

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

E. GLEN PORTER III,
1400 Woodlawn Circle
Elm Grove, WI 53122,

and

HIGHLAND MEMORIAL PARK, INC.,
14875 W. Greenfield Avenue
New Berlin, WI 53151,

Plaintiffs,

-vs-

Case No. 14-CV-

Case Code: 30701

Case Type: Declaratory Judgment

STATE OF WISCONSIN,
c/o J.B. Van Hollen, Attorney General,
17 W. Main Street
Madison, WI 53707,

DAVE ROSS, Secretary,
Wisconsin Department of Safety & Professional Services
1400 E. Washington Avenue
Madison, WI 53703,

and

WISCONSIN FUNERAL DIRECTORS EXAMINING BOARD,
1400 E. Washington Avenue
Madison, WI. 53703,

Defendants.

SUMMONS

THE STATE OF WISCONSIN

To each person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The court may

reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is: **Clerk of Circuit Court, Waukesha County Courthouse, 515 W. Moreland Blvd., Waukesha, WI 53188**, and to Wisconsin Institute for Law & Liberty, Plaintiffs' attorney, whose address is: **1139 E. Knapp St., Milwaukee, WI 53202**.

You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 21st day of August, 2014.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiffs



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Defendants.

COMPLAINT

Plaintiffs, E. Glen Porter III and Highland Memorial Park, Inc., through their counsel, Wisconsin Institute for Law & Liberty, as and for their complaint against Defendants, State of Wisconsin, Dave Ross, and Wisconsin Funeral Directors Examining Board, allege as follows:

INTRODUCTION

1. This civil rights lawsuit seeks to vindicate the right of certain Wisconsin citizens to earn an honest living free of anticompetitive, arbitrary, and irrational government regulation.

Plaintiff Highland Memorial Park, Inc. (“Highland Memorial”) owns and operates a duly licensed cemetery located in New Berlin, Wisconsin. Plaintiff E. Glen Porter III (“Porter”) is the President of Highland Memorial. The State of Wisconsin, acting through the Wisconsin Department of Safety & Professional Regulation (“Department”) and the Wisconsin Funeral Directors Examining Board (“Board”), prevents the Plaintiffs from owning or operating a funeral establishment within the State, even though by doing so they could expand and improve the services they offer to Wisconsin consumers who are faced with the difficult choices that must be made for memorial and other services associated with the death of a loved one. The Department and the Board similarly forbid owners or operators of funeral establishments from owning and operating a cemetery and from operating a funeral establishment on cemetery grounds, even if the funeral establishment is entirely independent of cemetery ownership. Funeral establishments could improve and expand the services they offer to bereaved families if these needless restrictions were lifted.

2. The Plaintiffs do not dispute that the State may regulate the funeral services industry in circumstances where such regulation is necessary to secure the legitimate goals of public health, safety and welfare. But the state laws and regulations at issue here are unnecessary to secure such goals and are in fact counterproductive. No public health or safety concerns require the ownership or operation of cemeteries to be completely independent from the ownership or operation of funeral establishments. And public welfare is best served in circumstances where consumers can obtain the benefits of efficiency and innovation through choice. The experience of the many states that permit combined operations of cemeteries and funeral establishments shows that consumers do benefit from their ability to obtain comprehensive funeral services from integrated firms that can offer a wide range of cost-effective services from a single, convenient location.

3. The Plaintiffs’ right to earn a living and engage in business in the manner of their choosing is protected by the Wisconsin Constitution – in particular by its guarantees of due process of law and equal protection. The statutes in question arbitrarily, irrationally and unduly restrict the economic liberty guaranteed the Plaintiffs by the Wisconsin Constitution and are therefore invalid and unenforceable.

JURISDICTION AND VENUE

4. Pursuant to Wis. Stat. § 806.04, the Plaintiffs seek a declaration that Sections 157.067 and 445.12(6) of the Wisconsin Statutes violate their equal protection and due process rights under the Wisconsin Constitution and are therefore void and unenforceable.

