

DEATH WILL HAVE HIS DAY: OVERLY RESTRICTIVE
FUNERAL DIRECTOR LICENSING STATUTES HARM
THE PUBLIC AND VIOLATE THE CONSTITUTION

*“Mine ear is open and my heart prepared;
The worst is worldly loss thou canst unfold.
Say, is my kingdom lost? why, ‘twas my care
And what loss is it to be rid of care?
Strives Bolingbroke to be as great as we?
Greater he shall not be; if he serve God,
We’ll serve Him too and be his fellow so:
Revolt our subjects? that we cannot mend;
They break their faith to God as well as us:
Cry woe, destruction, ruin and decay:
The worst is death, and death will have his day.”*
William Shakespeare, Richard II, Act III, scene 2¹

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1. WILLIAM SHAKESPEARE, RICHARD II act 3, sc. 2, ll. 95–105.

INTRODUCTION

Death and grief are woven into the fabric of the human experience and are a favorite subject of artistic expression.

Consider two interrelated examples. In the painting *The Funeral of Shelley* (1889), Louis Édouard Fournier depicts the beachside cremation of British Romantic poet Percy Bysshe Shelley, who died in 1822 when his yacht capsized in a storm off the coast of Spezia, Italy.² The poet lies on top of a funeral pyre that seems to be made of driftwood, his body unshrouded and unhooded to clearly depict his peaceful, could-be-sleeping face, even as the flames threaten to reach his corpse.³ Standing close at hand are three of the poet's friends, novelist Edward John Trelawney, essayist Leigh Hunt, and fellow Romantic poet Lord Byron.⁴ Lingered in the background is Percy Shelley's wife and fellow writer, Mary Wollstonecraft Shelley, who would go on to promote her husband's poetry for the rest of her life.⁵ The events are framed by a stormy, sepia-tinted sky and a placid ocean that is just a few shades darker than the ground, which looks more like a fine powder of snow than sand.⁶

Mary Shelley is the source of the second example. She wrote *Frankenstein* and the lesser-known dystopian novel *The Last Man*,

2. See Louis Edouard Fournier, *The Funeral of Shelley* (illustration), NAT'L MUSEUMS LIVERPOOL, <https://www.liverpoolmuseums.org.uk/artifact/funeral-of-shelley> (last visited Sept. 10, 2022). To call Shelley a poet is certainly selling him short. He was a novelist, inflammatory pamphlet writer, and political essayist. Any biography of Shelley is well worth a read. The major events of his life include endlessly interesting twists and turns such as: a unique propensity for provoking bullies and eventually society at large, an expulsion from Oxford, an anachronistic support of free love, and an attempt to incite Irish revolution. See *Percy Bysshe Shelley*, POETRY FOUND., <https://www.poetryfoundation.org/poets/percy-bysshe-shelley> (last visited June 19, 2022). Still, Shelley is best known in the modern age for his stunning lyrical poems, one of which begins with the famed line, "I met a traveller [sic] from an antique land." Percy Bysshe Shelley, *Ozymandias*, POETS.ORG, <https://poets.org/poem/ozymandias> (last visited June 19, 2022).

3. Fournier, *supra* note 2. Unsurprisingly, this depiction of an unchanged, peaceful face is artistic license and not reflective of reality. Percy Shelley's body was so unrecognizable that it could only be identified by the monogrammed handkerchief found nearby. E. J. TRELAWNY, *RECOLLECTIONS OF THE LAST DAYS OF SHELLEY AND BYRON* 130–33 (Cambridge, H. O. Houghton & Co. 1858). In Trelawny's account of the day Shelley's body was found, he describes "a shapeless mass of bone and flesh" from which "limbs separated from the trunk on being touched." *Id.*

4. Fournier, *supra* note 2.

5. *Id.* Mary Shelley's inclusion is also artistic license. In Trelawny's account, Mary Shelley was not in attendance at the funeral; Trelawny and Lord Byron were assisted in the cremation by Italian soldiers. TRELAWNY, *supra* note 3, at 130–33.

6. Fournier, *supra* note 2.

published just a few years after Percy Shelley's death.⁷ In *The Last Man*, Mary Shelley turns her deep understanding of grief to the page, imagining the downfall of human civilization after a long fight against an incurable pandemic.⁸ When the narrator survives a tempest that capsized his boat, he wakes on the shore to find his family gone, presumably drowned.⁹ Mary Shelley writes:

I ran to the water's edge, calling on the beloved names. Ocean drank in, and absorbed my feeble voice, replying with pitiless roar. I climbed a near tree: the level sands bounded by a pine forest, and the sea clipped round by the horizon, was all that I could discern. In vain I extended my researches along the beach; the mast we had thrown overboard, with tangled cordage, and remnants of a sail, was the sole relic recovered of our wreck. Sometimes I stood still, and wrung my hands. I accused earth and sky — the universal machine and the Almighty power that misdirected it. Again, I threw myself on the sands, and then the sighing wind, mimicking a human cry, roused me to bitter, fallacious hope. Assuredly if any little bark or the smallest canoe had been near, I should have sought the savage plains of ocean, found the dear remains of my loved ones, and clinging round them, shared their grave.¹⁰

Both Fournier's painting and this heart-wrenching scene in *The Last Man* are preceded by death caused by a ship capsizing in a storm. Both depict subsequent mourning on a cloudy beach. But where Mary Shelley's words convey the panic and desperation of losing a loved one with no body to bury, Fournier's painting portrays a somber, morose scene of friends quietly observing the final disposition of someone who died tragically and unexpectedly. This difference suggests that while death can drive a man to madness, funerals provide an opportunity for reflection and acceptance.

Funerals are an essential step in the human experience of grief—hence the phrase, “funerals are for the living.”¹¹ Science reflects this artistic truth to some degree. Sociological and psychological studies differ on whether participation in a funeral provides benefits for mental health or the process of grieving.¹² Some clinicians believe

7. MARY SHELLEY, *The Last Man* (1826), reprinted in 4 THE NOVELS AND COLLECTED WORKS OF MARY SHELLEY xi (1996) (introducing the novel and describing the author's grief in 1824 as she edited *The Posthumous Poems of Percy Bysshe Shelley* and drafted *The Last Man*).

8. *Id.* at xiii.

9. *Id.* at 344.

10. *Id.* at 345.

11. See Robert Kastenbaum, *Why Funerals?*, 28 GENERATIONS: J. AM. SOC'Y ON AGING 5, 5 (2004).

12. Alexander Burrell & Lucy E. Selman, *How Do Funeral Practices Impact Bereaved Relatives' Mental Health, Grief and Bereavement? A Mixed Methods*

that funerals help the bereaved process “the finality of loss” through “viewing the body of the deceased . . . [and realizing the deceased is] someone who is no longer alive and will only exist in memory.”¹³

Whatever the empirical benefit to funerals may be, both federal and state policymakers have identified funerals as a key area for regulation. Every state other than Colorado licenses funeral directors,¹⁴ and the Federal Trade Commission regulates death care costs through the Funeral Rule.¹⁵ The practical result of many state statutes is that it is unlawful to have any involvement in death care without a state-issued license.¹⁶ As will be explored in this Comment, many states’ funeral director licensing statutes require that anyone who disposes of bodies, arranges funeral services, or sells funeral supplies must be licensed by the state to avoid liability for the unauthorized practice of funeral service.¹⁷ Therefore, in most states a person must receive a license from the state in order to lawfully provide most death care services.¹⁸ It is thus vitally important to examine funeral director licensure requirements and determine whether those requirements are constitutional and protect the public interest. Flawed funeral service licensure schemes affect all Americans as we will all experience both funerals of loved ones and—eventually—our own deaths. Death will have his day.¹⁹

This Comment will provide an overview of two different approaches to funeral director licensing: one that requires all funeral directors to be licensed embalmers (“Single-Track Licensure”) and one that offers a license that does not require embalming education (“Dual-Track Licensure”); a timeline of federal appellate courts’ handling of funeral director licensing schemes through an examination of the “Casket Cartel” cases; and an argument for legislative reform to eliminate Single-Track Licensure based on such statutes’ failure to provide a rational basis for their limitations and failure to protect the public interest. Ultimately, this Comment presents a proposal for a better alternative—one which would both

Review with Implications for COVID-19, 85 OMEGA—J. DEATH & DYING 345, 373 (2022) (“Overall, evidence of the effect of funeral participation on mental health or bereavement outcomes was inconclusive.”).

13. THERESE A. RANDO, GRIEF, DYING, AND DEATH: CLINICAL INTERVENTIONS FOR CAREGIVERS 180–81 (1984).

14. David E. Harrington, *Preserving Funeral Markets with Ready-to-Embalm Laws*, 21 J. ECON. PERSPECTIVES 201, 202 (2007).

