STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP1599

E. GLEN PORTER, III, and
HIGHLAND MEMORIAL
PARK, INC.,

Plaintiffs-Appellants,

v.

THE STATE OF WISCONSIN,
DAVE ROSS and
WISCONSIN FUNERAL
DIRECTORS EXAMINING
BOARD,

Defendants-Respondents.

APPEAL FROM AN ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE PATRICK C. HAUGHNEY, PRESIDING

BRIEF AND APPENDIX OF DEFENDANTS-RESPONDENTS

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INTRODUCTION

This case involves a facial challenge to the constitutionality of two laws governing cemeteries and funeral homes. These "anti-combination" laws prohibit funeral directors from holding any financial interest in cemeteries, and prohibit cemetery authorities from holding financial interests in funeral homes.

The laws at issue are but one component of a substantial regulatory framework governing the death care industry in Wisconsin. Viewed in the context of this framework, it is clear that the anti-combination laws embody a desire to protect the consumers navigating this industry.

Indeed, underlying these laws is the reality of who these consumers of death care products are. They are children preparing to bury their parents; individuals with no close family, trying to get their affairs in order; and even parents forced to do what every parent dreads. These consumers are people agonizing over mortality, and confronting an unfamiliar and daunting industry in which virtually no one wants to participate.

It is in this context that the regulatory framework for the death care industry exists. These laws include limitations on how funeral directors may solicit business; ethical obligations imposed on funeral directors in conducting their businesses; and requirements about holding certain funds in trust to ensure that payments received are available as intended.

Also part of this suite of laws are the anti-combination laws, which prohibit two types of entities in the death care industry from entering into financial arrangements with one another. Thus, in addition to all the other provisions protecting consumers in this industry, the Legislature

thought it best to ensure that these two types of entities could not combine their economic power.

Porter argues that this was irrational. He claims that the anti-combination laws serve no purpose other than to protect funeral directors from the competition that cemeteries could pose. And he asserts that because there is no "real and substantial" proof of a connection between the laws and consumer protection, the laws must be struck down.

Porter's arguments should be rejected here, as they were in the circuit court. The anti-combination laws conceivably (and actually) serve the government's interest in protecting consumers in the often heart-rending process of navigating the death care industry. This is a rational basis for the law, and no further inquiry is required under established principles of rational basis review.

But even accepting Porter's invitation to apply a heightened level of scrutiny, and to examine evidence intended to *disprove* a legitimate basis for the laws, Porter has failed to carry his burden. On summary judgment, both parties submitted expert reports and affidavits; no further factual development is necessary or appropriate. Porter's facial challenge to the anti-combination laws fails, and this Court should affirm the decision below.

STATEMENT OF THE ISSUE

Laws that do not implicate a fundamental right or suspect classification are subject to rational basis review. Under this approach, laws will be upheld if there is even a conceivable rational basis for the laws. The laws at issue here prohibit funeral homes from holding financial interests in cemeteries, and vice versa. As one part of a regulatory framework governing the death care industry, the anti-combination laws conceivably serve the legitimate

governmental interest in protecting consumers against potential overreach in the death care industry. Does this interest provide a rational basis to support the anti-combination laws?

The circuit court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendants-Respondents do not request oral argument or publication. *See* Wis. Stat. §§ (Rules) 809.22, 809.23.[1]

SUPPLEMENTAL STATEMENT OF THE CASE

I. Applicable statutes governing the death care industry.

This case involves two statutes that are part of Wisconsin's regulation of the death care industry.[2] The relevant portions of these statutes prevent funeral directors (and their agents or employees) from holding any interest in a cemetery, *see* Wis. Stat. § 445.12(6), and also prevent cemetery authorities (and their agents or employees) from holding any interest in a funeral home, *see* Wis. Stat. § 157.067(2).

These two provisions, referred to as the "anti-combination laws," provide as follows:

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[1] All references to the Wisconsin Statutes are to the 2015–16 edition unless otherwise indicated.

[2] The term "death care industry" refers generally to providers of goods and services relating to transporting, caring for, and final disposition of the dead. *See* Keith E. Horton, Who's Watching the Cryptkeeper?: The Need for Regulation and Oversight in the Crematory Industry, 11 Elder L.J. 425, 429 n.30 (2003). At issue in this case are two components of that industry: cemetery owners and funeral directors.

> No licensed funeral director or operator of a funeral establishment may operate a mortuary or funeral establishment that is located in a cemetery or that is financially, through an ownership or operation interest or otherwise, connected with a cemetery. No licensed funeral director or his or her employee may, directly or indirectly, receive or accept any commission, fee, remuneration or benefit of any kind from any cemetery, mausoleum or crematory or from any owner, employee or agent thereof in connection with the sale or transfer of any cemetery lot, outer burial container, burial privilege or cremation, nor act, directly or indirectly, as a broker or jobber of any cemetery property or interest therein.

Wis. Stat. § 445.12(6); and

> No cemetery authority may permit a funeral establishment to be located in the cemetery. No cemetery authority may have or permit an employee or agent of the cemetery to have any ownership, operation or other financial interest in a funeral establishment. Except as provided in sub. (2m), no cemetery authority or employee or agent of a cemetery may, directly or indirectly, receive or accept any commission, fee, remuneration or benefit of any kind from a funeral establishment or from an owner, employee or agent of a funeral establishment.

Wis. Stat. § 157.067(2).

