business structure under which professionals may practice, generally requiring that licensed professionals control any business structure. Psychologists may incorporate only with other licensed psychologists or other specified licensed professionals, 49 Pa. Code § 41.26. Architects may practice as partnerships, professional corporations, or business corporations; Board regulations prescribe the percentage of owners who must be licensees. § 9.162. Other professions whose business organization is regulated

¹⁸ It is a due process violation for a state to seek to export its rules beyond its borders.

¹⁹ Licensing rules typically change as standards are upgraded; grandfathering provisions commonly protect earlier licensees. *See, e.g.*, 49 Pa. Code §§ 17.1(a)(4)(i-iii) (two years of post-medical school training required for post-June 30, 1987 graduates, one year for earlier graduates); § 41.2 (enrollees in Ph.D. psychology program prior to March 23, 1991 evaluated under old regulations).

include accountants (§ 11.35); chiropractors (§ 5.32); landscape architects (§ 15.36); optometrists (§ 23.34); osteopaths (§ 25.214); podiatrists (§ 29.27); speech-language and hearing specialists (§45.201 *et seq.*); and social workers (§ 47.21 *et seq.*). The Liquor Code is replete with ownership restrictions. *See, e.g.*, 47 P.S. §§ 4-411 (“Interlocking business prohibited”); 4-438(b-c) (prohibiting ownership of more than one “D” or “ID” license or holding more than one class of license).

These ownership rules, and the requirement of professional control, reflect the general concern that business interests will override professional judgment. *Neill v. Gimbel Bros.*, 199 A. 178 (Pa. 1938), articulated this view in prohibiting the “corporate practice of medicine.” The Supreme Court there held that a department store could neither hire optometrists nor otherwise control their provision of patient care. The central concern, *Id.* at 181, was:

[T]he learned professions ... are characterized by the need of unusual learning, the existence of confidential relations, the adherence to a standard of ethics higher than that of the market place ... The rule is generally recognized that a licensed practitioner of a profession may not lawfully practice his profession among the public as the servant of an unlicensed person or a corporation; and that, if he does so, the unlicensed person or corporation employing him is guilty of practicing that profession without a license. *A corporation as such cannot possess the personal qualities required of a practitioner of a profession. Its servants, though professionally trained and duly licensed to practice, owe their primary allegiance and obedience to their employer rather than to the clients or patients of their employer.* The [Corporate Practice of Medicine] rule ... recognizes the necessity of immediate and

unbroken relationship between a professional man and those who engage his services.

(emphasis supplied). *See also North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 166-67 (1973) (upholding ban on corporate ownership, and quoting with approval Justice Holmes' dissenting opinion in *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 114-15 (1928) that "[a] standing criticism of the use of corporations in business is that it causes such businesses to be owned by people who do not know anything about it.") The Foreword to Purdons, Title 15 (addressing "Business Associations") states that "[d]uring the middle part of the 20th century it was generally understood to be unlawful for many professions to practice in corporate form."²⁰ *Id.* at LXXXV (Supp. 1995).

The restrictions on how professionals can organize themselves dovetail with these concerns. Pennsylvania's first "professional corporation" statute, Act of Aug. 7, 1961, P.L. 941, No. 416) allowed a Professional Association ("PA") to render only the professional services of the professional organizing it and required all PA members to be licensed in that profession. Subsequent laws, the Act of July

²⁰ Some Plaintiffs agree. *See* P. Connell Dep. at 114-16:

We still feel strongly that the independent funeral home has developed better relationships with the community. ... We're not answering to people in Houston [SCI's HQ's] or Canada [Loewen's] or anywhere else. We're answering to ourselves. ... We can internally control our business without a large corporate world telling us you have quotas to meet

9, 1970, P.L. 461, No. 160, and the Professional Association Act of 1988, 15 Pa.C.S.A. § 2901 *et seq.*, hew to these principles. Pennsylvania still requires that professional corporations, in general, provide only services in a particular profession and that all shareholders be licensees. 15 Pa.C.S.A. §§ 2903, 2922-23. Quite interestingly, § 2923(b-c) establish two additional rules: (1) shares may pass to the estate of a deceased shareholder for a reasonable period of time tied to the administration of the estate;²¹ and (2) a person licensed in another state must obtain Pennsylvania licensure to hold shares in a Pennsylvania PC.