15. Jerry Ellig, *State Funeral Regulations: Inside the Black Box*, 48 J. REGUL. ECON. 97, 98 (2015).

16. See Harrington, *supra* note 14, at 202 (detailing state licensing laws and restrictions on funeral directors and cemetery operators).

17. N.C. GEN. STAT. § 90-210.27A(g) (2019).

18. *Id.*

19. WILLIAM SHAKESPEARE, *RICHARD II* act 3, sc. 2, l. 105.

survive constitutional scrutiny and more effectively protect the public interest.

I. OVERVIEW OF DIFFERENT APPROACHES TO FUNERAL DIRECTOR LICENSING

All states except Colorado require funeral directors to receive a license to lawfully practice funeral directing.²⁰ Similar to the practice of medicine or law, practicing funeral directing without a license can be a violation of state law. Thus, the licensure requirements for funeral directors impact the availability and quality of funeral services for each state. In all states, the effect of licensure requirements depends on the definition of “funeral directing,” which can implicate a wide array of activities. In some states, the definition of funeral directing encompasses embalming and preparation of bodies for viewing, making funeral directing and embalming a single profession (“Single-Track Licensure”).²¹ In other states, funeral directing and embalming are distinct professions with separate licensure requirements (“Dual-Track Licensure”).²²

The following Subpart will examine both a Single-Track Licensure and Dual-Track Licensure scheme. To understand the implications of each type of statute, it is helpful to consider the licensure statutes’ effect on the profession known as death doula. Death doulas offer an array of services to dying people and their families, focusing on emotional, spiritual, and physical support—rather than merely arranging funerals.²³ Death doulas are not simply another version of hospice care, as they typically do not offer medical care.²⁴ Instead, death doulas offer services after death (e.g., washing the body or helping loved ones through the grieving process), near the time of death (e.g., sitting vigil, easing pain through massages, or providing food for the family), and in the years leading up to death after a terminal diagnosis (e.g., providing companionship, helping with the emotional burden of illness, or helping the individual reflect on their life story).²⁵ Finally, this Comment will address whether a

20. See Harrington, *supra* note 14, at 202.

21. See, e.g., TEX. OCC. CODE ANN. § 651.001(7) (West 2003) (defining funeral directing as “acts associated with or arranging for the disposition of a dead human body”).

22. See, e.g., N.C. GEN. STAT. § 90-210.20(f) (2007) (defining funeral directing as “engaging in the practice of funeral service except embalming”).

23. Abby Ellin, *Death Doulas’ Provide Aid at the End of Life*, N.Y. TIMES (June 25, 2021), <https://www.nytimes.com/2021/06/24/well/doulas-death-end-of-life.html>.

24. “Unlike hospice workers, doulas don’t get involved in medical issues.” *Id.*

25. “Rather, they support clients emotionally, physically, spiritually and practically, stepping in whenever needed.” *Id.*; see also Ilana Kaplan, *How Death-Care Doulas have Adapted End-of-Life Care Amid COVID-19*, VOGUE (July 30,

death doula would be at risk of violating state law in North Carolina and New Jersey if they offered services without a funeral director license and, alternatively, which services they could offer lawfully.²⁶

A. *The New Jersey Approach: Single-Track Licensure*

New Jersey Statutes Title 45, Professions and Occupations, Chapter 7, Embalmers and Funeral Directors, contains the statutes covering the practice of funeral directing, embalming, and mortuary science in New Jersey.²⁷ The stated purpose of the statute is to secure “public health, safety, and welfare.”²⁸ The statute further states: “the practice of mortuary science and the practice of embalming and funeral directing are hereby declared to be occupations charged with a high degree of public interest and subject to strict regulation and control.”²⁹

New Jersey offers one license for both funeral directors and embalmers, who are subject to the same requirements, making it a Single-Track Licensure state.³⁰ The requirements for attaining funeral director licensure in New Jersey include: (1) two years of practical training; (2) supervision by a licensed practitioner of mortuary science who handles at least twenty-five cases per year; (3) assistance in embalming at least seventy-five bodies; (4) and several years of higher education.³¹ Under this Single-Track Licensure scheme, all prospective death care practitioners must embalm a significant number of bodies.³² Therefore, even if an individual only wanted to become a funeral director and had no interest in performing the embalming procedure, in New Jersey she would have to embalm seventy-five bodies simply to qualify for a license.³³

The New Jersey statute further ensures that no one other than those licensed under the statute can perform death care services.³⁴ The statute forbids “the practice of mortuary science, embalming or funeral directing” by anyone other than those licensed under the statute.³⁵ Notably, the statute’s definition of funeral directing focuses

2020), <https://www.vogue.com/article/how-death-doulas-have-adapted-end-of-life-care-amid-covid-19>.

26. A death doula “guides a person who is transitioning to death and their loved ones through the dying process.” *What is an End-of-Life Doula?*, INT’L END-OF-LIFE DOULA ASS’N (INELDA), <https://inelda.org/about-doulas/what-is-a-doula/> (last visited June 19, 2022).

27. N.J. STAT. ANN. § 45:7 (West 2022).

28. *Id.* § 45:7-33.

29. *Id.*

30. *Id.* §§ 45:7-48–45:7-49.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* § 45:7-47.

35. *Id.*

mainly on three categories of activities.³⁶ First, the definition includes the preparation of bodies for disposition through means other than embalming.³⁷ Second, the definition includes the operation of a mortuary or funeral home as well as the act of holding oneself out as a mortician or funeral director.³⁸ Finally, the definition includes any involvement in making “funeral arrangements,” which may include mundane tasks that would be associated with event planning in any other scenario.³⁹

B. The North Carolina Approach: Dual-Track Licensure

North Carolina General Statutes Chapter 90, Medicine and Allied Occupations, Article 13A, Funeral Service, sets out the regulations governing the practice of funeral service and the profession of funeral directing in the state of North Carolina.⁴⁰ The stated motivation of the statute is to protect “public health, safety, and welfare” in “the public interest.”⁴¹ According to the statute, “the public interest requires that only qualified persons be permitted to practice funeral service in North Carolina and that the profession merit the confidence of the public.”⁴² Notably, the clearly stated purpose of the statute is to promote and protect the public interest, and the statute itself directs that it be “liberally construed to accomplish [that] end”⁴³

36. “Funeral directing’ means (1) the engaging in or conducting or holding one’s self out as being engaged in or conducting the preparation (other than embalming) for burial or disposal and the direction or supervision of burial or disposal of dead human bodies; or (2) maintaining, using or operating a mortuary; or (3) in connection with one’s name or mortuary using the words ‘mortician’ or ‘funeral director’ or ‘undertaker’ or any other words or title of like import or signification.” *Id.* § 45:7-34(c).

37. *Id.*

38. *Id.*

39. “Funeral arrangements’ means funeral and burial plans made through a mortuary, including the selection of plans for the furnishing of funeral goods and services pursuant to a completed plan of bodily disposition and the act of offering the opportunity to purchase or to enroll in a prepaid funeral agreement by the mortuary.” *Id.* § 45:7-82.

40. N.C. GEN. STAT. § 90-210.18A (2005). Note that both the North Carolina statute and the New Jersey statute are in the *professions* chapter of the state code. *Cf.* N.J. STAT. ANN. § 45:7 (West 2022).

41. Note that both the North Carolina statute and the New Jersey statute explicitly refer to the need to protect public health and welfare—rooting this occupational licensing scheme in state police powers. *Compare* N.C. GEN. STAT. § 90-210.18A(a) (2005), *with* N.J. STAT. ANN. § 45:7-33 (West 2022).

42. N.C. GEN. STAT. § 90-210.18A(a) (2005).

43. *Id.*

Further, the statute establishes the Board of Funeral Service to regulate the practice of funeral service.⁴⁴ The Board of Funeral Service is comprised of six licensed funeral directors handpicked by the funeral industry; one licensed funeral director unaffiliated with the two leading funeral service trade associations; and two individuals who are neither funeral directors nor employed by funeral directors and are chosen by the state legislature.⁴⁵ In effect, the makeup of the board gives a 7-2 majority to funeral professionals, limiting the public's voice to mere oversight if the funeral professionals act in agreement.⁴⁶ Further, the statute gives the Board of Funeral Service broad administrative powers.⁴⁷ It empowers the Board of Funeral Service to "adopt and promulgate such rules and regulations for . . . the enforcement of the provisions of this Article as may be necessary and are consistent [with law]."⁴⁸ Thus, the statute makes funeral directing a self-regulating industry. The state agency tasked with overseeing the funeral industry is dominated by funeral professionals who are empowered to adopt and enforce regulations governing their own profession.⁴⁹ This reality is not unique to North Carolina; in most states, the funeral services industry is self-regulated.⁵⁰

44. *Id.* § 90-210.18A(b) ("The North Carolina Board of Funeral Service is created and shall regulate the practice of funeral service in this State. The Board shall have nine members as follows:

(1) Four members appointed by the Governor from nominees recommended by the North Carolina Funeral Directors Association, Inc. These members shall be persons licensed under this Article.