The anti-combination laws at issue in this case are not stand-alone provisions regulating either cemeteries or funeral directors. Rather, these laws make up just one part of a comprehensive statutory and regulatory framework that governs the death care industry in Wisconsin. This framework includes statutes and regulations governing cemeteries, *see* Wis. Stat. §§ 157.061–.65, Wis. Admin. Code chs. CB 1–5; funeral directors, *see* Wis. Stat. ch. 445, Wis. Admin. Code ch. FD 1; and, more generally, the role of the Wisconsin Department of Safety and Professional

Services in regulating these entities, *see, e.g.* Wis. Stat. §§ 440.90–.955. This regulatory framework includes but is not limited to the following:

- Establishing the training required to be a licensed funeral director, and establishing the funeral directors examining board, *see* Wis. Stat. § 445.03–.04; *see also* Wis. Admin. Code ch. FD 1;
- Creating a cemetery board vested with authority to "promulgate rules relating to the regulation of cemetery authorities, cemetery salespersons, and cemetery preneed sellers," Wis. Stat. § 440.905(2); *see also* Wis. Admin. Code chs. CB 1–5;
- Proscribing payments of commissions for referrals or "finders fees" by cemetery authorities, *see, e.g.*, Wis. Stat. § 440.91(9);
- Establishing requirements for holding funds in trust for certain purchases, including caskets, urns, monuments or markers, or cemetery plots, *see, e.g.*, Wis. Stat. §§ 157.11(9g)(c), 157.061(3), 440.92(3)(a), 445.125(1)(a)1.; and
- Prohibiting certain marketing or business practices, such as marketing to individuals in hospitals or health care facilities, contacting "a relative of a person whose death is imminent or appears to be imminent," or taking "undue advantage of patrons" making purchases in the death care industry, *see* Wis. Stat. §§ 445.12(3), (3g)(a)1.–2., (3g)(b), (4).

As discussed *infra*, this regulatory framework provides context for the anti-combination laws, and illuminates the consumer protective purpose to which the laws are directed.

II. The history of the anti-combination laws.

Wisconsin's prohibition on combination firms in the death care industry has existed in some form since 1939,

when the Legislature enacted Wis. Stat. § 156.12(6), the predecessor to what is now Wis. Stat. § 445.12(6). *See* § 4, ch. 93, Laws of 1939. Those early laws prohibited licensed funeral directors and licensed embalmers from operating a mortuary or a funeral establishment in a cemetery, and also prohibited funeral directors and embalmers from receiving, directly or indirectly,

> [a]ny commission, fee, remuneration or benefit of any kind from any cemetery, mausoleum, or crematory or from any proprietor or agent thereof in connection with the sale or transfer of any cemetery lot, entombment vault, burial privilege or cremation, nor act, directly or indirectly, as a broker or jobber of any cemetery property or interest therein.

See § 10, ch. 433, Laws of 1943. At that time, the anti-combination framework did not impose any prohibition on cemetery owners.

In 1946, the Wisconsin Attorney General issued an opinion examining the anti-combination laws on the question of whether a funeral director or embalmer violates the law if he serves as a secretary of a cemetery association. (*See* R. 21:247.) In concluding that a funeral director did not run afoul of the anti-combination law by doing so, the Attorney General noted that the law "was apparently intended to prevent funeral directors from acquiring an interest adverse to their clients in the purchase of cemetery lots, vaults, etc., through 'kickback' agreements with cemeteries, mausoleums and crematories." (R. 21:247–48.)

After being renumbered to Wis. Stat. § 445.12(6), the law proscribing funeral directors' combination with cemeteries gave rise to another Attorney General opinion, this time on a request by the Secretary of the Department of Regulation and Licensing. That opinion dealt with whether a parent corporation and wholly owned subsidiaries violated Wis. Stat. § 445.12(6) through joint ownership of interests in

cemeteries and funeral establishments. *See* 78 Wis. Op. Att'y Gen. 5 (1989); *see also* R. 21:249–52 (copy of AG opinion). While the facts presented did not allow a conclusive determination by the Attorney General, the request illustrated regulators' concerns about large, national companies holding interests in both cemeteries and funeral establishments. *See* 78 Wis. Op. Att'y Gen. at 6–7; R. 21:250. At the time, no Wisconsin law prohibited cemetery owners from holding an interest in funeral homes.

Soon thereafter, a bill was introduced in the State Senate proposing to repeal the anti-combination law; that bill failed to pass. 1993 S. B. 381. And instead of repealing Wis. Stat. § 445.12(6), the Legislature passed a law broadening the anti-combination provisions to address the corporate subsidiary situation described in the 1989 Attorney General opinion. *See* 1993 Wis. Act 100, § 3. At the same time, the Legislature also enacted Wis. Stat. § 157.067, prohibiting cemetery authorities from holding any "ownership, operation or other financial interest in a funeral establishment." *See* 1993 Wis. Act 100, §§ 1, 2.

The anti-combination issue was soon presented to this Court, when subsidiaries of one of the corporations at issue in the Attorney General opinion sought a declaratory judgment on the enforceability of the anti-combination laws against the corporate subsidiaries. *Cemetery Servs., Inc. v. Wis. Dep't of Reg. & Licensing*, 221 Wis. 2d 817, 821–23, 586 N.W.2d 191 (Ct. App. 1998). This Court held that in light of the corporate structure of the entities and their holdings in both funeral establishments and cemeteries, the two subsidiaries' financial connections violated the anti-combination laws. *See id.* at 826–28. The Court rejected a vagueness challenge to the anti-combination laws, and concluded that the laws "were applied in a constitutional

manner" to prohibit the combination at issue there. *See id.* at 829–31.[3]

Since this Court's decision in *Cemetery Services, Inc.*, at least two bills have been introduced in the Wisconsin Assembly seeking to repeal the anti-combination laws. *See* 2011 A.B. 523, 2013 A.B. 508. Both bills failed to pass.

III. Procedural posture.

A. Porter's claims.

Plaintiffs E. Glen Porter III and Highland Memorial Park, Inc. (hereinafter "Porter"), filed a complaint in the Waukesha County Circuit Court on August 22, 2014. (R. 1.) The complaint named the State of Wisconsin,[4] the Secretary of the Department of Safety and Professional Services (Dave Ross), and the Wisconsin Funeral Directors Examining Board (hereinafter, collectively, "the Board"). (R. 1:5.) Individual members of the Board were not named as defendants. (*See* R. 1:15.)

