STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 6

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

Plaintiffs,

v. Case No. 14-CV-1763

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

Defendants.

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

INTRODUCTION AND NATURE OF THE CASE

This case is about whether Wisconsin's laws that prohibit cemetery/funeral home combination firms are rationally related to legitimate state interests.

The Court should grant Defendants' motion for summary judgment and dismiss this action. The summary judgment record demonstrates that Wis. Stat. § 157.067 and Wis. Stat. § 445.12(6), the "anti-combo" laws, are rationally related to the State's legitimate interests. Plaintiffs cannot prevail on their claims that the anti-combo laws violate the substantive due process and equal protection components of article I, section 1 of the Wisconsin Constitution.

Because Plaintiffs' constitutional claims challenging the anti-combo laws do not involve a suspect classification or a fundamental right, the claims are evaluated under rational basis

review. Under this standard, Plaintiffs bear the heavy burden of proving beyond a reasonable doubt that the anti-combo laws are not rationally related to legitimate state interests. Where there is any conceivable rational basis for the legislation under review, courts properly defer to the legislature and should not question the wisdom of the legislature's policy choices.

The anti-combo laws were enacted to protect consumers from the abuses that can arise due to cemetery/funeral combination firms. These laws encourage competition between cemetery operators and funeral directors with regard to the products that death care consumers purchase in their time of need. Without anti-combo laws, death care conglomerates like Service Corporation International (SCI) could swoop into Wisconsin, buy up controlling interests in large cemeteries and nearby "mom and pop" funeral homes, foreclose competitors, and then raise prices on death care products and services. Consumers could be harmed by higher prices and diminished quality of services. Wisconsin consumers do not need the prospect of these additional burdens when they are grieving.

Because the means chosen by the legislature to accomplish legitimate state interests in protecting Wisconsin consumers are reasonable, the anti-combo laws pass rational basis review. The Court should grant the State's summary judgment motion and dismiss this case.

STATEMENT OF BACKGROUND FACTS

I. The challenged laws

A. The statutory language

Plaintiffs challenge two statutes, Wis. Stat. § 157.067(2) and Wis. Stat. § 445.12(6), which state:

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

Wis. Stat. § 157.067(2).

> (6) No licensed funeral director or operator of a funeral establishment may operate a mortuary or funeral establishment that is located in a cemetery or that is financially, through an ownership or operation interest or otherwise, connected with a cemetery. No licensed funeral director or his or her employee may, directly or indirectly, receive or accept any commission, fee, remuneration or benefit of any kind from any cemetery, mausoleum or crematory or from any owner, employee or agent thereof in connection with the sale or transfer of any cemetery lot, outer burial container, burial privilege or cremation, nor act, directly or indirectly, as a broker or jobber of any cemetery property or interest therein.

Wis. Stat. § 445.12(6).

B. History of Wisconsin's anti-combo laws

In 1939, the Wisconsin legislature enacted Wis. Stat. § 156.12(6), the predecessor to Wis. Stat. § 445.12(6), which prohibited licensed funeral directors and licensed embalmers from operating a mortuary or a funeral establishment in a cemetery. § 4, ch. 93, Laws of 1939. In 1943, the law was amended to also prohibit an operator of a funeral establishment from operating a mortuary or funeral home in a cemetery. § 10, ch. 433, Laws of 1943.

In 1946, Wisconsin's Attorney General was asked to determine whether a licensed funeral director and embalmer violated Wis. Stat. § 156.12(6) by also being a paid secretary of a

cemetery association. *See* 35 Wis. Op. Att'y Gen. 186 (1946), filed as Exhibit G to the Affidavit of Clayton P. Kawski. In answering that question, the Attorney General explained that the statute "was apparently intended to prevent funeral directors from acquiring an interest adverse to their clients in the purchase of cemetery lots, vaults, etc., through 'kickback' agreements with cemeteries, mausoleums, and crematories." *Id.* at 187-88.

In 1980, the legislature renumbered Wis. Stat. § 156.12(6) to Wis. Stat. § 445.12(6). § 31, ch. 175, Laws of 1979. In 1989, the Secretary of the Department of Regulation and Licensing requested the Attorney General's opinion regarding whether a parent corporation and wholly-owned subsidiaries violated Wis. Stat. § 445.12(6) through joint ownership of interests in cemeteries and funeral establishments. *See* 78 Wis. Op. Att'y Gen. 5 (1989), filed as Exhibit H to the Affidavit of Clayton P. Kawski. While the Attorney General did not conclusively answer the question presented, the request shined light upon the business practices of SCI, a Texas-based conglomerate in the death care industry. The letter requesting the Attorney General's opinion recounted the following facts:

> Service Corporation International (SCI) is a corporation operating out of Houston, Texas. SCI has numerous holdings nationwide, including funeral establishments and cemeteries. SCI has established several operating divisions, with its Cemetery Division being located in San Diego, California, and its Funeral Division in Houston, Texas. Recently, one of SCI's wholly owned subsidiaries, Funeral Corporation Wisconsin (FCW), purchased all of the issued and outstanding stock of a funeral establishment located in Beloit, Wisconsin. At that time, SCI also held all the preferred and common stock in a cemetery located in Appleton, Wisconsin. Furthermore, SCI through its wholly owned subsidiary Wisconsin Cemetery Services, Inc. (WCS), recently acquired all of the issued and outstanding capital stock of a cemetery in Oshkosh, Wisconsin.

Id. at 6-7.

There have been three efforts to repeal Wis. Stat. § 445.12(6). All have failed. In 1993, a bill was introduced in the State Senate that failed to pass. 1993 S. B. 381. Instead of repealing Wis. Stat. § 445.12(6), the legislature passed a law strengthening the anti-combo law to expand

its coverage to the corporate subsidiary situations described in the 1989 Attorney General opinion. The legislature also enacted Wis. Stat. § 157.067, which prohibits cemetery ownership of funeral homes. 1993 Wis. Act 100, §§ 1, 2.

