No. 14-53

In the Supreme Court of the United States

ERNEST F. HEFFNER, *ET AL.*,
Petitioners

v.

DONALD J. MURPHY, *ET AL.*,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

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

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The Court of Appeals' opinion is reported at 745 F.3d 56 and is reprinted in the appendix to the petition (Pet. App.) at 1. The District Court's opinion from which the appeal was taken is not reported and is not reprinted in the petition's appendix, but is reprinted in the appendix to this brief (Br. Opp. App.). An earlier opinion of the District Court is reported at 866 F.Supp.2d 358 and is reprinted at Pet. App. 84.

STATEMENT OF THE CASE

Petitioners' overtly argumentative statement of the case provides the Court with little information about what the courts below actually decided. We offer the following corrective. *See* Sup. Ct. R. 15.2.

1. Funeral directing in Pennsylvania is governed by the Funeral Director Law, Pa. Stat. Ann., tit. 63, § 479.1 *et seq.* (Purdon) ("FDL"), administered by the Pennsylvania Board of Funeral Directors. *Id.*, §§ 479.16(a), § 479.19. As relevant to this petition, the FDL provides as follows:

A license is required to engage in funeral directing, *id.*, § 479.13(a); and the FDL provides for the licensing of several kinds of entities:

- Individuals and partnerships. When a licensee dies, a license may be issued to the licensee's estate (for three years) or to the surviving spouse (until remarried), provided that the practice is supervised by a full-time licensed funeral director. *Id.*, § 479.8(a).
- Restricted corporations. A restricted corporation may engage in no other business

and may hold no interest in any other funeral establishment. Among other restrictions, all shareholders must be licensed funeral directors, members of their immediate family, or surviving members of their immediate family. *Id.*, § 479.8(b).

- Professional corporations. *Id.*, § 479.8(d).

Since 1935, when the law was changed, general business corporations have not been eligible for licensure. A decision of the Pennsylvania Supreme Court, however, strongly suggested that rescinding already existing licenses would be unconstitutional, and as a result a limited number of "pre-1935" corporations were grandfathered in and retain their licenses. *See Rule v. Price*, 185 A. 851 (Pa. 1936).

Each licensee may operate at only one principal place and one branch. *Id.*, § 479.8(e). A few licensees appear to have adopted convoluted stratagems to circumvent this limit; however, neither the Board of Funeral Directors nor any Pennsylvania court has had occasion to pass upon the legitimacy of these stratagems. *See* Pet. App. 48 n. 16 (describing a sale-and-leaseback arrangement christened by petitioners the "Pinkerton rule"); Pet. App. 143-144 (petitioner Heffner claims to have interests in eleven Pennsylvania funeral homes through his wife).

The FDL requires that every establishment have a "preparation room" for embalming and preparing the dead. *Id.*, § 479.7. Food service is not permitted, but non-alcoholic beverages may be served in areas not used for funeral services. *Ibid.*

2. Petitioners are a group of funeral directors and others who sought to upend the regulatory regime established by the FDL. They brought this action pursuant to 42 U.S.C. § 1983 against the respondents – members of the Board of Funeral Directors and

other state officials – asserting a series of facial challenges to the above provisions of the FDL, and to many others as well. *See* Pet. App. 12-14, 89-90 n. 6.

In May of 2012, the District Court upheld most of petitioners' claims, holding that various provisions of the FDL violated the Commerce Clause, the Contract Clause, the First Amendment, the Fourth Amendment, and the substantive component of the Fourteenth Amendment's Due Process Clause. Pet. App. 84-242. In the course of doing so, the District Court repeatedly lambasted the FDL as an "antediluvian," "outdated," "antiquated" law, although he offered little to support these epithets beyond his own view that the FDL failed to "appropriately govern the funeral industry in … the twenty-first century." Pet. App. 102, 236-237 & n. 29.

