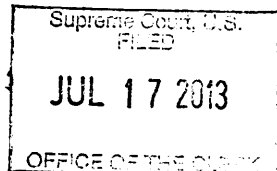


13-91

No. _____



In the Supreme Court of the United States

PAUL "WES" CASTILLE, *et al.*,
Petitioners,

v.

ST. JOSEPH'S ABBEY, *et al.*,
Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in holding that "economic protectionism" was not a legitimate state interest under Fourteenth Amendment rational-basis analysis of equal protection and due process claims, and thus deepened a circuit split that already existed between the Tenth Circuit and the Sixth Circuit?

2. Whether the Fifth Circuit erred by holding that Louisiana violated the Fourteenth Amendment guarantees of equal protection and due process by permitting only funeral directors to sell caskets to the public, and thus deepened a circuit split, rejecting the solution of the Tenth Circuit and aligning itself with the holding of the Sixth Circuit, which the Tenth Circuit itself had rejected?

LIST OF PARTIES

Petitioners, each in his or her capacity as a Member of the Louisiana State Board of Embalmers and Funeral Directors:

Paul “Wes” Castille

Patrick H. Sanders (replaces Oscar Rollins)

John Dansby, Sr. (replaces Andrew Hayes)

Margaret Shehee

Kelly Rush Williams

Louis Charbonnet III

Edward L. Muhleisen (replaces Royal J. David)

Gerald L. Schoen III

Steven Cox

Respondents:

Saint Joseph Abbey, Covington, Louisiana

Mark Coudrain

CORPORATE DISCLOSURE STATEMENT

Petitioners are all individuals. The Louisiana State Board of Embalmers and Funeral Directors is not a corporation but is a licensing and regulatory board created by statute. La. R.S. 37:831 et. seq.

Respondents Saint Joseph Abbey and Marc Coudrain are not corporations.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
CORPORATE DISCLOSURE STATEMENT ..	iii
TABLE OF CONTENTS	iv
TABLE OF CITED AUTHORITIES	vii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	2
STATEMENT OF THE CASE	2
REASONS FOR ALLOWANCE OF THE WRIT .	4
 I. THE CIRCUIT COURTS OF APPEAL OF THE UNITED STATES HAVE SPLIT ON THE SCOPE OF STATE LEGISLATIVE POWER UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES	 4
 <u>A. The Federal Circuit Courts Have Split on What Constitutes a Legitimate State Interest for Rational-Basis Review</u>	 4

<u>B. Decisions of the Tenth and Sixth Circuits Created the Split over State Power to Regulate the Sale of the Simple Box or Casket</u>	7
--	---

<u>C. The Fourth, Ninth, and Eleventh Circuits Have Taken Sides in the Split in Professional Licensing Cases</u>	15
---	----

II. The Fifth Circuit Below Followed the Sixth Circuit to Hold that Economic Protectionism is Not a Legitimate Governmental Interest under the Fourteenth Amendment Guarantees of Equal Protection and Due Process, and Therefore Misapplied Rational-Basis Review	22
---	----

<u>A. The Fifth Circuit in <i>Castille</i> Deepened the Circuit Split by Holding that Economic Protectionism is an Illegitimate State Interest and Erred by Requiring the State Prove a Benefit to the Public to Satisfy the Fourteenth Amendment</u>	22
--	----

<u>B. Rational-Basis Review Presumes that State Legislation is Constitutional</u>	23
---	----

<u>C. The Fifth Circuit Erred in Ruling that the Louisiana Act Violated Equal Protection</u>	26
---	----

<u>D. In Ruling that the Louisiana Act Violated Due Process, The Fifth Circuit Improperly Applied Rational Basis Analysis of the Means Chosen to Effect Its Purpose by Assuming that the State had Done Too Little in the Louisiana Act</u>	30
<u>E. The Fifth Circuit Erred by Purporting to Divine the One True Purpose of the Louisiana Act, Which is Inconsistent with Rational Basis Analysis</u>	32
<u>F. The Fifth Circuit Failed to Consider Other Possible Legitimate State Interests for the Louisiana Act, as Rational-Basis Review Requires</u>	33
III. This Court Should Eliminate the Circuit Split Over Economic Protectionism in Order to Guide Both State Legislatures and the Lower Courts	35
Conclusion	36
Appendix	
Appendix A: Opinion and Judgment, in the United States Court of Appeals for the Fifth Circuit (March 20, 2013)	App. 1

Appendix B:	Findings of Fact and Conclusions of Law and Judgment, in the United States District Court Eastern District of Louisiana (July 21, 2011)	App. 27
Appendix C:	Petition for Rehearing an banc denied, in the United States Court of Appeals for the Fifth Circuit (April 19, 2013)	App. 54
Appendix D:	Excerpt of Louisiana Revised Statutes: Title 37, Chapter 10, Embalming and Funeral Directors	App. 56

TABLE OF CITED AUTHORITIES

CASES

- Adkins v. Children's Hospital*,
 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785
 (1923) 25, 26
- Armour v. City of Indianapolis, Ind.*,
 — U.S. —, 132 S.Ct. 2073, 2012 WL 1969350
 (June 04, 2012) 27, 28
- Baynes v. George E. Mason Funeral Home, Inc.*,
 2011 WL 2181469, *1 (W.D. Pa., 2011) 28, 29, 34
- Brown v. Hovatter*,
 561 F.3d 357 (4th Cir. (Md.) 2009), cert. den.,
 558 U.S. 1048 (2009) 17
- City of Cleburne v. Cleburne Living Center*,
 473 US 432 (1985) 8, 13
- City of New Orleans v. Dukes*,
 427 U.S. 297 (1976) 17
- City of Philadelphia v. New Jersey*,
 437 U.S. 617 (1978) 12
- Coppage v. Kansas*,
 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915) . 25
- Craigsmiles v. Giles*,
 312 F.3d 220 (6th Cir. 2002) 5, 10, 11, 12, 32

<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970)	5, 29,30
<i>Energy Reserves Group, Inc. v. Kansas Power & Light Co.</i> , 459 U.S. 400 (1983)	12
<i>F.C.C. v. Beach Communications, Inc.</i> , 508 U.S. 307 (1993)	11, 13, 18, 33
<i>Ferguson v. Skrupa</i> , 372 U.S. 726 (1963)	25, 26
<i>Fitzgerald Racing Ass'n of Central Iowa</i> , 539 U.S. 103 (2003)	13
<i>Guardian Plans Inc. v. Teague</i> , 870 F.2d 123 (4th Cir. (Va.) 1989)	15, 16, 17
<i>H.P. Hood & Sons, Inc. v. Du Mond</i> , 336 U.S. 525 (1949)	12
<i>Heller v. Doe</i> , 509 U.S. 312 (1993)	11
<i>Jay Burns Baking Co. v. Bryan</i> , 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813 (1924)	25
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003)	14
<i>Lehnhausen v. Lake Shore Auto Parts Co.</i> , 410 U.S. 356 (1973)	11