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[3] The *Cemetery Services* court noted that the subsidiaries raised additional constitutional challenges, including under the due process and commerce clauses, but concluded that those arguments were insufficiently developed to warrant review. *See Cemetery Servs., Inc.*, 221 Wis. 2d at 830–31.

[4] In the circuit court, Defendants asserted that the State is immune from suit in this declaratory judgment action. (R. 19:28 (noting that under Wis. Const. art. IV, § 27, the Legislature may direct what types of suits may be brought against the State, and that the Legislature has not allowed declaratory judgment actions against the State).) The circuit court dismissed the complaint on the merits, without addressing the issue of sovereign immunity, (R. 33:31–33), and Porter does not address the question of sovereign immunity on appeal. Given the State's strong interest in protecting its sovereign immunity and Porter's acquiescence on this point, the State should be dismissed as a party, regardless how this Court decides the merits.

Porter's complaint raised two facial constitutional challenges to the anti-combination laws. (R. 1:13–15.) First, Porter alleged that the laws violate substantive due process by interfering with the right to earn a living and pursue business opportunities "free from anticompetitive, arbitrary, and irrational regulation." (R. 1:14.) Second, Porter asserted that the laws violate equal protection by creating arbitrary classes of citizens: those who are subject to the anti-combination laws, and those who are not. (*See* R. 1:14–15.) As alleged, these classes provide that "[o]nly those citizens who are cemetery operators are forbidden from becoming funeral directors or from obtaining an ownership interest in a funeral establishment," and "[o]nly those citizens who are funeral directors are forbidden from operating or obtaining an interest in a cemetery." (R. 1:14.) These classifications, Porter alleged, serve no rational basis because the characteristics of those entities or individuals impacted by the anti-combination laws "are not so far different from those of other businesses so as to justify the distinction." (R. 1:14.)

Porter asserted both claims only under Article I, § 1 of the Wisconsin Constitution.[5] As relief, Porter sought a declaratory judgment that the anti-combination laws violate the due process and equal protection guarantees of the Wisconsin Constitution; an order permanently enjoining Defendants Ross and the Funeral Directors Examining Board (but not Defendant State of Wisconsin) from enforcing the anti-combination laws; costs; and attorney fees. (R. 1:15.)

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[5] As Wisconsin courts have repeatedly noted, the due process and equal protection guarantees afforded by Article I, § 1 of the Wisconsin Constitution are interpreted as affording equivalent protections to those the parallel provisions in the United States Constitution. *See, e.g.*, *Blake v. Jossart*, 2016 WI 57, ¶ 28, 370 Wis. 2d 1, 884 N.W.2d 484.

B. Summary judgment proceedings.

The Board moved for summary judgment. (*See* R. 20; *see generally* R. 19 (State's brief in support of summary judgment).) The Board argued that because the anti-combination laws do not implicate a fundamental right or a suspect classification, they are subject to rational basis review. (R. 19:1–2, 9–12.) Under rational basis review, the Board argued, multiple legitimate governmental interests supported the anti-combination laws. (*See* R. 19:13–23.) Collectively, all of the proffered interests related in some way to protecting consumers in the death care industry, such as by preserving competition, preventing comingling of funds, or fostering a more consumer-friendly purchasing experience. (*See* R. 19:13–23.)

Both parties submitted expert reports, as well as lay affidavits. As its expert, the Board proffered Dr. Jeffrey Sundberg, who is a professor of economics, business, and finance. (R. 21:4, R. App. 100.) Dr. Sundberg opined that from the standpoint of bedrock economic principles, the anti-combination laws protect consumers from various economic conditions that could occur if Wisconsin allowed such combinations in the death care industry. (*See generally* R. 21:4–27 (Sundberg's expert report), R. App. 100–23.)

One particular concern that Dr. Sundberg noted was the possibility of "foreclosure" in the death care industry if combinations were allowed. Such foreclosure could occur by combination firms limiting competitors' access to cemeteries and lowering their own prices to drive competitors from the market, only to increase prices once competitors have been driven out of business. (*See* R. 21:12–13, 15, R. App. 108–09, 111.) Sundberg noted that while he was not aware of a study about the application of the "foreclosure" theory specifically to the death care industry, the theory had been studied "in industries structured the same way as the funeral homes

industry." (R. 21:14, R. App. 110.) Applying that theory, Sundberg concluded that the longer-term result of foreclosure in the death care industry would likely be "reduced competition and higher prices." (R. 21:15, R. App. 111.)

Dr. Sundberg also concluded that the anti-combination laws could protect against comingling of trust funds between cemeteries and funeral homes. (*See* R. 21:17, R. App. 113.) The issue of comingling arises because different types of sales within the death care industry are subject to different requirements for holding in trust those funds paid for "pre-need" purchase. For example, caskets purchased pre-need are subject to a 100% trusting requirement, meaning all funds paid for a casket before death must be held in trust. *See* Wis. Stat. § 445.125(1)(a)1. Other merchandise, however, is subject to different trusting requirements: for example, "monuments, markers, nameplates, vases, and urns" are subject to a 40% trusting requirement. *See* Wis. Stat. §§ 440.92(3)(a), 157.061(3). And sales of cemetery plots require the seller to place in trust 15% of the principal paid for the plot, to cover perpetual care expenses. *See* Wis. Stat. § 157.11(9g)(c).

