No. 15-507

IN THE

Supreme Court of the United States

SENSATIONAL SMILES, LLC, D/B/A SMILE BRIGHT,

Petitioner,

v.

JEWEL MULLEN, DR., IN HER OFFICIAL CAPACITY AS COMMISSIONER OF PUBLIC HEALTH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE ROMAN CATHOLIC ARCHDIOCESE OF NEWARK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MEGAN L. BROWN
Counsel of Record
STEPHEN J. OBERMEIER
STEPHEN J. KENNY
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
mbrown@wileyrein.com

Attorneys for Amicus Curiae

November 18, 2015

262553

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Page

STATUTES AND OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Archdiocese of Newark is a Roman Catholic archdiocese with jurisdiction over 219 parishes across four counties in northern New Jersey and approximately 1.3 million parishioners. One of the Archdiocese's many services is the operation of eleven Catholic cemeteries. In that capacity, the Archdiocese operates its "inscription-rights program," whereby a parishioner can enter into a contract to purchase a monument—*e.g.*, a mausoleum or headstone—from the Archdiocese, and the Archdiocese agrees to inscribe, install, and maintain the monument in perpetuity. The program allows for the Archdiocese to properly maintain the monuments in its cemeteries, which are typically owned and thus legally the responsibility of the decedent's family. And it allows the decedent and his or her family to ensure that the monument purchased will be properly cared for in perpetuity.

Recently, in response to a substantial lobbying campaign by the Monument Builders Association ("MBA") of New Jersey—the lobbying arm of the monument industry—the New Jersey General Assembly passed Assembly Bill 3840 ("A3840"), which amended New Jersey's Religious Corporations Law, N.J. Stat. §§ 16:1-1 *et seq.*, to prohibit a private religious cemetery from owning, manufacturing, installing, selling, or providing

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and have received appropriate notice.

headstones, vaults, and mausoleums for private use. This law in effect prohibits the Archdiocese from maintaining its inscription-rights program which, as of March 2015, serves approximately 600 parishioners.

The Archdiocese is currently challenging the constitutionality of the new law in federal district court. *Roman Catholic Archdiocese of Newark v. Christie*, No. 3:15-cv-05647-MAS-LHG (D.N.J. 2015). In particular, the Archdiocese has argued that A3840 violates the Fourteenth Amendment because its sole purpose and effect is to protect the economic interests of the moneyed and well-connected monument dealers, to the detriment of the Archdiocese and without any public benefit.

The Archdiocese's interests are directly implicated in the instant case, *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281 (2d Cir. 2015), which involves significant legal questions that are critical to the Archdiocese's challenge to A3840 and the survival of its inscription-rights program. Two judges of the Court of Appeals in *Sensational Smiles* held that the teeth-whitening regulation at issue would pass muster under rational basis review "even if the only conceivable reason for the [regulation] was to shield licensed dentists from competition." *Id.* at 286. In a separate opinion, Judge Droney criticized the panel's controversial reasoning, observing that this Court would not endorse the panel's holding that "protectionism for its own sake is sufficient to survive rational basis review." *Id.* at 289 (Droney, J., concurring in part) (emphasis in original).

Simply put, A3840 can be justified only if pure economic protectionism—the insulation of a favored group

of market participants from competition—is a legitimate state interest for purposes of rational basis review. Indeed, New Jersey has cited the Second Circuit's decision here as authority on this point in its motion to dismiss the Archdiocese's challenge to A3840. Moreover, the Second Circuit's dismissive treatment of record evidence has serious implications for the Archdiocese's attempt to demonstrate that A3840 does not rationally further any asserted state interest. The Archdiocese thus has a strong interest in seeing the Second Circuit's decision reversed.

SUMMARY OF ARGUMENT

In concluding that pure economic protectionism is a legitimate state interest for purposes of rational basis review, the Second Circuit here not only exacerbated a circuit split on the issue but also fundamentally misconstrued this Court's precedent. This Court has consistently held that a "bare [] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest" for purposes of rational basis review. *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). Rather, the Court has required the state to demonstrate that a statute serves a "legitimate public purpose." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring) (emphasis added).