<i>Lochner v. New York</i> , 198 U.S. 45 , 25 S.Ct. 539, 49 L.Ed. 937 (1905) .	25
<i>Locke v. Shore</i> , 634 F.3d 1185 (11th Cir. 2011), cert. den., 132 S.Ct. 1004 (2012)	18
<i>Merrifield v Lockyer</i> , 547 F.3d 978 (9th Cir., 2008)	7, 20, 21
<i>Nebbia v. New York</i> , 291 U.S. 502 (1934)	10
<i>Powers v. Harris</i> , 379 F.3d 1208 (10th Cir. 2004)	<i>passim</i>
<i>Railroad Retirement Bd. v. Fritz</i> , 449 U.S. 166 (1980)	11
<i>Romer v. Evans</i> , 517 U.S. 620 (1996)	13
<i>St. Joseph Abbey v. Castille</i> , 712 F.3d 215 (5th Cir. 2013)	5
<i>United States v. Carolene Products Co.</i> , 304 U.S. 144 (1938)	23, 27, 33
<i>United States v. Windsor</i> , -- U.S. --, 2013 WL 3196928 (2013)	14
<i>Williamson v. Lee Optical of Oklahoma, Inc.</i> , 348 U.S. 483 (1955)	<i>passim</i>

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Amend. XIV	2
28 U.S.C. § 1254	1
42 USC § 1983	1, 3
La. R.S. 37:831	iii, 2
La. R.S. 37:831(42), (45) & (46)	3
La. R.S. 37:832	2
La. R.S. 37:840 A (1)-(7)	2
La. R.S. 37:842	3
Okla. Stat. tit. 59	7
Tenn. Code Ann. § 62-5-101- § 62-5-708	10
Tenn. Code Ann. § 62-5-101(a)(3)(A)(ii)	11
Tenn. Code Ann. § 62-5-201	11

RULES

Supreme Court Rule 13 ¶3	1
--------------------------------	---

OTHER AUTHORITIES

ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS §§ 125-126 (1904)	29
--	----

Ronald D. Rotunda and John E. Nowak, TREATISE ON
CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, §
18.3(a)(ii-iv) (Westlaw)(updated June 2013) 27

Santiago Legarre, The Historical Background of the
Police Power, 9 U. Pa. J. Const. L. 745 (2007) 29

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals below is reported at *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013). App. 1.

The opinion of the District Court is reported at *St. Joseph Abbey v. Castille*, 835 F.Supp.2d 149 (E. D. La. 2011). App. 27.

STATEMENT OF JURISDICTION

Petitioner was defendant in an action for declaratory and injunctive relief under 42 USC § 1983 in the United States District Court of the Eastern District of Louisiana. The District Court held that Louisiana statute and regulations promulgated and enforced by Petitioner pursuant to the statute were unconstitutional under the Fourteenth Amendment equal protection clause and due process clause, both on their face and as applied to the Respondents.

A three-judge panel of the United States Court of Appeals for the Fifth Circuit affirmed on March 20, 2013. App. 1. The Fifth Circuit denied rehearing en banc on April 19, 2013. App. 55. A Petition of Writ of Certiorari therefore is timely if filed on or before July 18, 2013. Supreme Court Rule 13 ¶3.

This Petition for Writ of Certiorari has been filed with the Clerk of the United States Supreme Court on or before July 18, 2013. Therefore this Court has jurisdiction to consider the Petition for Writ of Certiorari. 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Constitution of the United States, Fourteenth Amendment 14, section 1: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Louisiana Revised Statutes, Title 37 Professions and Occupations, Chapter 10 Embalmers and Funeral Directors, sections 831 et seq. See Appendix D.

STATEMENT OF THE CASE

Louisiana statute created the State Board of Funeral Directors and Embalmers (the “Board” or “Petitioner”). Louisiana statute provides for the regulation of the burial of human corpses when survivors choose to bury their dead in certain ways. La. R.S. 37:831 et. seq. (the “Act” or “Louisiana Act”). The Louisiana Act uses the Board to carry out its provisions. La. R.S. 37:832 (providing for nine members, appointed by the Governor for four-year terms upon Senate confirmation); La. R. S. 37:840 A (1)-(7) (Board to have “all the powers necessary for administering and enforcing” the Act, including rulemaking authority). The Act empowers the Board to license funeral directors and embalmers who meet

and maintain professional requirements. La. R.S. 37:842. The Act provides that only a licensed funeral director may conduct “the business of funeral directing.” La. R.S. 37:842. The Act defines the retail sale of caskets as part of the business of funeral directing. La. R.S. 37:831(42), (45) & (46). Therefore, only a licensed funeral director associated with or employed by a funeral establishment may sell caskets to the public.

Respondent St. Joseph’s Abbey is a Catholic, Benedictine monastery (the “Abbey”). It is located on twelve hundred acres of land in St. Tammany Parish, Louisiana, where it operates a seminary for religious and lay students and a large church. Its monks made caskets for many years primarily for themselves but did not sell them to the public. After Hurricane Katrina, the Abbey established St. Joseph’s Woodworks (the “Woodworks”) to make and sell caskets to the general public and hired respondent Mark Coudrain, a deacon, as manager. App. 2. The Abbey established the Woodworks to generate revenue and sells caskets for double and triple the price of comparable caskets sold by licensed funeral directors. App. 2.¹

The Abbey brought suit in the Federal District Court for the Eastern District of Louisiana based on 42 U.S.C. § 1983, seeking a declaratory judgment that the Louisiana Act and the Board’s regulations violated the

¹ The Abbey so stipulated at trial. Trial transcript, p. 39, USCA5 733. The Fifth Circuit below incorrectly states that the Abbey’s prices are “significantly lower than those offered by funeral homes.” App. 2. The District Court did not make this error. App. 32-33.

Fourteenth Amendment guarantees of due process and equal protection. After a bench trial, the District Court ruled for the Respondents, enjoining enforcement of the Act. App. 51-53. The Board appealed.² The Fifth Circuit panel affirmed on March 20, 2013. App. 27. The Fifth Circuit denied rehearing en banc on April 19, 2013. App. 55.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE CIRCUIT COURTS OF APPEAL OF THE UNITED STATES HAVE SPLIT ON THE SCOPE OF STATE LEGISLATIVE POWER UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

A. The Federal Circuit Courts Have Split on What Constitutes a Legitimate State Interest for Rational-Basis Review

The circuit split concerns whether the underlying interest or purpose of State legislation may be to benefit one group of participants in that State's internal economy.³ This State interest has attracted

² The panel certified to the Supreme Court of Louisiana the question whether the Board possessed the authority under the Louisiana Act to forbid retail sales of caskets unconnected to funeral services; that court. The Louisiana Supreme Court denied certification. App. 9.