In 1994, SCI Wisconsin Funeral Services and its subsidiary, Cemetery Services, Inc., filed a declaratory judgment action in Dane County Circuit Court challenging the application of Wis. Stat. § 445.12(6) and Wis. Stat. § 157.067 to the ownership of funeral homes and cemeteries through related corporate subsidiaries. *Cemetery Servs., Inc. v. Wis. Dep't of Reg. & Licensing*, No. 1994-CV-490 (Dane Cty. Cir. Ct.). In 1998, the Wisconsin Court of Appeals held that SCI's ownership interests in funeral establishments and cemeteries violated the anti-combo laws. *Cemetery Servs., Inc. v. Wis. Dep't of Reg. & Licensing*, 221 Wis. 2d 817, 586 N.W.2d 191 (Ct. App. 1998). The court of appeals rejected SCI's vagueness constitutional challenge to the anti-combo laws and held that other constitutional challenges similar to those advanced here were insufficiently developed to address on appeal. *Id.* at 829-30.

In 2012, a bill was introduced in the Assembly to repeal the anti-combo laws. 2011 A. B. 523. A hearing was held, but the bill did not pass.

In 2013, another bill was introduced in the Assembly to repeal the anti-combo laws. 2013 A. B. 508. It, too, failed.

II. The parties

A. The plaintiffs

The plaintiffs are E. Glen Porter III and Highland Memorial Park, Inc. (Compl. ¶¶ 7-8.) Highland Memorial Park is a Wisconsin licensed cemetery, and Porter is its president. (*Id.*)

B. The defendants

The defendants are the State of Wisconsin, Dave Ross, who is the Secretary of the Department of Safety and Professional Services, and the Wisconsin Funeral Directors Examining Board. (Compl. ¶¶ 9-11; Answer ¶¶ 9-11.) The individual members of the Funeral Directors Examining Board were not named as Defendants in this action.

III. The procedural status, legal claims, and relief requested

Plaintiffs filed their Complaint on August 22, 2014. Defendants filed their Answer and Affirmative Defenses on October 10, 2014. Based on a stipulation, the Court ultimately set a dispositive motion filing deadline of October 1, 2015.

Plaintiffs raise two facial legal challenges under article I, section 1 of the Wisconsin Constitution. (Compl. ¶¶ 35-46.) Article I, section 1 of the Wisconsin Constitution states: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." The Wisconsin Supreme Court has held that the constitutional guarantees and restraints in the due process and equal protection clauses have the same effect in both the Wisconsin and Federal constitutions. *See State v. Interstate Blood Bank, Inc.*, 65 Wis. 2d 482, 490, 222 N.W.2d 912 (1974); *Chicago & N. W. Ry. Co. v. La Follette*, 43 Wis. 2d 631, 643, 169 N.W.2d 441 (1969).

Plaintiffs' first claim is that the anti-combo laws violate their substantive due process rights under the Wisconsin Constitution. (Compl. 11-12.) Plaintiffs would like to obtain a funeral director license and operate a funeral establishment on cemetery grounds. (*Id.* ¶ 39.) They assert that 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." (*Id.* ¶ 40.) They assert that the anti-combo laws "violate the Wisconsin Constitution in that they deny Plaintiffs' right to earn a living and do not further any legitimate governmental interest." (*Id.*)

Plaintiffs' second claim is that the anti-combo laws violate their equal protection rights under the Wisconsin Constitution. (Compl. 12-13.) Plaintiffs assert that the anti-combo laws "create anticompetitive, irrational, and arbitrary distinctions between classes of Wisconsin citizens." (*Id.* ¶ 43.) The classifications drawn by the anti-combo laws are described in the Complaint as: "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 interest in a cemetery." (*Id.*) The classifications drawn by the anti-combo laws allegedly violate the Wisconsin Constitution because the characteristics of those who are prevented from owning funeral establishments or an interest in a cemetery are "not so far different from those of other businesses" that are permitted to do so, as to justify the distinction. (*See id.* ¶ 45.)

Plaintiffs request: a declaratory judgment that the anti-combo laws violate article I, section 1 of the Wisconsin Constitution; an order permanently enjoining Defendants Ross and the Funeral Directors Examining Board (but not Defendant State of Wisconsin) from enforcing the anti-combo laws; costs; and attorney fees. (Compl. 13.)

SUMMARY JUDGMENT STANDARD

Summary judgment shall be rendered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2).

ARGUMENT

This case is appropriate for summary judgment. It involves only a legal question: Are the anti-combo laws rationally related to legitimate state interests?

The Court's role is limited when declaring the constitutionality of statutes. The Court does not sit as a "super-legislature" to determine public policy. *Flynn v. Dep't of Admin*, 216 Wis. 2d 521, 529, 576 N.W.2d 245 (1998). "Our form of government provides for one legislature, not two." *Id.* Here, the legislature has repeatedly and consistently rejected efforts to repeal the anti-combo laws. Plaintiffs' lawsuit is an effort to have the Court do what the legislature has been unwilling to do—get rid of the anti-combo laws. The Court should decline Plaintiffs' invitation and should instead grant Defendants' summary judgment motion.

I. Legal standards for constitutional challenges

A. Statutes are presumed constitutional, and Plaintiffs bear the burden of demonstrating that the challenged laws are unconstitutional.

The anti-combo laws are presumed constitutional, and Plaintiffs must clear a high bar to obtain the relief that they are requesting. "If any doubt exists as to a law's unconstitutionality, it will be resolved in favor of its validity." *Quinn v. Town of Dodgeville*, 122 Wis. 2d 570, 577, 364 N.W.2d 149 (1985).