Pure economic protectionism is nothing more than naked discrimination in the economic context and serves no public purpose. Thus, this Court has already struck down purely discriminatory economic legislation under the rational basis test. *See Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985) (holding that an Alabama law

"designed only to favor domestic industry" "constitute[d] the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent"). And *Ward*'s holding makes perfect sense—if economic discrimination were somehow distinct from other forms of discrimination such that it constituted a valid basis for legislation, politically favored groups could run roughshod over competitors by lobbying legislatures to enact protectionist legislation, and rational basis review would, in practice, be no review at all.

The Second Circuit panel contravened this Court's precedent—and effectively ignored *Ward*—when it wrongly concluded that this Court "has long permitted state economic favoritism of all sorts, so long as that favoritism does not violate specific constitutional provisions or federal statutes." *Sensational Smiles*, 793 F.3d at 286. The Second Circuit recognized that "some courts of appeals have held that laws and regulations whose sole purpose is to shield a particular group from intrastate economic competition cannot survive rational basis review," *id.*, but it decided to immunize naked favoritism from even that very deferential standard of review because "distinguishing between a protectionist purpose and a more 'legitimate' public purpose" is difficult, and such favoritism is mere "politics." *Id.* at 287.

The panel majority was worried that if it did not close the door to such inquiries, it would usher in the return of *Lochner v. New York*, 198 U.S. 45 (1905). *See id*. But *Lochner* has nothing to do with this case. *Lochner* improperly applied strict scrutiny to strike down an economic regulation. Requiring the government to meet the very low threshold of articulating a valid public

purpose for an economic regulation in no way risks ushering in a new wave of *Lochner*-era judicial activism.

The panel's reasoning drew a separate opinion expressing "disagreement" and articulating the modest, contrary view that "there must be at least some perceived public benefit for legislation or administrative rules to survive rational basis review under the Equal Protection and Due Process Clauses." *Sensational Smiles*, 793 F.3d at 288 (Droney, J., concurring in part). As Judge Droney properly observed, "it is quite different to say that protectionism for its own sake is sufficient to survive rational basis review, and I do not think the Supreme Court would endorse that approach." *Id.* at 289 (emphasis in original).

The Second Circuit also ignored this Court's precedent in dismissing record evidence tending to show that Connecticut's teeth-whitening statute did not rationally further the state's asserted interest in protecting oral health. The Court has consistently allowed plaintiffs to introduce evidence demonstrating that a legislature's basis for enacting a statute is illusory. *See, e.g.*, *City of Cleburne*, 473 U.S. at 449-50. Were it otherwise, a legislature could rely solely on *post hoc*, hypothetical justifications for the law, even if the evidence undercuts any conceivable basis for the law. This approach would render rational basis review a nullity.

While ordinary economic legislation regularly yields winners and losers, the recent experience of the Archdiocese demonstrates that truly irrational legislation can result when a legislature is hijacked by a well-connected interest group and enacts a statute

designed only to protect the economic well-being of that group. The Archdiocese's inscription-rights program has provided substantial value to both the Archdiocese and its parishioners. But, in response to a substantial lobbying campaign by existing cemetery monument dealers, New Jersey passed A3840, effectively banning the program solely to protect the revenues of the private dealers.

Failure to reverse the Second Circuit will thus have real and substantial negative effects on parties such as the Archdiocese. If, as the Second Circuit held, pure economic protectionism is indeed a valid state interest, it will be nearly impossible for parties like the Archdiocese to obtain redress when state legislatures act to protect powerful special interests at the expense of consumers and other market participants. This holding relieves states of their already minimal burden under the rational basis standard to articulate a public purpose of a challenged piece of legislation and signals to them that they may enact protectionist legislation to benefit favored groups without even offering a justification related to the public interest. Indeed, New Jersey has already seized on such language from the panel's decision, using it to urge dismissal of the Archdiocese's challenge to A3840 because, under the Second Circuit's reasoning, the Constitution permits "state economic favoritism of all sorts." *Sensational Smiles*, 793 F.3d at 286. Moreover, the Second Circuit's decision to ignore record evidence of the irrationality of Connecticut's teeth-whitening regulation will inhibit parties such as the Archdiocese from putting on evidence that arbitrary legislation does not rationally further the government's asserted interests.

The panel's holding transforms judicial deference to economic legislation into an abdication of common sense. Worse, its breadth immunizes and thereby invites further blatant discrimination of the sort that needlessly endangers the Archdiocese's program. This Court never intended rational basis review to be merely a rubber stamp. The Second Circuit's decision should be reversed.