³ This petition capitalizes "State" when referring to a state in the union, as opposed to state in its general sense, which may refer to

the label, “economic protectionism.”⁴ The Tenth Circuit held that it is a legitimate interest when claimed violations of the Fourteenth Amendment are evaluated under rational-basis review. *Powers v. Harris*, 379 F.3d 1208 (10th Cir. (Okla.) 2004). The Sixth Circuit held that it is not. *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. (Tenn.) 2002). Facing that conflict of authority, the Fifth Circuit below deepened the split by following the Sixth Circuit. *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013).

The Federal circuit courts have thus split on a fundamental and important issue: how a court is to conduct rational-basis review of State legislation under the Fourteenth Amendment. Rational-basis review proceeds in two steps. First, a reviewing court decides whether a State had a legitimate interest in legislating, and second whether the State pursued that interest using a classification or means rationally related to the underlying interest. The circuit split thus concerns the first step: what constitutes a legitimate interest for rational-basis review.

a nation-state, including the Federal government (also capitalized here). The Court has sometimes adopted this usage. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970) (Stewart, J.)

⁴The label is problematic. For one thing, it implies that legal rules can be totally neutral and without any “economic” benefit to some group, which is false. For example, it appears universally accepted that consumer protection, whether through lower prices and increased competition among sellers or through some other means, is a legitimate State interest. Yet consumer protection favors consumers economically and thus is also an example of “economic protectionism.”

Some circuits realistically acknowledge that State legislation may benefit one group of market participants and that it may do so by licensing a profession. Licensing burdens those who must satisfy statutory criteria to get and keep the license and offers them benefits. For example, license holders are entitled to engage in activities forbidden to unlicensed individuals. This protects licensed professionals from competition by those who have not invested time and effort to obtain the license. For example, licensed individuals may have the exclusive right to provide certain services or sell certain goods to the public.

Licensing thus classifies individuals in two groups: those who have the license and those who do not. The classification therefore potentially implicates equal protection under the Fourteenth Amendment. Yet if the underlying purpose of the licensing structure is legitimate, and if a court can find that a legislature might rationally have restricted access to that retail market in order to advancing that purpose, Fourteenth Amendment equal protection is not violated.

Forbidding unlicensed sellers to take part in a retail market is sometimes presented as a denial of a fundamental liberty and therefore a denial of due process under the Fourteenth Amendment. But Petitioner respectfully urges that this is incorrect. This Court's cases are clear that today there is no fundamental right to engage in any particular ordinary commercial transaction free of State regulation. Thus, the claim of the would-be retail seller who wants to skip getting a license is not one of due process but of equal protection. This is the view taken by the Tenth Circuit in *Powers v. Harris*, 379 F.3d 1208 (10th Cir.

(Okla.) 2004). Some courts melt due process and equal protection claims together, as did the Fifth Circuit below. Other circuits keep the claims distinct. *Merrifield v Lockyer*, 547 F.3d 978, (9th Cir. (Cal.), 2008) (State did not violate due process by requiring pest controller who did not use pesticides to satisfy license criteria related to pesticides, but State violated equal protection by exempting only some controllers who did not use pesticides from those requirements). Accordingly, the claims will be discussed separately here.

B. Decisions of the Tenth and Sixth Circuits Created the Split over State Power to Regulate the Sale of the Simple Box or Casket

The Tenth Circuit has clearly held that State legislation does not violate Fourteenth Amendment equal protection even if the court can find no other purpose for the legislation than the desire to favor one group of economic actors over another. *Powers v. Harris*, 379 F.3d 1208 (10th Cir. (Okla.) 2004). The Tenth Circuit there dealt with a challenge to the Oklahoma Funeral Services Licensing Act, Okla. Stat. tit. 59, § 395.1 et seq. (the “Oklahoma Act”). The Oklahoma Act required that retail sellers of caskets be licensed funeral directors and that they sell them from a licensed funeral establishment. *Powers v. Harris*, 379 F.3d 1208, 1211-12, fns 1-4, citing Okla. Stat. tit. 59, §§ 396.2 (seller of funeral service merchandise to public is a funeral director; funeral establishment is place of business used in funeral directing; funeral-service merchandise is a product “normally” sold by “funeral establishments” that the Federal Trade

Commission places on its General Price List, which includes caskets).⁵

The Oklahoma Board was empowered to enforce the Oklahoma Act when retail casket sales occurred intrastate. *Powers v. Harris*, 379 F.3d 1208, 1212. Thus, *Powers* dealt with a challenge to State regulation of intrastate ordinary commercial transactions that did not conflict with any federal legislation or regulation, any express provision of the Constitution, or any widely accepted constitutional restraint on State legislative power over ordinary commercial transactions, such as the dormant commerce power. *Powers v. Harris*, 379 F.3d 1208, 1218-19. Nor in *Powers* was there any issue of an exercise of State legislative power that targeted individuals based upon prejudice or animus of the kind this Court has found to be present in other cases. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 US 432 (1985). Because the Oklahoma Act merely protected an intrastate industry by restricting to licensed professionals retail sales of certain items

⁵ "By including all products normally provided by funeral establishments and required to be listed on the General Price List of the FTC (a list which includes caskets) within the definition of 'funeral service merchandise,' and by including anyone who sells such 'funeral service merchandise' within the definition of 'funeral director,' and by including the place of business of anyone who participates in 'funeral directing' within the definition of a 'funeral establishment,' the FSLA effectively requires that both a funeral director's license and a funeral establishment license be obtained from the Board before a person or entity may lawfully sell caskets." *Powers v. Harris*, 379 F.3d 1208, 1212 n. 4 (quoting the opinion of the District Court for the Western District of Oklahoma below).

(caskets), this fit satisfied rational-basis review. *Powers v. Harris*, 379 F.3d 1208, 1223.⁶

The Tenth Circuit relied on Supreme Court precedent to hold that a State may thus protect a licensed profession from competition. The court relied in particular on “the watershed Equal Protection Clause case,” *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955). In *Williamson*, this Court held that a State has the power to “free” a profession from “taints of commercialism” without violating the Fourteenth Amendment. *Williamson v. Lee Optical*, 348 U.S. at 491. While *Williamson* does not literally state that “economic protectionism” is a legitimate State purpose or interest, the *Williamson* formulation accomplishes this result. To free a profession from “commercialism” is to free the profession from competition with unlicensed non-professionals. The Tenth Circuit found the logic and authority of *Williamson* so powerful that it expressed surprise that other courts, such as the Sixth Circuit in *Craigmiles v. Giles*, could be distracted from its rule. *Powers v. Harris*, 379 F.2d 1208, 1221 (*Williamson* a “watershed” equal protection case that so “closely mirrors” the *Powers* facts that a mere “citation” to *Williamson* would control), citing *Williamson v. Lee Optical*, 348 U.S. 483, 491.