A court must indulge every reasonable presumption necessary to uphold legislation against constitutional challenges. *Quinn*, 122 Wis. 2d at 577; *Wis. Bingo Supply & Equip. Co. v. Wis. Bingo Control Bd.*, 88 Wis. 2d 293, 301, 276 N.W.2d 716 (1979). "Because of the strong presumption in favor of constitutionality, a party bringing a constitutional challenge to a statute bears a heavy burden." *Wis. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 37, 328 Wis. 2d 469, 787 N.W.2d 22 (citation and internal quotations omitted). It is *not sufficient* for a party to demonstrate "that the statute's constitutionality is doubtful or that the statute is probably

unconstitutional." *State v. Smith,* 2010 WI 16, ¶ 8, 323 Wis. 2d 377, 780 N.W.2d 90. Instead, the presumption can be overcome only if the party establishes "that the statute is unconstitutional beyond a reasonable doubt." *Id.* (quoting *State v. Cole,* 2003 WI 112, ¶ 11, 264 Wis. 2d 520, 665 N.W.2d 328).

B. Plaintiffs assert only facial constitutional challenges; therefore, they must demonstrate that the challenged laws are unconstitutional in every possible application.

Plaintiffs' equal protection and due process claims are facial challenges to the anti-combo laws. (Compl. ¶¶ 36-45.) Wisconsin courts have recognized that there are "fundamental differences" between facial and as-applied challenges. *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2013 WI App 77, ¶ 7, 348 Wis. 2d 714, 834 N.W.2d 393, *aff'd*, 2014 WI 97, 357 Wis. 2d 360, 851 N.W.2d 302. In *State v. Wood*, the Wisconsin Supreme Court explained that to prevail on a facial challenge the challenger must show that the law cannot be enforced legally under any circumstances. 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63; *see also United States v. Salerno*, 481 U.S. 739, 745 (1987).

To succeed on a facial challenge to the anti-combo laws, Plaintiffs must prove *beyond a reasonable doubt* that the statutes are unconstitutional in *all* of their potential applications. Plaintiffs cannot meet that burden and, as a result, cannot succeed on the merits.

C. Rational basis scrutiny applies.

1. Equal protection: There is no suspect class or fundamental right at issue.

When an economic regulation is challenged as violating the equal protection clause, courts consistently defer to legislative determinations as to the desirability of particular statutory classifications. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect

distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *Id.* "[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines[.]" *Id.* "For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993).

There is no allegation that the laws at issue implicate a fundamental right[1] or a suspect class.[2] Courts in other states have held that similar laws regarding funeral and cemetery operations "represent an archetypical instance of legislative regulation of economic activity." *Blue Hills Cemetery, Inc. v. Bd. of Registration in Embalming & Funeral Directing*, 398 N.E.2d 471, 474 (Mass. 1979); *Deepdale Mem'l Gardens v. Admin. Sec'y of Cemetery Regulations*, 426 N.W.2d 785, 788 (Mich. App. 1988).[3] The legislation here is social and economic in nature and involves no fundamental rights or suspect classifications. As such, it is presumed constitutional and is subject to rational basis review.

2. Substantive due process: There is no fundamental right at issue.

For essentially the same reasons, rational basis review applies to the substantive due process claim. Economic legislation does not violate substantive due process unless the law is

[1]Fundamental rights include rights of a uniquely private nature, *Roe v. Wade*, 410 U.S. 113 (1973); the right to vote, *Bullock v. Carter*, 405 U.S. 134 (1972); the right of interstate travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969); the rights guaranteed by the First Amendment, *Williams v. Rhodes*, 393 U.S. 23 (1968); and the right to procreate, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

[2]Suspect classes include alienage, *Graham v. Richardson*, 403 U.S. 365 (1971); race, *McLaughlin v. Florida*, 379 U.S. 184 (1964); and ancestry, *Oyama v. California*, 332 U.S. 633 (1948).

[3]These decisions are filed as Exhibits J and I to the Affidavit of Clayton P. Kawski.

arbitrary and irrational. *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 621 (7th Cir. 2014). As with the equal protection clause, the question is not whether a law is wise or unwise; the test is whether the law is rational. *See id.* As the U.S. Supreme Court has stated, "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining,* 428 U.S. 1, 15 (1976); *see also Goodpaster v. City of Indianapolis,* 736 F.3d 1060, 1071 (7th Cir. 2013). Under rational basis review, a state law is constitutional even if it is "unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 488 (1955). The law must only "bear[] a rational relationship to some legitimate end." *Romer v. Evans,* 517 U.S. 620, 631 (1996).

The anti-combo laws are classic examples of economic regulations—legislative efforts to structure and accommodate "the burdens and benefits of economic life." *Turner Elkhorn Mining*, 428 U.S. at 15. The laws are economic regulations that burden no fundamental rights, and they are subject only to rational basis scrutiny.

3. Under rational basis review, the laws must be rationally related to a legitimate state interest.

The analysis under the equal protection and due process clauses is essentially the same: both require rational basis review.

As to equal protection, a court must "uphold the statute if the legislature's distinction among groups of persons is rationally related to a legitimate government purpose." *Doering v. WEA Ins. Grp.*, 193 Wis. 2d 118, 131, 532 N.W.2d 432 (1995). Precision is not required. The rational basis test "does not require a statute to treat all persons identically, but it mandates that

any distinction have some relevance to the purpose for which the classification is made." *Id.* at 131-32.

Similarly, when faced with a substantive due process challenge, a court must examine "whether the statute is a reasonable and rational means to a legislative end." *State v. Smet*, 2005 WI App 263, ¶ 11, 288 Wis. 2d 525, 709 N.W.2d 474. The legislation need not expressly state a rationale nor must it contain legislative findings to support the law; rather, the legislation survives the substantive due process challenge if the court can conceive of a rational basis for the legislation. *State v. Radke*, 2003 WI 7, ¶ 27, 259 Wis. 2d 13, 657 N.W.2d 66.

