

**No. 12-3591**

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

---

ERNEST F. HEFFNER; HARRY C. NEEL; BART H. CAVANAGH, SR.; JOHN KATORA; BRIAN LEFFLER; REBECCA ANN WESSEL; MARK PATRICK DOUGHERTY; CYNTHIA LEE FINNEY; NATHAN RAY; TODD ECKERT; BEN BLASCOVICH; MATTHEW MORRIS; WILLIAM SUCHARSKI; JOHN MCGEE; AMBER M. SCOTT; ERIKA HAAS; NICOLAS WACHTER; DAVID HALPATE; PATRICK CONNELL; EUGENE CONNELL; MATTHEW CONNELL; JAMES J. CONNELL, JR.; JEFFERSON MEMORIAL PARK, INC.; JEFFERSON MEMORIAL FUNERAL HOME, INC.; WELLMAN FUNERAL ASSOCIATES, INC., doing business as FOREST PARK FUNERAL HOME; EAST HARRISBURG CEMETERY COMPANY doing business as EAST HARRISBURG CEMETERY & CREMATORY; ROBERT LOMISON; CRAIG SCHWALM; GREGORY J. HAVRILLA; BETTY FREY,

v.

DONALD J. MURPHY; JOSEPH A. FLUEHR, III; MICHAEL J. YEOSOCK; BENNETT GOLDSTEIN; JAMES O. PINKERTON; ANTHONY SCARANTINO; BASIL MERENDA; MICHAEL GERDES; PETER MARKS; C.A.L. SHIELDS,

Appellants.

---

Appeal from the United States District Court for the  
Middle District of Pennsylvania, No. 4:08-CV-990

---

***AMICUS CURIAE* BRIEF OF THE INTERNATIONAL CEMETERY,  
CREMATION, AND FUNERAL ASSOCIATION**

---

*Of Counsel:*

Robert M. Fells, Esquire  
International Cemetery, Cremation  
and Funeral Association  
107 Carpenter Drive, Suite 100  
Sterling, VA 20164  
(800) 645-7700

Charles I. Artz, Esquire  
ARTZ HEALTH LAW  
200 North Third Street, Suite 12-B  
Harrisburg, PA 17101  
(717) 238-9905  
[cia@artzhealthlaw.com](mailto:cia@artzhealthlaw.com)

Dated: February 15, 2013

**TABLE OF CONTENTS**

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES .....ii-iii

CORPORATE DISCLOSURE STATEMENT ..... 1

INTEREST OF *AMICUS CURIAE*..... 1-3

STATEMENT OF CONSENT TO FILE *AMICUS* BRIEF .....3

ARGUMENT

    A.    THERE IS A HISTORICAL RECORD OF PRIVATE  
          ECONOMIC PROTECTION BY AND FOR THE  
          FUNERAL PROFESSION THROUGH THE  
          REGULATIONS ESTABLISHED BY STATE  
          FUNERAL BOARDS ..... 4-9

    B.    THE PENNSYLVANIA FDL OWNERSHIP SCHEME  
          VIOLATES THE COMMERCE CLAUSE OF THE U.S.  
          CONSTITUTION..... 9-12

CONCLUSION.....13

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

CERTIFICATE OF SERVICE

**TABLE OF AUTHORITIES**

**Cases**

New Energy Co. of Ind. V. Limbach, 486 U.S. 269, 273-284 (1988)..... 10

Pennsylvania Funeral Directors Association v. Federal Trade Commission,  
41 F.3d 81, 83 (3<sup>rd</sup> Cir. 1994) ..... 7

W. Lynn Creamery v. Healy, 512 U.S. 186, 192 (1994) ..... 10

**Statutes**

Pa. Stat. Ann. Tit. 63 §479.1 *et seq.*..... 2, 3

63 P.S. §479.8(b)(4)..... 10

**Regulations**

Bureau of Consumer Protection, FTC, Funeral Industry Practices, Proposed  
Trade Regulation Rule and Staff Memorandum (1975)..... 5

16 C.F.R. §453.1 *et seq.*..... 6

47 Fed. Reg. 42,260 (Sept. 24, 1982) ..... 6

59 Fed. Reg. 1,592, 1,592 & n.2 (Jan. 11, 1994)..... 6

73 Fed. Reg. 13740 (March 14, 2008)..... 6

**Other Authorities**

Josh Slocum & Lisa Carlson, Final Rights: Reclaiming the American Way  
Of Death 19-24 (2011)..... 4