(2) Two members appointed by the Governor from nominees recommended by the Funeral Directors & Morticians Association of North Carolina, Inc. These members shall be persons licensed under this Article.

(3) One member appointed by the Governor who is licensed under this Article and who is not affiliated with any funeral service trade association.

(4) One member appointed by the General Assembly, upon the recommendation of the President Pro Tempore of the Senate. This member shall be a person who is not licensed under this Article or employed by a person who is licensed under this Article.

(5) One member appointed by the General Assembly, upon the recommendation of the Speaker of the House of Representatives. This member shall be a person who is not licensed under this Article or employed by a person who is licensed under this Article.").

45. *Id.*

46. *See id.*

47. *Id.* § 90-210.23.

48. *Id.* § 90-210.23(a).

49. *See id.*

50. Jeff Rowes, *Caskets and the Constitution: How a Simple Box Has Advanced Economic Liberty*, 8 WAKE FOREST J. L. & POL'Y 63, 64-65 (2018) ("In a

The licenses for North Carolina funeral practitioners fall into three categories: the practice of funeral directing (which involves only funeral directing); the practice of funeral service (which involves both funeral directing and embalming); and embalming (which does not include funeral directing).⁵¹ Funeral directing is defined as “engaging in the practice of funeral service except embalming.”⁵² Funeral service is defined as “duties and responsibilities in connection with the funeral as an organized, purposeful, time-limited, flexible, group-centered response to death.”⁵³ Notably, the definition of embalming does not include washing the body with soap and water to prepare a body for disposition by authorized agents who do so without pay or as part of religious practices.⁵⁴

A license to practice funeral directing requires a degree in mortuary science or completion of a funeral director program, twelve months of resident traineeship as a funeral director, and passing scores on several examinations.⁵⁵ A license to practice funeral service requires a degree in mortuary science, twelve months of resident traineeship as a funeral service licensee, and passing several examinations.⁵⁶ The key difference between the two types of funeral practitioners is thus the educational and residency requirements. Where the funeral director resident traineeship does not involve embalming,⁵⁷ the funeral service resident traineeship requires that the applicant has assisted in embalming at least twenty-five bodies.⁵⁸

Therefore, in North Carolina, embalming is essentially a specialized educational requirement that can be avoided if the applicant desires. However, despite the construction of the statute, there is a practical hurdle that may keep applicants from achieving the status of a licensed funeral director without having to train in embalming: the degree required for all three types of licenses must be from a program approved by the Board of Funeral Service and “accredited by the American Board of Funeral Service Education.”⁵⁹

typical state, the funeral industry is regulated by a state licensing board . . . [which] almost invariably consist of state-licensed funeral directors . . . [who are] in turn, members of state and national funeral-director associations, which lobby their own members on state licensing boards for industry-favoring forms of regulation.”).

51. *See generally* N.C. GEN. STAT. § 90-210.25 (2005).

52. *Id.* § 90-210.20(f).

53. *Id.* § 90-210.20(j).

54. *Id.* § 90-210.20(e).

55. *Id.* § 90-210.25(a)(1).

56. *Id.* § 90-210.25(a)(3)e.

57. *Id.* § 90-210.25(a)(4)f1.

58. *Id.* § 90-210.25(a)(4)f3.

59. *See id.* § 90-210.25(a)(1) (“To be licensed for the practice of funeral directing under this Article, an applicant for licensure bears the burden of substantiating to the satisfaction of the Board that the applicant . . . [p]ossesses

As of January 2022, there is only one funeral director program in North Carolina, located at the Fayetteville Technical Community College.⁶⁰ However, the funeral director program is not accredited by the American Board of Funeral Service Education.⁶¹ While the program brochure states that those who complete the funeral director program are eligible to sit for the North Carolina State Board for Funeral Directing—implying that the program can lead to licensing by the state⁶²—the statute clearly requires a program approved or accredited by the American Board of Funeral Service Education (“ABFSE”).⁶³ Even according to Fayetteville Technical Community College, “[the Funeral Director program] is not accredited by the American Board of Funeral Service Education due to the fact that it does not include instruction in the following areas: Anatomy, Chemistry, Embalming, Microbiology, and Restorative Arts. Students graduating from this program are not eligible to take the National Board Examination or any state board examination for which graduation from an ABFSE accredited program is required.”⁶⁴ Therefore, it is unclear whether those graduating from the Fayetteville Technical Community College funeral director program can qualify as funeral directors under the statute.

C. *Applying Both Schemes to Death Doulas*

To understand the difference between the two licensure schemes, it is helpful to determine which services require a license under each scheme.

New Jersey identifies three categories of activities that qualify as funeral directing: (1) the preparation of bodies for disposition through means other than embalming; (2) the operation of a mortuary or funeral home or holding oneself out as a mortician or funeral director;

a degree in mortuary science or has graduated from a Funeral Director Program, or the equivalent, from a program approved by the Board or accredited by the American Board of Funeral Service Education.”)

60. See *Funeral Service Education*, FAYETTEVILLE TECH. CMTY. COLL., <https://www.faytechcc.edu/academics/public-service-programs/funeral-service-education/> (last visited June 19, 2022).

61. See *NC Funeral Director Program Brochure*, FAYETTEVILLE TECH. CMTY. COLL. at 2.

62. *Id.*

63. See N.C. GEN. STAT. § 90-210.25(a)(1) (2005) (“To be licensed for the practice of funeral directing under this Article, an applicant for licensure bears the burden of substantiating to the satisfaction of the Board that the applicant . . . possesses a degree in mortuary science or has graduated from a Funeral Director Program, or the equivalent, from a program approved by the Board or accredited by the American Board of Funeral Service Education.”) (emphasis added).

64. See *NC Funeral Director Program Brochure*, *supra* note 61.

and (3) any involvement in making funeral arrangements.⁶⁵ Services relating to emotional and spiritual care are less likely to fall under the definition of “funeral directing.”⁶⁶ Emotional and spiritual care do not fall neatly into any of the three categories of activities covered by the statute. However, services more closely related to death—such as helping the family prepare the body for burial or arranging a home funeral—would most likely fall under the definition of “funeral directing.”⁶⁷ In particular, a death doula who prepares bodies for home burials would almost certainly be swept in with the statutory definition of funeral directing under the first category, preparing bodies for disposition. The definition explicitly includes “preparation (*other than embalming*),” which is broad enough to suggest the definition is meant to include *all* preparation.⁶⁸ Even if the death doula merely assisted the family in preparation for a home burial and had no physical contact with the body, they arguably would be “preparing” a body for burial.⁶⁹ Additionally, assisting a family in arranging memorial services could fall into the third category of funeral directing services.⁷⁰

Therefore, a death doula who wishes to aid the family in care closely related to death would potentially be at risk of violating the New Jersey statute unless they were also a licensed funeral director. To become a licensed funeral director, the death doula would not only have to seek several years of higher education and training, they would also have to embalm seventy-five bodies and receive extensive education and training on the practice of embalming.⁷¹ This requirement would apply even if the death doula never intended to operate a funeral home or to offer embalming to their clients.⁷²

Thus, Single-Track Licensure, exemplified by New Jersey’s statute, limits the ability of non-embalming death care practitioners to offer their services without violating state law.⁷³ In states like New Jersey, individuals such as death doulas risk violating state law when they offer services closely related to dead bodies and funeral arrangements.⁷⁴

Differently, Dual-Track Licensure, exemplified by North Carolina, gives a death doula alternative paths to licensure. If the death doula does not offer embalming, they would not be performing

65. *See supra* notes 34–39 and accompanying text.

66. *See* N.J. STAT. ANN. § 45:7-34(c) (West 2022).

67. *Id.*

68. *Id.* (emphasis added).

69. *Id.*

70. *Id.*

71. *Id.* § 45:7-49.

72. *Id.*

73. *See id.* § 45:7-82.

74. *Id.*

funeral service under the statute and thus avoid the extensive educational requirements and embalming experience required for funeral service practitioners.⁷⁵ Similar to New Jersey's statute, spiritual and emotional services would be unlikely to fall under the definition of funeral directing or funeral service, particularly those occurring prior to the time of death. However, services close to the time of death, such as the organization of memorial services, could be considered "in connection with the funeral as an organized, purposeful, time-limited, flexible, group-centered response to death," and thus fall into the definition of funeral directing.⁷⁶ Notably, washing and preparation of the body would not fall under the definition of funeral directing so long as the death doula did not take compensation for those services or the washing was in connection with religious practices.⁷⁷ Therefore, so long as the death doula does not take compensation for any non-religious body preparation, the only services that would require licensing under the statute would be those that are arguably related to funerals.