As Sundberg noted, the comingling concern arises when one firm sells different types of merchandise subject to different trusting requirements. (*See* R. 21:17, R. App. 113.) The comingling problem would occur if the firm charged more for merchandise that is subject to a lower trusting requirement, and lowered its prices for that merchandise which is subject to higher trusting requirements. Doing so would give the firm immediate access to more funds, at the risk that funds are not available when the pre-need purchaser dies and needs the paid-for merchandise. (*See* R. 21:17, R. App. 113.)

Dr. Sundberg also called into question the methodological approach that Porter's expert, Dr. David Harrington, used to define the impact of combinations in states where they are allowed. Sundberg noted that Harrington's analysis of combinations in other states used an artificially narrow definition of "combination firms." Specifically, in evaluating the impact of allowing combinations, Harrington considered only those funeral homes located in or very near cemeteries, without taking into account the financial relationship between the two groups, as Wisconsin's provides. (*See* R. 21:18–20, R. App. 114–16.) Sundberg concluded that with this "severe" limitation on his data, Harrington's analysis did not meaningfully address the impacts of the anti-combination laws in Wisconsin. (*See* R. 21:18–20, 25–26, R. App. 114–16, 121–22.)

Dr. Sundberg also pointed out that consumers at combination firms pay more than at stand-alone firms—sometimes as much as 42% more—while receiving similar services. (R. 21:22, R. App. 118.) Porter's expert, Dr. Harrington, acknowledged as much in his deposition, confirming that consumers at combination firms regularly ended up paying over 40% more than consumers at non-combination firms. (*See* R. 21:82.)

In addition to Dr. Sundberg's report, the Board also submitted affidavits of participants in the death care industry, funeral directors Mark Krause and Mary Lou Charapata. (*See* R. 22, 23.) Krause stated that his four funeral homes are in regular competition with cemeteries for sales of goods, including caskets, urns, and outer burial containers. (R. 22:6.) Krause also noted the concern about the comingling of funds, which could occur as a result of one

firm selling products subject to differing trusting requirements.[6] (R. 22:7–8.)

Funeral director Mary Lou Charapata's affidavit described customer service problems she saw at larger combination firms during her 30 years of experience. Charapata described her experiences working with bereaved families and individuals trying to navigate the death care industry in Arizona, where large combinations dominated the market. (*See* R. 23:3–4.) She emphasized numerous instances of families feeling pressured to use all components of a combination (*i.e.*, funeral and burial), or risk receiving inferior service or treatment. (*See* R. 23:3–4.)

Porter opposed the Board's summary judgment submissions, and submitted an expert report from Dr. Harrington, as well as two lay affidavits. In his report, Harrington opined that anti-combination laws are actually anti-competitive and do not protect the consumer's best interests. (*See* R. 29:3–23.)

Harrington's report focused on undercutting possible rationales for the anti-combination laws. For example, he concluded that the laws do not prevent foreclosure in the death care industry; that eliminating the laws would not result in increased prices due to tying arrangements (for example, where a cemetery requires consumers to purchase funeral products from the related funeral home); and that the laws do not prevent comingling of funds in death care

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[6] Although Porter argues that Krause's affidavit misstates the scope of the comingling problem (*see* Porter Br. 45), Porter does not suggest that the comingling problem doesn't exist. Indeed, as Porter's own expert noted, comingling of funds can exist between any variety of businesses, such as a cemetery and a flower shop. (*See* R. 9:13; *see also* R. 25:27–28.) But as Dr. Sundberg pointed out, the anti-combination laws reduce the *opportunity* for comingling within the death care industry. (*See* R. 21:17.)

firms. (*See* R. 29:6–11.) Harrington also concluded that the laws serve "only one purpose: to protect incumbent funeral establishments." (R. 29:11.)

In addition to Harrington's report, Porter submitted two other affidavits. One, from Porter himself, discussed facts about operating his cemetery in Milwaukee, and how he perceived the anti-combination laws to impact his operations. (*See* R. 27.) Porter also submitted an affidavit from Paul Haubrich, a former president and member of the board of directors for Forest Home Cemetery in Milwaukee. Haubrich's affidavit also discussed the operations of Forest Home, and explained his view of the perceived difficulties that cemeteries face as a result of the anti-combination laws. (*See* R. 28.)

After hearing oral argument from the parties, the circuit court granted summary judgment for the defendants. First, the court acknowledged that no trial was necessary to adjudicate this facial constitutional challenge, and that the case was proper for summary judgment. (*See* R. 33:30–31.) The court next agreed with Defendants that rational basis review does not contemplate Porter's "evidence based test," stating that the court "would be making new law" if it were to apply that approach. (R. 33:31.)

Ultimately, the court recognized that Porter's position would require the court to function as a "super-legislature," to choose a better policy approach for regulating the death care industry. (*See* R. 33:32–33.) The court thus declined to weigh in on propriety of the law, and instead concluded "that the Wisconsin [L]egislature has a rational basis for the law that it has passed." (R. 33:33.)

Porter now appeals, contending that summary judgment was not proper, and that he should be given another opportunity to submit evidence showing that the laws are irrational. (*See* Porter Br. 47.) Notably, Porter does

not argue that he is entitled to summary judgment; instead, his argument is confined to seeking a remand for further factual development. (*See* Porter Br. 46–47.)

STANDARDS OF REVIEW

On appeal from the grant of summary judgment, a court reviews the constitutionality of a statute de novo. *See Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 13, 358 Wis. 2d 1, 851 N.W.2d 337, *reconsid. denied*, 2015 WI 1, 360 Wis. 2d 178, 857 N.W.2d 620. And while disputes of "material fact" will preclude summary judgment, *Landreman v. Martin*, 191 Wis. 2d 787, 800, 530 N.W.2d 62 (Ct. App. 1995), the facial constitutionality of a statute never rests on any "material facts" specific to the parties in a case, *see League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶¶ 13–14, 357 Wis. 2d 360, 851 N.W.2d 302. Rather, the facial constitutionality of a statute turns on "'legislative facts', which is to say facts that bear on the justification for legislation, as distinct from facts concerning the conduct of parties in a particular case ('adjudicative facts')." *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). Accordingly, the question on review of a facial challenge is not whether disputed facts necessitate a trial; instead, the sole question is whether the circuit court granted summary judgment for the right party. *See Madison Teachers, Inc.*, 358 Wis. 2d 1, ¶ 13; *League of Women Voters*, 357 Wis. 2d 360, ¶ 14.

