

THE AFFORDABLE (DEATH) CARE ACT: RADICAL REFORMATION OF FEDERAL FUNERAL REGULATION TO ADDRESS FUNERAL POVERTY

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INTRODUCTION

Funeral poverty is a persistent problem in the United States, and existing programs and regulations do not adequately address it. Only providing direct funds to cover funeral expenses merely perpetuates the current economic dynamics of the industry. In this Essay, we propose that a better approach is to radically reform funeral regulations to reduce barriers to entry into funeral professions, transition into greener and more sustainable practices, and ultimately provide more and better options to American consumers. Our primary suggestion is to reposition coverage of death care under the umbrella of healthcare as regulated by the Department of Health

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and Human Services through the Affordable Care Act. Currently, the primary federal regulation of death care is the Federal Trade Commission's Funeral Rule. Although this rule may protect consumers from unfair trade practices, so far it has not lowered or prevented increases in the ultimate price paid by consumers, and it is not designed to address the professional, technological, and environmental challenges that have arisen since its enactment in 1982. In this Essay, we propose a radical shift in regulation by transferring federal oversight of the funeral industry from the FTC to the HHS through the expansion of the Affordable Care Act.

I. AMERICANS STRUGGLE TO COVER THE COST OF FUNERALS

Funerals serve as a significant cultural and social ritual in the United States, providing a means for families and communities to honor, celebrate, and mourn the loss of the lives of their deceased loved ones.¹ Indeed, "funeral practices can potentially embody meaningful and therapeutic practices for people recently bereaved, and . . . these practices can simultaneously be targeted by the exploitative nature of an industrialized and capitalistic death system."² This is illustrated by the financial burden associated with funeral expenses that have increasingly become a concern for many Americans.³ Over the past few decades, the costs of funerals in the United States have risen steadily, outpacing inflation and placing a considerable financial strain on families and other survivors.⁴ The

1. See Antonius C.G.M. Robben, *Death and Anthropology: An Introduction*, in *DEATH, MOURNING, AND BURIAL: A CROSS-CULTURAL READER* 1, 9 (Antonius C.G.M. Robben ed., 2004) ("[D]eath evokes moral and social obligations expressed in culturally determined funeral practices."); Dixie Dennis, *Funerals*, in *THE A-Z OF DEATH AND DYING: SOCIAL, MEDICAL, AND CULTURAL ASPECTS* 217–20 (Michael John Brennan ed., 2014).

2. Mark Shelvock et al., *Beyond the Corporatization of Death Systems: Towards Green Death Practices*, 30 *ILLNESS, CRISIS & LOSS* 640, 645 (2021).

3. See Victoria J. Haneman, *Funeral Poverty*, 55 *U. RICH. L. REV.* 387, 387 (2021) ("Death is an expensive proposition. The economics of life do not end with death, and putting the deceased to rest carries (often unexpected) funerary expenses for cremations, funerals, burials, and/or memorials."). However, this burden, while increasing, is not new. See JESSICA MITFORD, *THE AMERICAN WAY OF DEATH* 15 (1963) (noting that even sixty years ago "[m]any a badly stung survivor, faced with the aftermath of some relative's funeral, has ruefully concluded that the victory has been won hands down by a funeral establishment—in disastrously unequal battle").

4. A 2017 study by the Bureau of Labor Statistics found that over a period of thirty years, the price of funerals rose nearly twice as fast as consumer prices for all items. *The Rising Cost of Dying, 1986–2017*, U.S. BUREAU LAB. STAT. (Oct. 31, 2017), <https://perma.cc/J983-DY33>. This study found that funeral expenses rose 227.1% while overall consumer prices rose only 123.4%. *Id.* However, a more recent report by the National Funeral Directors Association found that increases in the median cost of both funerals with casket and burial (5.8%) and funerals

most recent survey report from the National Funeral Directors Association (NFDA) indicates that in 2023, the median cost of a funeral with viewing and burial was \$8,300, and the median cost with viewing and cremation was \$6,280.⁵ However, these amounts do not include the additional costs of interment, monuments, grave markers, or cash advance items.⁶ The same survey indicated that the “nondeclinable basic services fee”—a now-standard fee that came into existence only after the passing of the Funeral Rule—is the second highest cost item with a median cost of \$2,459, just behind the “metal burial casket,” with a median cost of \$2,500.⁷

Unlike typical economics, rising funeral costs do not drive consumers away because, as Professor Haneman notes, the funeral industry is “a marketplace of inevitable consumption.”⁸ Additionally, regardless of the rituals followed or the method of disposition chosen, nine states mandate the involvement (and therefore the payment) of a funeral director when caring for a dead body.⁹ Thus, a death and its aftermath can spring unexpected and unwanted costs on surviving family members and loved ones.