⁶ The Tenth Circuit used the phrase “narrow tailoring” to describe the fit, but that phrase usually describes not the means-end fit required by rational-basis review but by strict scrutiny (and perhaps by intermediate scrutiny).

Powers saw the issue to be equal protection: a State classifies persons as either licensed or unlicensed and provides benefits (as well as burdens) to those earning licenses, and denies those benefits to (and does not similarly burden) persons not holding licenses. *Powers* also noted, however, what it considered to be the proper role of rational-basis review under the due process clause of the Fourteenth Amendment, i.e., “substantive due process.” For a prima facie due process violation to occur, according to the Tenth Circuit, a State would have to deny all persons the right to engage in a given activity. But in the realm of ordinary business transactions, *Powers* acknowledged that a State could prohibit certain forms of business or enterprise entirely. And therefore a State could condition forms of business or enterprise as it saw fit. A State might even find it a legitimate interest to create a monopoly over an ordinary business enterprise without violating the substantive due process rights of anyone. *Powers v. Harris*, 379 F.2d 1208, 1221 n. 16 (citing *Nebbia v. New York*, 291 U.S. 502, 527-29 (1934)).

The Tenth Circuit in *Powers v. Harris* faced and rejected the example of the Sixth Circuit’s decision in *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. (Tenn.) 2002). *Powers* recognized that the Tennessee Funeral Directors and Embalmers Act, Tenn. Code Ann. § 62-5-101 through § 62-5-708 (the “Tennessee Act”), very closely resembled the Oklahoma Act. *Powers v. Harris*, 379 F.3d, at 1223 (Tennessee Act and Oklahoma act “nearly identical”). The Tennessee Act likewise permitted only licensed funeral directors to sell caskets

to retail buyers. Tenn. Code Ann. § 62-5-101(a)(3)(A)(ii) & § 62-5-201.⁷

The Sixth Circuit claimed to test whether the Tennessee Act satisfied the Fourteenth Amendment using rational-basis review. First, it stated that neither strict nor intermediate scrutiny was proper. 312 F. 2d 220, 223. Next, the court stated that under rational-basis review, State legislation enjoys a “strong” presumption of constitutionality. “Any reasonably conceivable” set of facts will suffice. To rebut the presumption of constitutionality requires that the challenger “negative every conceivable basis that might support it.” Evidence is not necessary; “rational speculation” that connects the regulatory means with a legitimate purpose is enough. Thus, the “reasoning” or motive for the legislation in fact is “constitutionally irrelevant.” 312 F. 2d 220, 224 (citing *Heller v. Doe*, 509 U.S. 312, 319 (1993), *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973), *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993), and *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). These cases address whether the fit between classification and purpose is rational. Thus, in *Heller v. Doe*, this Court ruled that a State for purposes of civil commitments could classify groups of

⁷ Section 62-5-101(a)(3)(A)(ii), which defined funeral directing, was amended in 2010 to read: “Making of arrangements to provide for funeral services or the making of financial arrangements for the rendering of funeral services.” Tennessee Session Laws, 2010 Session of the the 106th General Assembly, Pub. Ch. 720, Approved April 9, 2010. The amendment thus deleted the definition of funeral directing to include the “selling” or “sale” of “funeral merchandise,” such as caskets, at issue in *Craigsmiles*.

individuals according to the relative ease of diagnosis; because mental retardation is relatively easier to diagnose than mental illness, a State could use a lower burden of proof for the commitment of the former than the latter without violating equal protection. The classification, then, survived rational-basis review. These cases, then, did not ask whether a State's underlying purpose was legitimate for rational-basis review but whether the fit between classification and purpose was rational.

To address the legitimacy of the underlying purpose of the Tennessee Act, the Sixth Circuit asserted that this Court's decisions condemned economic favoritism as a per se illegitimate purpose. *Craigsmiles v. Giles*, 312 F.3d 220, 224. It cited three cases: first, *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), based on the dormant commerce power (New Jersey could not discriminate against interstate commerce in waste disposal); second, *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949), another commerce case (New York could not reduce milk exports); and third, *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983), a contract clause case. Thus, here the Sixth Circuit badly strayed. The cases it relied on did not use rational-basis review under the Fourteenth Amendment at all.

The Tenth Circuit in *Powers v. Harris* recognized three key weaknesses in the Sixth Circuit's reasoning in *Craigsmiles*. First, the Sixth Circuit claimed to have found the "actual" motive or purpose of the Tennessee Act, economic protection for one set of retail sellers. But this Court's cases have "foreclosed" doing so as a part of rational-basis review. *Powers v. Harris*, 379

F.3d 1208, 1223, citing *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307 (1993) (the Supreme Court “never require[s] a legislature to articulate its reasons” for legislating; federal Cable Act classification upheld against equal protection claim through the Fifth Amendment using rational-basis review; creating a class of persons exempt from a rule “much like classifying governmental beneficiaries”) (Thomas, J.). Second, the Sixth Circuit held that “protecting a discrete interest group from economic competition is not a legitimate governmental purpose,” a conclusion that the Tenth Circuit found “unsupportable.” *Powers v. Harris*, 379 F.3d 1208, 1223, citing *Fitzgerald v. Racing Ass’n of Central Iowa*, 539 U.S. 103 (2003) (State did not violate equal protection by favoring one group of gambling businesses with a lower tax rate than another; State supreme court incorrectly believed it had discovered the true purpose of the statute that the classification did not rationally serve) (Breyer, J.).

Third, the Tenth Circuit found that *Craigmiles* was completely wrong to justify its search for legislative motive in fact in a rational-basis review case on this Court’s decisions in *City of Cleburne v. Cleburne Living Center*, 473 US 432 (1985), and *Romer v. Evans*, 517 U.S. 620 (1996). These cases dealt with State law that the Court was satisfied classified individuals so as to target them for disparate treatment of a hostile or degrading character (respectively, the “mentally retarded” and “homosexuals”). Distilling the Tenth Circuit’s argument on this point, the simple reason these cases (and similar cases) were irrelevant in *Powers* and in *Craigmiles* is that would-be sellers of ordinary goods at retail simply cannot be equated in

any such individuals. Would-be retail sellers of ordinary goods have never been the target of any invidious discrimination of the kind that the Court found to exist in *Cleburne* and *Romer*.

In addition to *Cleburne* and *Romer*, Tenth Circuit also analyzed *Lawrence v. Texas*, 539 U.S. 558 (2003), decided after *Craigmiles*. But the disfavored group in *Lawrence* shared the same position and history as the disfavored group in *Romer*. Looking to a very recent decision, the same is true for the group, this time disfavored by Federal legislation. *United States v. Windsor*, -- U.S. --, 2013 WL 3196928 (2013) (Federal Defense of Marriage Act unconstitutional under the Fifth Amendment because inconsistent with State legislation that recognized marriages between two persons of the same sex).