With regard to substantive due process – the only subject of this petition – the District Court cited *Lawrence v. Texas*, 539 U.S. 558 (2003), for the proposition that petitioners' challenges would be governed by the "rational basis standard." Pet. App. 145. The District Court said nothing about the content of that standard, nor did he cite any other authority to support his substantive due process holdings, which were as follows:

Ownership. The District Court held that the FDL's restriction of licensees to one establishment plus a branch was "not rationally related" to any legitimate interest identified by respondents. Pet. App. 145-146. While the District Court recognized that respondents had identified several such interests, Pet. App. 144-145, the District Court discussed only one: that the restriction discouraged licensees from being "spread too thin." This rationale, in the District Court's view, was "obliterate[d]" by a single piece of anecdotal evidence involving a funeral director who handled an

unusually large number of funerals. Pet. App. 146. The District Court also relied on what he called respondents' "remarkable admission" that the FDL should be changed to eliminate this restriction.[1] *Ibid.*

The District Court likewise struck down the provision that limits ownership of funeral homes to licensed funeral directors. Pet. 151-152. The District Court held that this provision was "arbitrary" given that the unlicensed widows, widowers and heirs of deceased funeral directors were allowed to continue to operate the funeral home for a limited period. Pet. App. 151.

Place-of-practice. In a cryptic and conclusory sentence, the District Court asserted that the goals of "competency, public health, accountability and competition are not rationally related" to the place-of-practice restriction, for reasons "similar" to those that had led him to conclude that the provision also violated the Commerce Clause. Pet. App. 167. He offered no further explanation.

Preparation rooms. The District Court, again relying on an "admission" that requiring each funeral home to have a preparation room was "unnecessary," held that the requirement was therefore "not rationally related" to any legitimate state interest. Pet. App. 172-173.

Food service. The District Court recognized that it was reasonable to prohibit the service of food in preparation rooms or rooms in which dead bodies have been present, Pet. App. 177, but held that it was

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[1] This "admission," and the others relied on by the District Court, was actually one of a series of suggestions for legislative amendments to the FDL, made over the course of some twenty years by the then-members of the Board of Funeral Directors. *See* Pet. App. 42-43 & n. 14 (discussing similar "concessions").

"strained" to extend that prohibition to other rooms within the funeral home, "in which dead bodies are never present." *Ibid.*

The District Court did not at that time issue any remedial order. Instead, he *sua sponte* stayed his "mandates" for 90 days, "pending the [respondents'] reexamination and possible revision" of the statutory provisions at issue. Pet. App. 241. When that did not occur – respondents having informed the District Court of their intention to appeal – the District Court issued an opinion castigating the respondents for their "bad faith" and "cavalier disregard" for his decision which, he said, was "the culmination of a massive, systemic failure to promote appropriate public policy by the [respondents]." Br. Opp. App. 5a. The District Court then issued an order declaring the subject provisions invalid on their face and enjoining their enforcement,[2] to "place a capstone, and perhaps with it a judicial exclamation point, on this … matter." Br. Opp. 6a.

3. Or perhaps not. The Court of Appeals reversed the District Court on all of the substantive due process issues that are the subject of this petition.[3] Pet. App. 1-83.

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[2] In addition to the provisions discussed in the text, the District Court also invalidated, on various grounds, provisions of the FDL that authorize warrantless inspections of funeral homes, require that each funeral home have a full-time licensed supervisor, ban the use of trade names, govern the use of funds entrusted to funeral directors in "pre-need" arrangements, and prohibit paying sales commissions to employees. Pet. App. 10-11. None of these provisions are germane to this petition.

[3] In fact, the Court of Appeals reversed *all* of the District Court's holdings except with regard to the ban on trade names. *See* Pet. App. 82-83.

The Court of Appeals began by observing that "much of the District Court's conclusions regarding the constitutionality of the FDL, enacted in 1952, stem from a view that certain provisions of the FDL are antiquated in light of how funeral homes now operate. That is not, however, a constitutional flaw." Pet. App. 5. When it turned to substantive due process, the Court of Appeals elaborated at some length on the "rational basis" standard that governed petitioners' challenges:

> [A] statute withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature could rationally conclude was served by the statute. … [R]ational basis review allows legislative choices considerable latitude. … A governmental interest that is asserted to defend against a substantive due process challenge need only be plausible to pass constitutional muster; we do not second-guess legislative choices or inquire into whether the stated motive actually motivated the legislation. … Thus … the rationality requirement is largely equivalent to a strong presumption of constitutionality.