Americans often find themselves ill-equipped to handle unexpected expenses due to a variety of financial challenges, ranging from high inflation and rising costs of living to inadequate savings and increasing debt.¹⁰ These factors can converge to create a precarious financial situation for many individuals and families, leaving them vulnerable to financial emergencies and unexpected expenses. Less than half of U.S. adults would be able to pay for an

with cremation (8.1%) were less than the overall rate of inflation (13.6%) during the two-year period from 2021 to 2023. *2023 NFDA General Price List Study Shows Inflation Increasing Faster than the Cost of a Funeral*, NFDA NEWS RELEASES (Dec. 8, 2023) [hereinafter *2023 NFDA GPL Study*], <https://perma.cc/D2CY-MGYH>.

5. *2023 NFDA GPL Study*, *supra* note 4.

6. *Id.*

7. *Id.*

8. Victoria J. Haneman, *Prepaid Death*, 59 HARV. J. ON LEGIS. 329, 330 (2022). Put in other words, “[y]ou might not have to deal with the dead, but you will have to deal with their death.” GARY LADERMAN, *REST IN PEACE: A CULTURAL HISTORY OF DEATH AND THE FUNERAL HOME IN TWENTIETH-CENTURY AMERICA* 211 (2003) (quoting Interview with Thomas Lynch, Lynch & Sons Funeral Home, in Milford, Mich. (Oct. 13, 1990)).

9. The states in question are Connecticut, Illinois, Indiana, Iowa, Louisiana, Nebraska, New Jersey, New York, and Michigan. Brandon Heffinger, *Only Nine States Require the Use of Funeral Directors*, FUNERAL LAW BLOG (Mar. 3, 2014), <https://perma.cc/Z72L-DBKX>; *see also* TANYA MARSH, *THE LAW OF HUMAN REMAINS* 71 (2016) (discussing the status of “casket laws” requiring the involvement of funeral directors).

10. Recent polling suggests that 36% of American adults have more credit card debt than emergency savings. Lane Gillespie, *Bankrate’s 2024 Annual Emergency Savings Report*, BANKRATE (June 20, 2024), <https://perma.cc/3ZRL-XQND>.

unexpected \$1,000 expense without using a credit card or borrowing money.¹¹

This lack of individual safety nets means that many Americans may be driven into debt to cover the funeral expenses of their loved ones. When they are unable to foot the bill themselves, many people turn to crowdfunding sites such as GoFundMe.¹² This has led to notable instances of fake campaigns and misuse of donated funds,¹³ and around one-third of legitimate funeral campaigns fail to reach their stated funding goals.¹⁴ Moreover, the success of narrative-driven crowdfunding campaigns depends largely on the perceived deservingness of those asking for funding, while perceptions of deservingness are in turn shaped by gendered, classed, and racialized biases.¹⁵ A family's capacity to pay for a dignified funeral for their deceased loved one should not be dependent on their ability to spin a compelling story.

II. CURRENT FUNERAL INDUSTRY REGULATIONS FAIL TO ADDRESS FUNERAL POVERTY

“The way the funeral industry is regulated no longer matches the funeral industry we have.”¹⁶ In the United States, most rules and regulations governing the funeral and death care industry vary from state to state, leading to disparities in the availability of certain goods and services.¹⁷ These regulatory limitations can affect Americans' access to the full array of death care goods and services. We believe radical reform of the regulatory landscape, from the federal to the state to the municipal level, is necessary to meet the evolving wants and needs of Americans regarding their death care choices.

Entering the funeral industry involves various costs, including education and training, licensing and certification, facility expenses, equipment and supplies, as well as ongoing operational costs.¹⁸ All

11. Megan Leonhardt, *More Americans Can Now Cover a \$1,000 Emergency, but It's Still Less than Half*, FORTUNE (Jan. 19, 2022), <https://perma.cc/3SUQ-74X5>.

12. Laura M. Holson, *As Funeral Crowdfunding Grows, So Do the Risks*, N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/business/funerals-crowdsourcing-crowdfunding-scams.html>. There are even crowdfunding sites devoted specifically to funding funerals. See Haneman, *supra* note 3, at 401.