5. When licensure involves a physical structure/location, the state commonly requires that the site have on hand certain things deemed essential to the proper conduct of the business. *See* 49 Pa. Code § 27.14-.17, pharmacies; § 3.52-.54, barber shops, and § 20.51-.54, massage therapy locations. The Department of Health imposes substantial analogous restrictions in licensing hospitals (*see, e.g.*, 28 Pa. Code § 119.43 “Basic facilities for outpatient surgery”); blood banks (§ 30.40); and ambulance services (§1005.10(c)(1) (“ BLS and ALS vehicles shall carry medical equipment and supplies as published by the Department in the *Pennsylvania Bulletin*”) More generally, the Health Department commonly

²¹ We discuss this provision later when we discuss the FDL’s “widow/estate” license.

identifies the services that licensed facilities must provide.²²

Facility licensure leads invariably to inspections, with deficiencies and responsive plans of correction. The Health Department inspects hospitals (28 Pa. Code §§ 101.61-.69, .81) and ambulatory surgical facilities, including on an unannounced basis (§ 551.51-.56, .71); nursing homes (35 P.S. §§ 448.813, 448.806d); blood banks (28 Pa. Code § 30.11); BLS and ALS Ground Ambulance Services, (§ 1005.3); camps (§ 17.11); and free standing treatment facilities (§ 709.15.) The purpose of inspections is as expected: to ascertain compliance with regulatory standards and, more broadly, to advance public health and safety.²³

Inspections sometimes respond to a complaint or concern, but most are done simply to determine *if* a facility is operating in compliance with law. These routine inspections find matters requiring correction,²⁴ and likewise serve a prophylactic purpose. One wonders why plaintiffs oppose inspections, including having taken

²² As an example, DOH hospital licensing regulations require a hospital to provide pharmaceutical services under the direction of a licensed pharmacist trained in the specialized functions of hospital pharmacy who is responsible to the hospital CEO or designee. 28 Pa. Code § 113.1-.3.

²³ The grand jury report concerning a Philadelphia area abortion clinic, the Women's Medical Society reveals the consequences of *not* inspecting facilities *See* <http://www.phila.gov/districtattorney/PDFsGrandJuryWomensMedical.pdf>. A Report heading (at 137) summarizes: "the Health Department conducted sporadic, inadequate inspections for 13 years, and then none at all between 1993 and 2010."

²⁴ The Department of Health website displays the results of surveys of nursing facilities. *See, e.g.*, <http://app2.health.state.pa.us/commonpoc/content/publicweb/nhinformation2.asp?COUNTY=Dauphin> (information on Dauphin County facilities).

steps, as detailed in Defs.’ FF 629, n. 26, to delay them entirely pending consultation with legal counsel. Anyone who professes to be uncertain as to an inspection’s purpose is creating a problem where none exists.

With this background, we turn to the FDL.

III. THE PENNSYLVANIA FUNERAL DIRECTORS LAW

The FDL fits the typical regulatory model. It defines the practice of funeral directing (63 P.S. §§ 479.2, .15); requires licensure, establishes required qualifications, and prohibits unlicensed persons from practice (§§ 479.3, .13, .15); establishes a Board (§ 479.19); empowers the Board to approve “funeral establishments” (§ 479.7); imposes basic rules on ownership and operation (§§ 479.7-.8); and authorizes inspections (§ 479.16(b)).²⁵

A. Plaintiffs’ Scope of Practice Challenge: Regulating the Direct Sale of Cremation Services

Plaintiffs challenge the FDL’s regulation of the direct sale of cremation services to consumers even though that act indisputably lies within the regulated scope of practice. *See Cornerstone, supra*, and *Pre-Need Family Services Eastern*

²⁵ Pennsylvania appellate courts have construed many FDL provisions; many of the rules Plaintiffs contest arose from those cases. Those constructions are not open to review here, absent findings that the Supreme Court would rule differently (including in cases in which it has already ruled). Additionally, the 11th Amendment prohibits this Court from finding that state officials have violated state law. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). A state constitutional provision is a “state law” for those purposes. Plaintiffs asserts violations of Pa. Const., Article I, § 1 in Counts I-III, V-VIII, and XI-XII, and of Article I, § 8, in Count I.

