Summary of Remarks Regarding Online Casket Retailers for FTC's "Competition on the Internet" Workshop

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Thank you for the opportunity to participate in this important workshop on e-commerce. The Institute for Justice litigates on behalf of entrepreneurs whose right to earn an honest living has been stifled by arbitrary or irrational government regulations. Those regulations are often protectionist measures, the sole purpose of which is to benefit particular special interest groups by shielding them from fair competition. A perfect example of this is the ten states that forbid anyone who is not a licensed funeral director from selling caskets. As described below, such laws have significant anticompetitive effects on the retail casket market, much to the detriment of consumers. This is particularly troubling given the fact that for many consumers, a casket will be the second or third single most expensive item they ever purchase in their entire lives.

The Institute for Justice currently represents two entrepreneurs, Kim Powers and Dennis Bridges, together with the company they formed, Memorial Concepts Online, in a federal court challenge to Oklahoma's Funeral Services Licensing Act ("FSLA"). The FSLA requires anyone who wishes to sell caskets or other funeral merchandise to be a licensed funeral director. Okla. Stat. tit. 59 [hereafter "FSLA"], § 396.2(1)(d). The requirements for obtaining a funeral director's license in Oklahoma are substantial: The applicant must have completed 60 hours of undergraduate study, must hold a degree from an accredited school of mortuary science, and must have completed a one-year apprenticeship during which he or she must embalm at least 25 bodies. FSLA §

396.11(B). The applicant must also take two licensing examinations and pay a registration fee. FSLA § 396.3(C).

Besides its education requirements, the FSLA further requires any business that sells caskets to be a licensed "funeral establishment." FSLA § 396.12(A). In order to be a licensed "funeral establishment," the business is required to maintain a room for preparing human remains for burial and a casket selection room with no fewer than five adult caskets, to provide "adequate areas for viewing dead human remains," and to employ a licensed full-time embalmer. Okla. Admin. Code § 235-10-2.

There are nine states besides Oklahoma that impose similar restrictions on the sale of caskets: Maine (32 M.R.S.A. § 1400 et seq.), Vermont (26 V.S.A. § 1211 et seq.), Delaware (Del. Code § 3101 et seq.), Virginia (Va. Stat. § 54.1-2800 et seq.), South Carolina (S.C. Stat. § 40-19-20), Alabama (Ala. Code § 34-13-1 et seq.), Louisiana (La. R.S. 37:831 et seq.), Idaho (Id. Stat. 54-1102 et seq.), and perhaps Minnesota (Minn. Stat. § 149A.02). This does not include three states – Tennessee, Mississippi, and Georgia – where federal courts have struck down casket sales restrictions on the grounds that they have no rational basis. The Tennessee case, *Craigmiles v. Giles*, 110 F. Supp.2d 658, 664 (E.D. Tenn. 2000), was litigated and won by the Institute for Justice, and it is currently on appeal to the U.S. Court of Appeals for the Sixth Circuit.

Oklahoma's casket sales restrictions restrict consumer choice and thwart beneficial competition in at least three ways. First, by raising barriers to entry into the retail casket market, Oklahoma imposes substantial costs on those who wish to sell caskets there. Those costs can only be recouped by charging higher prices for merchandise, a cost that is passed directly on to the consumer. Second, Oklahoma's administrative regulations require caskets to be sold only from fully equipped, operational funeral homes, with all of the attendant overhead expenses. Again, those expenses can only be recouped by charging higher prices to consumers. Third, by arbitrarily restricting entry into the retail casket business, Oklahoma limits the range of consumer choices and effectively ensures that many consumers will have no choice but to deal with a state-created and state-regulated cartel. Indeed, of the 588 cities and towns in the State, 359 have no funeral homes and 124 have only one funeral home. This severely limits the possibility that many Oklahomans will be able to comparison shop for caskets.

The ability to shop for caskets over the Internet would seem a natural solution to the problem of restricted consumer choice in Oklahoma, but the State's licensing scheme presents at least two potential barriers to the ability of consumers to shop online. First, as noted above, Oklahoma requires that caskets be sold from an actual "brick and mortar" business that is not only licensed as a "funeral establishment" but that maintains an on-site inventory of caskets, as well as embalming, selection, and viewing rooms. Those requirements obviously make it impossible to operate a retail casket business according to the standard Internet model, with all of the cost savings normally associated with that model.

Second, although Oklahoma currently disavows any intent to enforce the FSLA's caskets sales restrictions to casket retailers outside the state, nothing in the text of the statute compels such restraint, and it appears to be only the forbearance of the State Board of Embalmers and Funeral Directors that has resulted in the current policy of non-interference. Obviously, to the extent out-of-state casket retailers began to cut into the volume of casket sales by in-state funeral directors, it would be reasonable to expect them to exert their influence with the State Board to expand its enforcement activities to include unlicensed out-of-state retailers. Of course, any such enforcement would implicate the so-called "dormant" commerce clause of the U.S. Constitution, and, if challenged, the State of Oklahoma would have to show that the in-state interests putatively advanced by its casket sales restrictions were sufficient to justify the burden imposed on interstate commerce as a result. *See, e.g.*, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). While it seems doubtful that Oklahoma could meet this test, the mere fear of facing a criminal enforcement action in Oklahoma might well be enough to discourage out-of-state retailers from selling caskets there.

Laws that are passed not for the public good, but simply to benefit selected special interest groups from fair competition are certainly objectionable on those grounds alone. But they often have the effect of stifling competition, thwarting entrepreneurship, and harming consumers in ways that could not even have been contemplated at the time they were passed. The negative effect of Oklahoma's Funeral Services Licensing Act on Internet casket sales is a perfect example of how the law of unintended consequences can seriously impair new (and cheaper and more convenient) avenues of commerce in the 21st century.