5. This court has jurisdiction pursuant to Wis. Stat. § 806.04(1) and (2).

6. Venue is proper pursuant to Wis. Stat. § 801.50(3)(a), as the sole defendants are the State, a state board, and a state officer in his official capacity, and the Plaintiffs designate Waukesha County as the venue.

THE PARTIES

7. Plaintiff Highland Memorial is a Wisconsin corporation having its principal place of business at 14875 Greenfield Avenue, New Berlin, Wisconsin 53151. Highland Memorial is a duly licensed cemetery under Wisconsin law, cemetery authority license number 13-95.

8. Plaintiff Porter is an adult citizen of the State of Wisconsin, residing at 1400 Woodlawn Circle, Elm Grove, WI 53122. Porter is the President of Highland Memorial as well as one of the principal owners of that company. Highland Memorial has been owned and operated by the Porter family for more than sixty years.

9. Plaintiffs challenge the constitutionality of Wis. Stat. §§ 445.12(6) and 157.067, duly enacted statutes of the State of Wisconsin. Defendant State of Wisconsin is a sovereign State with an address (care of the Attorney General) of 17 West Main Street, Madison, Wisconsin 53707.

10. Defendant Dave Ross is the duly-appointed Secretary of the Department. The Department is the state agency that is responsible for the enforcement of Wis. Stats. §§ 157.067 and 445.12(6), the statutes challenged in this action. Defendant Ross is sued in his official capacity.

11. Defendant Board is an agency of the State of Wisconsin operating within the Department. Pursuant to Wis. Stat. § 445.03(1), the Board is charged with enforcing Chapter 445 of the Wisconsin Statutes, including Wis. Stat. § 445.12(6). Defendants Ross and the Board have offices at 1400 East Washington Avenue, Madison, Wisconsin 53703.

STATEMENT OF FACTS

The Death Care Industry

12. Every society is faced with the necessity of making arrangements associated with the inevitable death of human beings, including economic and other arrangements involving the disposition of human remains. The various products and services that consumers must unfortunately obtain in connection with the death of a loved one can best be considered as falling into three separate and somewhat distinct categories: (a) mortuary and funeral services, including the transportation of human remains and preparation for final disposition; (b) final disposition, including burial, entombment or cremation and the associated keeping of permanent records; and (c) memorialization.

13. *Mortuary and Funeral Services.* These are the services necessary to care for and prepare human remains for final disposition. These services include removal of the body from the place of death – usually a hospital or hospice – to a funeral home. Preparation may involve the preservation of the body by embalming and, depending on custom and practice, cosmetic treatment of the body for display in connection with public or private ceremonies. Ceremonies may take place at the funeral home, a church or similar religious institution, or at the place of final disposition such as a cemetery. Funeral services involve the transportation of the body between the various places that ceremonies may take place.

14. Licensed funeral directors are the providers of funeral and mortuary services. Funeral homes operated by funeral directors are frequently the site of visitation and other memorial or funeral services. Funeral directors sell caskets and assist bereaved families in making an appropriate choice given their needs. They frequently assist families in making other necessary arrangements, such as the publication of death notices and the purchase of burial vaults and markers or memorials of various kinds. In some cases, funeral directors also assist the family in making arrangements for final disposition or memorialization.

15. *Final Disposition and Record Keeping.* Final disposition consists of one or more steps that must be taken to dispose of the body in some permanent manner. Bodies may be buried in a cemetery or permanently placed in a mausoleum as an alternative to ground burial. Although cemetery burial has been traditional in the United States, entombment in a mausoleum has become more frequent and over the past century many traditional cemeteries have built mausoleums. And in recent years cremation has become an alternative considered by many

families. Cremated remains may be dispersed, retained by the family in an urn or similar container or placed in a columbarium – a structure dedicated to the permanent placement and memorialization of cremated remains. In circumstances involving ground burial, entombment in a mausoleum, or the placing of cremated remains in a columbarium, it is expected that the place of disposition and records be maintained in perpetuity.