App. 46-47 (internal quotation marks and citations omitted). As to each challenged provision of the FDL, the Court of Appeals disagreed with the District Court's application of this standard.

Ownership. The Court of Appeals began by holding that limiting licensees to one establishment plus a branch could rationally be thought to further several legitimate goals: diversifying the ownership of funeral homes, promoting familiarity and accountability between funeral directors and their customers, and preventing licensees from being spread too thin. Pet. App. 47-48. The mere fact that the provision did not

operate perfectly – for example, by leaving loopholes through which it might be circumvented – was not constitutionally fatal: "'there is no need for mathematical precision in the fit between justification and means.'" Pet. App. 49, *quoting Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 639 (1993). "'A legislature need not … risk losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.'" Pet. App. 50, *quoting McDonald v. Bd. of Election Comm'rs*, 3934 U.S. 802, 809 (1969).

The Court of Appeals rejected a similar argument to uphold restricting the ownership of funeral homes to licensed funeral directors; such a restriction, the court held, furthers legitimate state interests in "consumer protection, accountability, competency, trust and accessibility." Pet. App. 54. The rationality of the provision was not undermined by the exceptions for surviving spouses and family members, which themselves advance legitimate interests "in protecting the livelihood of … surviving family members and the interests of the community in a funeral home's continued operation following the death of the owner." Pet. App. 52. The legislature was free to balance these competing interests within the statute, Pet. App. 52, *citing Salazar v. Buono*, 555 U.S. 700 (2010) and *Dennis v. U.S.*, 341 U.S. 494 (1951); and the means chosen was "a rational (though perhaps imperfect) means of achieving those ends." Pet. App. 53.

Place-of-practice. The Court of Appeals held that "[l]imiting licensees to one primary location and one branch … clearly helps to protect against funeral directors being 'spread too thin' to provide personal, caring and sensitive services…. Likewise, [it] is a rational means of advancing accountability by

ensuring that a funeral director is more readily accessible to answer questions from grieving and particularly vulnerable consumers." Pet. App. 55.

Preparation room. Respondents argued that requiring each funeral home to have a preparation room furthered several legitimate goals, including minimizing the time between death and embalming, reassuring families about the safeguarding of their loved ones, and ensuring accountability. Pet. App. 58. The Court of Appeals held that these rationales were "so patently reasonable as to eliminate the need for much discussion." Pet. App. 59.

Petitioners argued that Pennsylvania law did not require that the preparation rooms actually be used, but the Court of Appeals held that this would not affect the results of the rational basis review: a law need not embody "the most efficient or even the most practical" means of achieving its goals; a law may even impose "'a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the [] requirement.'" Pet. App. 59-60, *quoting Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487 (1955).

Food service. In upholding the FDL's restrictions of the service of food and beverages in funeral homes, the Court of Appeals found it "exceedingly difficult to understand how it could be viewed as unreasonable" as a measure to protect public health. Pet. App. 61. The court then expanded upon the point it had made at the beginning of its opinion:

> It may well be that the legislature's concern had *more* force in an earlier time when refrigeration and sanitation were not as developed as they are today. … However, there is a fundamental difference between legislative enactments that

> may be archaic and those that are irrational for purposes of our substantive due process inquiry. These restrictions may now be overly cautious, but excess caution does not rise to the level of a due process deprivation if it is reasonably intended to advance a legitimate governmental interest.

Pet. App. 62-63 (emphasis added).

The Court of Appeals remanded to the District Court for entry of an order consistent with its opinion. Pet. App. 83.

4. The Court of Appeals denied rehearing and rehearing *en banc* without recorded dissent. Pet. App. 244.

REASONS FOR DENYING THE WRIT

Petitioners say that the Court should review this case because the Court of Appeals "rejected the principle that the rationality of a statute depends on the rationality of its application now. … Instead, the panel focused on whether it was rational for the legislature to enact the Funeral Law in 1952." Pet. 10. This, according to petitioners, exacerbates a conflict among the lower courts about the proper nature of substantive due process review, which in turn stems from a 76-year old fissure in the Court's own jurisprudence. Pet. 13-24.

This is all fantasy. Petitioners misunderstand the decision of the Court of Appeals; and the "conflict" on which they lavish such attention does not exist.