Region, v. BOPA, 904 A.2d 996 (Pa. Commw. 2006), *appeal denied* 2007 Pa. LEXIS 447 (Pa. 2007). That conclusion is not open to question here.²⁶

Both *Cornerstone* and *Pre-Need* address the sale of cremation services along with certain relatively minor ancillary services.²⁷ Both *Cornerstone* and *Pre-Need* argued that a license was not necessary “unless ritual/traditional life commemoration services or embalming services are offered” and that the FDL applies only when an individual “engage[s] in all of the activities listed in the definition of funeral director.” *Pre-Need*, 904 A.2d at 1002. Commonwealth Court disagreed: “[b]ecause *Cornerstone* is in the business of disposing of human bodies, supervising burial, transporting, and selling goods and services related to cremation, it is by definition engaged in funeral directing and therefore subject to the Law.” 802 A.2d at 40-41. It continued: “While unlicensed individuals may

²⁶ Plaintiffs state repeatedly (*see* FF 572-587, Brief at 140-44) that other agencies and statutes regulate cremation services, as if to suggest that the Board and the FDL do not. *Cornerstone* and *Pre-Need* reject that argument. The argument is no sounder than contending that “wage and hour” rules do not apply to a physician office because the Medical Practice Act does (or vice versa).

²⁷ *Pre-Need*’s “direct cremation package” included (1) removal of the body; (2) review and completion of paperwork to complete arrangements by a cremation specialist, who also will be in contact with the next of kin; (3) storage of the body; (4) placement of the body in a nonpermanent container for cremation; (5) cremation itself; (6) placement of the cremated remains into a nonpermanent container or in burial urn or a non-ceremonial scattering of the remains; (7) five death certificates and completion of all state and federal forms; (8) assistance in notifying various agencies for benefits; (9) assistance with newspaper obituary; (10) attempt to return the remains to a church, cemetery or private memorial service; and (11) arrange the return of the remains. 904 A.2d. at 999. *Cornerstone*’s services included “transportation, cremation, internment and other arrangements for disposition, such as using an urn.” *Id.* at 1001.

sell merchandise under the Future Interment Law, they may not step into the shoes of a funeral director and offer to counsel families in the selection of goods and services which is governed by the Funeral Law.” *Id.* at 41.

A funeral director is one engaged “in the care and disposition of the human dead ... or the supervising of burial, transportation or disposal of deceased human bodies” or who “makes arrangement for funeral service.” 63 P.S. § 479.2

Cornerstone and Pre-Need easily fit within that definition. The FDL exception for licensing for crematory employees they sought to invoke, 63 P.S. § 479.13(a)(1), applies to those “whose duties extend no further” than performing cremation, pure and simple. Cornerstone’s and Pre-Need’s duties extended further.

Plaintiffs argue (FF 588, Brief at 143) that “[t]he Board historically took the position that cremation is not funeral directing and that ... [crematories] are beyond the Board’s jurisdiction.” Current case law, not past positions, controls. In any event, the assertion is incorrect (minimally, a disputed fact).²⁸

At bottom Pennsylvania has determined that a qualified professional, not an unlicensed person who operates a specialized type of furnace, should interact with consumers in making pre-need and at-need arrangements, even when the consumer

²⁸ As support, Plaintiffs reference (Brief at 143, n. 31 and FF 587-93) a 1998 Board meeting in which various persons assertedly stated that the Board had “no jurisdiction” over crematories. In fact, the Board *has* no jurisdiction over crematories, unless they enter into the scope of practice of “funeral directing.” Likewise, the Board of Medicine has no jurisdiction over a lay person, until he holds himself out as a licensed physician or otherwise practices medicine.

is interested in cremation. Pennsylvania may someday license “direct cremation sellers” and impose qualifications that insure those licensees can competently handle a broad range of issues. To date, however, Pennsylvania has chosen to have a licensed funeral director perform those tasks.²⁹

Plaintiffs’ argument on this point becomes either: (1) that Pennsylvania *may not* regulate the sale of cremation services; or (b) that it *must* regulate the sale but *only* via a distinct “cremation sellers license.” Neither alternative makes any constitutional sense, and the “may not/must” nature of the argument illustrates its flaws. It is hard to imagine how a Court could rewrite the scope of practice of “funeral directing” to exclude cremation services, or on what basis it could do so.