16. *Memorialization.* Families that select a cemetery burial generally provide for a permanent memorial marker on the gravesite. Until the middle of the 20th century, the typical grave marker was a stone monument. Given the development of memorial parks – cemeteries or sections of cemeteries that allow only flush-with-the-ground memorial markers – metal markers may now take the place of more traditional headstones. Bodies that are entombed in a mausoleum may also be memorialized by a metal or stone marker that indicates their final resting place. Cremated remains may be stored in an urn or similar receptacle and placed in a columbarium or buried in a cemetery. In either case, the family may desire a stone or metal marker at the crypt or burial location.

17. This constellation of death care products and services are competing in some respects but in other respects they are complementary. Families may choose between cemetery burial and cremation, for example. But in either of those two cases they may still want (or be required) to purchase some form of permanent memorial. Even if embalming is not desired, families require the services of a funeral director to arrange for storage of the body and transportation to the place of final disposition. Most families look to funeral directors to arrange for memorial and similar observances, even though in many cases those services are provided by others such as religious leaders. Caskets need not be provided by funeral directors, although in many cases they offer caskets as an adjunct to their other services. Permanent memorials can be purchased in a variety of ways, including from cemeteries, funeral directors, or directly from the memorial supplier.

18. Despite the unavoidable emotional and religious context, the death care industry is subject to the same economic forces as any other business. Firms involved in the industry seek to profit from their activities, which they can only do by operating in a way that creates value for their customers. Families of the deceased are consumers of these products and services in the same way that they are consumers of other products and services. The purchase of death care services is of major significance for most families, likely one of the most expensive purchases

they will ever make. It has been estimated that the annual sales of funeral products and services in the United States is more than \$15 billion.

19. Until recently, the death care industry in the United States was characterized by smaller firms and the fragmentation of products and services. Before the middle of the 19th century, most funeral arrangements were the responsibility of the family. Most memorial observances were held in the family home, followed by a funeral service and burial in the church or local municipal graveyard. Caskets were purchased from local cabinet makers, monuments from local stone-carvers. The more difficult tasks associated with preparation of the body for visitation and burial were done by family members, friends, or in some cases by practitioners who would undertake to do these necessary but unpleasant tasks – undertakers.

20. Embalming did not become common until the Civil War, when it was commonly used to enable families to arrange for the bodies of fallen soldiers to be returned long distances for funeral services and burial near their homes. Lincoln's body was embalmed and sent by train from Washington to Springfield in a funeral procession that covered 1,654 miles and lasted almost two weeks.

21. Preservation by embalming for visitation and funeral services became popular after the war and by the turn of the century had become common in the United States. The business of embalming was typically regulated by the states and performed by licensed individuals or firms – funeral directors. Funeral directors gradually took over other responsibilities that had once been the families', such as transportation of the body from the place of death to its final resting place, the acquisition of a casket for burial, and providing a location – the funeral home – for visitation and in some cases memorial services. In Wisconsin, as in every state, funeral directors became a licensed profession and their operations governed by state law.

22. The development of larger cemeteries removed from cities took place in the middle of the 19th century as well. Before then, burials took place in churchyards, family plots, and small municipal burial grounds. These spaces became crowded and difficult to maintain and were increasingly seen as a hazard to public health. And given the uncertainty as to the continued viability of small municipal and church graveyards in rapidly growing cities, many Americans decided they would be better served if they could arrange for a permanent burial plot that could be used by their families in perpetuity. In response, public, private and religious

organizations began to build cemeteries on larger tracts of land far from the city centers. Families were able to buy plots for their permanent use; cemetery operators were expected to maintain the property in perpetuity. The operations of such cemeteries in Wisconsin became subject to regulation by the state.