Given this standard for reviewing facial constitutional challenges, Porter's request for further factual development is a non-starter. If there are any disputed facts, they are legislative facts, and relate to *why* the Legislature chose to adopt the anti-combination laws. But this type of dispute about legislative facts (if relevant at all) is a question of law—*i.e.*, whether there exists a legitimate justification for the law. This Court reviews that question de novo, and

without any need to examine the facts of this case. *See League of Women Voters*, 357 Wis. 2d 360, ¶¶ 13–14.

ARGUMENT

I. Porter's constitutional challenges are subject to rational basis review, and require Porter to show beyond a reasonable doubt that the laws cannot be applied constitutionally.

Porter has framed his challenge as a general attack on the rationality of the laws, without clearly distinguishing between his equal protection and due process claims. (*See* R. 25:6–28; Porter's Br. 17–46.) This approach is appropriate: because no fundamental rights or suspect classifications are at issue, rational basis review applies to both claims. And because Porter is unable to make the demanding showing that the laws are unconstitutional beyond a reasonable doubt, both claims fail, and were properly dismissed on summary judgment.

A. A facial challenge to a statute must show beyond a reasonable doubt that the law can never be validly applied.

Porter's equal protection and due process claims are facial challenges to the anti-combination laws. (R. 1:13–14.) Whereas an as-applied challenge rests on the parties' particular factual circumstances, a facial challenge asserts that the law "cannot be enforced 'under any circumstances.'" *See State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 336, 780 N.W.2d 63 (quoting *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 44 n.9, 309 Wis. 2d 365, 749 N.W.2d 211). Legislative acts, however, are presumed constitutional and courts will indulge "every presumption to sustain the law." *Madison Teachers, Inc.*, 358 Wis. 2d 1, ¶ 13. The presumption of constitutionality will be overcome only if the

challenger can establish beyond a reasonable doubt that the law is unconstitutional in every instance.[7] *See id.* ¶ 13 & n.8 (citing *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 2005 WI 125, ¶ 68 n.71, 284 Wis. 2d 573, 701 N.W.2d 440).

Under this demanding standard, a challenger cannot succeed if he shows only that the law's constitutionality is "doubtful," or even that the law is "probably unconstitutional." *See Wis. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 37, 328 Wis. 2d 469, 787 N.W.2d 22. On rational basis review, the challenge of showing that a law is unconstitutional is "frequently insurmountable." *See Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 44, 235 Wis. 2d 610, 612 N.W.2d 59 (quoting *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 209, 313 N.W.2d 805 (1982)).

Thus, for Porter's facial challenge to succeed, he must prove beyond a reasonable doubt that there is no set of circumstances in which the prohibition on combinations could be constitutionally applied.

B. Economic regulations like the anti-combination laws are universally subject to rational basis review.

When confronted with equal-protection or due-process challenges to economic regulations, courts consistently defer

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[7] Although the "beyond a reasonable doubt" standard is reminiscent of an evidentiary burden in criminal cases, the constitutionality of a law is a purely legal question, so the standard in this context does not implicate any factual showing. *See Ferdon*, 284 Wis. 2d. 573, ¶ 68 n.71. Rather, the "beyond a reasonable doubt" standard in a constitutional challenge "means that a court gives great deference to the legislature," and the degree of certainty required pertains to the persuasive force of the legal argument seeking to show unconstitutionality. *Id.*; *accord Madison Teachers, Inc.*, 358 Wis. 2d 1, ¶ 13 n.8.

to legislative determinations about the proper scope of regulation. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Courts reviewing such challenges must not sit as a "super-legislature," seeking to "judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Id.* Instead, courts "accorded a strong presumption of validity" to laws that do not involve fundamental rights or proceed along suspect lines. *Heller v. Doe*, 509 U.S. 312, 319 (1993).

Such laws should be upheld as long as there is some conceivable, legitimate basis for the law. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Indeed, such a law "may be based on rational speculation unsupported by evidence or empirical data," *id.*, and courts need not evaluate any explicit statement of purpose or legislative findings in support of the law, *see State v. Radke*, 2003 WI 7, ¶ 27, 259 Wis. 2d 13, 657 N.W.2d 66. As Wisconsin courts have noted repeatedly, "In evaluating whether a legislative classification rationally advances the legislative objective, we are obligated to locate or, in the alternative, construct a rationale that might have influenced the legislative determination." *Madison Teachers, Inc.*, 358 Wis. 2d 1, ¶ 77 (quoting *Ferdon*, 284 Wis. 2d 573, ¶ 74 (quotations omitted)).

Thus, the Legislature's actual motive (to the extent that a Legislature ever has a single motive) is irrelevant for purposes of rational basis review. *See Beach Commc'ns, Inc.*, 508 U.S. at 315. It is the challenger's "burden to negate every conceivable basis which might support" the law. *Id.*

Relatedly, the rational basis test "does not require the legislature to choose the best or wisest means to achieve its goals. Deference to the means chosen is due even if the court believes that the same goal could be achieved in a more

effective manner." *Ferdon*, 284 Wis. 2d 573, ¶ 76 (footnote omitted).

II. The anti-combination laws easily satisfy rational basis review.

The anti-combination laws are conceivably (and actually) related to the legitimate governmental interest of protecting consumers. Because this conceivable basis satisfies rational basis review, Porter's challenges to the laws were properly dismissed.