Defining scope of practice, e.g., what is regulated activity and who can do what, is at the heart of a state’s regulatory scheme. Only doctors and not nurses can diagnose and prescribe (*see* 63 P.S. § 212(1), definition of the “Practice of Professional Nursing”); and only licensed psychologists (not unlicensed psychologists with advanced degrees) can perform “measuring and testing of

²⁹ ICCFA argues (Brief at 7-8) that cemeteries and crematories “are banned from communicating about ... their services in Pennsylvania, unless a Pennsylvania funeral director is paid as a middleman.” Nothing prohibits advertising that promotes the benefits of cremation, akin to drug manufacturers’ advertising that builds product demand even though the manufacturer cannot sell it to the viewer. But cemeteries/crematories cannot advertise what they cannot lawfully do, anymore than a nurse can advertise her ability to provide surgical services. *See Pre-Need*, 904 A.2d at 1003 (protected commercial speech must concern lawful activity.)

personality, intelligence, aptitudes, and emotions,” 63 P.S. § 1202 (definition of “Practice of psychology.”)

Pennsylvania’s hearing aids sales regulation parallels the “direct sale of cremation.” In recent years, some businesses have sought to sell hearing aids on the internet, without examination or consultation with a licensed professional. *See Internet and OTC Hearing Aid Purchase Options*, accessible at http://www.audiology.org/Documents/AN2009Handouts/FS503_Eagon.pdf; <http://www.generalhearing.com/readywearcfm>. Pennsylvania’s “Hearing Aid Sales Registration Law” prohibits that business model, instead requiring the involvement of a licensed professional, 35 P.S. § 6700-102(a); prescribing equipment a hearing aid fitter must have at the place of business, § 6700-505; and prohibiting the sale unless the fitter or a referring audiologist or physician has performed certain tests, *Id.* Those wishing to “sell direct” would characterize those provisions as anti-competitive, protectionist, and unnecessary. PFDA views it as an appropriate police power measure, attempting to protect hearing aids purchasers. *See Pa. Hearing Aid Dealers Assoc. v. Commw.*, 417 A.2d 1340, 1343 (Pa. Commw. 1980), *aff’d* 430 A.2d 1150 (Pa. 1981) (“purpose of the [registration] examination is to insure that the fitter has a thorough knowledge of eight areas related to ear testing and fitting.”) The legislative judgment as to the scope of practice of funeral directing prevails under any appropriate standard of review.

B. Plaintiffs' Ownership Challenge: Licensure of Business Corporations

Plaintiffs direct substantial firepower to the FDL's ownership/licensure ban on standard business corporations, focusing on inconsistencies that result from ownership arrangements that Pennsylvania permits (pre-1935 licenses, widow/estate licenses, and RBCs) and prohibits (business corporations).

Recognizing the flaws in that argument requires understanding the legislative history of these provisions and the proper analysis of "exceptions."

1. The **pre-1935 licenses** exist because the Commonwealth once allowed corporate ownership, changed its position, and grandfathered in existing licensees. In 1931, Pennsylvania banned corporations from holding funeral home licenses subject to exceptions for corporations "heretofore licensed" or in which all the officers were "duly licensed undertakers actively engaged in the conduct of the business of said corporation," (essentially a PC). *See* Act of June 10, 1931, P.L. 485, § 13. The Act of June 21, 1935, P.L. 398, removed the second exception, which did not reappear until the 1970's. *See Rule v. Price*, 185 A. 851 (Pa. 1936); *E. Nugent Funeral Home, Inc v. Beamish*, 173 A. 177 (Pa. 1934). *Nugent* strongly suggested that not honoring prior-issued corporate licenses would violate a licensees' constitutional rights.

The 1935 Act thus announced the desired Legislative policy subject to a judicially-influenced grandfathering exception. A substantive due process claim

cannot be premised on comparisons arising from constitutionally-required government action. But even if not constitutionally required, allowing pre-1935 licensees to continue operating was reasonable and does not seriously undercut the underlying rule. Under plaintiffs' contrary approach, a state acts unconstitutionally whenever its regulatory policy changes and it grandfathers prior licensees. There are 76 pre-1935 licenses (including 21 inactive ones), which equal 4.5% (total licenses) or 3.2% (active only) of licenses.