In applying the rational basis standard, the Court must exercise judicial restraint. *Doering*, 193 Wis. 2d at 132. The Court must defer to the legislature because "drawing lines and creating distinctions to establish public policy is a legislative task." *Id.* It is irrelevant whether the reasons given actually motivated the legislature; rather, the question is whether some rational basis exists upon which the legislature could have based the challenged law. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). "[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* Those attacking a statute on rational basis grounds have the burden to negate "every conceivable basis which might support it." *Id.*

II. The challenged laws do not violate Plaintiffs' equal protection or due process rights under article I, section 1 of the Wisconsin Constitution.

Wisconsin's anti-combo laws are constitutional under the equal protection and due process clauses if they are rationally related to a legitimate state interest. The challenged laws meet this test because they serve the important goals of preserving competition in the death care services industry, protecting consumers from higher prices and poor service, and reducing the potential for abuses from commingling of cemetery and funeral revenues. Defendants' expert,

professionals in the industry, and articles on the topic support this conclusion: the anti-combo laws are rationally related to legitimate state interests.

A. Several important interests are served by Wisconsin's anti-combo laws.

The important state interests served by Wis. Stat. §§ 445.12(6) and 157.067 include the following:

- **Preserve competition:** These laws preserve and promote competition in the death care industry by prohibiting one entity from owning and operating a cemetery and a funeral home;

- **Avoid commingling of funds:** These laws promote effective oversight of the death care industry because commingling of funds between cemeteries and funeral homes could make state oversight of cemetery financing difficult and could undercut the not-for-profit status of cemeteries;

- **Preserve consumer choices:** These laws maintain and promote choices for death care consumers because, without these laws, national death care conglomerates like SCI might purchase large numbers of cemeteries and funeral homes in Wisconsin, thereby driving stand-alone or family-owned funeral homes out of business and leaving consumers with limited or insufficient choices for death care services;

- **Avoid higher prices:** These law protect consumers from higher prices because allowing cross-marketing of goods and services between cemeteries and funeral homes might result in inappropriate tie-in arrangements and, eventually, higher prices for death care services;

- **Foster personal service:** These laws protect death care consumers because integration of funeral services into the operations of a large, diversified corporation could diminish the personal quality of such services and increase the possibility that the consumer would be taken advantage of at a vulnerable and emotionally fragile time, namely, immediately after the death of a loved one; and

- **Avoid undue pressure on consumers:** These laws protect death care consumers because if funeral and cemetery services are allowed to be combined death care consumers might feel pressured to buy these services from a single entity.

The legislature may or may not have actually been motivated by these goals. But if any rational basis for the anti-combo laws exists, they survive constitutional scrutiny.

B. Defendants' summary judgment submissions support that the challenged laws are rationally related to these important state interests.

This Court must uphold the anti-combo laws if there is any conceivable rational basis for them. The foregoing lists many reasons that are rational on their face. Further, Defendants' summary judgment submissions support that the legislature acted rationally.

Defendants' expert, Jeffrey Sundberg, is a professor of economics at Lake Forest College in Lake Forest, Illinois. (Expert Report of Jeffrey O. Sundberg, August 25, 2015 ("Sundberg Report") ¶ 1.)[4] He holds a Ph.D. and an M.A. in economics from Stanford University and a B.A. in economics from Carleton College. (*Id.* ¶ 1.) It is Professor Sundberg's opinion "that the laws that prevent joint ownership of funeral homes and cemeteries, as well as prevent funeral homes from locating in cemeteries, do serve legitimate state interests." (*Id.* ¶ 89.) His opinion is "rendered to a reasonable degree of certainty in [his] field of expertise," economics. (*Id.* ¶ 5.)

1. Wisconsin's anti-combo laws support the important goals of promoting competition and protecting consumers from higher prices.

Professor Sundberg concludes that funeral homes in a financial relationship with a cemetery have an opportunity to significantly reduce the amount of competition they face by foreclosing competitors and raising prices. (Sundberg Report ¶¶ 9, 46, 88.) He explains that "foreclosure" is a strategy whereby firms that own or operate both a cemetery and a funeral home ("combinations" or "combos") force other companies out of the market by restricting access to an important part of the funeral product—the cemetery. (*Id.* ¶¶ 35, 46.) Professor

[4]Professor Sundberg's expert report and curriculum vitae are filed as Exhibit A to the Affidavit of Clayton P. Kawski.

Sundberg concludes that this might result in lower prices in the short-term, but that in the long-term "this would result in an increase in [the combos'] own market share and exit by other firms, with the likely effect of higher prices for consumers in the future." (*Id.* ¶ 88.)[5]

In fact, it is undisputed by Plaintiffs that combination firms result in consumers spending more on death care products and services. Plaintiffs' expert, Professor David Harrington, testified at deposition that consumers spend more at combination firms. (Deposition Transcript, David E. Harrington, dated Aug. 25, 2015, ("Harrington Depo.") 45:19-46:19.)[6] And consumers do not just spend a little more money at combos. Professor Harrington testified that they spend up to 41% more money. (Harrington Depo. 45:19-46:19.) At his deposition, Professor Harrington testified that he did not know why people spend more at combos. (Harrington Depo. 48:1-49:23.)

According to Professor Sundberg, Professor Harrington provided no evidence to support his argument that prices are higher because consumers purchase more elaborate funerals. (Sundberg Report ¶ 69.) Professor Sundberg also relies upon a 2013 *Bloomberg Businessweek* article that analyzed the prices charged by SCI, the largest firm in the death care industry. (*Id.* ¶¶ 61, 69.) The article observes that SCI charged as much as 30% to 42% more in some markets than independent firms, while providing similar death care services. (Sundberg Report ¶ 69.)[7] Other articles on the death care industry confirm that permitting combinations does not

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[5]Allowing combinations will not necessarily encourage new and innovative entry into the funeral home industry, as Plaintiffs suggest. (Sundberg Report ¶ 7.) Instead, the repeal of Wisconsin's anti-combo laws is more likely to encourage mergers between existing funeral homes and cemeteries, as is currently being seen in states that allow combinations. (*Id.*)

[6]A copy of the transcript of Professor Harrington's August 25, 2015, deposition is filed as Exhibit B to the Affidavit of Clayton P. Kawski.