It is unnecessary to dig deeply into these opinions to see that according a group of individuals who wish to engage in a certain type of retail sale the same protection under the Fourteenth Amendment as the individuals in *Cleburne-Romer* line of cases would be a significant change in the law. The excluded retail sellers here are altogether free to engage in some other type of retail sale if for whatever reason this type does not work out or if they grow tired of it. The members of the groups in *Cleburne-Romer* line of cases are in a completely different position. For one, they cannot easily leave the classification into which the statute puts them, unlike retail sellers of caskets who can sell something else. For another, retail sellers of caskets, licensed or not, simply never have been members of a group suffering the stigma or deprivation. Finally, retail sellers are engaged in just the sort of transaction

for individual gain that the States and Congress have had a relatively free hand in regulating, subject to rational-basis review, for decades.

Some have claimed that the *Cleburne-Romer* line of cases established a radical change and expansion of rational-basis review. Petitioners submit that the change, however, has not been made by this Court, and it should be rejected clearly so as to afford the States clear boundaries within which they may legislate and the lower courts clear guidance by which to adjudicate Fourteenth Amendment claims.

**C. The Fourth, Ninth, and Eleventh
Circuits Have Taken Sides in the Split in
Professional Licensing Cases**

The view of the Tenth Circuit is shared by the Fourth and Eleventh Circuits.

In the Fourth Circuit, the court dealt with a “due process / equal protection” attack on a Virginia statute that required allegedly irrational qualifications for “persons who do nothing more than arrange funerals.” In *Guardian Plans Inc. v. Teague*, 870 F.2d 123 (4th Cir. (Va.) 1989), the court stated that because it was dealing with “economic regulations,” it could not rule them unconstitutional unless “wholly arbitrary” and “without any basis in reason.” If they were “rationally related to a legitimate state interest,” they would be upheld. The court found that Virginia had a legitimate interest “in protecting the health, safety and welfare of its citizens through regulation of the funeral profession.” The court found there was a rational

relationship between the licensing rules and that State interest.

The Virginia General Assembly could have rationally determined that keeping the arrangement of funerals in the hands of licensed funeral professionals would benefit the public by ensuring competence in funeral arrangement. Our inquiry ends here. The wisdom of this determination is simply irrelevant. Because these licensure requirements are rationally related to a legitimate interest, they survive due process/equal protection scrutiny. Therefore, anyone who makes funeral arrangements in the Commonwealth of Virginia must be a licensed funeral service professional.

Guardian Plans Inc. v. Teague, 870 F.2d 123, 126-27 (4th Cir. (Va.) 1989).

The Fourth Circuit here cited two cases from this Court. It cited this Court's "admonition" in *Williamson v. Lee Optical* as "directly applicable":

[A] law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.... The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, ..., because they may be unwise.... For protection against abuses by legislatures the people must resort to the polls, not the courts."

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487-88 (1955) (State could require consumer wanting to replace broken eyeglass lens to undergo examination for new prescription by ophthalmologist or optometrist and could not simply return to the optician who had ground the lens).

The Fourth Circuit in *Guardian Plans* also cited *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976), where this Court upheld against an equal protection challenge a city ordinance that classified pushcart vendors according to how long they had been in operation, and forbade newer pushcart vendors in an historic district but exempted or grandfathered two older vendors from the ordinance.

Later, in *Brown v. Hovatter*, the Fourth Circuit reaffirmed its analysis in another case concerning the same profession. A Maryland statute only permitted individuals to own funeral homes and prohibited corporate ownership, with exemptions for certain grandfathered corporations. The court held this did not offend either equal protection or due process. Because the statute “is an economic regulation,” it must stand unless “wholly arbitrary” and “without any basis in reason.” The Fourth Circuit had “already recognized that a State has a ‘legitimate interest in protecting the health, safety and welfare of its citizens through regulation of the funeral profession.’” “*Brown v. Hovatter*, 561 F.3d 357, 368 (4th Cir. (Md.) 2009), cert. den., 558 U.S. 1048 (2009) (citing and quoting *Guardian Plans Inc. v. Teague*, 870 F.2d 123, 126 (4th Cir.1989)).

The Eleventh Circuit has adopted the same view in a challenge of a different profession. *Locke v. Shore*, 634 F.3d 1185, 1195-96 (11th Cir. (Fla.) 2011), cert. den., 132 S.Ct. 1004 (2012). In *Locke*, the court held that Florida's professional licensing of commercial interior designers did not violate Fourteenth Amendment equal protection or due process. The Eleventh Circuit relied on *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307 (1993). *Beach Communications* upheld a challenge to Federal cable regulation on equal protection grounds implied in the Fifth Amendment's due process clause. The circuit court below had engaged in a search for legislative purpose through "legislative facts." This Court rejected that approach entirely. Legislation that does not proceed along "suspect lines" or affect "fundamental rights," but merely touches "social or economic policy," "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313. This Court "never" insists that a legislature "articulate its reasons for enacting a statute." Therefore, it is "entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315. "The absence of legislative facts" to explain the classification through the record has no significance in rational-basis analysis." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (internal quotes and citations omitted).

In other circuits, however, if a State cannot articulate a satisfactory legitimate interest, and the

court becomes persuaded that economic protectionism is the only plausible motive for the statute, that will doom the statute under the Fourteenth Amendment. Thus, States in the Fifth Circuit and in the Sixth Circuit are now under a burden to avoid legislating so as to provide protection to a State-licensed profession. That purpose by itself is now illegitimate for Fourteenth Amendment rational-basis review.

Whether the court finds the statute violates equal protection or due process or an amalgam of the two does not particularly matter. Thus, in the Fifth Circuit decision below, both the District Court and the Court of Appeals ruled that the Louisiana Act violated both equal protection and due process under the Fourteenth Amendment, without articulating the reasoning. As will be discussed below, Petitioner suggests that such cases are properly understood as arising out of claims of the violation of equal protection, as the Tenth Circuit in *Powers* ruled.

Thus, may a State by legislation and regulation favor one group of sellers in a retail market, to whom the State issues professional licenses as part of the regulation of the qualifications and activities of the licensees, over others who wish to sell in the same retail market without securing licenses from the State or submitting to regulation by the State? The federal circuits now answer both Yes and No. This is not desirable. Moreover, it is unnecessary, as one side in this split is correct, and the other is incorrect, under current law: "economic protectionism" is not an illegitimate purpose under the Fourteenth Amendment. It is a legitimate purpose when the economic benefit bestowed is access to a particular

retail market in goods as a part of structure of professional licensing. Economic protectionism indeed occurs in so much legislation, both intentionally and unintentionally, so much so that it may be practically impossible to avoid it. Just as many State constituents send their representatives and senators to Congress with a mandate, whatever else they may do, to bring back benefits to the State, so also constituents within the States encourage their State representatives and senators to do the same. The idea that courts -- Federal or State -- could change this perhaps regrettable truth is just unworkable.