I. The Question Presented Was Neither Raised In Nor Decided By The Courts Below.

Petitioners claim that the Court of Appeals dismissed as irrelevant their "effort to use

contemporary evidence" in their case, Pet. 11, and instead considered only conditions as they existed in 1952. Pet. 10-13. The Court of Appeals did nothing of the kind. The Court of Appeals "waved off," Pet. 11, petitioners' "contemporary evidence" not because it was irrelevant, but because it was inadequate to carry petitioners' heavy burden.

This case was not submitted to the courts below, or decided by them, on two rival sets of facts: the "1952 facts" and the "present-day facts." In defending the challenged provisions of the FDL, respondents identified a number of legitimate state interests – for example, protecting vulnerable consumers, maintaining professional standards, and safeguarding the public health – furthered by those provisions. Petitioners did not attack the legitimacy of any of these interests, but instead set themselves to show that these interests were not furthered by the statutory provisions in question.

But in this, petitioners faced a formidable task. Rational-basis review, as the District Court failed to recognize, "is not a license for courts to judge the wisdom, fairness or logic of legislative choices," *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993), but is instead "a paradigm of judicial restraint." *Id.*, at 314. Legislation must be upheld "if there is any reasonably conceivable set of facts that can support it," *id.*, at 313; and those attacking it "have the burden to negative every conceivable basis which might support it." *Armour v. City of Indianapolis*, __ U.S. __, 132 S.Ct. 2073, 2080-2081 (2012) (internal quotation marks and citations omitted). Moreover, such legislation is "not subject to courtroom fact-finding," *Beach Communications*, 508 U.S. at 15, for "the District Court's responsibility for making 'findings of fact' certainly does not authorize

it to resolve conflicts in the evidence against the legislative judgment." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). If the facts are "arguable," that very circumstance "immunizes" the legislation from attack. *Id.*, at 112. Petitioners' burden was further augmented by their choice to bring this action as a series of *facial* challenges – "the most difficult challenge to mount successfully" – since it required them to show that "no set of circumstances exists under which the [FDL] would be valid." Pet. App. 12-13, *quoting U.S. v. Salerno*, 481 U.S. 739, 745 (1987).

To accomplish this, petitioners relied on evidence which, even if accepted, established only that the challenged provisions of the statute did not *perfectly* achieve their respective goals. They relied, for example, on anecdotal evidence about the number of funerals handled by a single funeral director; on evidence about individual licensees who managed to circumvent this or that provision of the statute; and on evidence that not all funeral homes actually use the preparation rooms that they are required to have available.

In rejecting their attacks, the Court of Appeals relied, not on some rival set of "1952 facts," but on well-settled principles of law: for example, the principle that "there is no need for mathematical precision in the fit between justification and means. … [The FDL] can survive our substantive due process scrutiny even though it neither targets all applicable threats nor succeeds in preventing all of them." Pet. App. 49 (internal quotation marks and citation omitted). *Accord, e.g., Heller v. Doe*, 509 U.S. 312, 321 (1993) ("A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. … The problems of government are

practical ones and may justify, if they do not require, rough accommodations") (internal quotations and citations omitted). Petitioners lost this case not because the Court of Appeals was fixated on 1952, but because their "contemporary evidence" was inadequate to its purpose.

Petitioners, however, lay particular stress on the Court of Appeals' remark, at the beginning of its opinion, that being "antiquated" is "not a constitutional flaw." Pet. App. 5, *quoted at* Pet. 4, 10, 19. This, they say, demonstrates that the Court of Appeals "focused exclusively on the rationality in the abstract of the challenged provisions when [the FDL] was enacted in 1952." Pet. 4. This is a non sequitur.

In the first place, the Court of Appeals' comment is not part of its substantive due process analysis. It appears in the introduction to an opinion that deals with a large number of other issues as well; and responds to comments by the District Court (likewise not part of his due process analysis) which revealed a troubling tendency to inject his own views on "appropriate" public policy. *See* Pet. App. 102, 236-237 & n. 29; Br. Opp. App. 5a.