ARGUMENT

I. The Second Circuit's Blessing of Pure Economic Protectionism as a Legitimate State Interest Contradicts This Court's Rational Basis Precedent.

The Second Circuit held that pure economic protectionism is a legitimate state interest for purposes of rational basis review under the Fourteenth Amendment. This holding is flatly inconsistent with this Court's precedent.

This Court has consistently held that discrimination unhinged from a public purpose is not a legitimate state interest for purposes of the rational basis test. And pure economic protectionism—that is, government discrimination meant to protect favored interests at the expense of disfavored groups—is a classic example of discrimination without any truly public purpose. Therefore, as this Court has recognized, *see Ward*, 470 U.S. at 878, legislation that discriminates along economic lines purely for the benefit of favored groups cannot satisfy rational basis review.

The Second Circuit's holding is not necessary to avoid the return of *Lochner*. That decision improperly applied

strict scrutiny to strike down economic legislation. By contrast, proper application of the rational basis test to prevent pure economic discrimination does not raise the specter of judicial interference in economic legislation. The Second Circuit's decision should be reversed.

A. Pure Economic Protectionism Has Never Been Endorsed by This Court and Was Not Even Endorsed by the Entire Panel Below.

"The Supreme Court has consistently grounded the 'legitimacy' of state interests in terms of a public interest." *Powers v. Harris*, 379 F.3d 1208, 1225 (10th Cir. 2004) (Tymkovich, J., concurring in part). That is, a statute must "serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." *City of Cleburne*, 473 U.S. at 452 (Stevens, J., concurring) (emphasis added). Rational basis review thus asks whether a statute "includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially." *Id.*

As a result, naked discrimination or favoritism has never been considered by this Court to be a legitimate governmental purpose. For example, in *Moreno*, this Court, applying rational basis review, struck down a federal statute designed to prevent "hippie" communes from receiving food stamps. The Court held that a "bare [] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest" for purposes of rational basis review, and thus the "purpose to discriminate against hippies cannot, in and of itself and without reference to (some independent) considerations in the public interest, justify" the legislation. *Moreno*, 413

U.S. at 534-35 (emphasis added). Likewise, in *Cleburne*, the Court held under rational basis review that a city's housing policy based only on discrimination against the mentally disabled did not serve a legitimate state interest. *See* 473 U.S. at 447-48. Indeed, the bulk of this Court's rational basis case law would be unnecessary if discrimination is *per se* lawful under this standard. *See, e.g.*, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (holding that mandatory retirement age for police officers who reached age 50 was rational, not because discrimination against those officers was a legitimate purpose in and of itself, but because the state had a legitimate interest in "protect[ing] the public by assuring physical preparedness of its uniformed police").

Pure economic protectionism is nothing more than the "bare desire" to discriminate against one party for the benefit of another and thus serves no public interest. *Moreno*, 413 U.S. at 534. As a result, in *Ward*, this Court held that legislation that discriminates along economic lines purely for the benefit of favored interests cannot survive rational basis review. In that case, this Court held that Alabama's discriminatory treatment of out-of-state insurance companies violated the Equal Protection Clause. Noting that the state's "aim to promote domestic industry [was] purely and completely discriminatory" and "designed only to favor domestic industry," this Court held that the statute "constitute[d] the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." *Ward*, 470 U.S. at 878. In so holding, this Court rejected the state's argument that promotion of domestic industry is "always a legitimate state purpose" because acceptance of such a contention would "eviscerate" the Equal Protection Clause. *Id.* at 882.

In permitting the state of Connecticut to justify its teeth-whitening regulation on the basis of pure economic protectionism, the Second Circuit ignored this Court's long line of rational basis cases making clear that discrimination alone is not a legitimate state interest. In particular, the majority failed to recognize that unadorned economic favoritism, like other forms of discrimination, fails to advance a public—*i.e.*, legitimate—interest.

Moreover, the Second Circuit completely mischaracterized *Ward*. In a footnote, the majority distinguished *Ward* on the grounds that it involved interstate, not intrastate, economic discrimination. But the Court in *Ward* explicitly held that it was analyzing Alabama's statute under the Equal Protection Clause and not the Commerce Clause. *See id.* at 881 ("The two constitutional provisions perform different functions in the analysis of the permissible scope of a State's power—one protects interstate commerce, and the other protects persons from unconstitutional discrimination by the States."); *id.* ("Equal protection restraints are applicable even though the *effect* of the discrimination in this case is similar to the type of burden with which the Commerce Clause also would be concerned."). In other words, the fact that the plaintiffs in *Ward* were out-of-state companies was irrelevant from an Equal Protection perspective.