In addition to the Fifth and Sixth Circuits, the Ninth Circuit has also ruled that economic protectionism alone is not a legitimate State interest. *Merrifield v Lockyer* , 547 F.3d 978 (9th Cir. (Cal.), 2008). In *Merrifield*, the Ninth Circuit dealt with the licensing of persons controlling or eliminating pests of various kinds, some of whom used pesticides and others who did not. Merrifield, did not use pesticides. Instead, he used devices to discourage certain animals from invading man-made structures, objected on due process grounds to the State's requirement that he satisfy criteria more properly linked to a person who intended to use pesticides. He wanted to bid on a contract to keep birds away from such a structure. The Ninth Circuit held that due process was not violated by that requirement. It was rationally related to his planned work as a non-pesticide using pest controller, if only indirectly "increase the safety of his profession." *Merrifield v Lockyer* , 547 F.3d 978, 987. On the other hand, the Ninth Circuit held that the statute violated equal protection. It did so because it exempted some non-pesticide using pest controllers based on the

animals they targeted animals (bats, raccoons, skunks, and squirrels), which were different from the animals that Merrifield targeted (rats, mice, and pigeons). Here, the Ninth Circuit discovered a logical contradiction in the State's position.

The possibility that non-pesticide-using pest controllers might interact with pesticides or will need the skill to suggest pesticide use when it would be more effective is the very rationale that government's counsel proffered, and we relied upon, in upholding the requirement that Merrifield obtain a license under due process grounds. We cannot simultaneously uphold the licensing requirement under due process based on one rationale and then uphold Merrifield's exclusion from the exemption based on a completely contradictory rationale. Needless to say, while a government need not provide a perfectly logical solution to regulatory problems, it cannot hope to survive *rational* basis review by resorting to irrationality.

Merrifield v Lockyer, 547 F.3d 978, 991. Accordingly, the Ninth Circuit ruled the California legislation violated equal protection. *Merrifield*, therefore, shows the limits to which a court using rational-basis review ought to go in order to find an absence of a legitimate State interest. The Ninth Circuit in *Merrifield* did find that the purported State interest was not legitimate because it resulted in a logical contradiction. The State's interests for due process and for equal protection contradicted each other.

II. The Fifth Circuit Below Followed the Sixth Circuit to Hold that Economic Protectionism is Not a Legitimate Governmental Interest under the Fourteenth Amendment Guarantees of Equal Protection and Due Process, and Therefore Misapplied Rational-Basis Review

A. The Fifth Circuit in *Castille* Deepened the Circuit Split by Holding that Economic Protectionism is an Illegitimate State Interest and Erred by Requiring the State Prove a Benefit to the Public to Satisfy the Fourteenth Amendment

The Fifth Circuit below declared that the Louisiana Act satisfied neither equal protection nor due process under the Fourteenth Amendment. App. 2. It concluded by simply affirming the judgment of the District Court, effectively incorporating it by reference. App. 24. On due process, the District Court ruled: “Thus, Plaintiffs have demonstrated that there is no rational relationship between requiring persons selling caskets to become funeral directors and to sell caskets only from funeral establishments thus violating Plaintiffs’ constitution[al] rights to Due Process.” App. 48. On equal protection, the District Court ruled: “Likewise these laws violate the Equal Protection Clause, since the Act in essence treats two distinct and different occupations as the same. The licensing scheme is not rationally related to public health and safety concerns.” App. 48. The Fifth Circuit affirmed these holdings.

The true basis for the District Court's action is here: "Simply put there is nothing in the licensing procedures that bestows any benefit to the public... ." App. 28. Of course, requiring a State to prove that economic legislation in fact benefits the public would flip rational-basis on its head and turn it into a presumption of unconstitutionality, and therefore very similar to intermediate and strict scrutiny.

B. Rational-Basis Review Presumes that State Legislation is Constitutional

When a Federal court tests whether a State regulation of an ordinary commercial transaction satisfies equal protection or due process under the Fourteenth Amendment, the court begins with a presumption of constitutionality. The presumption applies to "social and economic" legislation or regulation. The Court formulated this rule in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). There, this Court drew the limits of Federal and State legislative power. It declared that even without legislative history as to the facts that the legislature had before it, "the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *Carolene Products*, 304 U.S. 144, 152.

This formula could have been read to invite a consideration of facts. The Court made sure that it

could not be read that way in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955). There the District Court dealt with a State statute that meant an eyeglass wearer could not, for example, ask an optician to fit an existing lens into a new frame without a new prescription from an optometrist or optician. The District Court held this requirement not rationally related to the purported State interest of eye health and safety, and it “arbitrarily” interfered with the optician’s “right to do business.” *Williamson v. Lee Optical*, 348 U.S. 483, 486. This Court reversed. “The day is gone,” the Court wrote, “when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.” The legislature “might” have considered several sets of facts that justified this prohibition, but the Court never asked what facts the State did consider. *Williamson v. Lee Optical*, 348 U.S. 483, 488 (additional citations omitted).

Williamson likewise ruled that the State statute did not violate equal protection by exempting one group of market participants from the regulations. The Court wrote that “legislative classification” cannot be settled with a “doctrinaire definition.” The “legislature may think” that similar problems differ in importance and require “different remedies.” Furthermore, the legislature “may” proceed “one step at a time and attack the part of the problem that to the legislature then might seem “most acute.” Those exempted by the statute “may” not be a large part of the market in the State or “may” present their own regulatory challenges. Equal protection only blocks classifications that carry

out “invidious discrimination,” and this one obviously did not. *Williamson v. Lee Optical*, 348 U.S. 483, 488-89.

In 1963, the Court reinforced the holding in *Williamson*. A Kansas statute provided that only lawyers could engage in the business of debt adjusting. The District Court held this restriction violated the Fourteenth Amendment. This Court reversed. *Ferguson v. Skrupa*, 372 U.S. 726 (1963). The Court held the statute did not violate due process. Justice Black for the Court emphasized that the practice of substituting its judgment for the legislature’s, which he took to be the essence of “*Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases,” had been “discarded.” *Ferguson v. Skrupa*, 372 U.S. 726, 730⁸ The Court quoted Justice Holmes: “The criterion of constitutionality is not

⁸ The District Court had accepted “that it is the province of courts to draw on their own views as to the morality, legitimacy, and usefulness of a particular business in order to decide whether a statute bears too heavily upon that business and by so doing violates due process. Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), outlawing ‘yellow dog’ contracts, *Coppage v. Kansas*, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915), setting minimum wages for women, *Adkins v. Children’s Hospital*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923), and fixing the weight of loaves of bread, *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813 (1924).” *Ferguson v. Skrupa*, at 728-29.

whether we believe the law to be for the public good.” *Ferguson v. Skrupa*, 372 U.S. 726, 730, quoting *Adkins v. Children’s Hospital*, 261 U.S. 525, 567, 570 (1923) (Holmes, J., dissenting). This is precisely the error that the Fifth Circuit and the District Court made. App. 23 & 28 (law must serve the “public good;” Louisiana Act creates no “benefit to the public”).