William M. Lamers, A Centurama of Conventions: A Review of All The  
Convention of NFDA Focusing on The Words and Deeds of Funeral  
Service Practitioners 4 (1981)..... 4

Colorado Department of Regulatory Affairs, 2007 Sunrise Review:  
Funeral Service Practitioners 5 (2007) ..... 5

Funeral Industry Practices, Final Staff Report to the Federal Trade Commission and proposed Trade Regulation Rule (16 CFR Part 453) (June 1978), available at <http://www.ftc.gov/bcp/rulemaking/funeral/finstaffrept.pdf>. . . . . 5, 7

Pennsylvania Legislative Budget and Finance Committee, Performance Audit of State Board of Funeral Directors, at 32-33, 37 (January 1994), available at <http://lbfc.legis.state.pa.us/reports/1994/149.PDF> (Vol. 1) and <http://lbfc.legis.state.pa.us/reports/1994/150.PDF> (Vol. 2). . . . . 8

## **CORPORATE DISCLOSURE STATEMENT**

Amicus ICCFA is an IRS Code Section 501(c)(6) non-profit corporation. No disclosure statement is required.

### **INTEREST OF AMICUS CURIAE**

*Amicus* is the International Cemetery, Cremation and Funeral Association (“ICCFA”). Founded in 1887, ICCFA is a voluntary trade association with over 7500 members, including non-profit, for-profit, religious and municipal cemeteries, funeral homes, crematories, monument builders, and third party retailers. The ICCFA is unique among funeral-related trade associations in that it represents all segments of the so-called “death care industry” and therefore speaks on behalf of all segments rather than merely one, i.e., funeral homes, to the exclusion of other interests. ICCFA’s activities include tracking federal and state legislation affecting the death care industry and promoting education through its publications, and by holding seminars, conferences, annual conventions and trade shows.

ICCFA also takes an active role in advancing the public interest on funeral industry issues. ICCFA promotes consumer choice, the pre-arrangement of funeral and burial decisions, and open competition among providers of death care services. For example, ICCFA has published more than two dozen model guidelines

advocating state legislation on a variety of consumer-related issues. All these guidelines stress open competition and full disclosure.

The diverse membership represented by ICCFA actively seeks to expand the services they offer to the public. The eleven provisions of the Pennsylvania funeral director law (“FDL”), Pa. Stat. Ann. Tit. 63 §479.1 *et seq.*, which have been found unconstitutional by the federal district court’s Order of August 22, 2012, were unlawful and unjustified restraints on ICCFA’s members and on the communities they serve.

The parties to this litigation, including other *Amici*, seem to agree that the district court’s Order will have far-reaching implications not only in the Commonwealth of Pennsylvania, but in many other states and their respective funeral boards where many of these restraints remain in force. ICCFA agrees that these provisions are in jeopardy, as they should be, because they have served to legalize decades of protectionist, anti-competitive practices.

The purpose of ICCFA’s *Amicus* brief is to respectfully bring to this Court’s attention a historical overview of funeral regulatory boards in general, and the Pennsylvania state board in particular. ICCFA’s purpose is to demonstrate that the federal district court was correct in ruling that eleven provisions of the state FDL are unconstitutional. In short, ICCFA urges this Honorable Court to affirm the district court’s Order finding specific provisions of the FDL unconstitutional as a

statutory scheme that is anti-consumer, anti-competitive, and a quintessential blueprint of unlawful protectionism which stands as an affront to the dormant Commerce Clause.

Since at least 97% of ICCFA's members are corporations, ICCFA is troubled by Pennsylvania's unique statutory scheme which, but for certain protectionist exceptions, bans out-of-state corporations from entering the Pennsylvania funeral market. This anti-competitive statute, which has generally been known since at least 1952 as the "Funeral Director Law", 63 P.S. §479.1 *et seq.* ("FDL"), gives Pennsylvania's state-licensed funeral directors, along with their spouses, children and grandchildren, the virtually exclusive right to provide funeral services in Pennsylvania – in a market that generates revenues in the tens of millions on an annual basis.

**STATEMENT OF CONSENT TO FILE *AMICUS* BRIEF**

ICCFA's counsel secured the consent of John G. Knorr, III, counsel to Appellants, to file this *Amicus* brief. ICCFA's counsel has authored this brief in whole and ICCFA has borne all expenses.