Considering the wide array of services offered by death doulas, it is highly possible that a North Carolina death doula could design their services without triggering licensure requirements. As discussed above, the only service that potentially falls into the category of funeral directing would be arranging a funeral or similar "group-centered response to death."⁷⁸ If a death doula does not assist with home burials or funerals, she will avoid this requirement. In the case that the death doula did offer such services, a Dual-Track statute would allow the death doula to obtain a license without the need to receive extensive education in embalming. The death doula could apply for a Funeral Director license after three semesters at Fayetteville Technical Community College and twelve months of training as a Funeral Director. Compared to New Jersey's Single-Track Licensure, Dual-Track Licensure offers significantly more flexibility for death care practitioners who follow paths outside of traditional funeral directing.

75. *See supra* notes 42–64 and accompanying text.

76. N.C. GEN. STAT. § 90-210.20(f), (j) (2007).

77. *Id.* § 90-210.20(e) ("Embalming shall not include the washing or use of soap and water to cleanse or prepare a dead human body for disposition by the authorized agents, family, or friends of the deceased who do so privately without pay or as part of the ritual washing and preparation of dead human bodies prescribed by religious practices; provided, that no dead human body shall be handled in a manner inconsistent with G.S. 130A-395.").

78. *Id.* § 90-210.20(j).

II. EXPLORING THE PRACTICAL EFFECTS OF FUNERAL DIRECTOR LICENSURE SCHEMES: THE “CASKET CARTEL” CASES

The statutes explored above, imagined even in the abstract, clearly have a tremendous impact on the availability of death care services. While North Carolina and New Jersey differ on whether all death care professionals must have embalming education, both states define funeral directing such that many death-related services fall under the umbrella of activities regulated by the state. Particularly in Single-Track Licensure states, death care professionals such as death doula's risk violating state statutes even when they offer services that differ from traditional funeral directing.⁷⁹

Enforcement of funeral director licensing statutes is not merely an abstract threat. As the following three cases demonstrate, funeral licensing boards have attempted to apply licensing requirements to activities that are—at most—tangentially related to funerals.

The following cases related to the sale of caskets represent three circuits' approach to challenges against funeral director licensure schemes and are known as the “Casket Cartel” cases. As two of the cases struck down licensing schemes as anticompetitive, some scholars have identified the statute-invalidating “Casket Cartel” cases as “the first time in the post-*Lochner* era that a federal court of appeals had struck down any part of an occupational licensing law.”⁸⁰

First, *Craigmiles v. Giles*⁸¹ arose out of “entrepreneurial opportunity.”⁸² The plaintiffs recognized that the markup on caskets negatively affected their community and opened a store offering caskets at a minimal markup.⁸³ The plaintiffs were soon served with a cease and desist order by the Tennessee Board of Funeral Directors and Embalmers (“FDEA”), which, similar to North Carolina's board, is made up of a supermajority of funeral directors.⁸⁴ The plaintiffs were faced with the choice of closing their store or obtaining a funeral director's license.⁸⁵ Such a license would require extensive experience in embalming and a two-year degree—all to sell affordable caskets to their community.⁸⁶ The legal justification for the order was that the

79. See N.J. STAT. ANN. § 45:7-82 (West 2022).

80. Rowes, *supra* note 50, at 83.

81. 312 F.3d 220 (6th Cir. 2002).

82. Chip Mellor, *Burying the Casket Cartel*, INST. FOR JUST. (May 1, 2002), <https://ij.org/ll/may-2002-volume-11-number-3/burying-the-casket-cartel/>.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* (“During that time, that person will come into frequent contact with dead bodies, often handling them, even participating in embalming. They must also incur tens of thousands of dollars in expenses through tuition and lost

business was engaged in unlicensed “funeral directing” through the sale of funeral merchandise.⁸⁷

The plaintiffs challenged the FDEA’s order under the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment.⁸⁸ Applying rational basis review,⁸⁹ the court determined that the issue was whether “requiring those who sell funeral merchandise to be licensed funeral directors bears a rational relationship to any legitimate purpose other than protecting the economic interests of licensed funeral directors.”⁹⁰ In considering this issue, the court determined that there was no rational connection between either public health or consumer protection and requiring those who sell caskets to have funeral director licenses.⁹¹

None of the state’s public health arguments passed muster with the court.⁹² When considering whether a license protected public health, the court was unconvinced for three reasons. First, the plaintiffs did not handle dead bodies, so the court doubted that the plaintiffs needed extensive scientific education to protect public

income. And they must master voluminous information and skills absolutely irrelevant to selling caskets.”).

87. *Craigsmiles v. Giles*, 312 F.3d 220, 223 (2002) (“Both businesses ceased operations on issuance of the orders.”).

88. *Id.*

89. *Id.* at 224 (“While feared by many, morticians and casket retailers have not achieved the protected status that requires a higher level of scrutiny under our Equal Protection jurisprudence.”).

90. *Id.* at 225.

91. *Id.* at 226 (“In fact, restricting sales of caskets to licensed funeral directors would seem to have an adverse effect on the quality of caskets. The licensing requirement does not require consumers to choose more protective caskets or funeral directors to recommend them. Generally, however, the cost of more protective caskets is higher. If casket retailers were to increase competition on casket *prices* and bring those prices closer to marginal costs, then more protective caskets would become more affordable for consumers with limited funds and their use would likely increase. If a consumer were able to spend, for example, \$2000 on a casket, a more competitive casket market would likely lead to that consumer procuring a higher quality casket. Because nothing prevents licensed funeral directors from selling shoddy caskets at high prices, the licensing requirement bears no rational relationship to increasing the quality of burial containers.”).

92. *Id.* at 229 (“No sophisticated economic analysis is required to see the pretextual nature of the state’s proffered explanations for the 1972 amendment. We are not imposing our view of a well-functioning market on the people of Tennessee. Instead, we invalidate only the General Assembly’s naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers. This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.”).

health.⁹³ Second, the caskets sold by licensed funeral directors and the plaintiffs' businesses differed only in price, meaning there was no reason to believe the plaintiffs' caskets were potentially detrimental to public health.⁹⁴ Finally, the court dismissed the argument that greater education and training allows funeral directors to protect public health by educating consumers on the most protective types of caskets.⁹⁵ The court reasoned that funeral directors can still advise clients on casket safety even if those clients choose to purchase caskets elsewhere.⁹⁶

As for the state's consumer protection argument, the court was unmoved because the unlicensed casket sellers were still subject to both state laws forbidding fraud and misrepresentation as well as the federal Funeral Rule.⁹⁷ Additionally, the court reasoned that the state could amend the statute to apply consumer protection requirements to unlicensed casket retailers, which would achieve the state's purpose without subjecting casket retailers to unreasonable educational requirements.⁹⁸

As the statute lacked a rational relationship to its articulated purposes, the court found that the only purpose of the statute was to impose a "significant barrier to competition in the casket market," harming consumers in the process.⁹⁹ Although the statute failed to survive rational basis review, the court was careful to point out that it was not making a ruling on the proper economics of the funeral market. Rather, the court held that "privileg[ing] certain businessmen over others at the expense of consumers" was not a legitimate governmental purpose for the purposes of rational basis review.¹⁰⁰

Thus, the Sixth Circuit held that the state must be able to show a linkage between the challenged component of the statute (e.g., only funeral directors can sell caskets) and the articulated purpose of the statute (e.g., protecting public health and safety and/or consumer protection).¹⁰¹ If the claimed benefit provided by the regulation (e.g., requiring education and training for funeral directors allows them to provide better advice regarding proper casket purchases and protects

93. *Id.* at 225 ("The plaintiffs, of course, would not handle the bodies, much less engage in any embalming services.").

94. *Id.* at 226.

95. *Id.*

96. *Id.* at 227.

97. *Id.*

98. *Id.* at 227–28 ("Perhaps the best antidote for the evil of funeral goods and services bundling by funeral homes is to have third-party competitors on individual items like caskets. Licensure is a barrier to that solution.").

99. *Id.* at 228–29.

100. *Id.*

101. *See id.* at 229 ("As this court has said, rational basis review, while deferential, is not toothless.") (citations omitted).

consumers from fraud and misrepresentation) is not actually produced by the statute, the court is not likely to find a rational relationship between the statute and its alleged purpose.¹⁰² In that case, the court may assess what aims the state was actually trying to accomplish, and will not accept protecting the economic interests of a particular industry as a rational basis for state action.