2. The **widow/estate** exception in § 8(a), along with its counterpart in the Professional Associations Law, stands on a different footing.³⁰ The policy *per se* first appears in the 1931 Act, § 12(f) (excluding from licensure the “[e]state of deceased licensee, when the business is carried on under the supervision of a licensed undertaker, for such period and under such rules and regulations as may be prescribed by the board.”)³¹ Interestingly, the 1895 enactment contained the substance of this provision without its text. *See* Atty. Gen. Opinion, 17 CC 106 (1885), (“widow can carry on the business of her deceased husband but she must

³⁰ This exception is not limited to widows but applies quite expressly to estates generally. The assertion of unmarried plaintiffs that they are deterred from owning a home because of inheritance issues is based on nothing real.

³¹ The 1935 Act, § 12, then modified this provision to limit the license to three years for estates and for widows “as long as they remain unmarried.”

employ some competent person to do the practical work as an undertaker, and that person must be licensed by your board.”)³²

The widow/estate license resulted from a clear policy decision, not a grandfathered exception. It allowed a widow a measure of financial security by allowing her to continue to receive income from her deceased husband’s business; to continue to live in the home; and to profit from the sale of the business her husband had built. Similarly, the estate provision allowed a funeral director to engage in estate planning as to his most valuable business and personal asset. Recognizing that neither the widow nor the estate administrator was likely a qualified funeral director, the statute required one be hired.

This exception is rational; addressing legitimate legislative concerns that, as the Professional Associations Act shows, extend to professional associations in general. The exception does some incidental but unavoidable damage to the principle that only licensed funeral directors own funeral homes. There are currently 26 widow licenses, approximately 1.5% of all licenses.

Plaintiffs describe the widow/estate provisions as the “best illustrat[ion]” of the FDL’s “protectionism.” Harrington Report at ¶ 46, Pls. Record 333. More accurately, the provision has nothing to do with “*protectionism*” and everything to

³² The 1895 Act, § 8, provided that licenses were not transferrable. It is a reasonable surmise in 2011 that the inquiry concerned a widow’s right to carry on the business.

do with *protecting widows* from the financial consequences of their husbands' death. That this is the "best illustrat[ion]" says a great deal.

3. **Professional Corporations and RBCs** both reflect the trend of professionals conducting business as a corporation. RBCs, under § 479.8(b), require involvement of a licensed professional and have other limitations that distinguish them from a general business corporation. They differ slightly from the PC because not all shareholders need to be licensed professionals. Instead, the RBC incorporates a fuller estate planning aspect, allowing shareholders to include the funeral director's spouse, children, grandchildren, or a trustee. This "liberalization" reflects several unique aspects of the funeral home business: the common continuation of the business from generation to generation; and the funeral home's dual use as the family's residence. In reality, the RBC resembles the estate/widow license, with the difference that it allows two generations (children and grandchildren) to be shareholders.³³

The RBC paradigm was a funeral director who owned "one and a branch" and had some or all of his spouse, children, and grandchildren as shareholders. Over time, that model has been largely ignored. Parties have taken advantage of

³³ Plaintiffs suggest that the RBC structure allows spouses, children and grandchildren to run the funeral home. The thought of a toddler owning all shares of stock is cute, but the notion that s/he would run the shop, or even that a trustee would, is incorrect. The RBC must have a licensed, dedicated funeral director in charge. 63 P.S. § 479.8(b)(6); 49 Pa. Code § 13.144.

poor drafting to broaden the ownership of RBCs and, in so doing, provide grist for their constitutional claims. In this respect, the FDL prohibits a funeral director from “apply[ing]” for more than one RBC, or from owning any interest in another funeral establishment; there is, however, no comparable explicit limitation as to the funeral director’s spouse or family members. Additionally, § 479.8(b)(4) provides that RBC shareholders must be “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.” (Emphasis supplied). Relying on these provisions, some family members, such as Mrs. Heffner, have acquired stock in multiple RBCs.³⁴ No court decision finds this practice legal.³⁵