23. By the early 20th century, these trends had produced markets in which funeral directors took primary responsibility for mortuary and funeral services and final disposition took place mostly in larger cemeteries in which the family had purchased a plot. Funeral directors tended to be directly involved in the purchase of caskets; the business of casket making was consolidating as local cabinet-makers and carpenters were displaced by larger, national firms. Firms involved in various aspects of memorialization were growing larger as well, but generally maintained their independence from funeral directors or cemetery owners. The operations of funeral directors tended to be extremely local in character, with one or two firms (usually family owned) associated with a particular place of worship or neighborhood. Although funeral directors might have assisted families in the selection and purchase of cemetery lots, they were not involved in the development, ownership or operation of large cemeteries. For the most part, the owners and operators of cemeteries were private firms or religious institutions. Cemeteries did not own or operate funeral establishments; funeral directors did not own or operate cemeteries.

24. That changed in the early 1930s, when a California entrepreneur named Hubert Eaton proposed to build a mortuary on the grounds of his enormously successful Forest Lawn Memorial Park in Los Angeles. In the previous decade, Eaton had converted a decrepit cemetery into a memorial park that was devoid of individual or family gravestones but instead featured a natural and well-manicured landscape of lawns, flowering trees, fountains, and memorial architecture. Forest Lawn has since become one of the most famous cemeteries in the world, emulated by cemeteries across the United States.

25. Building on the success of his memorial park, Eaton decided to enter the market for funeral and mortuary services as well by building a funeral home on the grounds of Forest Lawn. His decision to build a mortuary and operate as a funeral director on the cemetery property was not well-received by California's funeral directors, who considered it a threat to their historical business model. In fact, the California Board of Embalmers and Funeral Directors refused to grant Forest Lawn a license to operate as a funeral establishment – a license

to which it was entitled under the applicable regulations. Litigation followed, and eventually the court concluded that the Board's refusal to grant Forest Lawn a license had been improper and unlawful. *Forest Lawn Memorial Park Ass'n. v. State Bd. of Embalmers and Funeral Dirs.*, 24 P.2d 887 (Cal. App. 1933). By the end of 1934, the court had directed the board to grant Forest Lawn a mortuary license, and Forest Lawn had begun operations as a licensed funeral establishment on cemetery grounds. Over the next few years, its combined business became enormously successful.

26. In the years since, it has become more and more common for owners and operators of cemeteries to engage in business as funeral directors and for funeral directors to take an ownership interest in cemeteries. It is estimated that by 2012 there were more than 700 of these so-called combination firms, operating in at least 39 states. Consumers of death care services benefit from the existence of these combination firms, which can achieve economies of scope in their operations and which may offer consumers not only the benefit of lower costs but the ability to obtain more comprehensive and innovated services from a single source. The ability of incumbent firms to achieve efficiencies and pursue innovation is vital when markets are undergoing secular change. That has been the case for a number of years in the death care industry. Cremation has become an increasingly popular alternative to cemetery burial. The dispersion of family members across wide geographical lines has created circumstances in which highly local and fragmented firms cannot easily or effectively meet their needs. The internet has made it possible to obtain better and more comprehensive information on prices and services, inevitably fraying historical relationships and the more traditional methods of competition among firms.

27. Driven by these trends, the development and growth of combination firms is merely one aspect of a general movement toward consolidation in the death care products and services. There are now a number of sizable, publicly traded companies involved in the industry. Service Corporation International, Carriage Services, Inc. and StoneMor Partners, for example, are large companies that own and operate funeral homes and cemeteries in numerous states. Mathews International, Inc. manufactures and sells memorialization products nationwide. Hillenbrand Inc.'s Batesville Casket makes and sells caskets used throughout the United States. Market forces that are trending toward the replacement of smaller firms in a highly fragmented

industry with larger, highly integrated and more efficient firms have increased competition, fostered innovation and benefited consumers.

Wisconsin Law

28. The death care industry in Wisconsin is subject to extensive regulation under state law. The state requires funeral directors to be licensed by the state, acting through the Funeral Directors Examining Board. Funeral establishments cannot operate without first obtaining a permit from the Board. No person in Wisconsin can operate a funeral establishment unless licensed as a funeral director. And no person other than a licensed funeral director can engage in the business of embalming or directing and supervising the transportation of human bodies within the state.