Importantly, one member of the panel below recognized the straightforward import of this Court's rational basis jurisprudence and disagreed with the majority's holding on the issue of economic protectionism. In his concurring opinion, Judge Droney concluded, after a thorough analysis of this Court's precedent, that economic protectionism for its own sake is not a legitimate state

interest. That even a member of the panel understood that the court's holding conflicts with this Court's precedent demonstrates the need for reversal by this Court.

At bottom, the Second Circuit ignored that discrimination in any form—including economic discrimination—cannot form the basis of legislation under the Equal Protection Clause. The government must articulate a public—as opposed to purely discriminatory—purpose for all statutes, including economic regulations. The Second Circuit's decision thus directly contradicts this precedent and should be reversed.

B. Overturning the Second Circuit Would Vindicate Familiar Rational Basis Principles and Would Not Resurrect the *Lochner* Era.

The Second Circuit's erroneous holding—that pure economic protectionism is a legitimate state interest—is substantially influenced by its fear of resurrecting this Court's much-reviled decision in *Lochner*. *See Sensational Smiles*, 793 F.3d at 287. But this fear is misguided.

Put simply, *Lochner* bears no resemblance to this case. At issue in *Lochner* was a New York law that limited the number of working hours for bakers. This Court held that the law violated the freedom of contract protected by the Fourteenth Amendment. In so holding, the majority disregarded substantial evidence—summarized in Justice Harlan's dissent—that the statute at issue protected the health and well-being of bakers. The majority opined that the health concerns were exaggerated and that "the real object and purpose w[as] simply to regulate the hours of labor between the master and his employees." *Lochner*, 198 U.S. at 64.

In the intervening decades, the Court retreated from the exacting level of scrutiny that characterized the *Lochner* decision. In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), this Court upheld a state minimum wage law in the face of a Fourteenth Amendment challenge. Applying what would now be characterized as rational basis review, the Court held that, "[i]n dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety" and "to insure wholesome conditions of work and freedom from oppression." *Id.* at 393. A year later, in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Court confirmed that economic regulations are subject only to rational basis review, and stricter scrutiny is warranted only when a regulation infringes on a fundamental right or targets "discrete and insular minorities." *Id.* at 152-53 & n.4.

Applying this Court's familiar rational basis standard to strike down a purely discriminatory economic statute does not portend a return to *Lochner*. Rather, requiring a legitimate public purpose is simply part and parcel of routine application of the rational basis test as it has been understood since the New Deal Court. Indeed, the Court has repeatedly upheld economic regulations where there exists any feasible purpose other than naked favoritism. For example, in *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955)—which is widely recognized as "a zenith of [] judicial deference to state economic regulation," *St. Joseph Abbey v. Castille*, 712 F.3d 215, 221 (5th Cir. 2013)—this Court affirmed that the Equal Protection Clause prohibits "invidious discrimination," but nevertheless upheld the statute at issue based on

the law's rational connection to the state's proffered health and safety justification. *Williamson*, 348 U.S. at 488-89. Similarly, in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), this Court accepted the legitimacy of the government's interest in "preserv[ing] the appearance and custom" of an historic area frequented by tourists when assessing whether it was rational for the city to exclude vendors "grandfathered in" to the city's new ban on street vending. *Id.* at 304.

The Second Circuit suggests that the law in *Lochner* might fail the rational basis review sought by the Petitioner here because the statute "was probably a rent-seeking, competition-reducing measure supported by labor unions and large bakeries for the purpose of driving small bakeries and their large immigrant workforce out of business." *Sensational Smiles*, 793 F.3d at 287 (quoting Rebecca L. Brown, *Constitutional Tragedies: The Dark Side of Judgment*, in Constitutional Stupidities, Constitutional Tragedies 139, 142 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998)). This is disingenuous. Even if economic protectionism played a role in enacting the New York baker law, the evidence cited in Justice Harlan's dissent would nevertheless satisfy the rational basis test articulated here. That is, a court need not agree with the Second Circuit that pure economic protectionism is itself a legitimate state interest to reach a different result in *Lochner*. And, if the law at issue in *Lochner* truly did serve only protectionist interests, it could have been struck down on rational basis grounds without necessitating a higher level of scrutiny.