13. Holson, *supra* note 12.

14. *Id.*

15. Haneman, *supra* note 3, at 402.

16. Cremation Association of North America, *The Future of Death Care in America 2024 Symposium - Welcome and Keynote Address by Caitlin Doughty*, YOUTUBE (Mar. 1, 2024), <https://perma.cc/5T5T-84CB>.

17. For an overview of the various state laws affecting the operation of home funerals, see Lee Webster, *Legal State Requirements for Home Funerals*, N.H. FUNERAL RES., EDUC. & ADVOC. (2020), <https://perma.cc/L2WY-FNEX>.

18. Henry Sheykin, *Core Startup Costs to Launch a Funeral Home*, FINMODELSLAB (Sept. 12, 2024), <https://perma.cc/8ARS-2Y6X>.

states except Colorado require licensure for funeral directors, embalmers, and crematory operators.¹⁹ The educational and licensing costs pose a significant barrier to entry for individuals seeking to enter the death care profession, thereby limiting the pool of qualified providers available to consumers.²⁰ Because of this shortage, any proposed reforms of death care regulation should be modeled in a way that encourages entry to the profession, either by lowering the barriers to entry or by providing assistance to qualified individuals seeking licensure. One proposal for lessening the barrier for entry involves eliminating “ready-to-embalm laws.”²¹ By requiring that licensed funeral directors also be licensed as embalmers, these laws protract education and training, deter would-be funeral service providers who do not wish to embalm or provide embalming services, and justify prep room requirements that substantially increase facility expenses, even as the popularity of embalming decreases nationwide.²²

A. *The Funeral Rule*

On the federal level, the Funeral Rule²³ was implemented by the Federal Trade Commission (FTC) in 1984 to address concerns about deceptive practices and lack of transparency in the funeral industry.²⁴

19. See INT’L CONF. OF FUNERAL SERV. EXAMINING BODS, REGULATIONS IN FUNERAL SERVICE LICENSING 1, 6 (2023) [hereinafter REGULATIONS IN FUNERAL SERVICE LICENSING], <https://perma.cc/43ZQ-4QGV>.

20. See Hannah LaClaire, *Death Becomes Her: The Future of Funeral Home Work Is Female*, PORTLAND PRESS HERALD (Dec. 2, 2023), <https://perma.cc/C763-VRV3> (noting that there is a “critical shortage of funeral directors,” because, for example, licensure in one state requires an associate’s degree, 2,000 hours of apprenticeship, and multiple costly exams).

21. The wisdom and practicality of “ready-to-embalm” laws—so named in David E. Harrington, *Markets: Preserving Funeral Markets with Ready-to-Embalm Laws*, 21 J. ECON. PERSPS. 201, 202 (2007)—has been challenged by several scholars. See David Foos, Comment, *State Ready-to-Embalm Laws and the Modern Funeral Market: The Need for Change and Suggested Alternatives*, MICH. ST. L. REV. 1375, 1376–77 (2012); Alison Cathles et al., *The Gender Gap in Funeral Directors: Burying Women with Ready-to-Embalm Laws?*, 48 BRIT. J. INDUS. RELS. 688, 701–02 (2010) (criticizing ready-to-embalm laws for negative impacts on funeral director gender demographics); David E. Harrington, *The High Cost of Protecting (Morbid) Jobs*, 39 REGUL. 26, 31 (2016); Tanya D. Marsh, *Regulated to Death: Occupational Licensing and the Demise of the U.S. Funeral Services Industry*, 8 WAKE FOREST J.L. & POL’Y 5, 19 (2018).

22. See Oliver Whang, *The Fading Art of Preserving the Dead*, N.Y. TIMES (Nov. 1, 2022), <https://www.nytimes.com/2022/11/01/science/embalming-funerals-death.html>.

23. 16 C.F.R. § 453 (2023).

24. See *Your Rights in the Funeral Industry*, FUNERAL CONSUMERS ALL. GA. (2024), <https://perma.cc/4WUE-XEBU>; Funeral Rule Statement of Basis and Regulatory Analysis, 47 Fed. Reg. 42260, 42260 (Sept. 24, 1982) (to be codified at 16 C.F.R. pt. 453).