[7]Paul M. Barrett, *Is Funeral Home Chain SCI's Growth Coming at the Expense of Mourners?*, Bloomberg Businessweek (Oct. 24, 2013), http://tinyurl.com/lqcb547. This article is being filed as Exhibit D to the Affidavit of Clayton P. Kawski.

mean lower prices for consumers.[8] Given the evidence of higher prices charged by combos, Professor Sundberg is not convinced that consumers would be better off if more combos existed. (Sundberg Report ¶ 70.)

Professionals in the death care industry indicate that competition is preserved under the current law. Mark Krause, the President of Krause Funeral Home & Cremation Services, Inc., which operates out of four locations in the Milwaukee area, has experienced this competition first hand. (Sept. 16, 2015, Affidavit of Mark Krause ("Krause Aff.") ¶¶ 2-3, 28-38.) For example, consumers often agree to purchase caskets, urns, or outer burial containers from Krause Funeral Homes before they meet with the cemetery. (*Id.* ¶ 32.) On many occasions, consumers will later ask to be released from that purchase because the cemetery presented them a different or lower-priced option. (*Id.* ¶ 34.) In those instances, Krause releases the customer from the obligation, and the customer purchases those items from the cemetery. (*Id.*) Thus, funeral homes and cemeteries in Wisconsin compete directly on the sale of caskets, urns, and outer burial containers. (*Id.* ¶ 35.)

In fact, Plaintiffs compete directly with Krause Funeral Homes, most significantly on the sales of outer burial containers. (Krause Aff. ¶ 36.) Krause regularly has customers agree to purchase an outer burial container from one of his funeral homes but then return and ask to be released from their purchase obligation because they found a different option at Plaintiffs' cemetery. (*Id.*) In those instances, Krause releases the customer from their purchase obligation. (*Id.*)

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[8] *See* Dee J. Hall, *More profitable death*, The Wisconsin State Journal, Dec. 28, 1997, at 1A; Shelby Gilje, *Funeral Industry: Big Corporations Shove Aside Mom and Pop*, The Seattle Times (Dec. 11, 1996), http://tinyurl.com/ptxm89k. These articles are being filed as Exhibits E and F to the Affidavit of Clayton P. Kawski.

Pinelawn Memorial Cemetery in Milwaukee also competes directly with Krause Funeral Homes. (*Id.*) Without Wisconsin's anti-combo laws, the same entity, such as SCI, could own both funeral homes and cemeteries. If SCI were to purchase Krause Funeral Homes, Highland Memorial Park, and Pinelawn Memorial Park, for example, the level of competition that exists on caskets, urns, and outer burial containers in the Milwaukee area might well decrease. (*Id.* ¶ 38.)

Furthermore, according to Professor Sundberg, cost efficiencies still exist under the current law. Combinations are not necessary to achieve the efficiencies of economies of scale and scope. (Sundberg Report ¶¶ 16-23, 87.) Economies of scale—that is, increasing the capacity for a given facility—can be achieved by any funeral home or cemetery that is able to attract more clients to its existing facility without having to make substantial additional capital investments. (*Id.* ¶ 20.) Economies of scope—that is, using a facility for multiple purposes—can be realized any time a funeral home or cemetery can use existing facilities for another lawful purpose, such as for flower shops, weddings, or print shops that offer announcements. (*Id.* ¶¶ 21, 22.) And, moreover, funeral homes in a financial relationship with a cemetery would be less likely to create advantages through economies of scale and scope because the company would have multiple facilities in different places. (*Id.* ¶¶ 11, 87.) Instead, these combo firms could create a competitive advantage by foreclosing independent firms and raising prices. (*Id.* ¶¶ 11, 88.) This could make consumers much worse off if the anti-combo laws are struck down.

2. Wisconsin's anti-combo laws protect consumers from poor service.

Professor Sundberg concludes that "[t]he existing law may protect consumers from poor service." (Sundberg Report ¶ 50.) He reasons that combination firms are more likely to be large firms due to the capital requirements of owning more assets. (*Id.* ¶ 47.) In a large corporation, the

actions of one employee have little effect on the overall profitability of the organization, and individual employees are much more difficult to monitor. (*Id.* ¶ 48.) Employees have less financial incentive to do their best personal job. (*Id.*) In contrast, a small firm, run by people who know that every interaction they have with consumers is important to the well-being of the company, may be better able to impress that importance on each employee, as well as better able to monitor a small number of employees. (*Id.* ¶ 47.) Professor Sundberg cites this as one reason to believe that there is at least some possibility of less personal service from a large firm. (*Id.* ¶ 48.)

Another reason why service can suffer at larger firms is that individual employees may be less concerned about the reputation of a large multi-region or even national firm, and the employee will have less incentive to provide the best possible service. (Sundberg Report ¶ 49.) Large, well-financed firms are also better able to support large marketing campaigns. (*Id.* ¶ 50.) Large firms, like SCI, are well-known for their significant investments in developing brand names and crafting reputations. (*Id.*; *see also* Expert Report of David E. Harrington, July 24, 2015, ("Harrington Report") ¶ 27, filed by Plaintiffs' counsel on July 30, 2015, with their Witness List.) Small firms are unlikely to be able to afford similar campaigns, so personal service is likely to be even more valuable to them. (Sundberg Report ¶ 50.)