The Second Circuit responded to its aversion to *Lochner* by subjecting the Connecticut teeth-whitening

measure to an unwarranted, extra-deferential standard of review and endorsing pure economic protectionism as a legitimate governmental interest. But, even post-*Lochner*, this Court has never suggested that economic regulations are entitled to an even more deferential standard of review and has never endorsed the bare desire to discriminate as a legitimate state interest for purposes of rational basis review. *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1692 (1984) ("The minimum requirement that government decisions be something other than a raw exercise of political power has been embodied in constitutional doctrine under the due process clause before, during, and after the *Lochner* era.") Indeed, the Second Circuit's decision threatens to push judicial review too far in the opposite direction, turning the federal courts into mere rubber stamps of discriminatory legislation. As a result, the Court should reverse that decision.

II. The Second Circuit's Failure to Consider Evidence of Irrationality in Conducting Rational Basis Review Also Conflicts with This Court's Precedent.

Although this Court has stated that the absence of "legislative facts" supporting a statute does not foreclose a finding of rational basis, *see FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993), it has consistently held that plaintiffs may, under the rational basis test, "negate a seemingly plausible basis for the law by adducing evidence of irrationality." *St. Joseph Abbey*, 712 F.3d at 223 (citing *Beach Commc'ns*, 508 U.S. at 314-15).

Dating at least back to *Carolene Products*, the Court explained that "the constitutionality of a statute, valid on

its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition." 304 U.S. at 153-54. *City of Cleburne* demonstrates application of this principle. In that case, the city offered various rationales for its zoning ordinance requiring a special use permit for the construction of a home for the mentally handicapped in a certain neighborhood. Some of the city's justifications—*e.g.*, the need to prevent overcrowded housing—were acceptable on a purely hypothetical level. However, their persuasiveness evaporated when assessed against the record evidence. The evidence revealed, for example, that the zoning ordinance would not have required a special use permit for construction of other types of buildings, such as boarding homes and dormitories, that might contain a similar number of occupants. 473 U.S. at 449-50. The Court thus concluded, under the rational basis test, that the ordinance did not rationally further the city's articulated objective.

Similarly, in *Moreno*, this Court considered evidence that the restriction on food stamp eligibility to households consisting only of family members would not rationally further the government's asserted interest in preventing fraud. This Court pointed to evidence that the targets of the restriction—*i.e.*, hippie communes—could easily alter their living arrangements to remain eligible, while needy recipients of the program could not typically afford to alter their living arrangements. 413 U.S. at 537-38. Thus, the record evidence belied the rationality of the connection between the government's asserted ends and means, and this Court consequently invalidated the restriction under rational basis review.

The Second Circuit rejected this Court's approach to weighing evidence under rational basis review. Record evidence demonstrated conclusively that Connecticut's health and safety justification for its teeth-whitening regulation was a mere pretext. Indeed, the Dental Commission admitted that its prohibition on the use of teeth-whitening lights by Sensational Smiles provided no health and safety benefit—after all, the state does not prohibit customers of the business from using the lights on themselves under the supervision and instruction of a Sensational Smiles employee. But the Second Circuit simply ignored this evidence.

The Second Circuit's approach would render rational basis review a nullity. The government can almost always assert *post hoc* that a statute is rational on a purely hypothetical level. Thus, it is essential for plaintiffs to be able to introduce evidence demonstrating the irrationality of a challenged regulation in its application. This is a fundamental component of this Court's rational basis jurisprudence, and material evidence of the irrationality of the Connecticut tooth-whitening provision should have been sufficient to defeat the state's motion for summary judgment. The Second Circuit's decision should be reversed for this additional reason.

III. The Second Circuit Invites Legislatures to Pass Purely Protectionist Laws That Provide No Public Benefit, Such as New Jersey's Ban on the Archdiocese's Inscription-Rights Program.

New Jersey's law banning the Archdiocese's inscription-rights program provides a stark example of the type of irrational and harmful legislation that

can result if pure economic protectionism constitutes a legitimate state interest. The inscription-rights program has provided an important and valuable service to parishioners while allowing the Archdiocese to better maintain its cemeteries. But, by waging an organized and well-funded lobbying campaign, the private monument dealers were able to convince the New Jersey General Assembly to enact a statute that prohibits the Archdiocese from continuing the inscription-rights program for the sole purpose of protecting entrenched economic interests.