It requires funeral providers to disclose pricing information and other relevant details to consumers, theoretically allowing them to make informed decisions about funeral arrangements.²⁵ The Funeral Rule was enacted under the assumption that consumers often faced pressure to purchase unnecessary goods and services at inflated prices during a stressful and emotional time.²⁶ The Funeral Rule aimed to empower consumers by providing them access to the information needed to make informed decisions about their funeral purchases.²⁷ The Rule requires any “funeral provider,”²⁸ to provide inquiring prospective customers with a casket price list, and outer burial price list, and a general price list.²⁹ These price lists must delineate specific goods and services, allowing customers to select only those they want without being forced into a package price.³⁰ Funeral providers are also required to share this pricing information over the phone³¹ and to disclose that embalming is not typically required by law.³² Additionally, funeral providers may not refuse to use a casket the consumer purchased elsewhere.³³

25. See *Your Rights in the Funeral Industry*, *supra* note 24; see also *The FTC’s Funeral Rule: Helping Consumers Make Informed Decisions During Difficult Times*, FED. TRADE COMM’N (2024), <https://perma.cc/T6VR-BDU9>.

26. See Steven W. Kopp & Elyria Kemp, *Consumer Awareness of the Legal Obligations of Funeral Providers*, 41 J. CONSUMER AFFS. 326, 327 (2007).

27. See Funeral Rule Statement of Basis and Regulatory Analysis, *supra* note 24.

28. Defined within the regulation as “any person, partnership or corporation that sells or offers to sell funeral goods and funeral services to the public.” 16 C.F.R. § 453.1(i).

29. *Id.* § 453.2(b)(2)–(4).

30. *Id.*

31. *Id.* § 453.2(b)(1).

32. *Id.* § 453.3(a)(1)(ii). The reason for this requirement is that consumers are often under the impression that embalming is a generally requisite procedure—an impression of which funeral directors often do not actively disabuse their customers. Note also that the contemporary funeral industry was effectively built upon the advent of arterial embalming (and the sale of embalming chemicals) for funerary purposes. See DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* 92 (2009) (“It was during the [civil] war that embalming first became more widely practiced, not just generating a transformation in physical treatment of the dead but establishing a procedure that would serve as a foundation for the emergence of the funeral industry and the professionalization of the undertaker.”); LADERMAN, *supra* note 8, at 6 (describing embalming as “the bedrock of the emergent [funeral] industry”). For many funeral directors and funeral trade organizations, embalming remains a normative aspect of the professional identity of death care workers. See Philip R. Olson, *Flush and Bone: Funeralizing Alkaline Hydrolysis in the United States*, 39 SCI., TECH., & HUM. VALUES 666, 670–71 (2014).

33. *The FTC Funeral Rule*, FED. TRADE COMM’N (July 2012), <https://perma.cc/3VYY-4C95>.

Despite the FTC's goal of creating more informed consumers, "[i]n a 2016 survey by the National Funeral Directors Association, 81 percent of respondents said they called only one funeral home before making their decision."³⁴ Between its enactment in 1982 and amendment in 1994, the Funeral Rule did not reduce the overall cost of American funerals.³⁵ In fact, "many contemporary funeral directors agree on at least one point [regarding the impact of the funeral rule]: consumers are in fact paying more now than they did before federal involvement," and some have maintained that itemization actually allows funeral directors to charge more for their services.³⁶

In September of 2023, the FTC hosted a workshop, seeking input on proposed changes to the Funeral Rule.³⁷ The proposed updates include online or electronic pricing disclosures, disclosing prices associated with new forms of disposition of human remains—including alkaline hydrolysis and natural organic reduction—and changes to the required general price list.³⁸ As discussed in the workshop, these proposed changes all have potential benefits for consumers; however, because the FTC is limited by its congressional grant of authority,³⁹ any reforms eventually implemented cannot provide the comprehensive changes, discussed below, necessary to realign the regulations with reality.

B. Current Government Funeral Assistance Programs

The Social Security Administration (SSA) provides a one-time lump-sum death benefit (LSDB) of up to \$255 to the eligible surviving spouse or children of a deceased individual who was receiving Social Security benefits.⁴⁰ To qualify for this lump-sum payment, the deceased must have been eligible for Social Security benefits at the time of death, and the surviving spouse or child must meet certain eligibility criteria.⁴¹ When the SSA first introduced the LSDB in 1935, the amount of the benefit equaled "3.5% of the individual's covered earnings," but not exceeding \$315.⁴² In 1954, the SSA capped the

34. Maggie Jones, *The Movement to Bring Death Closer*, N.Y. TIMES MAG. (June 15, 2023), <https://www.nytimes.com/2019/12/19/magazine/home-funeral.html>.

35. LADERMAN, *supra* note 8, at 138–39.

36. *Id.* at 139–40.

37. *Shopping for Funeral Services: An FTC Workshop*, FED. TRADE COMM'N, (Sept. 7, 2023), <https://perma.cc/R4F9-GFE7>.