A. The anti-combination laws conceivably protect vulnerable consumers participating in the death care industry.

The anti-combination laws are quintessential economic regulations, along with the entire framework regulating the death care industry. These laws have no bearing on fundamental rights or suspect classifications. As such, the anti-combination laws are presumptively constitutional.

And viewed together, these regulations form a protective buffer between the competitive interests of death care companies and particularly vulnerable consumers—individuals navigating a process that, for many, involves the most stressful, emotionally charged financial decisions they might ever be required to make. The anti-combination laws fit rationally into this protective framework, by precluding combination firms that could potentially take advantage of vulnerable consumers during times of grief.

The State has a legitimate interest in protecting its citizens from such possible harms. The Supreme Court has recognized this well-established concept, confirming that a state's strong interest in protecting consumers from "commercial harms" supports regulating "price advertising in one industry but not in others, because the risk of fraud

. . . is in [the state's] view greater there." *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011) (addressing First Amendment challenge) (citation omitted). Because the anti-combination laws are conceivably (and actually) related to this legitimate purpose of protecting citizens from commercial harms, the laws are constitutional under rational basis review.

The rational basis inquiry ends here. Once a court identifies a conceivable, rational basis for a statute, "the court must assume the legislature passed the act on that basis." *Blake*, 370 Wis. 2d 1, ¶ 32 (quoting *Ferdon*, 284 Wis. 2d 573, ¶ 75). "[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Comm'ns*, 508 U.S. at 315. Therefore, all of Porter's assertions about legislative favor for funeral directors are not only unsupported, they are irrelevant. In the face of the plausible, consumer protective purpose for the anti-combination laws, this Court should presume that the Legislature acted properly, and sustain the laws on that basis.

Two cases involving similar laws lend additional support to the conclusion that Wisconsin's laws are rational and are therefore a valid exercise of the State's regulatory power.

In the first case, a cemetery owner brought a due process and equal protection challenge to a statute that "provided that a corporation [could] engage in the business of funeral directing only if it engage[d] in no other business." *See Blue Hills Cemetery, Inc. v. Bd. of Registration in Embalming & Funeral Directing*, 398 N.E.2d 471, 473 (Mass. 1979) (R. App. 134). The Massachusetts Supreme Court concluded that the challenged law did not implicate any fundamental right or suspect class, and that the law

was justified under rational basis review. *See id.* at 474–77 (R. App. 135–38). The court rejected the due process and equal protection challenges, concluding that the "Legislature was free to pursue the . . . valid goal of enhancing the quality of funeral services, which are always rendered and most often contracted for under emotional circumstances." *Id.* at 4756–77 (R. App. 136–38).

Similarly, in *Deepdale Memorial Gardens v. Administrative Secretary of Cemetery Regulations*, 426 N.W.2d 785, 787 (Mich. Ct. App. 1988) (R. App. 141), a cemetery owner raised due process and equal protection challenges to a Michigan statute that prohibited dual ownership, management, or operation of both a cemetery and funeral establishment, whether "directly or indirectly." As Porter does here, the challenger in that case argued that a more demanding version of rational basis review applied, which required the state to show a "substantial relation to the purpose of the statute." *See id.* at 789 (R. App. 143). The court rejected this heightened standard, concluding that the trend "has been away from the means scrutiny for cases which do not involve fundamental rights or suspect classifications." *Id.* (R. App. 143).

But the *Deepdale* court went one step further, and confirmed that even under the heightened "substantial relation" standard of proof, the court would nevertheless hold that "the Legislation here in question bears a substantial relation to legitimate governmental purposes." *Id.* As support, the court noted that there was "ample, rational basis [for the Legislature] to conclude that competition in the cemetery and funeral businesses was preserved by prohibiting one agency from both owning and operating a cemetery and acting as a mortician." *Id.*

Therefore, under the controlling, deferential standard for rational basis review, the anti-combination laws at issue in this case must be sustained as constitutional, just as were the laws in *Blue Hills* and *Deepdale*. And as discussed next, Porter is unable to prove otherwise beyond a reasonable doubt.

B. Porter fails to show beyond a reasonable doubt that the anti-combination laws are irrational.

The foregoing provides rational reasons for the law, and nothing Porter argues can change that. Rather, ignoring the clear tenor of this consumer protective framework, Porter argues that the anti-combination laws serve only protectionist purposes in favor of funeral directors, and are therefore irrational. Porter's arguments are contrary to common sense, and paint an inaccurate picture of the history of the laws.

As a matter of common sense, if the sole purpose of the anti-combination laws were to protect funeral directors from competition (*see, e.g.*, Porter Br. 33), the means used would be laughably ineffective. Far from walling off funeral directors from any competition, the law prohibits only *one* type of entity—cemeteries—from entering the funeral directing business. So as long as an entity is not a "cemetery authority" (or an employee or agent thereof), the anti-combination laws have nothing to say about the entity's participation in the business of funeral directing.

In addition to the illogic of a "protectionism" argument, Porter's argument fails to acknowledge that for over a half century, the anti-combination law applied only to funeral directors. *See* 1993 Wis. Act 100, §§ 1–3. When the Legislature enacted the reciprocal provision for cemeteries in 1993, it was simply to close the loop restricting how the two types of entities could combine. To allege that that the

laws were intended to protect funeral directors is therefore contrary to the history of the laws, and contrary to common sense about how to "protect" against competition.

Equally unpersuasive are Porter's suggestions that any legitimate purpose of the anti-combination laws could be addressed without these laws. For example, Porter asserts that any anti-monopolistic purpose could be addressed through the state's antitrust laws, and that the anti-combination laws are therefore unnecessary. (*See, e.g.*, Porter Br. 38.) Similarly, Porter's expert points out that comingling could still be a concern with anti-combination laws in place. For example, a funeral home might sell merchandise subject to varying trusting requirements, or a cemetery might operate a flower shop (not subject to any trusting requirements). (*See, e.g.*, R. 29:11 (Harrington Report).)