Plaintiffs' expert agrees that "[c]onsumers are especially vulnerable in death care services markets because they often have to make decisions quickly at a time when they are grieving the loss of friends and relatives and most have little or no experience in buying the funeral or cemetery services." (Harrington Report ¶ 24.) Large, diversified corporations will not necessarily take advantage of consumers during this vulnerable time, but they are in a much better position

to do so than smaller firms are. Therefore, the existing state of the law is more likely to protect Wisconsin consumers from potential bad actors.

Mary Lou Charapata, a funeral director at Cesarz, Charapata, and Zinnecker Funeral Home in Waukesha, Wisconsin, has direct experience with combo firms providing poor service and taking advantage of consumers. (Sept. 22, 2015 Affidavit of Mary Lou Charapata ("Charapata Aff.") ¶¶ 2, 8-17.) Charapata has worked in one state that permits combination businesses (Arizona) and one that does not (Wisconsin). (*Id.* ¶ 8.) While she lived in Arizona, Charapata worked at a funeral home and cemetery combination called Evergreen. (*Id.* ¶ 9.) Evergreen's business plan stressed cross-marketing of funeral and cemetery services, and staff attempted to sell services for both the funeral home and cemetery aspects of Evergreen's business. (*Id.*)

Charapata also worked for a large stand-alone funeral home called Adair Funeral Home in Tucson, Arizona. (Charapata Aff. ¶¶ 6, 10.) At Adair, Charapata met with an average of ten to 12 families per week and helped them with funeral arrangements for their loved ones. (*Id.* ¶ 11.) Adair did not own its own cemetery, so the families with which Charapata worked used local cemeteries for assistance with burial or cremation services. (*Id.* ¶ 12.) Most of the cemeteries in Tucson at the time were owned by combination firms. (*Id.* ¶ 13.)

During her time at Adair, Charapata worked with many families that made their funeral arrangements at Adair, next went to the cemetery to look at burial or cremation options, and then returned to Adair. (Charapata Aff. ¶ 14.) Many of these families were upset by their experiences at the cemetery. Charapata spent a considerable amount of time comforting and reassuring these families that they were free to use the services of a funeral home unassociated with the cemetery and that neither they nor their loved ones should receive inferior treatment at the cemetery if they

elected to purchase their funeral services from an independent funeral home. (*Id.*) Given how often she had to convey this message to families, Charapata became convinced that, even though no direct threats had been made, families routinely inferred that they would receive inferior treatment at a combination firm if they did not use the combination's funeral services in addition to its cemetery services. (*Id.*) Based on her experiences, Charapata concluded that the high pressure, cross-marketing sales tactics used by combinations in Arizona did not help families in their time of need, but instead increased their stress levels and exacerbated their grieving. (*Id.*)

The funeral home and cemetery culture that Charapata experienced in Arizona was drastically different from the culture she has experienced in Wisconsin. (Charapata Aff. ¶ 15.) The industry in Arizona placed its own needs and desires over the needs and desires of families. It was not a service-oriented industry. (*Id.* ¶ 16.) Competition was stiff in Tucson, and a few large players dominated the market. The small, family-owned funeral homes that are common in Wisconsin had already disappeared by the time Charapata arrived in Arizona. (*Id.*) Charapata's experiences led her to conclude that a local, family-owned operator with ties to the community can better provide the personal, caring service that consumers deserve in their time of need. (*Id.*) Charapata saw no benefits to consumers from the Arizona law permitting combinations. (*Id.* ¶ 17.)

Both Professor Sundberg and funeral director Mary Lou Charapata provide examples of how the introduction of large combination firms into the market could diminish the personal quality of death care services and increase the possibility that consumers would be taken advantage of at a vulnerable time. Wisconsin's anti-combo law could protect consumers from this problem.

3. Wisconsin's anti-combo laws reduce the potential for abuses from commingling of cemetery and funeral revenues.

Cemeteries and funeral homes are structured very differently in terms of revenue and finances. They are also subject to different state and federal regulations. If combination firms were allowed to operate in Wisconsin, they could exploit these differences to their financial advantage and to the detriment of consumers.

One potential for abuse involves the different trusting requirements of cemeteries and funeral homes. (Krause Aff. ¶¶ 41-44.) When consumers purchase funeral services or goods on a pre-need basis, Wisconsin law requires funeral homes to place 100% of that money into trust. Wis. Stat. § 445.125(1); (Krause Aff. ¶ 41.) The trust belongs to the consumer and is entirely portable. Funeral homes are not entitled to access any of the money until after they have provided the pre-purchased funeral goods and services. (*Id.*) Trust funds must be deposited only in certain types of investments. *See* Wis. Stat. § 445.125(1)(b).

The trusting requirements for cemeteries are not the same. Consumers may purchase graves or other items from cemeteries on a pre-need basis, but cemeteries are only required to place 40% of a pre-need payment into trust. Wis. Stat. § 440.92(3); (Krause Aff. ¶ 42.) Thus, cemeteries can use 60% of the money for their immediate expenses. (*Id.*) And any money paid toward a casket or outer burial container does not count. So cemeteries have no obligation to put any money into trust when a consumer buys a casket or outer burial container from them on a pre-need basis; whereas, funeral homes must put 100% of that money into trust. (*Id.*) If combination firms were allowed to operate in Wisconsin, nothing would prohibit those firms from accounting for the sale of caskets, urns, and outer burial containers on the cemetery side of the business in order to avoid Wisconsin's 100% trusting requirement for funeral homes. (*Id.* ¶ 44.)

There are other ways in which the State regulates funeral homes and cemeteries differently. Funeral homes are prohibited by Wisconsin law from paying their employees commissions. *See* Wis. Stat. § 445.12(6). Cemetery salespeople, however, are allowed to work on a commission basis, and many do. (Krause Aff. ¶ 46.) Also, funeral homes pay property tax under Wisconsin law, whereas cemeteries are not required to pay property tax. (*Id.* ¶ 47.); *see* Wis. Stat. § 70.11(3).