The Second Circuit's holding that pure economic protectionism is a valid state interest for purposes of rational basis review will encourage legislatures to pass discriminatory laws like A3840 without any consideration of the public interest. Indeed, in the Archdiocese's litigation challenging the constitutionality of the law, New Jersey has already cited the Second Circuit's holding on this point in its motion to dismiss, demonstrating that states will shirk even their minimal burden of connecting legislation to the general welfare if they are not required to identify a public goal of economic legislation.

The Court should reverse the Second Circuit's erroneous decision and establish once and for all that pure economic protectionism, such as that embodied in A3840, is not a legitimate state interest for purposes of rational basis review.

A. The Archdiocese's Inscription-Rights Program Provides a Valuable Public Service.

As explained *supra*, among the many services offered by the Archdiocese is the operation of eleven Catholic

cemeteries. These cemeteries have provided the final resting place for generations of New Jersey's Catholics. The Archdiocese is obligated to maintain its cemeteries in a dignified manner in perpetuity, consistent with its religious mission to provide consecrated ground for the burial of deceased Catholics, as well as with its contractual obligations to those who purchased interment rights in its cemeteries.

The scope of the Archdiocese's obligations is enormous. The cemeteries have about 176 employees who oversee approximately 3,600 new in-ground burials per year and take care of nearly one million existing graves across 763 acres of cemetery space. The cemeteries include over 500,000 monuments—which include mausoleums and headstones—many of which date back to the nineteenth century. Not surprisingly, thousands of these monuments exhibit signs of significant wear and decay. Some have fallen over completely or are beyond repair, and others may become hazardous to visitors.

For many years, the Archdiocese's ability to fulfill its cemetery obligations has faced two significant hurdles. First, the annual cost of maintaining its cemeteries is huge and continues to rise. Traditionally, the fees paid to the Archdiocese for interment did not include funds for the perpetual care of monuments, which has typically been considered a family responsibility. However, many family members do not provide for the long-term care of monuments—particularly generations after the decedent has passed—rendering many monuments in permanent disrepair.

Second, the Archdiocese does not own many of the monuments in the cemeteries. In the ordinary case, a decedent's family purchases the monument directly from a monument dealer. Thus, as a legal matter, the Archdiocese does not typically have the right to repair these monuments, even if it has the funds to do so.

To address these problems, the Archdiocese introduced its inscription-rights program in 2006. As explained *supra*, the program allows a parishioner to purchase from the Archdiocese a monument or mausoleum owned by the Archdiocese and set on a burial space, also owned by the Archdiocese. In turn, the Archdiocese agrees to inscribe, install, and maintain the monument or mausoleum in perpetuity. Originally, the Archdiocese sold only private family mausoleums. But, in 2013, the Archdiocese expanded the program to other types of monuments, such as headstones.

The program has greatly benefited both the Archdiocese and its parishioners. Families are typically happy to allow the Archdiocese to retain ownership of the monuments—as part of this bargain, the Archdiocese agrees to replace monuments that are damaged beyond repair—because the arrangement provides them peace of mind with respect to the maintenance of gravesites and ensures that someone will always be taking care of their family members' monuments and remains. Moreover, parishioners have appreciated the opportunity to contribute financially to the Archdiocese and its cemeteries. In addition to helping to support the cemeteries themselves, a small portion of the funds generated are returned to the Archdiocese to support its charitable, educational, and religious missions. And the Archdiocese benefits from the funds obtained

from the program, as well as from retaining ownership over the monuments, which allows the Archdiocese to maintain them in perpetuity and thus properly care for its cemeteries overall.

B. New Jersey Passed A3840 for No Reason Other Than to Protect Monument Dealers by Shutting Down the Archdiocese's Inscription-Rights Program.

Because of its success, the Archdiocese's most recent expansion of the inscription-rights program raised the ire of private monument dealers. On behalf of the monument industry, the MBA aggressively lobbied the New Jersey Legislature to prohibit private religious cemeteries from selling monuments. The legislature responded by passing A3840, which prohibits a private religious cemetery from owning, manufacturing, installing, selling, or providing headstones, vaults, and mausoleums for private use.