Differently, in *Powers v. Harris*,¹⁰³ the plaintiffs were unlicensed individuals who operated a business that sold funeral merchandise online but provided no other funeral-related services.¹⁰⁴ The plaintiffs challenged the Oklahoma Funeral Services Licensing Act, which required anyone “engaged in the sale of funeral-service merchandise, including caskets, [to] be a licensed funeral director operating out of a funeral establishment,” with a few exceptions.¹⁰⁵ Seeking permission to make pre-need casket sales to Oklahomans without a license, the plaintiffs argued that Oklahoma’s licensing scheme violated the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment based on the holding in *Cornwell v. Hamilton*,¹⁰⁶ as less than five percent of the education and training requirements for licensure pertained to skills or knowledge necessary to sell caskets.¹⁰⁷ While this argument succeeded at the district court level,¹⁰⁸ the Tenth Circuit quickly determined that there was a rational basis for the statute on the grounds that the licensing protocol was not “wholly irrelevant” to consumer protection due to the necessity of protecting at-need casket buyers.¹⁰⁹ The issue for the court was then whether protecting the

102. *See id.*

103. 379 F.3d 1208 (10th Cir. 2004).

104. *Id.* at 1211.

105. *Id.* at 1211–12 (noting exceptions in state licensing law for the sale of urns, grave markers, monuments, clothes, and flowers).

106. 80 F. Supp. 2d 1101 (S.D. Cal. 1999).

107. *Id.* at 1111 (holding California’s cosmetology licensing requirements in violation of the Fourteenth Amendment’s Due Process and Equal Protection Clauses because “just over six percent of the curriculum is relevant . . . [to] a would-be African hair braider.”).

108. *Powers*, 379 F.3d at 1213–14 (“[V]ery little specialized knowledge is required to sell caskets. Most consumers select caskets based on price and style. Any information a generally educated person needs to know about caskets in order to sell them can be acquired on the job. Less than five percent of the education and training requirements necessary for licensure in Oklahoma pertain directly to any knowledge or skills necessary to sell caskets. As a result of the substantial misfit between the education and training required for licensure and the education and training required to sell caskets in Oklahoma, people who only wish to sell caskets, if they wish to make in-state sales, are required to spend years of their lives equipping themselves with knowledge and training which is not directly relevant to selling caskets.”).

109. *Id.* at 1215–16.

intrastate funeral home industry was a legitimate state interest.¹¹⁰ The court determined economic protectionism was a legitimate state interest based on Supreme Court precedent and argued the *Craigmiles* court went a step too far when it applied “*Cleburne*-style rational basis review to economic issues,” which, the court pointed out, the Supreme Court has never done.¹¹¹

There are factual differences that can begin to reconcile the inconsistent holdings of *Craigmiles* and *Powers*. In *Craigmiles*, the plaintiffs were already operating their business, so the court was able to see the benefit lower-cost caskets provided to the community.¹¹² Differently, in *Powers*, the plaintiffs had yet to operate their business in a way that conflicted with the statute and were making a facial challenge.¹¹³ Also in *Powers*, the court read the statute as less prohibitive than the *Craigmiles* statute, as the statute did allow some unlicensed activities.¹¹⁴ Finally, the plaintiffs in *Powers* were seeking permission for *pre-need* casket sales, which often face more stringent statutory protections to ensure that consumers’ money is protected and that the casket is available when needed.¹¹⁵ In *Craigmiles*, the court explicitly addressed the fact that the plaintiffs were not involved in any *pre-need* casket sales and that if they did engage in such sales, the district court’s order would not prevent the funeral board from applying the state statute to the plaintiffs.¹¹⁶ Even with those factual differences, the circuits’ holdings differ on whether economic protectionism can function as a legitimate state interest under rational basis review.

*St. Joseph Abbey v. Castille*¹¹⁷ is a helpful tool in reconciling *Craigmiles* and *Powers*. In *St. Joseph Abbey*, the Monks of St. Joseph Abbey started selling handmade caskets after Hurricane Katrina

110. This is the argument that *Craigmiles* explicitly overruled: “[A] measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.” *Craigmiles*, 312 F.3d at 228–29.

111. *Powers*, 379 F.3d at 1223–24.

112. *Craigmiles*, 312 F.3d at 222–23.

113. *Powers*, 379 F.3d at 1211 (noting that plaintiffs “wish” to sell caskets over the Internet, without obtaining licenses required by Oklahoma occupational law).

114. *Id.* at 1212 (“As such, an unlicensed Oklahoman may sell a time-of-need casket to a customer outside of Oklahoma—indeed, Plaintiffs have sold caskets to consumers located outside of Oklahoma—and an unlicensed salesperson who is not located in Oklahoma may sell a time-of-need casket to a customer in Oklahoma.”).

115. *Id.*

116. *Craigmiles*, 312 F.3d at 228–29 (“Moreover, the plaintiffs here do not engage in *pre-need* sales.”).

117. 712 F.3d 215, 217–18 (5th Cir. 2013).

decimated their community.¹¹⁸ The monks did not offer funeral services or prepare bodies.¹¹⁹ The Louisiana State Board of Embalmers and Funeral Directors argued that under state law, intrastate sales of caskets to the public may be made only by a state-licensed funeral director at a state-licensed funeral home.¹²⁰ The State Board ordered the Abbey not to sell caskets to the public.¹²¹ The plaintiffs argued that the state's only justification for the regulation was the pure economic protection of a discrete industry, which the plaintiffs claimed could not be a rational basis for state action.¹²²

In considering these arguments, the Fifth Circuit looked to *Craigmiles* and *Powers*, determining that the split between the two previous cases resulted from “the difference in implicit answers to the question of whether the state legislation was supported by a rational basis.”¹²³ In *Castille*, the Fifth Circuit held that “neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate government purpose, but economic protection, that is favoritism, may well be supported by a post hoc perceived rationale.”¹²⁴ In other words, protection of a particular industry cannot stand on its own “to the extent that it harms consumers.”¹²⁵

In assessing the possible rationales for the rule, the court determined that the statute was not justified by consumer protection.¹²⁶ First, funeral directors received no special training in advising consumers about caskets.¹²⁷ Second, the federal Funeral Rule requires funeral directors to give advice to consumers on caskets

118. *Id.* (describing the casket-making business of the thirty-eight cloistered monks in New Orleans after Hurricane Katrina).

119. *Id.* at 217 (“The Abbey offers no funeral services. It does not prepare a deceased for burial and its monks do not participate in funerals, except as pastors.”).

120. *Id.* at 218 (“In sum, the State Board’s sole regulation of caskets presently is to restrict their intrastate sales to funeral homes. There are no other strictures over their quality or use.”).

121. *Id.* at 219.

122. *Id.* at 220 (“Facing these hurdles, the Abbey and Deacon Mark Coudrain filed this suit in the district court under 42 U.S.C. § 1983. The Abbey and Coudrain sought declaratory and injunctive relief against enforcement of the Louisiana Embalming and Funeral Directors Act by the nine members of the State Board.”).

123. *Id.* at 222 n. 33 (citing *Craigmiles*, 312 F.3d at 224), n. 34 (citing *Powers*, 379 F.3d at 1221).

124. *Id.* at 222–23.

125. *Id.* at 223 (quoting *Greater Hous. Small Taxicab Co. Owners’ Ass’n v. City of Hous.*, 660 F.3d 235, 240 (2011) (citing *Craigmiles*, 312 F.3d at 228–29)).

126. *Id.* at 223 (“The State Board argues that the challenged law is rationally related to consumer protection . . . [b]ut it is betrayed by the undisputed facts.”).

127. *Id.* at 224.

even if the consumer purchases a casket from a different vendor.¹²⁸ The court found that there was no connection between prohibiting third-party sales and protecting consumers when other statutes protect consumers from misrepresentation and fraud in all settings. The court further argued that such a holding would be in tension with the Federal Trade Commission's Funeral Rule, which requires funeral directors to accept and advise on third-party caskets.¹²⁹ The court also determined that the statute was not justified by a need to protect public health and safety because Louisiana put no restrictions on casket design or construction and did not educate funeral directors on casket design.¹³⁰ The lack of other restrictions on caskets suggested to the court that there was no true public health concern related to casket sales.¹³¹ Finally, the court concluded that lacking any other justification, the statute's purpose was economic protectionism, unsupported by any rational basis for state regulation.¹³²

Therefore, *St. Joseph Abbey* attempts to reconcile *Craigmiles* and *Powers*. The *St. Joseph Abbey* holding is that economic protectionism cannot be a legitimate state interest if it is unsupported by some other rational basis to the extent that such economic protectionism harms consumers or violates constitutional protections.¹³³ However, this rule only reconciles the "Casket Cartel" cases if economic protectionism is not a legitimate state interest, as this Comment will explore in the following Subpart.