Cemeteries and funeral homes are also subject to different federal regulations. For example, funeral homes are subject to the Federal Trade Commission (FTC) Funeral Rule,[9] but cemeteries are not regulated by the FTC and are not subject to the Funeral Rule. 16 C.F.R. § 453; (Krause Aff. ¶¶ 23-24, 48.) The Funeral Rule requires funeral homes to disclose their prices to prospective customers over the phone and to provide itemized price lists when customers visit the funeral home. (*Id.* ¶ 25.) The Funeral Rule also gives customers the right to buy funeral goods and services on an itemized basis, and requires funeral homes to use merchandize that the customers have purchased or secured elsewhere, if the customer chooses. (*Id.* ¶¶ 24-27.) Cemeteries are not subject to these rules. (*Id.* ¶ 24.)

Also under the Funeral Rule, funeral homes cannot charge customers any additional fees if the customer purchases or secures merchandise somewhere other than the funeral home. (Krause Aff. ¶ 45.) Cemeteries, however, are allowed to charge customers additional fees if they purchase merchandise elsewhere. (*Id.*) For example, if a customer buys a grave marker from somewhere other than a cemetery, the cemetery can charge a "setting" or "administrative" fee that would not be charged if the customer purchased a grave marker from a funeral home. (*Id.*)

If combination firms were permitted to operate in Wisconsin, those firms could funnel business through the cemetery side of the operation in order to avoid consumer-friendly state and federal regulations that apply only to funeral homes. This has the potential to harm Wisconsin consumers.

Another potential for abuse involves the Wisconsin statute that requires cemeteries to set aside money for perpetual care. (Sundberg Report ¶ 52.) Pursuant to this statute, cemeteries must set aside 15% of the value of a plot for perpetual care. Wis. Stat. § 157.11(9g)(c). By providing funeral services as well as cemetery plots, a firm could potentially exploit this law by increasing the price of something like burial vaults and reducing the price of the plot itself. (*Id.*) The combo firm would collect the same amount of revenue but would be required to set aside less money for perpetual care, without actually reducing the expenses of perpetual care. (*Id.*) Therefore, Professor Sundberg concludes that "[t]he existing law reduces the potential for abuses from commingling of cemetery and funeral revenues." (*Id.* ¶ 53.)

C. The data used by Plaintiffs' expert has serious limitations and does not support the theory that efficiencies would result if Defendants are enjoined from enforcing the anti-combo laws.

Because this Court's role is limited to applying rational basis review, and because the foregoing analysis states multiple rational reasons for the anti-combo laws, the analysis ends. It does not matter if Plaintiffs, or their expert, think a different set of laws are preferable. Further, even if Plaintiffs' expert's opinion were relevant, it has several significant deficiencies.

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[9]For a detailed analysis of the requirements of the Funeral Rule, *see* Federal Trade Commission, Complying With the Funeral Rule, April 2015, https://www.ftc.gov/system/files/documents/plain-language/pdf-0131-complying-with-funeral-rule.pdf (last visited Sept. 29, 2015).

Plaintiffs' expert, Professor Harrington, filed an expert report that relied heavily on a previous article written by Professor Harrington and another professor, Jaret Treber, which was published in *Regulation*.[10] The *Regulation* article is being filed as Exhibit C to the Affidavit of Clayton P. Kawski. Professor Sundberg concluded that this article and the Harrington Report are based on data that has serious limitations. (Sundberg Report ¶¶ 54-85.) Some of those limitations are discussed in this section. The rest are addressed in detail in Professor Sundberg's report. (*Id.*)

First, Professor Harrington's definition of combos is not consistent with the relationships prevented by Wisconsin's anti-combo laws. (Sundberg Report ¶¶ 55-56.) Professor Harrington defines a combo as a firm where a funeral home is located in or near a cemetery. (*Id.*) Wisconsin law, however, also prevents funeral homes and cemeteries from having a financial relationship, regardless of where they are located. (*Id.*) Professor Harrington does not account for this difference, which results in a major shortcoming in the data presented in his report. (*Id.* ¶¶ 55-62.)

For example, Professor Harrington dramatically underestimates the number of funeral homes jointly owned with cemeteries in other states, compared to the number of combination firms. (Sundberg Report ¶ 57.) This greatly reduces the relevance of the data set to the Wisconsin laws because the Wisconsin laws could affect more funeral homes than just those that might someday be built on the grounds of a cemetery. (*Id.*) Professor Harrington's measure of combinations also underestimates the market power of firms that own multiple funeral homes. (*Id.* ¶ 60.) It is unreasonable to think that funeral homes will compete against another funeral

[10]Professor Harrington testified at his deposition that Stewart Corporation, formerly one of the largest death-care companies in the nation that was recently purchased by SCI, paid him tens of thousands of dollars to write the report that became the *Regulation* article. (Harrington Depo. 31:24-34:5.) Stewart Corporation also provided much of the data for the report that become the *Regulation* article. (Harrington Depo. 57:3-8).

home owned by the same person or corporation, whether or not one of them is located in a cemetery. (*Id.*)

Second, Professor Harrington provides no empirical evidence anywhere in his report or the *Regulation* article that supports his claim that combos operate at lower costs than non-combo firms. (Sundberg Report ¶ 63.) He discusses possible cost savings due to economies of scope and scale and joint production technologies, but he provides no cost figures that contrast funeral costs for combo and non-combo firms, other than the use of "cost-to-revenue" ratios, which are not explained in his *Regulation* article or expert report. (*Id.*) In the *Regulation* article, these ratios are applied to the average funeral expenditure at stand-alone funeral homes, which, as discussed above, may actually be owned by combination firms under Professor Harrington's definition. (*See id.*) Professor Harrington then argues, without evidence, that lower cost-to-revenue ratios for combo firms suggest that overall costs at combo firms are lower than costs at non-combo firms. (*Id.*) Professor Sundberg concluded that Professor Harrington provided no empirical evidence for this conclusion. (*Id.*) Even if the cost-savings estimates were accurate, there is no evidence that these savings are passed on to consumers, as it is undisputed that consumers spend more at combo firms. (*Id.* ¶ 69; Harrington Depo. 45:19-46:19.)