38. *Id.*

39. See 15 U.S.C. § 46 (outlining Commission's powers); *id.* § 57a (describing limitations of the Commission's authority).

40. Social Security Act of 1935, 42 U.S.C. § 402(i) (2022).

41. *Id.*

42. Larry Dewitt, *Research Note #2: The History & Development of the Lump Sum Death Benefit*, SOC. SEC. ADMIN. (Sept. 7, 2006), <https://perma.cc/PTG7-PG2Q>.

LSDB at the lower amount of \$255, and it has not changed since.⁴³ Thus, the LSDB has not kept up with the rate of inflation or with increasing costs of death care services. According to the 2023 NFDA survey, the \$255 LSDB was not sufficient to cover the typical cost of an urn for cremated remains.⁴⁴

In response to the COVID-19 pandemic, the Federal Emergency Management Agency (FEMA) established the COVID-19 Funeral Assistance program to provide financial assistance to individuals and families who incurred funeral expenses for loved ones who died from COVID-19.⁴⁵ Under this program, FEMA provides up to \$9,000 in financial assistance—which exceeds the median cost of a funeral with viewing and burial by \$700.00—to cover eligible funeral expenses incurred after January 20, 2020, for deaths attributed to COVID-19.⁴⁶ The assistance is available to reimburse individuals and families for expenses related to funeral services, burial or cremation, caskets or urns, transportation of the deceased, and other related costs.⁴⁷ The popularity of this program is evidenced by the 438,000 applications FEMA has approved as of January 18, 2024.⁴⁸ At an average of \$6,400 per award, FEMA has to date paid out roughly \$2.8 billion in COVID-19 funeral assistance.⁴⁹ FEMA will continue to provide funeral assistance until September 30, 2025.⁵⁰ The adoption and implementation of this program indicates the potential success of large-scale federal funeral payment programs. However, because this is a reimbursement-based program, it may be of little benefit to families and individuals who lack the money or credit to pay the costs upfront.⁵¹

In addition to federal programs, some states and municipalities, including New Jersey, Delaware, Illinois, Massachusetts, and New York City, have established funds to assist with funeral and burial costs for low-income families and individuals.⁵²

43. *Id.*

44. *2023 NFDA GPL Study*, *supra* note 4 (stating that median cost of an urn was \$295).

45. *See COVID-19 Funeral Assistance*, FEMA (Jan. 18, 2024), <https://perma.cc/23DP-F7EF>.

46. *Compare id.*, with *2023 NFDA GPL Study*, *supra* note 4 (noting that median cost of funeral with viewing and burial in 2023 was \$8,300).

47. *COVID-19 Funeral Assistance*, *supra* note 45.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Annie Nova, *Some States Offer Assistance to Families Unable to Afford Funeral Costs*, CNBC (Jan. 19, 2022), <https://perma.cc/PTV7-5U9S>.

C. *Unnecessary and Detrimental State Regulations*

Some state regulations create a barrier to entry into the funeral profession and might explain attrition during professional training. The most obvious of these are single licensure regimes and “ready-to-embalm” laws.⁵³ Single licensure regimes require that all funeral directors also be trained and licensed as embalmers, regardless of whether they intend to embalm.⁵⁴ This adds hours and dollars to the cost of funeral director training and turns away from the profession otherwise-interested individuals. Ready-to-embalm laws require that all funeral homes maintain facilities, staff, and equipment sufficient to properly embalm, regardless of whether they offer embalming services.⁵⁵ This adds unnecessary capital costs, especially for businesses that intend to focus on green disposition services, which do not utilize embalming.⁵⁶ Similarly, state regulations requiring large amounts of time apprenticing as a funeral director or embalmer—including up to 75 funeral service case reports and 75 embalming case reports, or as many as 2,000 hours or a minimum of 12 months of funeral service and embalming training—create another barrier to those interested in entering the profession.⁵⁷

State regulations also impact the cost of running a funeral home and lead to higher costs for consumers. These regulations entrench status-quo professional and industry identities.⁵⁸ As mentioned above, ready-to-embalm laws and other regulations on the adequacy of funeral home facilities add unnecessary costs for many funeral home businesses.⁵⁹ Consider Brooklyn’s Janazah Project, a Muslim funeral home that is required to maintain an embalming prep room even though traditional Islamic funeral practices reject embalming.⁶⁰

53. See *supra* notes 20–21 and accompanying text.

54. See Foos, *supra* note 21, at 1388.

55. See, e.g., N.C. GEN. STAT. § 90-210.27A (2022).

56. Foos, *supra* note 21, at 1402 (“First, the costs of operating in a Ready-to-Embalm market are higher than in other markets. This is reflected in the data in the form of higher marginal costs for traditional burials and cremations in these markets. The businesses that are the most affected by these costs are those that wish to operate outside of the traditional realm of a small, full-service funeral home. In this way, Ready-to-Embalm laws punish innovation and specialization within the industry while preserving the traditional business mode.”).