Ferguson also held that the Kansas law did not violate equal protection by classifying debt adjusters as lawyers and nonlawyers. The classification was not “invidious discrimination” against nonlawyers. Furthermore, debt adjustment raises several legal issues of liability and of rights as to which the debtor will need the legal advice that Kansas might find only a lawyer can give. *Ferguson v. Skrupa*, 372 U.S. 726, 732-33.

C. The Fifth Circuit Erred in Ruling that the Louisiana Act Violated Equal Protection

A State regulation satisfies rational-basis review under Fourteenth Amendment equal protection based on the answers to three questions. First, what classification does the statute create? Second what are the characteristics of those complaining that the statute discriminates against them? Third, do those characteristics place the challengers within a classification that requires a court reviewing the statute to exercise strict scrutiny, intermediate scrutiny, or rational-basis review? If strict scrutiny, then the reviewing court must find both a compelling State interest or purpose for the classification and regulatory means that are narrowly tailored to the

achievement of that compelling interest. If intermediate scrutiny, those characteristics require that the reviewing court find that there is an important State interest and a choice of regulatory means that bears a substantial relationship to that State interest. If rational-basis review, then the reviewing court asks whether the State legislative purpose for the classification is not forbidden by the Constitution and whether it is “conceivable” that the classification may accomplish that legislative purpose.⁹

Thus, to follow that presumption of constitutionality requires two distinct steps. First the court presumes that the State had a legitimate governmental interest that is the reason for the classification of persons that the regulation creates. The direct way to defeat this presumption is to show that the classification targets a group of individuals protected from classifications that are based on characteristics of the group. Thus, if the group is classified by race, religion, or national origin, or is a “discrete and insular minority,” *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938), then the presumption is defeated. But for ordinary commercial transactions, the presumption persists.

The Supreme Court recently applied rational-basis review to deny a claimed violation of equal protection in State regulation of purely economic interests. *Armour v. City of Indianapolis, Ind.*, __ U.S. __, 132

⁹ Ronald D. Rotunda and John E. Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, § 18.3(a)(ii-iv) (Westlaw)(updated June 2013).

S.Ct. 2073, 2012 WL 1969350 (June 04, 2012). In *Armour*, the Supreme Court permitted the State of Indiana and the City of Indianapolis to treat differently two groups of taxpayers whose interests were identical, except for the method each group chose to pay the tax, in a lump sum or in installments. The first group ended up paying the tax; the second did not. The legitimate State interest to which the Supreme Court tethered this classification was administrative convenience -- the inconvenience of computing what the city owed the lump-sum taxpayers when the tax was amended and the debt of the installment taxpayers canceled. *Armour*, 132 S.Ct. at 2081. Thus, administrative convenience was a legitimate purpose for the city to pursue, and the classification implemented that purpose rationally. *Armour*, 132 S.Ct. at 2081. For the dissent, the asserted purpose for the classification did not make sense. Indianapolis had “in fact already produced records showing exactly how much each lump-sum payer overpaid in *every*” open case. *Armour*, 132 S.Ct. at 2086 (Roberts, C.J., dissenting, joined by Scalia and Alito, JJ.) (emphasis in original).

Plainly, the legitimate State interest in *Armour* was thin and the disparate treatment of the disfavored group was substantial. By comparison, in *Castille* the State interest in regulating funerals and burial is at least as substantial as administrative convenience. This State interest is both traditional and is close to the State’s interest in providing a framework for family life. “From time immemorial, the funeral, perhaps more than any other ceremony, has stood as a solemn occasion, warranting the utmost respect, dignity, and solace.” *Baynes v. George E. Mason Funeral Home*,

Inc., 2011 WL 2181469, *1 (W. D. Pa., 2011) (not reported in F. Supp.). Such an interest or purpose derives from the traditional, fundamental police power of the State, not merely from the fact that neither the Constitution nor any Federal law prohibits it as a legitimate purpose.¹⁰ Moreover, the burden endured because of the classification in *Castille* is much less than the burden suffered in *Armour*. If the Abbey is denied the retail sales of caskets, it has the wholesale market, and it can make other items in its Woodworks whose sale does not require a professional license. But the lump-sum taxpayers in *Armour* will not see their money again.

In *Dandridge v. Williams*, another State awarded benefits unequally. *Dandridge v. Williams*, 397 U.S. 471 (1970). There, Maryland capped benefits under the Aid to Families with Dependent Children program at a flat dollar amount. Upon a Fourteenth Amendment equal protection challenge, this Court held that the cap would undergo rational-basis review, not more searching scrutiny. The State offered several legitimate interests. This Court noted that under rational-basis review, it did not need to test all the interests offered by the State. “It is enough that a solid foundation for the regulation can be found in the State’s legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor.”

¹⁰ ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* §§ 125-126 (1904). See also, Santiago Legarre, *The Historical Background of the Police Power*, 9 U. Pa. J. Const. L. 745 (2007).

Dandridge v. Williams, 397 U.S. 471, 483-84. Thus, the legitimate State interest in *Dandridge* was not only general but perhaps by its nature incapable of proof or disproof. A court can only speculate as to the effectiveness of the legislation. This is not a judicial function; it is inevitably a legislative function. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955).

The effect of this presumption as to the first step is that the court is bound not merely to follow the legitimate governmental interests offered for the State regulation. Instead, if the court is not satisfied with the explanations offered, the court is bound to engage in its own search for a legitimate purpose.

D. In Ruling that the Louisiana Act Violated Due Process, The Fifth Circuit Improperly Applied Rational Basis Analysis of the Means Chosen to Effect Its Purpose by Assuming that the State had Done Too Little in the Louisiana Act

A State statute enacted in order to advance a legitimate interest and that uses a regulatory means that a court can say rationally advances that interest will not deny due process to a person whose freedom to the application of that means.

From the outset of its opinion, however, the Fifth Circuit makes clear it will not properly apply rational-basis review of a State regulation of a commercial transaction. It is not simply that the Fifth Circuit did not accord the statute every benefit of the doubt, or adhere to the presumption of the constitutionality of

State legislation in the realm of its internal economy. Even in its recital of the facts in the case, the Fifth Circuit showed that it would not address them as rational-basis review requires.