Finally, there are obvious limitations in Professor Harrington's use of a linear model to show the relationship between the percentage of combo firms and expenditures per death. (Sundberg Report ¶¶ 76-78.) Professor Harrington indicates that an increase in the share of combination firms of 1% is expected to reduce the average expenditure per death by $83.62. (*Id.* ¶ 76; Harrington Report 13, Table 1.) Taken to its logical conclusion, this estimate would mean that if combination firms controlled 100% of the market, the average expenditure would be reduced by $8,362, apparently causing funeral homes to *pay clients* in order to perform a funeral.

(Sundberg Report ¶ 78.) That cannot be so. But Professor Harrington provides no range of expected percentages of combo market share for which the linear estimate is expected to be accurate. Therefore, the statistical model that Professor Harrington uses does not support the claim that increasing the percentage of combination firms will benefit consumers.

The empirical evidence that Professor Harrington provided in his report and the *Regulation* article do not support the various claims made, especially given the restrictive definition of combinations used to develop the data set. (Sundberg Report ¶ 85.) Accordingly, Professor Sundberg concluded that "[t]he empirical evidence does not support efficiencies from repeal of the laws." (*Id.*)

Notably, regardless what Professor Harrington opines about efficiencies, none of it shows that there is no conceivable rational basis for the anti-combo laws. Professor Harrington's commentary is really just a policy argument that is properly directed to the legislature, not this Court.

D. Similar laws have been upheld by foreign courts in the face of equal protection and due process challenges.

Other state legislatures have made the public policy choice to prohibit combinations of funeral and cemetery operations. In some of those states, there have been constitutional challenges to the laws. But none of those laws have been found to be unconstitutional. In fact, legislation similar to Wisconsin's in Michigan and Massachusetts has been upheld as constitutional on due process and equal protection grounds.

In *Deepdale Memorial Gardens v. Administrative Secretary of Cemetery Regulations*, a cemetery owner raised a due process and equal protection challenge to a Michigan statute which prohibited dual ownership, management, or operation of both a cemetery and funeral establishment, "directly or indirectly." 426 N.W.2d at 787. The Michigan Court of Appeals

concluded that rational basis review applied because there was no fundamental interest or suspect classification involved. *Id.* at 788-89. Applying that test, the court held that "the legislature had an ample, rational basis to conclude that competition in the cemetery and funeral businesses was preserved by prohibiting one agency from both owning and operating a cemetery and acting as a mortician." *Id.* at 789.

Similarly, in *Blue Hills Cemetery, Inc. v. Board of Registration in Embalming & Funeral Directing*, a cemetery owner brought a declaratory judgment action challenging, on due process and equal protection grounds, a statute which provided that a corporation could engage in the business of funeral directing only if it engaged in no other business. 398 N.E.2d at 473. The Massachusetts Supreme Court concluded, as the Michigan Court of Appeals did, that no fundamental right or suspect class was involved and that rational basis review applied. *Id.* at 474-75. The court further held that the statute was reasonably related to a valid legislative goal because "[i]t was open to the Legislature to conclude that integration of funeral services into the operations of a large, diversified corporation would diminish the personal quality of such services." *Id.* at 476.

In both *Deepdale* and *Blue Hills*, the courts upheld anti-combo laws similar to Wisconsin's when presented with due process and equal protection challenges. The courts concluded that no fundamental right or suspect class was at issue and that rational basis review applied. Applying that test, the courts concluded that the laws were rationally related to legitimate state interests, such as preserving competition and protecting the personal quality of funeral services. The same analysis applies here, and Wisconsin's anti-combo laws should also be upheld.

III. State sovereign immunity bars Plaintiffs' suit against Defendant State of Wisconsin.

Finally, Plaintiffs have sued the State of Wisconsin as a defendant in this declaratory judgment action. But the law is well-established that sovereign immunity bars declaratory judgment actions against the State of Wisconsin. Wis. Const., art. IV, § 27. This is a technical point given that other defendants are named in this action, but it is nonetheless important to recognize.

The State of Wisconsin has not waived sovereign immunity for declaratory judgment actions. In *City of Kenosha v. State*, the Wisconsin Supreme Court held that "[t]he Wisconsin declaratory-judgment statute does not make any provision for suits against the state and we have held that declaratory judgments against the state are barred by sovereign immunity." 35 Wis. 2d 317, 323, 151 N.W.2d 36 (1967). Thus, "declaratory-judgment actions are not maintainable against the state." *Wis. Fertilizer Ass'n v. Karns*, 39 Wis. 2d 95, 100, 158 N.W.2d 294 (1968).

Plaintiffs' request for an injunction is also barred against the State. An injunction is simply a means of effectuating a declaratory judgment. *English Manor Bed & Breakfast v. Great Lakes Cos.*, 2006 WI App 91, ¶ 52, 292 Wis. 2d 762, 716 N.W.2d 531.

CONCLUSION

This case is ripe for summary judgment. The anti-combo laws are constitutional. They are rationally related to the State's legitimate interests in protecting death care consumers. For the reasons argued in this brief, as supported by the evidence filed, the Court should grant Defendants' summary judgment motion and dismiss this case.

Dated this 30th day of September, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
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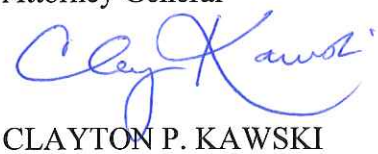

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