## ARGUMENT

**A. THERE IS A HISTORICAL RECORD OF PRIVATE ECONOMIC PROTECTION BY AND FOR THE FUNERAL PROFESSION THROUGH THE REGULATIONS ESTABLISHED BY STATE FUNERAL BOARDS.**

There is a long history of state funeral licensing boards being used to protect the interests of funeral directors rather than the protection of the public. The great majority of state laws governing the licensing and practice of funeral directors were initiated by the National Funeral Directors Association (“NFDA”) and its various state-level affiliates. *See*, generally Josh Slocum & Lisa Carlson, *Final Rights: Reclaiming the American Way of Death* 19–24 (2011). As one historian and friend of the funeral industry and the NFDA has written, the goal has been to establish an exclusive, licensed industry by “securing the passage of laws” restricting admission to funeral service. *Id.* at 22 (quoting William M. Lamers, *A Centurama of Conventions: A Review of All The Convention of NFDA Focusing on The Words and Deeds of Funeral Service Practitioners* 4 (1981)).

In the 1970s, the Federal Trade Commission (“FTC”) took note of the economic protectionism behind these practices. The FTC’s Bureau of Consumer Protection highlighted the tension between a funeral director’s “public relations image” and his “economic self-interest”:

[The funeral director’s] public relations image emphasizes his duties as a professional serving people at a time of particular desperation. His economic self-interest puts him in a different role: he is a

salesman of goods and services to these same people; and, if he wants to prosper or even survive, he must move his high profit lines. Bureau of Consumer Protection, FTC, Funeral Industry Practices, Proposed Trade Regulation Rule and Staff Memorandum (1975). The funeral director industry, the Bureau observed, used “the professional image [to] fight anything that would interfere with it or . . . come between it and the customer.” *Id.* at 4-5.

Importantly, these “many restrictive state regulations operate[d] not to provide badly-needed information or weed out the unqualified or unscrupulous, but to insulate licensed funeral directors from the pressures of competition.” *See*, Funeral Industry Practices, Final Staff Report to the Federal Trade Commission and proposed Trade Regulation Rule (16 CFR Part 453), at 103 (June 1978). Thus, for example, the funeral directors industry “vigorously opposed” the elimination of the Colorado Board of Mortuary Sciences in 1977, even though the State had determined that “there [wa]s no actual health threat associated with the disposition of dead human bodies” and therefore no public-health reason for the Board. *Id.* at 110–11 & n.28. The Board was abolished, but the Colorado Funeral Directors Association has persisted in its efforts to protect its economic interests. In 2007, it requested licensing requirements be imposed across the funeral industry, including on “any business that provides funeral goods and services.” Colorado Department of Regulatory Affairs, 2007 Sunrise Review: Funeral Service Practitioners 5 (2007).

Along with other abuses, the use of state licensing boards by the funeral director industry led the FTC in 1982 to promulgate the Funeral Rule, which remains in effect today. The rule requires itemized price disclosures and forbids other unfair and deceptive practices. 16 C.F.R. § 453.1 et seq.; 47 Fed. Reg. 42,260 (Sept. 24, 1982). In 1994, the FTC reviewed the rule, which had first issued in 1982, the Funeral Rule became fully effective in 1984. 59 Fed. Reg. 1,592, 1,592 & n.2 (Jan. 11, 1994). FTC reviewed the Funeral Rule a second time in 1999, concluded in 2008. FTC determined that the entire Rule should be left intact with nothing rescinded or deleted. 73 Fed. Reg. 13740 (March 14, 2008). FTC also declined to expand the Rule finding that “there is insufficient evidence that [other entities] are engaged in widespread practices that injure consumers.” *Id.* at 13745.

Pennsylvania provides one of the clearest examples of industry influence over regulation and the regulators. Amicus Pennsylvania Funeral Directors Association (“PFDA”) is the largest state association of professional funeral directors in the country. PFDA boasts that 1,100 of the approximately 1,600 funeral homes in Pennsylvania are members. PFDA describes its average member as a “mom and pop small business,” consisting of one to two people. PFDA’s express mission is to “protect and promote the independent, family-owned funeral home and the traditional funeral.”

There has long been evidence that PFDA exerts control over the Board. In its seminal 1978 report on Funeral Industry Practices, which led to the adoption of the Funeral Rule, *see, e.g., Pennsylvania Funeral Directors Association v. Federal Trade Commission*, 41 F.3d 81, 83 (3<sup>rd</sup> Cir. 1994), the Federal Trade Commission (“FTC”) explained the influence that funeral industry trade associations wield over state boards. The FTC found that trade associations have “a great deal to say about who will be appointed to the board” and “are well represented on the state boards,” specifically citing Pennsylvania as an example of the of members of the state board simultaneously holding high positions in the national or state trade association. The FTC noted that “virtually all funeral director board members are also members of NFDA [National Funeral Directors Association] and of its state affiliates.” The FTC concluded:

This monopoly on board membership has served to exclude not only public representatives, but also industry members with views different from those of the association. It has also served to blur, if not completely eradicate, the distinction between the responsibilities of practicing funeral directors and those of state officials charged with regulating the practices of the industry.