128. *Id.* at 225.

129. *Id.* at 225–26.

130. *Id.* at 226 ("That Louisiana does not even require a casket for burial, does not impose requirements for their construction or design, does not require a casket to be sealed before burial, and does not require funeral directors to have any special expertise in caskets leads us to conclude that no rational relationship exists between public health and safety and limiting intrastate sales of caskets to funeral establishments.").

131. *Id.*

132. *Id.* at 226–27 ("The principle we protect from the hand of the State today protects an equally vital core principle—the taking of wealth and handing it to others when it comes not as economic protectionism in service of the public good but as 'economic' protection of the rule makers' pockets.").

133. *Id.* at 227 ("We deploy no economic theory of social statics or draw upon a judicial vision of free enterprise. Nor do we doom state regulation of casket sales. We insist only that Louisiana's regulation not be irrational"); *Craigmiles*, 312 F.3d at 228 ("Finding no rational relationship to any of the articulated purposes of the state, we are left with the more obvious illegitimate purpose to which licensure provision is very well tailored. The licensure requirement imposes a significant barrier to competition in the casket market."); *Powers*, 379 F.3d at 1225 ("Because we hold that intrastate economic protectionism, absent a violation of a specific federal statutory or constitutional provision, is a legitimate state interest and that the FSLA is rationally related to this legitimate end, we AFFIRM.").

III. THE NEED FOR LEGISLATIVE REFORM

As discussed previously, Single-Track Licensure schemes like New Jersey's raise significant concerns of liability for death care practitioners such as death doulas.¹³⁴ Further, in order to avoid liability, death care practitioners would have to receive extensive education and training in all aspects of funeral service, including embalming, regardless of whether those practitioners ever plan on offering embalming services.¹³⁵ The lack of flexibility allowed by Single-Track Licensure statutes is even more concerning when viewed in light of the difficulty of accessing funeral services in certain areas of the country—a problem which is likely to get worse with time.¹³⁶ This Subpart will argue for legislative reform based on constitutional concerns and the public interest and ultimately propose a suggestion for states with Single-Track Licensure.

A. Single-Track Licensure Schemes Implicate Economic Protectionist Concerns and Would Not Survive Rational Basis Review under St. Joseph Abbey

It is not difficult to imagine a death doula ending up in a position like the plaintiffs in *St. Joseph Abbey* if state funeral boards decide that the availability of alternative death care services violates state licensing statutes.¹³⁷ Imagine this scenario: a death doula is operating her business in New Jersey, counseling clients and helping families through grief. One day, she receives a cease and desist order from the state funeral board and learns that in order to continue her business, she must receive a license that requires several years of school, an apprenticeship, and experience in embalming—despite the fact that she has no interest in running a funeral home or offering embalming services. Instead, she decides to bring a challenge to the statute on the same grounds as the plaintiffs in the “Casket Cartel” cases: funeral director licensing statutes violate the Due Process Clause. How is a court likely to rule in light of *St. Joseph Abbey*?

Although some scholars identify a circuit split between the “Casket Cartel” cases,¹³⁸ the court in *St. Joseph Abbey* clearly did not

134. See *supra* Part I-A.

135. See *supra* notes 71–72 and accompanying text.

136. Danny Lawhon, *Small Towns Struggle to Keep Funeral Directors*, DES MOINES REG. (May 26, 2018, 10:28 PM), <https://www.thehawkeye.com/story/news/state/2018/05/27/small-towns-struggle-to-keep/12128192007/>.

137. Because state funeral boards are generally made up of members of the funeral industry, such an action would likely be motivated by self-interest. The more families that use death doulas—particularly for care around the time of death—the less money goes into the hands of licensed funeral directors.

138. Rowes, *supra* note 50, at 85.

mean to pick one side of a split.¹³⁹ Rather, the court viewed *Craigmiles* and *Powers* as standing for the same rule, although it did disagree with *Powers*'s reading of Supreme Court precedent.¹⁴⁰ Ultimately, the tension that runs through the "Casket Cartel" cases is whether economic protectionism can stand without some other rational basis, to the extent that such protectionism harms consumers. *St. Joseph Abbey* has the correct reading of Supreme Court precedent. Even in supposedly iconic cases for "the scope of judicial deference,"¹⁴¹ the Court does not actually go so far as to say that *any* basis will satisfy rational basis review in *all* circumstances such that a statute will survive judicial review. In fact, the Supreme Court has stated, "[A]bsent some reason to infer antipathy, even improvident decisions will eventually be rectified by democratic process and that judicial intervention is *generally unwarranted* no matter how unwisely we may think a political branch has acted."¹⁴² The Supreme Court's language implies exceptions to judicial deference, both in situations where there is a reason to infer antipathy and in situations where there is no reason to infer such antipathy. Ultimately, there still must be a *rational* basis for legislation. This is not the same as *any* basis; rather, it requires a relation to a "constitutionally permissible objective."¹⁴³

Funeral director licensing laws that require all death care practitioners to have embalming education have no "rational relation

139. *St. Joseph Abbey*, 712 F.3d at 221 ("As a threshold argument, the State Board urges pure economic protection of a discrete industry is an exercise of a valid state interest. It points to the Tenth Circuit's decision in *Powers v. Harris* The Abbey in turn points to *Craigmiles v. Giles*, in which the Sixth Circuit rejected 'economic protectionism' as a rational basis for similar casket regulations, striking down those regulations as a denial of due process and equal protection.").

140. *Id.* at 222 ("*Craigmiles* and *Powers* rest on their different implicit answers to the question of whether the state legislation was supportable by rational basis. *Craigmiles* looked for rationality and found none. *Powers* found economic protection to be a traditional wielding of state power and rational by definition.").

141. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."); *St. Joseph Abbey*, 712 F.3d at 221 ("Justice Douglas's opinion in *Williamson v. Lee Optical* is generally seen as a zenith of this judicial deference to state economic regulation and the State Board invokes its protections, including its willingness to accept post hoc hypotheses for economic regulation. But even *Williamson* offers the State Board little succor.").

142. *Fed. Comm'n's Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)) (emphasis added).

143. *Ferguson v. Skrupa*, 372 U.S. 726, 733 (1963) (Harlan, J., concurring).

to a constitutionally permissible objective.”¹⁴⁴ The state will likely argue that the statute is necessary to protect public health, as fully educated funeral service practitioners can offer consumers advice and information about embalming. However, just as in *St. Joseph Abbey* and *Craigmiles* the plaintiffs did not handle dead bodies and thus did not need extensive education in the handling of dead bodies, here the death doula does not embalm bodies and thus does not need education in embalming. Further, even if there are some aspects of the funeral director program that the state believes are necessary to protect public health and consumers, there is a less restrictive means of accomplishing that goal. Look no further than North Carolina, whose Dual-Track Licensure scheme would allow a non-embalming death care professional to attain a license with half the schooling and no embalming experience.¹⁴⁵ Just as the educational requirements in *St. Joseph Abbey* and *Craigmiles* were too stringent to be justified by the stated purpose, here, the educational requirements are too stringent to be justified by protecting public health, especially considering the less burdensome path taken by other states. Further, unlike *Powers*, where the statute allowed some unlicensed activities that did not implicate public health and thus avoided implicating Due Process Clause concerns, here, statutes like New Jersey’s are so broad as to allow very few exceptions to licensing requirements.¹⁴⁶

Considering the lack of legitimate state interests to justify these statutes, a court would very likely find the licensing statute unconstitutional. It is not for the court to substitute its economic theories for the legislature’s in some *Lochner*-ian thrust.¹⁴⁷ Rather, it is for the court to determine whether the legislature has acted permissibly in the scope of the Constitution’s affirmative protections, like the Due Process Clause and the Equal Protection Clause.¹⁴⁸ As the courts in *Craigmiles* and *St. Joseph Abbey* saw the state’s purpose as economic protectionism when there was a lack of other legitimate purposes,¹⁴⁹ here, a court is very likely to see economic protectionism as the only justification for requiring the death doula to receive extensive embalming education. Applying the holding of *St. Joseph*

144. *Id.* (citing *Williamson*, 348 U.S. at 491).

145. *See supra* Part I-C.

146. *See* N.J. STAT. ANN. § 45:7-34(c) (West 2022) (defining “funeral directing” broadly to include activities that would normally be considered event planning, not funeral directing).

147. *See Lochner era*, LEGAL INFORMATION INSTITUTE https://www.law.cornell.edu/wex/lochner_era (last visited Sept. 12, 2022).

148. *See St. Joseph Abbey*, 712 F.3d at 227 (finding no rational relationship between public safety and casket regulation).