In the second place, even in the context of substantive due process, the Court of Appeals' comment was entirely correct. Subjective epithets such as "antediluvian," "outdated" and "obsolete" are *not* synonymous with "irrational" in its constitutional sense. They are not the same, that is, as saying that there is no "conceivable basis which might support" a law. As the Court of Appeals pointed out, the rationale underlying a law may have had "*more* force" in an earlier time, Pet. App. 62-63 (emphasis added), but it does not follow that it now has no force at all: as in this case, the law may still reasonably be thought

to advance a legitimate governmental interest, and that is all that substantive due process requires.

Despite what petitioners say, then, the Court of Appeals did not decide that "contemporary evidence" is irrelevant to a substantive due process analysis of legislation. No such issue was ever raised and the Court of Appeals did not even discuss it. Thus, even if other courts were in conflict on this issue – a subject we briefly discuss below – this would not be the case in which to resolve it.

II. There Is No Conflict Among the Lower Courts For the Court To Resolve.

Petitioners say that there is a "doctrinal conflict" on whether changed conditions are relevant to the rational-basis analysis. Pet. 13. But this "doctrinal conflict," if it exists at all, is entirely abstract: petitioners have not identified a single case in which it made a difference to the outcome. They have not identified a single case in which a court, having held that a law cannot reasonably be conceived to further any legitimate state interest in the present day, nevertheless upheld the law on the ground that it had a rational basis when it was enacted. Of the handful of cases petitioners have identified as embodying their "conflict," *see* Pet. 17-19, 23-24, none so held.

We begin with the cases petitioners cite from the Third Circuit. *See* Pet. 17-19. *Murillo v. Bambrick*, 681 F.2d 898 (3d Cir. 1982), involved a challenge to a New Jersey statute that imposed fees on litigants in divorce proceedings that were not imposed on other civil litigants. *Id.*, at 899. In a footnote, the court noted that this Court "appears not to have determined definitively whether changed conditions are a relevant consideration in equal protection analysis."

Id., at 912 n. 27. The Third Circuit found it unnecessary to resolve this issue, however, *ibid*, "because a rational reason can be identified for the institution *and retention*" of the fees in question. *Id.*, at 912 (emphasis added).

Alexander v. Whitman, 114 F.3d 1392 (3d Cir. 1997), did not involve the rational basis test at all but a question of constitutional interpretation: whether a fetus is a "person" within the meaning of the Fourteenth Amendment. The Third Circuit held that this Court had answered that question in the negative in *Roe v. Wade*, 410 U.S. 113, 158 (1973), and its progeny; and went on to hold that advances in medical technology did not permit it to re-examine *Roe's* holding. The question, said the court, was not factual but legal: "not whether a stillborn child is a human being from the moment of conception, but whether that unborn 'human being' is included within the meaning of 'person' contained in the Fourteenth Amendment." 114 F.3d at 1400. Petitioners cannot seriously contend that any other court would have, or should have, decided the case differently.

The two cases they cite from other circuits are equally unhelpful to petitioners. *See* Pet. 23-24. *Burlington Northern R.R. Co. v. Dept. of Pub. Serv. Regulation*, 763 F.2d 1106 (9th Cir. 1985), involved a challenge to a Montana statute that required railroads to maintain station facilities in towns of more than 1,000 people. *Id.*, at 1108-1109. The Ninth Circuit thought that this Court had been "ambivalent on whether changed circumstances can transform a once-rational statute into an irrational law." *Id.*, at 1111. Just as in *Murillo*, however, there was no need to resolve the issue, since the railroad had failed to show that the law was irrational either when it was passed or in 1985. *Ibid.*

Finally, *U.S. v. Then*, 58 F.3d 464 (2d Cir. 1995), presented a challenge to the differential treatment of crack and powdered cocaine under the federal Sentencing Guidelines. All three judges agreed that the Guidelines had a rational basis. *Id.*, at 466; *ibid* (Calabresi, J., concurring). Contrary to petitioners' contention, the two judges of the majority did not "disavow," Pet. 24, the idea that changed circumstances might support a future challenge to the Guidelines. Rather, they simply declined to join their concurring colleague's lengthy discussion of what future courts might do in a hypothetical future situation. *Ibid* ("we ordinarily do not issue advisory opinions"); *see id.*, at 466-469 (Calabresi, J., concurring).