57. See REGULATIONS IN FUNERAL SERVICE LICENSING, *supra* note 19, at 12, 16, 20.

58. See Harrington, *supra* note 21, at 214 (describing ready-to-embalm laws as “blatantly anticompetitive”).

59. See, e.g., Katelynn McBride, *Minnesota Entrepreneur Challenges Stupid Law That Wastes His Money*, INST. FOR JUST. (Mar. 29, 2012), <https://perma.cc/7QAB-2JW8>.

60. See *About Us*, JANAZAH PROJECT (2020), <https://perma.cc/5QM7-6UFM> (describing goal and mission of Janazah Project); N.Y. COMP. CODES R. & REGS. tit. 10 § 77.5(d)(3) (2024) (requiring that funeral homes have “a preparation room,

Similarly, it makes no sense for licensed businesses focused on natural organic reduction or alkaline hydrolysis to be required to maintain embalming facilities they will never use.

Other regulations more directly impact the cost to consumers of funeral goods and services. For example, several states have required that funeral goods, including caskets, only be sold to consumers by licensed funeral directors or licensed funeral homes.⁶¹ This means that carpenters and craftsmen within those states cannot legally construct and sell caskets without completing their state's funeral director licensure program or establishing a licensed funeral home.⁶² In 2011, one federal court found that there was no rational basis (neither consumer protection nor public health) for such a requirement, and the "sole reason for these laws" appeared to be "the economic protection of the funeral industry."⁶³ However, this ruling has not affected similar laws in states outside of the Fifth Circuit, including North Carolina.⁶⁴

The lack of online price information also affects consumer costs. Although the Funeral Rule requires funeral homes to provide customers with price lists in person and over the phone, there is not currently a requirement for those prices to be available online.⁶⁵ Fewer than one-quarter of funeral home websites voluntarily provide their full price list, and most do not provide any price information.⁶⁶ "In the internet era, . . . it's hard to see why anyone should have to physically visit or call multiple funeral homes just to compare prices.' Electronic sharing of information . . . could encourage competition and lower the expensive burden of putting a loved one to rest."⁶⁷ California does require funeral homes to post prices online, indicating

containing at least 120 square feet of floor space. The preparation, disinfection, embalming, washing, dressing and casketing or other care of a body of a deceased person shall take place only in such room, which room shall contain only articles and equipment necessary for such preparation."); A.R. Gatrad, *Muslim Customs Surrounding Death, Bereavement, Postmortem Examinations, and Organ Transplants*, 309 BMJ 521, 521 (1994) ("Muslim bodies are not embalmed.").

61. See Judith A. Chevalier & Fiona M. Scott Morton, *State Casket Sales Restrictions: A Pointless Undertaking?*, 51 J.L. & ECON. 1, 2 (2008).

62. See *id.*

63. *St. Joseph Abbey v. Castille*, 835 F. Supp. 2d 149, 151 (E.D. La. 2011), *aff'd*, 712 F.3d 215 (5th Cir. 2013).

64. See N.C. GEN. STAT. § 90-210.67(a) (2022) (requiring individuals offering caskets for sale to apply for a funeral license).

65. Ann Carrns, *Funeral Homes Don't Have to List Prices Online. That May Change.*, N.Y. TIMES (Apr. 17, 2023), <https://www.nytimes.com/2023/04/14/your-money/funeral-homes-prices-online.html>.