*See*, Funeral Industry Practices, Final Staff Report to the Federal Trade Commission and proposed Trade Regulation Rule (16 CFR Part 453), at 133-138 (June 1978), available at <http://www.ftc.gov/bcp/rulemaking/funeral/finstaffrept.pdf>.

The FTC also noted the close relationship between state boards and trade associations on substantive policy matters and, again, specifically cited Pennsylvania as an example of how “the trade association is usually well represented at board meetings.”

The Audit Report addressed in detail in the District Court’s decision reached similar conclusions. The Audit Report noted that licensing boards, like the Funeral Board, made up predominantly of professional members with ties to trade associations are “strongly oriented toward ... the status quo” and “likely to reflect the attitudes, values, and policy concerns of the association’s leadership.” The Audit Report concluded:

Regulatory bodies, whether state or federal, are sometimes “captured” by the industry they are intended to regulate. There are indications that this may be the case with the Funeral Directors Board. The Board’s former chief prosecutor believes the Board exercises little or no control over the industry and serves to advance the interests of the profession, often at the expense of the public.

*See*, Pennsylvania Legislative Budget and Finance Committee, Performance Audit of State Board of Funeral Directors, at 32-33, 37 (January 1994), available at <http://lbfc.legis.state.pa.us/reports/1994/149.PDF> (Vol. 1) and <http://lbfc.legis.state.pa.us/reports/1994/150.PDF> (Vol. 2).

Against this backdrop, it is not surprising that the Pennsylvania funeral home ownership scheme is merely another example of anti-consumer, protectionist practices by the funeral director industry.

**B. THE PENNSYLVANIA FDL OWNERSHIP SCHEME VIOLATES THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION.**

The ownership scheme set forth in Pennsylvania law is unique unto itself.<sup>1</sup> The Act purports to restrict ownership of funeral homes to licensed funeral directors, but carves out exceptions for the widow, estate, spouse, children and grandchildren of Pennsylvania funeral directors to own funeral homes – without regard for the knowledge, training, or qualifications of these individuals or even so much as consideration of their age, competence or character. The FDL does not promote qualified funeral director ownership of funeral homes in Pennsylvania. It promotes ownership of funeral homes in Pennsylvania by Pennsylvanians to the detriment of anyone not fortunate enough to have been born into or marry into a Pennsylvania funeral director's family. It is, respectfully, the most offensive scheme existing throughout the United States.

---

<sup>1</sup> To the knowledge of ICCFA, the only other State in the United States which restricts ownership to in-state funeral directors is Maryland; however, the Maryland scheme is at least not so brazen as to create the type of ownership exceptions that exist for unlicensed spouses, children and grandchildren of licensed Pennsylvania funeral directors – a patent protectionist exception to the general rule which eviscerates any legitimate argument that ownership be restricted to licensed funeral directors. Conspicuous by its absence in the National Funeral Directors Association *Amicus* Brief is any reference to or argument concerning let alone defending the Pennsylvania's funeral home ownership scheme.

There are hundreds of ICCFA members that successfully own and operate funeral homes throughout the United States wherein the ownership resides in entities other than licensed funeral directors. Much like the Plaintiffs–Appellees, *ICCFA is not advocating the elimination of regulation, nor does it advocate the elimination of licensed funeral establishments.*

Under the FDL, however, a five-year old grandchild of a Pennsylvania licensed funeral director would qualify to own stock in a restricted business corporation. *See*, 63 P.S. § 479.8(b)(4). Additionally, even a spouse who is certified as legally incompetent would qualify to obtain a widow’s license and own his or her spouse’s funeral home upon the death of that spouse. This statutory scheme, which permits these forms of ownership, but precludes a plaintiff like Robert Lomison or Wellman Funeral Associates, Inc. (who operate cemeteries and funeral homes in multiple states) from owning a Pennsylvania licensed home, certainly cannot withstand constitutional scrutiny.

The dormant Commerce Clause “prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *W. Lynn Creamery v. Healy*, 512 U.S. 186, 192 (1994) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-284 (1988)). The Pennsylvania ownership restrictions patently discriminate against interstate

commerce and unduly burden interstate commerce in violation of the dormant Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3.