149. *Id.* at 226; *Craigmiles*, 312 F.3d at 224 (“Courts have repeatedly recognized that protecting a discrete interest group from economic protection is not a legitimate governmental purpose.”).

Abbey, economic protectionism with no legitimate basis is not a legitimate state interest to the extent it harms consumers. Here, consumers are harmed because the statute prevents them from accessing alternative death care services such as those offered by the death doula, including lower cost home funerals. Therefore, the death doula will likely prevail, and the statute will be struck down as unconstitutional.

Rather than risk their statutes being declared unconstitutional following the *St. Joseph Abbey* decision, Single-Track Licensure states should act now to amend their statutes to ensure that their licensing schemes do not violate their residents' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

B. Single-Track Licensure Schemes Do Not Protect the Public Interest

Putting aside constitutional concerns, Single-Track Licensure schemes simply do not serve the public interest. The explicit justification for most funeral director licensure statutes is protecting the public interest,¹⁵⁰ so states should seriously consider the way Single-Track Licensure fails their citizens.

1. Economic Concerns

The stringent requirements of funeral-related statutes have significant practical implications for consumers' pocketbooks. For example, Arizona recently considered repealing its requirement that all funeral homes have embalming preparation rooms.¹⁵¹ An academic study estimated that requiring all funeral homes to have embalming preparation rooms cost Arizona's consumers \$16.8 million annually, or \$554 per traditional funeral and \$203 per cremation.¹⁵² This was a 9 percent increase and a 14 percent increase over the average cost of funerals and cremations respectively.¹⁵³ By repealing this requirement, Arizona would reduce the cost of each funeral by hundreds of dollars.

In the case of Single-Track Licensure, there are several costs to consider. First, there is the cost of attaining an unnecessary license. Turning back to the example of our death doula, imagine that she

150. "The General Assembly declares that the practice of funeral service affects the public health, safety, and welfare and is subject to regulation and control in the public interest. The public interest requires that only qualified persons be permitted to practice funeral service in North Carolina and that the profession merit the confidence of the public. This Article shall be liberally construed to accomplish these ends." N.C. GEN. STAT. § 90-210.18A (2005).

151. David E. Harrington & Jaret Treber, *Numbers Matter: Estimating the Cost of State Funeral Regulations*, 8 WAKE FOREST J.L. & POL'Y 29, 30–31 (2018).

152. *Id.* at 52–53.

153. *Id.*

decides she wants to keep her business open and thus to complete the requirements for licensing. Of course, school costs money, so she must pay for her classes. She must also forego her opportunity to earn as much income as she could if she could dedicate her time to working. She may be able to make some money during her traineeship, but that pay will likely be lower than the pay she receives for her work as a death doula. Finally, she must pay for licensing costs, such as the cost of sitting for her board examinations and the cost of applying for and maintaining the license. As discussed above, much of this education and training will be for services she has no intention of offering. Clearly, Single-Track Licensure creates significant costs to prospective death care professionals.

If the death doula lived in North Carolina, the Dual-Track scheme would offer her a cost-saving option. Instead of seeking the full Funeral Service License, she could pursue the Funeral Director License, which has significantly less stringent requirements. Let's consider what this looks like in dollars. If she chooses to go to Fayetteville Technical Community College, the college will charge her seventy-six dollars per credit hour.¹⁵⁴ The Funeral Director program requires thirty-six credits to the Funeral Service program's sixty-eight credits.¹⁵⁵ That alone will save the death doula \$2,432, plus potentially hundreds more dollars in fees and books. Further, the Funeral Director program is only three semesters, whereas the Funeral Service program is two years long, saving the death doula an entire year of lost income.¹⁵⁶ Clearly, Dual-Track Licensure offers significant financial benefits for those who actually have to attain a license under the statute.

For consumers, there are a myriad of costs that could conceivably be reduced by allowing alternatives to traditional funeral care. For example, the median cost of a full-service burial with a viewing and vault was \$7,848 in 2021.¹⁵⁷ Using a traditional funeral home costs consumers a staggering amount of money. Affordable alternatives such as home burials or green burials could save consumers thousands of dollars by eliminating the need to pay for unwanted funeral services. For example, if a family chooses to do a home funeral and burial, the costs would likely be limited to purchasing or making

154. *All About Tuition*, FAYETTEVILLE TECH. CMTY. COLL., <https://www.faytechcc.edu/campus-offices/business-finance-office/> (last visited June 8, 2022).

155. *See* FAYETTEVILLE TECH. CMTY. COLL, PROGRAM FACT SHEET (2020).

156. *Id.*

157. Press Release, National Funeral Directors Association, 2021 NFDA General Price List Study Shows Funeral Costs Not Rising as Fast as Inflation (Nov. 4, 2021), <https://nfda.org/news/media-center/nfda-news-releases/id/6182/2021-nfda-general-price-list-study-shows-funeral-costs-not-rising-as-fast-as-rate-of-inflation>.

a coffin and the cost of preparing the home for the service.¹⁵⁸ The family could forego embalming or even involving a funeral home through the services of death doulas, who often assist families in washing and preparing the body for burial. Although the availability of such services would certainly benefit consumers, both Single-Track and Dual-Track Licensure states typically require a funeral director license to offer services like arranging funerals with no exception for home burials.¹⁵⁹ If statutes were more flexible, death care professionals like death doulas could assist families in alternative burial options that would save consumers thousands of dollars.

2. Hurdles to Employment and Their Concomitant Effect on the Availability of Death Care Services

As discussed throughout this Comment, funeral director licensing statutes tend to require extensive education and training, erecting substantial hurdles for those who seek licensure.¹⁶⁰ In fact, Single-Track Licensure has a negative impact on both the availability of funeral service professionals and graduation rates from mortuary school.¹⁶¹ The requirement of embalming training deters many would-be morticians from seeking or completing educational programs.¹⁶² Many of those interested in funeral service are understandably unnerved by embalming and never wish to practice embalming. Additionally, requiring embalming as part of funeral director education has been shown to have a negative impact on the numbers of women and people of color in funeral service, which not only disadvantages those individuals but also prevents consumers from having meaningful options for who performs their loved ones' death care.¹⁶³

Notably, certain religions such as Orthodox Judaism and Islam consider embalming to be desecration of a corpse and, therefore, a sin.¹⁶⁴ Requiring embalming as part of funeral director education removes options for those with sincerely held religious beliefs that oppose embalming.

158. *Id.*

159. *See supra* notes 68–78 and accompanying text.

160. *See* Tanya Marsh, *Regulated to Death: Occupational Licensing and the Demise of the U.S. Funeral Services Industry*, 8 WAKE FOREST J. L. & POL'Y 5, 18–20 (2018) (discussing the connection between licensure requirements and challenges to entering the death care industry).

161. *Id.*

162. *Id.*

163. *Id.* at 20.

164. *See How Muslims Wash, Bury Their Dead*, WFAE 90.7 (Sept. 30, 2013, 5:18 PM), <https://www.wfae.org/local-news/2013-09-30/how-muslims-wash-bury-their-dead> (discussing an avoidance of embalming in Jewish and Muslim communities).

Troublingly, there is already a crisis of access to funeral care services, which has only been exacerbated by COVID-19.¹⁶⁵ The American Board of Funeral Service Education says in the Frequently Asked Questions section on its website: “On a national basis there are generally more jobs available than there are licensed funeral directors to fill them.”¹⁶⁶ When Virginia considered amending its statute to allow a non-embalming license track, the government affairs director for Service Corporation International (“SCI”) (the largest provider of funeral services in the country) wrote:

[The] shortage [of funeral directors] is a result of states mandating embalming as part of the licensing process [A]n internal SCI study conducted in 2006 found that by the year 2012, staffing each funeral home location with 1.5 full time equivalent licensees would not be possible It is not uncommon to experience a shortfall in staffing, with the inability to fill these positions quickly. The average time to fill a vacancy is from three to six months, which impacts not only the funeral home, but also the consumer.¹⁶⁷

Exacerbating this problem, COVID-19 took the lives of hundreds of thousands of Americans, including many morticians.¹⁶⁸ The combination of morticians dying unexpectedly due to COVID-19 and embalming’s depressing effect on educational outcomes and licensure suggests that restrictive licensure schemes will lead to reduced access to funeral care services—particularly in poor, rural, and minority communities, where such services are already hard to come by.¹⁶⁹

165. See *The Coronavirus Claims Black Morticians, Leaving Holes in Communities*, NPR (Sept. 12, 2021, 7:01 AM), <https://www.npr.org/2021/09/12/1035999075/coronavirus-covid-black-morticians-funerals> (discussing a shortage of personal protective equipment and a demand exceeding the AIDS epidemic in funeral service).