The MBA did not even attempt to hide the fact that A3840 was intended solely to protect the economic interests of its members. No evidence was presented to the General Assembly that allowing any cemetery, secular or religious, to sell monuments or vaults harmed consumers in any of the 47 states where direct sales of monuments and vaults is permitted. Nor did the MBA present any evidence that the inscription-rights program had harmed any consumers. Instead, the MBA simply presented evidence that the program would negatively impact the revenues of its members.

At the time of the law's passage in March 2015, the Archdiocese's cemeteries were the only religious cemeteries engaged in monument sales. Thus, the sole purpose of the law was to prevent the Archdiocese specifically from expanding its inscription-rights program and selling monuments. Should the bill become law on its effective date of March 23, 2016, the Archdiocese will have no choice but to terminate the program.

C. The Second Circuit's Holding Green-Lights Purely Protectionist Laws, Like New Jersey's, That Further No Public Purpose.

By any measure, the Archdiocese's inscription-rights program has been a success. As a result, there exists no public interest reason to enact legislation banning the program. In fact, the program furthers the public interest by providing a valuable service to a large segment of New Jersey's population. Nevertheless, A3840 will deprive the Archdiocese and its parishioners of the benefits of the program simply to protect the economic interests of a well-funded and well-connected interest group.

New Jersey's monument law is thus precisely the type of irrational, protectionist legislation that the Second Circuit's erroneous reasoning not only permits, but actively encourages. By allowing a state to rest on its desire to protect certain market participants at the expense of others, the Second Circuit renders rational basis review nothing more than a rote exercise in judicial validation of discriminatory economic regulations. And, as a result, it renders nugatory an important constitutional check on arbitrary and abusive legislation like A3840. Indeed, the Second Circuit's rule that economic protectionist

measures are *per se* lawful under the Fourteenth Amendment deprives less influential parties—such as the Archdiocese—of the opportunity even to present evidence demonstrating that an economic regulation is irrationally discriminatory. This holding relieves the government of even the modest rational basis burden and provides a worrying assurance to state legislatures that their efforts to protect favored interest groups at the expense of less powerful groups will face no judicial resistance.

The requirement under this Court's jurisprudence that a state articulate a rationale for legislation related to the public interest—as opposed to pure economic favoritism—is based on the common-sense recognition that favored groups may manipulate the legislative process to alter market conditions for their own benefit at the expense of competitors and, by extension, consumers. The efforts of the monument dealers in New Jersey exemplify this problem. The Archdiocese, in an effort to address the obstacles it faced in maintaining its cemeteries—and offer its parishioners a reasonable bargain in the process—sought to enter the market for selling monuments to consumers. The monument dealers responded by lobbying the legislature to ban religious cemeteries from selling monuments and thereby put an end to the inscription-rights program, which the monument dealers saw as a threat to their profits. Thus, a well-connected interest group was able to invoke state power to protect itself from competition and reduce consumers' options in the process. This arbitrary display of power is simply not consistent with the Fourteenth Amendment or this Court's jurisprudence with respect to discriminatory economic legislation.

Moreover, the state's response to the Archdiocese's challenge demonstrates how the Second Circuit's refusal to weigh evidence of irrationality can render futile any effort to strike down a discriminatory and abusive piece of legislation like A3840. The state now claims in litigation that the law's purpose is consumer protection—*i.e.*, that the legislation prevents cemeteries from exploiting aggrieved persons by tying purchase of a burial plot to the purchase of a headstone or vault. The Archdiocese contends there is simply no evidence to support this hypothetical justification; indeed, there is substantial evidence to the contrary. But, under the Second Circuit's holding, courts are invited to credit such *post hoc* hypothetical justifications and ignore undisputed evidence to the contrary. This Court has never endorsed such a self-defeating interpretation of the rational basis test. Accordingly, this Court should grant certiorari to reaffirm that, under the rational-basis test, litigants such as the Petitioner and the Archdiocese must be given a meaningful opportunity to refute the alleged rational bases that often serve as a pretext for protectionist regulation.

It is time for this Court to reiterate that rational basis review has meaning, by correcting the impulse of some lower courts to abdicate even minimal review of blatantly protectionist legislation that lacks any public purpose.

CONCLUSION

For the reasons set forth herein and in the petition, the *amicus curiae* respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

MEGAN L. BROWN
Counsel of Record
STEPHEN J. OBERMEIER
STEPHEN J. KENNY
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
mbrown@wileyrein.com

Attorneys for Amicus Curiae

November 18, 2015