But even accepting Porter's premises on these points, the laws do not fail rational basis review simply because another, general law might also cover the same concerns, or because the anti-combination laws do not address every occurrence of a problem. Rather, "the mere existence of alternative policy proposals does not negate the rational relationship" between the Legislature's goals and its chosen methods. *Blake*, 370 Wis. 2d 1, n.16. Likewise, the fact that the law could be structured differently, or that its goal accomplished in another manner, will not negate the rationality of the law. "The rational basis test does not require the legislature to choose the best or wisest means to achieve its goals. Deference to the means chosen is due even if the court believes that the same goal could be achieved in a more effective manner." *Ferdon*, 2005 WI 125, ¶ 76, 284 Wis. 2d 573, 701 N.W.2d 440; *see also Doering v. WEA Ins. Grp.*, 193 Wis. 2d 118, 131–32, 532 N.W.2d 432 (1995).

Deference in this context also requires acknowledging that the Legislature has twice rejected arguments in favor of repealing the anti-combination laws. *See* 2011 A.B. 523; 2013 A.B. 508. Deference thus means that a disappointed constituent cannot turn to the courts to push through a policy that the Legislature has twice declined to adopt. This is particularly so under rational basis review.

Because the anti-combination laws are rationally related to a legitimate governmental interests, and because Porter's allegations of protectionism come nowhere close to proving unconstitutionality beyond a reasonable doubt, his challenge fails.

III. This Court should reject Porter's attempt to heighten the applicable level of review; however, the laws nonetheless satisfy Porter's novel standard.

As set forth *supra*, the anti-combination laws should be sustained under established rational basis principles. Porter, however, contends that something other than the typical rational basis review applies, and argues that under that novel approach, the laws are invalid. Porter's legal arguments should be rejected. But even under his heightened standard for rational basis review, his challenge fails.

A. This Court should reject Porter's attempt to invoke heightened scrutiny based on the asserted "fundamental right to earn a living."

In an attempt to alter the applicable constitutional standard, Porter tries to characterize the right at issue as "the right to earn a living," and suggests that this "fundamental right" cannot be infringed without a showing of a "real and substantial connection" between the challenged law and the law's "claimed objectives." (*See, e.g.* Porter Br. 16.) This approach fails for two reasons.

For one, Porter's focus on "claimed objectives" is contrary to the very nature of *rationality* review, under which a law will be upheld if there is any conceivable basis to sustain it. Rather, it is black letter law in Wisconsin that courts reviewing constitutionality of laws "are obligated to locate or, in the alternative, construct a rationale that *might have* influenced the legislative determination." *Madison Teachers, Inc.*, 358 Wis. 2d 1, ¶ 77 (emphasis added) (citation omitted)). Thus, the Legislature is not required to outline its "objectives" for the law, and courts are not required to (indeed, should not) confine their inquiry to any "claimed objective."

Second, it should be clear that Porter's invocation of the "right to earn a living and pursue [his] business free from anticompetitive, arbitrary, and irrational regulation" is an attempt to reinvigorate notions of court-defined "liberty" popular in the *Lochner* era. *See Lochner v. New York*, 198 U.S. 45 (1905). That understanding of the judicial role—with its "infamous usurpation of legislative power"—has been "relegated to the ash heap of history." *Ferdon*, 284 Wis. 2d 573, ¶ 215 n.2 (Prosser, J., dissenting); *see also Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (noting that *Lochner* "has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.").

Economic regulations, like those at issue here, are now universally recognized as squarely within the Legislature's authority to enact. For example, the Wisconsin Supreme Court has explained that "[t]he legislature has broad latitude to experiment with economic problems and we do not presume to second-guess its wisdom." *Madison Teachers, Inc.*, 358 Wis. 2d 1, ¶ 119 (citing *Ferguson v. Skrupa*, 372 U.S. 726 (1963)). Porter does not provide any viable

reason to apply a more searching review for the purely economic regulations at issue here, and his attempt revitalize *Lochner* should be decisively rejected.[8]

B. Viewed in context with the regulations governing the death care industry, the anti-combination laws bear a "real and substantial" connection with the government's interest in protecting consumers.

Even if Porter's anachronistic approach were the law, his claim still would fall short. Contrary to Porter's portrayal, the anti-combination laws involve far more than limiting the operations of cemetery owners. When viewed in the context of the comprehensive regulations governing the death care industry, it becomes clear that the anti-combination laws are simply one component of the broad, consumer protective purpose of that framework. This is demonstrated in the language of the statutes, and is supported by the Board's submissions on summary judgment.

1. Statutory provisions surrounding the anti-combination provisions illustrate that the laws at issue serve a consumer protective purpose.

The anti-combination provision applicable to funeral directors is found in Wis. Stat. § 445.12(6), which is part of the "Prohibited Practices" section for funeral directors. That section includes other provisions prohibiting certain

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[8] In the circuit court, Porter relied on two federal cases to support his argument that the anti-combination laws serve only protectionist ends: *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) and *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013). In his opening brief in this Court, Porter has not cited these cases as support for this argument; accordingly, the Board does not address them.

marketing techniques, limiting who funeral directors may contact and how they can contact them, and prohibiting general business practices that might have an undue influence on the vulnerable consumers of death care products. Together, these provisions show that the anti-combination laws (both as to cemetery authorities and funeral directors) serve to protect consumers.