166. *Frequently Asked Questions*, AM. BD. OF FUNERAL SERV. EDUC., <https://www.abfse.org/html/faq.html> (last visited June 11, 2022).

167. Letter from Blair Nelson, Dir., E. Region of Gov’t Affs., Serv. Corp. Int’l Mgmt., to Elizabeth A. Carter, Ph.D., Exec. Dir. of Va. Bd. of Health Pros. (May 28, 2015).

168. See Rachel Chason, *Even on his Birthday, a Black Funeral Director Can’t Escape Covid Deaths*, WASH. POST (March 8, 2022, 7:00 AM), <https://www.washingtonpost.com/dc-md-va/2022/03/08/black-funeral-directors-covid/>.

169. See Patrice Taddonio, *‘Playing Russian Roulette with Our Own Lives’: At Black-Owned Funeral Homes in New Orleans, Covid Takes a Harsh Toll*, PBS FRONTLINE (Mar. 22, 2021), <https://www.pbs.org/wgbh/frontline/article/documentary-black-owned-funeral-homes-new-orleans-covid-harsh-toll/> (documenting the disproportionate impact of COVID-19 on communities of color).

C. The Need for Legislative Reform

Clearly, Single-Track Licensure creates substantial problems both for death care professionals and the public. The funeral industry will predictably fight tooth and nail to keep its monopoly on death care. Considering the regulatory capture of funeral service boards in many states, the administrative bodies tasked with overseeing the funeral industry have little incentive to change policies that protect funeral directors' monopoly over death care services. State legislatures must change course and prohibit a self-regulating industry from maintaining a monopoly that harms the public by amending funeral director licensing statutes to create more flexibility for death care professionals. Such changes would be in the best interest of the public. Further, if states do not act, it is highly likely that a constitutional challenge could lead to the Supreme Court striking down such unnecessary and harmful licensing requirements.

Considering constitutional concerns and the failure to protect the public interest, the question that remains is what states should do if they want to fix their funeral director licensing statutes. Luckily, there are states that can serve as good examples. For instance, North Carolina's funeral director licensing statute provides three paths for death care practitioners: full funeral service, including embalming; funeral directing without embalming; and embalming without funeral directing.¹⁷⁰ These paths allow much more flexibility for death care practitioners such as death doulas, who do not provide embalming services. Dual-Track Licensure schemes are better for the public, would-be death care professionals, and the price of funerals. The only people who this would hurt are the entrenched majority—funeral service professionals who are already licensed under Single-Track Licensure schemes and who would face increased competition.

In making changes to funeral director licensing statutes, states should carefully consider the definitions used in the statute. While overly broad definitions are a drafter's shortcut to ensuring a statute applies to unforeseeable scenarios, in the case of funeral director licensing statutes, overly broad definitions jeopardize the public's access to affordable and alternative death care services. For example, the New Jersey statute explored above defines funeral directing so broadly as to sweep in a broad array of activities, many of which do not implicate the same public health and safety concerns as embalming.¹⁷¹ By requiring a license to perform "funeral directing" and then broadly defining that term to encompass nearly any service

170. See N.C. GEN. STAT. § 90-210.25 (2005).

171. See N.J. STAT. ANN. § 45:7-34(c) (West 2022) ("Funeral directing" also means the engaging in or making, or holding one's self out as being engaged in or making, funeral arrangements, including at need funeral arrangements or preneed funeral arrangements; or the offering or holding one's self out as offering the opportunity to purchase or enroll in a prepaid funeral agreement.").

related to death, states increase the number of people who must seek licensure. A more carefully drafted statute would instead ensure that licensing requirements only apply where necessary to protect the public, excluding those activities that can be performed without extensive education.

However, even Dual-Track Licensure statutes limit the availability of alternative death care services. Although Dual-Track Licensure offers more flexibility for practitioners, a license is typically still required to offer services closely related to death.¹⁷² Funeral director licensing statutes are intended to protect the public interest.¹⁷³ A more carefully drafted statute would ensure that licensing requirements only apply where necessary to protect the public—excluding those activities that can be performed without extensive education.

It is thus worth considering which death care services pose public health concerns. A dead body can be an infectious hazard if the body contains certain types of diseases, but the microorganisms that cause decay do not pose a risk of infection.¹⁷⁴ For both living and dead bodies, bloodborne viruses can spread from “direct contact with nonintact skin, percutaneous injury from bone fragments and needles, and mucous membrane exposure from splashes of blood or body fluid to the eyes, nose, or mouth.”¹⁷⁵ When touching dead bodies, gastrointestinal organisms pose a greater risk than bloodborne viruses.¹⁷⁶ These organisms can spread through direct contact with feces or dirty clothes, but gastrointestinal organisms do not survive long past death.¹⁷⁷ To reduce the risk of any infectious hazard, experts recommend wearing gloves, washing hands, and staying up-to-date on vaccinations.¹⁷⁸

Traditional funerals typically involve embalming, an invasive and complicated process that exposes bodily fluids that could pose a risk of disease if not handled properly.¹⁷⁹ Therefore, requiring proper education and training for embalmers certainly protects public

172. See *supra* notes 74–77 and accompanying text (explaining the activities that are likely to trigger licensure requirements, including arranging home funerals or burials).

173. See *supra* notes 42–43 and accompanying text.

174. Oliver Morgan, *Infectious Disease Risks from Dead Bodies Following Natural Disasters*, 15 PAN. AM. J. PUB. HEALTH 307, 308 (2004) (“Infectious hazards for individuals who routinely handle cadavers include tuberculosis, group A streptococcal infection, gastroenteritis, transmissible spongiform encephalopathies, hepatitis B, hepatitis C, HIV infection, and possibly meningitis and septicemia . . .”).

175. *Id.* at 309.

176. *Id.*

177. *Id.*

178. *Id.*

179. See *id.*

health. Differently, alternative death care options typically do not involve processes that pose a risk to public health. For example, a home funeral usually involves washing the body with soap and water to prepare for burial.¹⁸⁰ Even if the body being prepared did carry pathogens, those pathogens are unlikely to spread unless there was contact with bodily fluid or an open wound, the risk of which can be further reduced by simple precautions such as hand washing.¹⁸¹ Similarly, green burials involve burying non-embalmed and non-cremated bodies in biodegradable materials.¹⁸²

Alternative death care options do not present significant public health concerns. There is no scientific data to support requiring extensive training or education in biology to wash a dead body with water in the family home, as humans have for centuries.¹⁸³ Alternative death care services also pose significantly fewer costs to consumers and can increase access to death care services. To ensure that these alternative services are available, licensing requirements should be relaxed, and statutes should be carefully drafted to give consumers meaningful death care choices. Some consumers will still choose traditional funerals in traditional funeral homes with embalming by licensed funeral directors. Other consumers may choose to hire a death doula to help prepare a loved one for a home funeral or green burial. In either case, the statute will have protected public health and avoided disadvantaging the public merely to protect one industry's entrenched economic monopoly over vital services.

Consider the "Casket Cartel" cases one last time. Why does someone need an associate degree and a license to sell caskets? Is that really in the public's interest? Or does such a requirement merely ensure that a self-regulating industry never faces competition?

CONCLUSION

All of us will die. Everyone we love will die. We will all go to funerals, and many of us will have to plan funerals and purchase caskets or urns for people we love. The way that death interacts with every American's life means that regulation of the funeral industry is vitally important and impactful. Laws that fail to preserve the public interest or that create additional costs for consumers harm all of us, and that harm comes at a time when people are most vulnerable and most in need of protection. Thus, states with Single-Track Licensure

180. See Maggie Jones, *The Movement to Bring Death Closer*, N.Y. TIMES (Dec. 19, 2019), <https://web.archive.org/web/20220616230950/https://www.nytimes.com/2019/12/19/magazine/home-funeral.html>.

181. See *id.*

182. *Id.*

183. *Id.*

for funeral directors should carefully consider whether those statutes are serving the public. Further, all states should consider amending their statutes to increase access to alternative death care options, such as home burials and death doulas. Although the self-regulating funeral services industry will surely resist any changes, the public is in desperate need of cheaper and more accessible death care services. Trends suggest that access to death care will become increasingly difficult as fewer people graduate from mortuary science programs.¹⁸⁴ Statutes that make it more difficult for would-be death care professionals to serve their community will exacerbate this problem and lead to many Americans struggling to find quality care for their deceased loved ones. It is time to change. After all, death will have his day.

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184. See George P. Connick, *The Impact of Declining Mortuary Science Enrollment* THE DIRECTOR 9, 9–10 (2019) <https://www.abfse.org/docs/Connick-Director.edu.pdf> (discussing declining enrollment in mortuary science programs as an indicator of a declining funeral director population).