It seems quite unlikely that the legislature contemplated the “Mrs. Heffner model.” Ironically, Plaintiffs, having substantially produced this unanticipated result – Gary James, Plaintiffs’ co-counsel, has served as counsel in many of these transactions – point (FF 51) to its illogic and decry it as “evidence of the protectionist purpose and effect of the law.” What Plaintiffs cannot assert is that this resulted from purposeful legislative action, as opposed to an unintended

³⁴ In general, Plaintiffs construe these provisions as: (a) not requiring any funeral director ownership of an RBC; and (b) allowing a sale of RBC shares to any “member[] of the immediate family of a licensed funeral director,” whether or not that funeral director owns any shares in that RBC.

³⁵ Were the practice invalidated, PFDA would support grandfathering those licensed under the current interpretation.

consequence of legislative drafting, aided and abetted by Plaintiffs' own actions. The former is required to support claims of protectionism and discrimination.

Statutory exceptions tautologically conflict with the statutory rule, addressing situations in which the rule's application is unfair or there is a supervening policy objective. Inquiring whether the exception is consistent with the statute's policies has only one answer – “no” –but it poses the wrong question. The court must evaluate an exception on its own terms, *i.e.*, does it fairly further a legitimate policy concern. If it does, the exception is, in general, proper.

Exceptions are relevant only when a statute is so riddled with them that the rule essentially no longer exists. Even then, the issue is not equal protection (a comparison of similarly situated groups) but substantive due process (fair basis for determinations). Plaintiffs' focus on the small number of pre-1935, widow/estate and RBC licenses proceeds fails because it uses an improper analysis.

The widow/estate/RBC provisions serve understandable and non-protectionist goals. The pre-1935 licenses arise from a legally-influenced grandfathering provision. Those exceptions do not eviscerate the rule prohibiting non-licensees and business corporations from owning funeral homes. At bottom, Plaintiffs' challenge is that Pennsylvania requires a licensee – someone who necessarily practices within Pennsylvania – to form a professional

corporation/RBC, and then allows narrow exceptions at the licensee's death. That requirement is both rational and constitutional³⁶

IV. BRIEF COMMENTARY ON PLAINTIFFS' COMMERCE CLAUSE AND DUE PROCESS CLAIMS

A. Commerce Clause

This is a Substantive Due Process case masquerading as a Commerce Clause case. The plaintiffs are overwhelmingly in-staters.³⁷ Their objections, regardless of state, are fundamentally identical. *Where* a plaintiff or applicant lives is irrelevant both to their objections and to their eligibility to own a funeral home or practice as a funeral director. An Alaska resident may own a Pennsylvania funeral home provided he otherwise satisfies the applicable criteria.

Holding a Pennsylvania license requires that the licensee do business in Pennsylvania. One cannot practice funeral directing *in* Pennsylvania without being *in* Pennsylvania. It is difficult to fit that paradigm into a Commerce Clause challenge. Not only is a New Jersey resident dentist not prevented from doing

³⁶ Plaintiffs assert (Brief at 49) that “[i]n practice, Pennsylvania funeral directors ... may own an unlimited number of funeral homes.” That assertion is incorrect unless “in practice” means that *Mrs. Heffner* appoints *Mr. Heffner* to run the multiple funeral homes she owns and thus circumvents the “one and a branch” limitation. No court has addressed that arrangement.

³⁷ Only Plaintiff Wellman (a Louisiana corporation owned by plaintiff Lomison, a Pennsylvania resident and non-licensee) is an out-of-stater. No plaintiff contends the FDL impairs his ability to do business *outside* the Commonwealth. These facts impose “case or controversy” limitations. The Court must evaluate the Commerce Clause claim only through the facts and contentions regarding Wellman.

business in Pennsylvania but, by licensure, Pennsylvania affirmatively invites him to do so, subject to the generally applicable rules.

This leads to the flaw in Plaintiffs' central Commerce Clause argument – that the FDL prohibits the clustering of commonly-owned funeral homes. *See* Brief at 53 (“FDL discriminates against out-of-state interests ... by negating the primary competitive advantage of out-of-state firms: clustering.”) But the (in)ability to cluster is neither unique to out-of-state interests nor even related to their out-of-state status. Plaintiffs agree (Brief at 53), asserting that “funeral firms,” not only out-of-staters, can benefit from clustering. In fact, some of the Pennsylvania resident plaintiffs want to cluster funeral homes but the same provisions apply to them. Of course, there are ways to cluster homes under the FDL, as Mr. and Mrs. Heffner have shown.