29. Wisconsin also regulates the business of cemeteries, mausoleums, and crematories. Owners of larger cemeteries and public mausoleums must be licensed by the state, and their operations are subject to state regulation. The finances of cemetery operators are subject to review, audit, and regulation by the Wisconsin Cemetery Board. The construction of a crematorium requires a permit from the state, and crematory operations are regulated by the Department of Safety and Professional Services.

30. Wisconsin's extensive regulation of the death care industry is not unusual. All of the states regulate the industry to some extent. The operations of funeral directors, cemeteries, crematoria, and mausoleums touch on matters of public health and are thus properly subject to the traditional police powers of the state. Consumers who purchase cemetery lots or spaces in a mausoleum or columbarium expect them to be maintained in perpetuity, and state regulation of the financial operations of their owners or operators may be appropriate to assure that they are able to fulfill the long term promises that they have made. Families in need of death care services are in a vulnerable position, and regulations that require full and fair disclosure of prices and terms and conditions of sale may be necessary for their protection.

31. In contrast to most of the states, however, Wisconsin law contains provisions that forbid funeral directors from owning or operating cemeteries and that forbid cemetery operators from having an ownership interest in funeral establishments. Wis. Stat. § 157.067 provides that no cemetery authority may permit a funeral establishment to be located in a cemetery and further prohibits such authorities, their employees and agents from having "an ownership, operation or

other financial interest in a funeral establishment.” Wis. Stat. § 445.12(6) contains similar provision as applied to funeral directors. That section prohibits licensed funeral directors from operating a funeral establishment that is financially “connected” with a cemetery through an ownership or operating interest. That section also prohibits a licensed funeral director from operating a mortuary or funeral establishment that is located in a cemetery, whether or not that funeral director has any form of ownership interest in that establishment.

32. These statutory prohibitions are anticompetitive, irrational, and arbitrary. Wisconsin law does not forbid licensed funeral establishments from ownership or other involvement in any other aspects of the death care industry. Funeral establishments can and do own or operate facilities for cremation. They are free to engage in the business of memorialization in any way that will best serve their customers. Cemeteries may also engage in memorialization or in any other aspect of the death care industry, except for the operation of a licensed funeral establishment. There is no plausible justification for a regulatory scheme in which only cemeteries and funeral establishments are foreclosed from combined ownership interests, when combined ownership is permitted in all other aspects of the death care industry.

33. In addition to prohibiting combined ownership, § 445.12(6) goes so far as to prohibit a funeral director from operating a funeral establishment on cemetery grounds, even if there is no overlapping ownership or any other relationship, other than landlord and tenant, between the two. This makes no sense at all. Consumers of death care services might in many cases prefer to take advantage of a funeral home located in the cemetery where they will lay their loved one to rest. The State of Wisconsin’s decision to prohibit such a practical and sensible arrangement cannot be rationally justified and is entirely arbitrary.

34. In fact, there were no prohibitions of these kinds in Wisconsin law prior to the passage of § 445.12(6)’s predecessor in 1939. As noted above, it was during the 1930’s that Forest Lawn Memorial Park in California became the first American cemetery to build and operate a funeral home on cemetery grounds. California funeral directors did not approve of this competitive innovation, an innovation that they took to be a threat to their established businesses. But, despite the opposition by entrenched interests, the combined operation at Forest Lawn was a great success. These developments in California were well known throughout the death care services industry in the United States and most certainly in Wisconsin, given the Milwaukee headquarters location of the National Funeral Directors Association. The 1939 amendment to

the Wisconsin statutes that prevents the combined operation of cemeteries and funeral establishments was likely passed in response to those events, as its only purpose is to protect Wisconsin funeral directors from the competitive innovation pioneered in California and now common throughout the United States. Statutes that have as their only purpose the protection of the economic interests of one group at the expense of another cannot be squared with the Wisconsin Constitution's protection of economic liberty.