66. *Id.*

67. *Id.* (quoting FTC Chair Lina Khan's remarks in favor of "modernizing" the Funeral Rule).

that states could fill in this gap if the FTC does not include an online price requirement in future updates to the Funeral Rule.⁶⁸

Lastly, many of the regulatory bodies established to oversee the funeral industry are populated by industry professionals.⁶⁹ This presents concerns about conflicts of interest and lack of accountability. For example, many state boards of funeral directors and embalmers almost exclusively consist of professional funeral directors and embalmers.⁷⁰ Similarly, the Funeral Rule Offender Program, established in 1996 as a rehabilitation program for violators of the Funeral Rule, is run not by the FTC but by the National Funeral Directors Association.⁷¹ Not only does this appear to be a conflict of interest, but compliance with the Funeral Rule has worsened since the program's implementation.⁷²

III. THE AFFORDABLE CARE ACT AS A BASIS FOR DEATH CARE REGULATION

“The mission of the U.S. Department of Health and Human Services (HHS) is to enhance the health and well-being of all Americans, by providing for effective health and human services and by fostering sound, sustained advances in the sciences underlying medicine, public health, and social services.”⁷³ The provision of affordable and accessible death care is an important human service, and regulation of the funeral industry under HHS is therefore fitting.

A. *Affordable Care Act Goals*

According to HHS, the Patient Protection and Affordable Care Act (ACA) has three primary goals: (1) “Make affordable health insurance available to more people” through the provision of premium tax credits, (2) “Expand the Medicaid program to cover all adults with income below 138% of the [Federal Poverty Level],” and (3) “Support innovative medical care delivery methods designed to lower the costs of health care generally.”⁷⁴ We propose that these goals be expanded to include (1) making affordable death care available to more people,

68. CAL. BUS. & PROF. CODE § 7685(b)(1) (2017).

69. See Margaret Engel, *Funeral Regulators Hit as Servants of Industry*, WASH. POST (June 26, 1984), <https://www.washingtonpost.com/archive/politics/1984/06/26/funeral-regulators-hit-as-servants-of-industry/c6b75a18-b608-424d-b981-92e5398c9793/>.

70. *Id.*

71. The Journal, *The Deal to Hide Bad Actors in the Funeral Industry*, WALL ST. J., at 6:34–9:02 (Feb. 15, 2024), <https://www.wsj.com/podcasts/the-journal/the-deal-to-hide-bad-actors-in-the-funeral-industry/b686fd56-147b-431c-b545-214dd485ead9>.

72. *Id.*

73. *About HHS*, HHS (2024), <https://perma.cc/HZQ9-7JUG>.

74. *About the Affordable Care Act*, HHS (Mar. 17, 2022), <https://perma.cc/HGM4-YDG9>.

(2) expanding the Medicaid program to cover basic funeral costs for covered individuals, and (3) supporting innovative death care delivery methods designed to lower the costs and environmental impacts of death care generally.

The first goal—making affordable health insurance available to more people through the provision of premium tax credits—could be achieved either through the provision of additional premium tax credits to individuals purchasing qualifying funeral or burial insurance plans or, as Professor Haneman suggests, the creation of death-care-specific Flexible Savings Accounts (FSAs).⁷⁵ Another approach would be to include funeral insurance in state ACA benefit exchanges. Funeral insurance premiums are affordable, averaging between \$50 and \$100 per month for \$10,000 in coverage,⁷⁶ compared with full-price health care premiums, which averaged \$605 per month in 2023.⁷⁷ In 2023, the “average [healthcare] premium subsidy was \$536 per month. The overall average after-subsidy premium (including people who didn’t get a subsidy at all) was just \$111 per month.”⁷⁸

If funeral insurance followed this pattern, the range for premium subsidies would be between \$44 and \$88 per month.⁷⁹ Thus, the public cost of including funeral insurance in ACA benefit exchanges would be very low compared to the public costs of health care subsidies.

The second goal—expanding Medicaid to cover all adults with income below 138% of the Federal Poverty Level—could be achieved by increasing the current SSA lump-sum death benefit⁸⁰ to the average cost of a direct cremation (including transportation, storage, and container costs) or direct burial (including transportation, storage, and container costs). This benefit could be universal or targeted at individuals who are eligible for their state’s Medicaid program.⁸¹

The third goal—supporting innovative medical care delivery methods designed to lower the cost of health care—could be achieved

75. For a discussion of Professor Haneman’s FSA thesis, see Haneman, *supra* note 8, at 366–74.

76. Anthony Martin, *The Cost of Final Expense Insurance*, CHOICE MUT. (Oct. 24, 2024), <https://perma.cc/YAF3-262X>.

77. Louise Norris, *Will You Receive an ACA Premium Subsidy?*, HEALTHINSURANCE.ORG (Apr. 18, 2024), <https://perma.cc/GP5E-BBV8>.

78. *Id.*

79. *See id.*; *see also* Martin, *supra* note 76. The estimate of the price range for premium subsidies is based on our calculations and was not sourced externally.