It is abundantly clear from the record below and the District Court's decision that a more than adequate record was developed which indisputably confirms the protectionist nature of the Pennsylvania statutory scheme and the absence of any legitimate benefit flowing from that restrictive scheme (of course, but for the benefit flowing to the progeny of the "mom and pop" Pennsylvania licensed funeral directors). The record is clear – in-state interests are benefitted while out-of-state interests are burdened. There simply is no need for this complex statutory scheme of ownership, nor is there any legitimate need for the limitation on how many homes may be owned or operated by a particular entity. Indeed, the frivolity in arguing that there is a need for the limitation on funeral homes owned is belied by the very statute which allows spouses, children and grandchildren of Pennsylvania licensed funeral directors to own the stock in as many restricted business corporations as can be purchased and operated.

ICCFA agreed below not to supplement the existing summary judgment records as a condition to securing consent to the submission of its *Amicus* brief in the District Court. Accordingly, ICCFA will not detail census data, the volume of death care industry business within the United States, etc. At the same time, it is axiomatic and beyond cavil that an ownership scheme whose protectionist

exceptions swallow “the rule” itself, and a scheme which benefits the family members of Pennsylvania licensed funeral directors to the detriment of all others, cannot withstand any challenge under our United States Constitution, whether that challenge is based upon Commerce Clause analysis, or even under the more deferential Due Process Clause analysis.

ICCFA submits that Pennsylvania’s ownership scheme, given its facial preference for in-state interests, requires a “strict scrutiny” analysis, and no legitimate, let alone compelling, reason can be asserted to justify the barriers which have been erected to protect the Pennsylvania licensed funeral director and his extended family.

**CONCLUSION**

For the foregoing reasons, and for the many reasons set forth in the District Court's decision and the Brief filed by Plaintiffs–Appellees, it is respectfully requested that the Court uphold the District Court's decision and order Pennsylvania to remove its long-standing barriers and prohibitions, thus allowing a freer flow of commerce, greater consumer access, and compliance with the dictates of our Constitution.

Respectfully submitted,

/s/ Charles I. Artz  
Charles I. Artz, Esquire  
ARTZ HEALTH LAW  
200 North Third Street, Suite 12-B  
Harrisburg, PA 17101  
Telephone: (717) 238-9905  
[cia@artzhealthlaw.com](mailto:cia@artzhealthlaw.com)

*Of Counsel:*

Robert M. Fells, Esquire  
International Cemetery, Cremation  
and Funeral Association  
107 Carpenter Drive, Suite 100  
Sterling, VA 20164  
Telephone: (800) 645-7700  
[rfells@iccf.com](mailto:rfells@iccf.com)

*Counsel for International Cemetery,  
Cremation and Funeral Association*

Date: February 15, 2013

**CERTIFICATE OF COUNSEL**

The undersigned counsel hereby certifies that:

1. I am a member of the Bar of this Court.
2. The text of the electronic version of this Brief is identical to the text of the paper copies.
3. The following virus detection program – Norton 360 by Symantec, Version 5.2.2.3 – was run on the file and no virus was detected.
4. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,457 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
5. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 and in 14 point Times New Roman font.

Dated: February 15, 2013

/s/ Charles I. Artz

Counsel of record for *Amicus Curiae*

**CERTIFICATE OF SERVICE**

I, Charles I. Artz, Esquire, do hereby certify that I electronically by ECF served, a copy of the foregoing on the following:

John G. Knorr, III  
Chief Deputy Attorney General  
Chief, Appellate Litigation Section  
Office of Attorney General  
Strawberry Square, 15<sup>th</sup> Floor  
Harrisburg, PA 17120

James J. Kutz, Esquire  
Jason G. Benion, Esquire  
Post & Schell, P.C.  
17 North Second Street, 12th Floor  
Harrisburg, PA 17101

Gary L. James, Esquire  
James Smith Dietterick &  
Connelly LLP  
134 Sipe Avenue  
Hummelstown, PA 17036-9137

Christopher K. McNally, Esquire  
Board Counsel, State Board of  
Funeral Directors  
One Penn Center, Third Floor  
2601 North Third Street  
P. O. Box 2649  
Harrisburg, PA 17105-2649

/s/ Charles I. Artz  
Charles I. Artz, Esquire  
ARTZ HEALTH LAW  
200 North Third Street, Suite 12-B  
Harrisburg, PA 17101  
Telephone: (717) 238-9905  
[cia@artzhealthlaw.com](mailto:cia@artzhealthlaw.com)

Date: February 15, 2013