FIRST CLAIM FOR RELIEF

(Violation of Article I, Section 1 of the Wisconsin Constitution – Substantive Due Process)

35. Plaintiffs incorporate by reference the allegations above as if fully set forth herein.

36. Sections 445.12(6) and 157.067 of the Wisconsin statutes arbitrarily and irrationally prevent cemetery operators from owning an interest in a funeral establishment and owners and operators of funeral establishments from having an ownership interest in a cemetery. Owners and operators of funeral establishments and cemeteries are not prohibited from having an ownership interest in any other kinds of firms that are involved in the death care services industry in Wisconsin.

37. Section 445.12(6) prevents a licensed Wisconsin funeral director from locating a facility on cemetery grounds, and thus also prevents a cemetery operator from entering into a relationship that would permit a funeral establishment to operate on its grounds.

38. The effect of these statutes is to prevent competitive innovation in the death care services industry in Wisconsin.

39. Absent these statutory prohibitions, the Plaintiffs would be free to engage in the business of funeral directors. Plaintiffs are ready, willing and able to take the steps necessary to satisfy the Wisconsin requirements to obtain a license as funeral directors and to operate a funeral establishment on their cemetery grounds. Plaintiffs believe that they and their customers would benefit from the integration of these two businesses at a single location, from the lower costs that they could achieve by combining the businesses, and from the convenience of obtaining more comprehensive death care services from a single vendor.

40. Article I, section 1 of the Wisconsin Constitution, through its guarantee of due process, protects the Plaintiffs' right to earn a living and pursue their business free from anticompetitive, arbitrary, and irrational regulation. The statutes in question violate the Wisconsin Constitution in that they deny Plaintiffs' right to earn a living and do not further any legitimate governmental interest.

41. Plaintiffs have suffered harm as a result of the restrictions on their business operations imposed by §§ 445.12(6) and 157.067 of the Wisconsin Statutes.

SECOND CLAIM FOR RELIEF

(Violation of Article I, Section 1 of the Wisconsin Constitution – Equal Protection)

42. Plaintiffs incorporate by reference the allegations above as if fully set forth herein.

43. Sections 445.12(6) and 157.067 create anticompetitive, irrational, and arbitrary distinctions between classes of Wisconsin citizens. Only those citizens who are cemetery operators are forbidden from becoming funeral directors or from obtaining an ownership interest in a funeral establishment. Only those citizens who are funeral directors are forbidden from operating or obtaining an ownership interest in a cemetery.

44. As a direct result of these anticompetitive, arbitrary, and irrational distinctions as to who can and cannot own an interest in certain businesses, the Plaintiffs have been harmed in that they are prevented from operating their businesses in the manner best suited to their own benefit and that of their prospective customers.

45. There is no reasonable basis for the classifications set forth in §§ 445.12(6) and 157.067 of the Wisconsin Statutes, and they serve no legitimate governmental purpose. The characteristics of those who are prevented from owning funeral establishments are not so far different from those of other businesses who are permitted to do so as to justify that distinction. The characteristics of those who are prevented from owning an interest in a cemetery are not so far different from those of other businesses so as to justify that distinction. Sections 445.12(6) and 157.067 violate the guarantee of equal protection set forth in Article I, section 1 of the Wisconsin Constitution.

46. Plaintiffs have suffered harm as a result of the restrictions on their business operations imposed by §§ 445.12(6) and 157.067 of the Wisconsin Statutes.

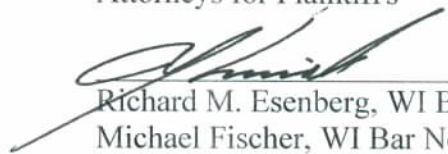
RELIEF REQUESTED

WHEREFORE, the Plaintiffs request that this Court:

- A. Enter a declaratory judgment that Wis. Stat. §§ 157.067 and 445.12(6) are in violation of the equal protection and due process guarantees set forth in Article I, section 1 of the Wisconsin Constitution;
- B. Enter an order permanently enjoining Defendants Ross and the Board from enforcing the provisions of those statutes;
- C. Enter an order awarding the Plaintiffs their reasonable costs and fees allowed by law; and
- D. Enter an order granting the Plaintiffs such other and further relief as the Court deems appropriate.

Dated this 21st day of August, 2014.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiffs



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