Yet a further flaw is that the “who can own” limitation is irrelevant to the clustering issue on which the argument rests. No matter who owns a funeral home, the “one and a branch” rule limits clustering and it applies to all licensees. Plaintiffs assert (Brief at 54-55) that “[o]ne cannot cluster funeral homes if one cannot own them.” More accurately, “[o]ne cannot cluster funeral homes regardless of who owns them.”

Plaintiffs also contend (at 147) that the FDL prohibits “the sale of cremation by anyone but in-state funeral homes” and is thus analogous to the “flow control”

ordinance in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). But nothing in the FDL prevents a Pennsylvanian from taking a deceased family member to a state where direct purchase is permitted and purchasing cremation services. Equally erroneous is the ICCFA’s argument (at 6-7) that the FDL “deprives citizens of their right to have access to the markets of other States on equal terms,” citing *Grantholm v. Heald*, 544 U.S. 460, 473 (2005).³⁸ A statute prohibiting bodies of deceased persons from crossing state lines for burial or cremation would be clearly illegal. The FDL does not do so.

Two final points. First, states generally “retain authority under their general police powers to regulate matters of ‘legitimate local concern, “even though interstate commerce may be affected.”” *Lewis v. BT Inv. Managers*, 447 U.S. 27, 36 (1980). Second, the Commerce Clause protects the interstate market in general, not particular participants or their “chosen way of doing business.” *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978)).

B. Due Process

Plaintiffs challenge economic regulation that prevents them from operating as they wish. There was a time, typified by *Lochner v. New York*, 198 U.S. 45, 56

³⁸ In *Grantholm*, Michigan and New York regulated the sale and importation of wine in a manner that explicitly prohibited out of state sellers from direct-sale business and thus deprived citizens of access to those sellers. Pennsylvania’s ban on internet sales of hearing aids is analogous.

(1905), when comparable claims prevailed on the basis that state limitations “interfer[ed] with the right of the individual to his personal liberty.”

Nebbia v. New York 291 U.S. 502 (1934) repudiated that approach, upholding regulation that was no less an infringement on individual liberty:

So far as the requirement of due process is concerned ... a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied..... ‘With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

Id. at 538. Shortly thereafter, the famous footnote 4 in *United States v. Carolene Products*, 304 U.S. 144, 152, n. 4 (1938), affirmed that principle while establishing that some circumstances – now recognized as “fundamental rights/suspect classes” – were appropriately “subjected to more exacting judicial scrutiny.” But “regulatory legislation affecting ordinary commercial transactions,” the Court emphasized, “is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the

assumption that it rests upon some rational basis within the knowledge and experience of the legislators.” *Id.* at 152. That standard still governs.

Defendants’ Brief discusses in detail the benefits of Pennsylvania’s regulatory scheme. Space limitations prevent PFDA from expounding on them. But the broad outlines of Pennsylvania’s regulatory approach – that a licensed professional should be involved in acts within the regulated scope of practice; that the involvement of business corporations should be limited; and that pre-need funds should be safeguarded – all materially benefit Pennsylvania consumers. Ms. Ryan summed it up: funeral directors under this model:

tend to have longstanding relationships in the community. They’re involved in their community. They know the families in their community. They have an investment and they’re not one to just get up and leave and not serve the people that they live among and interact with on a day-to-day basis.

Pls.’ R. 2886-87. Those are all good things.

CONCLUSION

For these many reasons, PFDA respectfully requests that the Court grant Defendants’ Motion and deny Plaintiffs’ Motion for Summary Judgment.

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

ERNEST HEFFNER, et al.,	:	
Plaintiffs,	:	
	:	
v.	:	No. 4: 08-CV-990
	:	Judge Jones
DONALD MURPHY, et al.,	:	Electronically Filed
Defendants	:	

CERTIFICATE OF SERVICE

I hereby certify that that I electronically filed this document on October 19, 2011, and that counsel listed below will receive a copy via the Court’s ECF system:

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