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The "conflict" among the lower courts that petitioners posit is thus illusory. This makes it unnecessary to address petitioners' further contention that this "conflict" in turn stems from "serious tension," Pet. 24, within the Court's own case law: petitioners say that virtually the entire body of the Court's rational-basis jurisprudence is "difficult to reconcile" with certain dicta that they have isolated from *U.S. v. Carolene Products Co.*, 308 U.S. 144 (1938).[4] Pet. 16-17. Even if we accepted this

[4] Petitioners rely on the following passage from *Carolene Products*: "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *Id.*, at 153; *see* Pet. 2, 13, 17, 18. While petitioners consistently refer to this passage as a "rule," *see* Pet. 2, 3, 4 ("unambiguous rule"), 5, 16, 17 ("foundational rule"), 18 ("binding rule"), 21, 30, 33, 34, in

contention at face value – and we do not – it would not support review by the Court. A "tension" that has subsisted for 76 years, without affecting the outcome of a single case, hardly requires the Court's intervention.

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fact it is dicta: no one in *Carolene Products* contended that the statute in question should be invalidated on that basis.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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August 18, 2014

APPENDIX

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

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

MEMORANDUM

August 22, 2012

I. Procedural History and Factual Background

On May 8, 2012, the Court issued a memorandum and order ruling on the parties' cross motions for summary judgment. (Doc. 182). Through that order, we granted summary judgment in Plaintiffs' favor on eleven (11) out of twelve (12) counts in Plaintiffs' amended complaint. (*Id*. at 155-158). However, we also stayed the effect of our mandate therein for a period of ninety (90) days to allow the parties to reexamine and possibly revise portions of the FDL that we found violated the United States Constitution. (*Id*.).

Thereafter, on June 29, 2012, Defendants filed a Motion to Amend Order of May 8, 2012, (doc. 189), requesting that the Court amend its prior order so that the same could be immediately appealed to the Third Circuit Court of Appeals. On July 12, 2012, the Court issued an order denying Defendants' motion to amend our May 8, 2012 order. (Doc. 195). On August

8, 2012, the Court conducted an informal status conference with counsel for the parties to determine whether Defendants had attempted to rectify any of the deficiencies identified in our May 8order. Following the conference call, the Court ordered that the parties each submit a brief outlining their respective positions concerning injunctive relief. (Doc. 197). After reviewing the parties' submissions, the Court is now prepared to finalize our May 8, 2012 summary judgment ruling. Therefore, we shall proceed to analyze whether Plaintiffs are entitled to a permanent injunction.

II. Discussion

As the Supreme Court noted in *eBay Incorporated v. MercExchange*, a plaintiff seeking a permanent injunction must satisfy a four-factor test before obtaining such relief, including: "(1) that it has suffered an irreparable injury; (2)that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." 547 U.S. 388, 391 (2006).

Here, concerning the first element, implicit in our previous finding is that Plaintiffs have suffered an irreparable injury, as also demonstrated by the numerous provisions of the FDL that the Court declared unconstitutional in our May 8, 2012 order. As to the second element, there are no remedies at law, such as monetary damages, that are adequate to compensation Plaintiffs for the injuries suffered as a result of the unconstitutional provisions of the FDL.

Regarding the third element, the balance of the hardships between the parties, the Court finds Defendants' assertions that enjoining them from enforcing the FDL will essentially yield a completely unregulated death-care industry to wildly overstate the parameters of our ruling. While it is clear that Defendants will have to propose amendments to the FDL to rectify those provisions struck down by our May 8, 2012 ruling, the order that follows does not open wide the doors to the unlicensed practice of funeral directing as Defendants appear to contend it does. As Plaintiffs highlight in their brief, Defendants are perpetuating a wholly disingenuous type of hysteria in suggesting that they will experience an extreme hardship simply because funeral directors will hereafter be permitted: (1) to admit inspectors only when inspections are limited in time, place, and scope, which the Board claims is already its practice; (2) to share a supervisor with another location, which the Board has already conceded through legislative initiative is permissible; (3) to cease the establishment and maintenance of a separate preparation room at each funeral home, which the Board's legislative initiative acknowledged was already a widespread practice; (4) to serve food, as permitted under the Board's allegedly proposed regulations; (5) to operate under a trade, which essentially occurs when a funeral home operates under a predecessor name; (6) to operate a separate merchandise company, which some Board members conceded was already lawful; or (7) to pay unlicensed employees without fear of prosecution.