Thus, in Part I of its opinion the Fifth Circuit writes that Louisiana did not regulate the quality of caskets sold in any way. The panel opinion declared that the State does not: require burial of the dead in a casket at all; forbid purchase of caskets from out-of-state sellers via the internet; forbid individuals to make and use their own caskets; require that caskets be sealed; regulate how caskets are used to bury the dead. App. 2. But the basic error the Fifth Circuit makes here is that the failure of a State to do everything possible to regulate an activity cannot be a weakness of the legislation under rational-basis review. The State is simply not bound to attempt all possible regulation of an activity in order for the regulation to satisfy the Fourteenth Amendment. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955).

The same criticism applies to the other observations. A State need not require that all corpses be buried in caskets in order to regulate the burials in caskets that people choose to do. A State need not regulate every nook and cranny of an activity to regulate rationally.

Here the Fifth Circuit made the identical error that the Sixth Circuit committed. This Court should grant certiorari, therefore, to make clear to the lower courts how States may regulate ordinary commercial transactions without failing rational-basis review.

E. The Fifth Circuit Erred by Purporting to Divine the One True Purpose of the Louisiana Act, Which is Inconsistent with Rational Basis Analysis

The Fifth Circuit erred in accepting as valid evidence for the Louisiana legislature's true purpose for the Louisiana Act that the legislature refused to amend it as the Abbey desired. It drew that inference from the Abbey's unsuccessful effort to change the rule via "petition."

There are clear problems with using a non-event as evidence of the one true illegitimate purpose of the statute. First, the failure of the legislature to act is ambiguous: it can mean opposition to the proposal in principle or opposition to the bill because it does not do enough to advance the principle. Here, opponents might very well have wished to open up the retail market entirely, not just to "charities" like the Abbey. But most important, a failure to act today cannot indicate anything at all about the reasons for which a legislature acted in the past. A failure to act today cannot create a retroactive legislative history.

A subsidiary issue is what *evidence* is needed to prove that a State legislature in fact had economic favoritism as its purpose. The Fifth Circuit had no direct evidence of this, as noted above. Nor did the Sixth Circuit in *Craigmiles*; it said, perhaps sarcastically, that it could smell it. *Craigmiles v Giles*, 312 F.3d 220, 225 (6th Cir. (Tenn.) 2002) (like a dead fish).

Yet this Court has clearly declared that under rational-basis review, factual proof of legislative motive is irrelevant. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (Federal legislation). Nevertheless, the circuits that have ruled economic protectionism an illegitimate purpose resort to such fact finding. In rational-basis review, however, “speculation” as to what the legislative motive was *in fact* is not proper. Under the jurisprudence of this Court, a reviewing court engages in this reasonable speculation only to hypothesize what the State interest *might* be, not what it in fact is. Otherwise, it would be proper for a Federal court to hear evidence of what occurred on the way to the passage of a State statute that potentially affects Fourteenth Amendment guarantees. This is because the purpose of rational-basis review is to insulate State legislation on economic and social issues from judicial review. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 (1938).

F. The Fifth Circuit Failed to Consider Other Possible Legitimate State Interests for the Louisiana Act, as Rational-Basis Review Requires

The Fifth Circuit speculated that the only purpose for the Louisiana Act was “economic protectionism.” The Board offered consumer protection at trial as a plausible State interest in this case. In doing so, the Board was in line with the jurisprudence of this Court that encourages States and State boards such as Petitioner to suggest consumer protection as a plausible hypothetical state interest. As noted above, the District Court and the Fifth Circuit were satisfied, based on no evidence bearing on the behavior of the

Board in this case, that the only purpose for the Louisiana Act and the Board's actions was economic protectionism. The courts below scarcely took the notion of consumer protection at all seriously.

But consumer protection is not an irrational purpose for statutes such as the Louisiana Act. Evidence does exist (though none is needed for rational-basis review) that the dangers the Board asserted are real, not imaginary. Litigation has occurred in which a casket leaked after the seller misrepresented the kind of metal it was made of, and in which a replacement casket was too large for the mausoleum space. *Baynes v. George E. Mason Funeral Home, Inc.*, 2011 WL 2181469 (W. D. Pa., 2011) (Not Reported). Both considerations were discounted by the Fifth Circuit below.

Baynes confirms that Judge Tymkovich's finding of a legitimate State interest for rational-basis review in his concurring opinion in *Powers v. Harris* was entirely justified. Judge Tymkovich concurred in the result in that case, because he agreed that the Oklahoma Act could be presumed to protect the consumer and therefore had a legitimate purpose, though different from one accepted by the majority.

Thus, if a reviewing court finds that a State interest suggested in defense of the statute is implausible or unsatisfactory, the court is bound by the jurisprudence of this Court to search for an interest that could meet the requirements of rational-basis review.

Thus in this case, the Fifth Circuit erred by failing to consider a hypothetical purpose for the Louisiana

Act slightly more general than consumer protection or public safety narrowly understood. It failed to consider that the State interest could be to provide a structure via regulation for the process of the disposition of dead bodies with dignity, in a manner consonant with the desires and feelings of most of the State's citizens and residents. And that interest is a legitimate one.

III. This Court Should Eliminate the Circuit Split Over Economic Protectionism in Order to Guide Both State Legislatures and the Lower Courts

This Court's review of the Fifth Circuit decision will clarify the proper analysis in such cases by deciding what is needed to make out *prima facie* claim of a violation of equal protection and of due process under the Fourteenth Amendment when an ordinary commercial transaction and an ordinary profession are at issue.

It is not too soon to resolve the split. The circuit courts have divided on this particular issue and on several related issues. And these issues will come to the courts again.

If economic protectionism becomes a *per se* illegitimate government interest, it will hamper the ability of States to deal with the serious economic issues that confront them today and will confront them tomorrow. This the Tenth Circuit in *Powers* saw clearly. First, States will be forced to reexamine professional licensing statutes. More broadly, States will have to reevaluate other statutes that could be accused of economic protectionism. State Legislation

“aiming to protect or favor one industry or business over another in the hopes of luring jobs to that state would be in danger.” *Powers v. Harris*, 379 F.3d 1208, 1222 (10th Cir. (Okla.) 2004).

Finally, because the Fifth and Fourteenth Amendment’s due process standards are read similarly, and the Fifth Amendment’s due process has been held to incorporate equal protection on a par with the Fourteenth Amendment, there is no reason to believe that similar attacks on Federal legislation and regulation using enhanced rational-basis review are not waiting in the wings.

Conclusion

The Fifth Circuit in *Castille* has deepened the split over what is a legitimate state interest for rational-basis review. And the split exists not just over casket sales. It also exists for several other categories of goods and services. After *Cleburne*, *Romer*, and *Lawrence*, the States look to this Court to set clear legislative boundaries and the lower courts need guidance on how to conduct rational-basis review. The issue is one of basic State power to legislate and is sufficiently important to merit this Court’s attention.

Petitioner therefore urges this Court to grant a writ of certiorari to the Court of Appeals for the Fifth Circuit.

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