Under Wis. Stat. § 445.12(3), funeral directors are prohibited from soliciting "a funeral service or the right to prepare a dead human body . . . either before or after death has occurred, or pay or cause to be paid any sum of money or other valuable consideration for the securing of the right to do such work." Relatedly, funeral directors and their agents are restricted in *how* they may solicit the sale of burial agreements. *See* Wis. Stat. § 445.12(3g)(a). These limits include prohibitions on contacting prospective purchasers "in a hospital, health care facility or similar facility or institution"; contacting relatives of "a person whose death is imminent or appears to be imminent"; or contacting prospective purchasers "by door-to-door solicitation or in a manner that violates rules promulgated by the examining board." *See* § 445.12(3g)(a)1.–3.

The statutes also explicitly outline certain methods of solicitation that are not prohibited, including mass media "that is not directed solely toward persons in a hospital, health care facility or similar facility or institution or toward the relatives of a person whose death is imminent or appears to be imminent." *See* Wis. Stat. § 445.12(3g)(b)2. Solicitation is also allowed if a prospective purchaser of a burial agreement requests a contact. *See* Wis. Stat. § 445.12(3g)(b)1.

Another provision under Wis. Stat. § 445.12 prohibits funeral directors from requiring purchasers of burial

agreement to purchase certain forms of life insurance. *See* Wis. Stat. § 445.12(3r)(a), (b).

Notable for current purposes, Wis. Stat. § 445.12(4) includes multiple prohibitions on how funeral directors may engage with consumers in the death care industry. Funeral directors may not

- Publish "any false, misleading or fraudulent advertisement";
- Take "undue advantage of patrons or commit any fraudulent act in the conduct of business"; or
- Do "any other act not in accord with the rules established by the department of health services and the examining board and not in accord with *proper business practices* as applied to the business or profession of funeral directing and embalming."

Wis. Stat. § 445.12(4). Subsection (5) further provides that funeral directors are liable for any violations of the statutory chapter committed by any person under the director's supervision. *See* Wis. Stat. § 445.12(5).

It is within this framework that the anti-combination provision is located. After setting out prohibitions on taking "undue advantage of patrons" or engaging in "improper" business practices, the statute lays out its proviso about which business entities within the industry must remain separate.

In keeping with the proceeding subsections' limits on funeral directors' activities, the anti-combination provision prohibits funeral directors (or their agents) from receiving any compensation from any cemetery, mausoleum or crematory (or any agent or employee thereof) "in connection with the sale or transfer of any cemetery lot, outer burial container, burial privilege or cremation." Wis. Stat. § 445.12(6). That subsection also prohibits funeral directors

from operating a funeral establishment "located in" or financially connected with a cemetery, or from acting "as a broker or jobber of any cemetery property or interest therein." *Id.*

The parallel provision, applicable to "cemetery authorities," imposes prohibitions reciprocal to those imposed on funeral directors. *See* Wis. Stat. § 157.067(2). Substantially similar to the funeral director provision, the cemetery provision prohibits cemetery authorities from allowing funeral homes to locate in the cemetery, and also prohibits cemetery authorities from holding any financial interest in funeral establishments. Wis. Stat. § 157.067(2).

It bears emphasizing that the cemetery provision was adopted on the heels of a Wisconsin Attorney General opinion dealing with the increasing incidence of corporate subsidiaries holding controlling interests in both cemeteries and funeral homes. *See* 78 Wis. Op. Att'y Gen. at 6–7; *see also* R. 21:249–52 (copy of AG opinion). Without this reciprocal provision, such arrangements could have effectively circumvented the anti-combination laws, which was previously applicable only to funeral directors. *See* 1993 Wis. Act 100, §§ 1, 2 (creating provision applicable to cemetery authorities).

Viewing these provisions in context, the consumer protective purpose of the anti-combination laws is clear. Thus, even under Porter's novel approach to rational basis review, the statutory framework evinces a clear intent to protect consumers. The challenged laws therefore bear a real and substantial relationship to the legitimate purpose of consumer protection, and should be upheld even on this more-searching review.

2. Evidence presented on summary judgment shows that the anti-combination laws have a real and substantial connection to consumer protection.

Additionally, the submissions on summary judgment lend additional, evidentiary support to the conclusion that the anti-combination laws serve to protect consumers. These submissions, discussed *supra*, at 10–14, and set forth at length in the circuit court (*see, e.g.*, R. 19:13–23 (State's summary judgment brief); R. 21:5, 7, 12–13, 15, 17, 26–27 (expert report of Dr. Sundberg, R. App. 100–31)), showed that the laws are related to preserving competition; avoiding comingling of funds; protecting trusting requirements between different types of death care purchases; avoiding higher prices on death care goods and services; and avoiding undue pressure on bereaved consumers.

Thus, there is more than enough evidence to conclude that the laws bear a "real and substantial" connection to protecting consumers. Porter's argument—that there exists some dispute about material facts—misunderstands even his own proposed standard. That is, even under his proffered standard, the constitutionality of the laws is not resolved by weighing competing expert testimony. Rather, even under his standard, the question is whether there is a solid basis for the law. If the answer is, yes, as it is here, then it is immaterial whether others may disagree. Thus, under any view of the law, Porter's claims must fail.

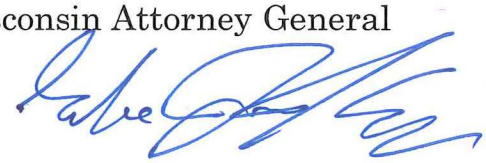
CONCLUSION

Based on the foregoing, the Board asks this Court to AFFIRM the circuit court's order granting summary judgment to the Defendants.

Dated this 1st day of December, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 7642 words.

Dated this 1st day of December, 2016.

GABE JOHNSON-KARP
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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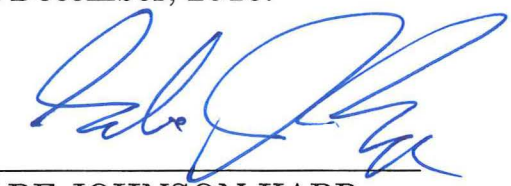

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