In addition, our order in no way sanctioned the unlicensed practice of funeral directing by untrained individuals, but rather held that the Board's ownership restrictions on non-licensees' *ownership* of a

funeral home was a violation of the Commerce Clause, (doc. 182 at 51-57), and substantive due process, (*id*. at 57-73), given the Board's issuance of licenses to non-licensees, such as widows of Pennsylvania funeral directors, estates of Pennsylvania funeral directors, spouses of Pennsylvania funeral directors, children of Pennsylvania funeral directors, grandchildren of Pennsylvania funeral directors, trusts established for the spouses, children, and grandchildren of Pennsylvania funeral directors, trusts established for the spouses, children, and grandchildren of Pennsylvania funeral directors, purchasers of pre-1935 corporations, and those who purchase all the assets of a funeral home and employ a Pennsylvania funeral director to act as the "owner" of the stock of a corporation. (*Id*. at 51-73).[1]

Finally, as to the public interest, we find that enjoining Defendants from enforcing the constitutionally infirm provisions of the FDL will serve to benefit consumers through the potential savings achieved by a more efficient and cost-conscious delivery of death-care services. Throughout the hundreds upon hundreds of pages submitted by Defendants in support of the clearly archaic FDL, they have failed to highlight even one piece of evidence demonstrating how the public interest would be adversely affected by a ruling that declines to uphold the protectionist regime and status quo perpetuated by the FDL concerning funeral regulation in Pennsylvania.

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[1] We again regret the extreme and hyperbolic reaction to our mandate, which was cast in certain quarters as a veritable return to the Dark Ages. We strongly suspect that Defendants know better.

III. Conclusion

As lamented numerous times by the Court throughout this case, we find much of Defendants' conduct to constitute the very epitome of bad faith and most recently an almost cavalier disregard for our May 8, 2012 ruling, as demonstrated by their failure to at least begin formulating legislative initiatives amending or replacing a Truman-era law that could be submitted to the General Assembly when they return to session in the fall. (*See* Pl. R. at 3153-3157, 3236-3246). While the Court is clearly acquainted with the process by which legislation is passed and regulations are amended, and though we recognize that our ruling was entered toward the end of the previous legislative session, it appears that the Board was more content to sit on their hands than to earnestly tackle the constitutional deficiencies explicitly identified in our order.[2]

Our ruling on May 8, 2012 was the culmination of a massive, systemic failure to promote appropriate public policy by the Board. That the Board would cling to a law that is so outdated and patently unconstitutional in so many ways is as embarrassing as it is unconscionable. Frankly, the members of the

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[2] We note that counsel for Defendants informally advised the Court during our August 8, 2012 status conference that the Board had started crafting an administrative policy responding to the Court's finding that the unannounced and warrantless inspections of funeral homes violated the Fourth Amendment as set forth in Court I of Plaintiffs' amended complaint. (See Doc. 101). While we appreciate the Board's efforts to remedy this aspect of the FDL, it is unclear why the Board was unable to at least begin a similar process, or one involving the drafting of legislative initiatives, concerning the remaining counts we found violative of the Constitution.

Board should be ashamed of themselves.[3] The FDL begs for a legislative overhaul and the persistent recalcitrance of the Board to act while instead choosing to litigate every single issue in this case, at substantial cost in Commonwealth funds, has only served to further deplete the Commonwealth's scarce resources. *See Pub. Citizen Health Research Grp. v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987) ("But we also understand, because we have seen it happen time and time again, that action Congress has ordered for the protection of the public health all too easily becomes hostage to bureaucratic recalcitrance, factional infighting, and special interest politics. At some point, we must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough."). That time has arrived, and an appropriate order shall issue as we place a capstone, and perhaps with it a judicial exclamation point, on this lengthy and difficult matter.

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[3] Candidly, and while this issue was not raised by Plaintiffs, we find the Board's conduct so disturbing that surcharging its members could have been appropriate in lieu of allowing them to burn up taxpayer dollars in their folly.