80. Social Security Act of 1935, 42 U.S.C. § 402(i) (providing \$255 as lump-sum death benefit).

81. Some states have expanded their Medicaid programs to allow qualification based on income alone, while others look at household size, disability, family status, and other factors. *Medicaid Expansion & What It Means for You*, HHS (2024), <https://perma.cc/2B7B-DGFH>.

by tying federal funds to state adoption of dual licensure regimes, repeal of ready-to-embalm requirements, countenance of home funerals without the involvement of a funeral director,⁸² and a requirement that funeral businesses provide access to green disposition technologies such as alkaline hydrolysis, natural organic reduction, and green burial. The federal government could also offer tax incentives directly to funeral businesses that adopt these green technologies or that promote environmentally sustainable choices for their customers.

Although most states regulate death care providers through professional and licensing boards, in several states, the funeral industry is regulated by the state's department of health.⁸³ Even where funeral providers are not under the direct supervision of a department of health, states recognize that death care is an important matter of public health.⁸⁴ Recognition of this fact by the federal government would provide appropriate justification for bringing funeral regulation into the ambit of the HHS because access to adequate death care choices is necessary for the health and welfare of all.

B. *The Role of State Health Departments*

State departments of health play a significant role in regulating the funeral industry to ensure public health and safety, consumer protection, and compliance with relevant laws and regulations.⁸⁵ These agencies typically oversee the licensing and certification of funeral establishments, funeral directors, and embalmers within their jurisdiction.⁸⁶ They establish requirements for obtaining and maintaining licenses, which may include completing accredited education and training programs, passing state exams, and meeting

82. Currently ten states require that a licensed funeral director be involved in the postmortem environment in some way. *The 10 States That Restrict Caring for Your Own Dead*, FUNERAL CONSUMERS ALL. (2024), <https://perma.cc/K389-XHGX>; see, e.g., N.Y. PUB. HEALTH LAW § 4140(2) (Consol. 2014) (requiring burial or removal permit to be issued to funeral director or undertaker).

83. States where the funeral industry is regulated by the department of health include Connecticut, Hawaii, Iowa, Minnesota, Nebraska, and New York. See *Licensing Boards & Requirements*, NFDA (2024), <https://perma.cc/73XT-WZZF>.

84. E.g., N.C. GEN. STAT. § 90-210.18A(a) (2023) (“[T]he practice of funeral service affects the public health, safety, and welfare and is subject to regulation and control in the public interest.”); see also T. SCOTT GILLIGAN & THOMAS F.H. STUEVE, *MORTUARY LAW* 6 (11th ed. 2011) (“Society has recognized that health and safety concerns, as well as public morality, necessitate the disposition of the dead by regulated methods.”).

85. See, e.g., CONN. GEN. STAT. § 20-211 (2024) (transferring regulatory power from the Connecticut Board of Examiners of Embalmers and Funeral Directors to the Department of Health Services).

86. See, e.g., § 20-209(a).

specific experience criteria.⁸⁷ State health departments conduct regular inspections of funeral homes, crematories, and other facilities to ensure compliance with health and safety regulations.⁸⁸ Inspections may cover various aspects of funeral home operations, including facility cleanliness, infection control practices, handling of human remains, storage of embalming chemicals, and compliance with environmental regulations.⁸⁹

State health departments also regulate disposition technologies and practices, including embalming, cremation and emerging methods of disposition. State health departments ensure proper sanitation, handling, and disposal, of embalming fluids and other chemicals used in the preparation of human remains.⁹⁰ They may establish guidelines for embalming procedures, require proper ventilation and personal protective equipment in embalming rooms, and monitor compliance with relevant health and safety standards.⁹¹ State health departments may require funeral establishments to maintain accurate records of all funeral arrangements, services provided, and disposition of human remains.⁹² They may also require timely reporting of certain events, such as deaths, cremations, and transportation of human remains, to facilitate public health surveillance and regulatory oversight.⁹³ State health departments investigate complaints and allegations of regulatory violations within the funeral industry.⁹⁴ They may respond to complaints from consumers, industry stakeholders, or whistleblowers and take appropriate enforcement actions, such as issuing citations, fines, or license suspensions, against violators of regulatory requirements.⁹⁵

State health departments regulate cremation services to ensure proper operation and maintenance of crematories, adherence to cremation procedures, and accurate identification and tracking of human remains.⁹⁶ They may establish standards for crematory facilities, require licensing of crematory operators, and monitor compliance with relevant regulations.⁹⁷ State and local departments play a crucial role in public health emergency preparedness and

87. *Embalmer Licensure Requirements*, CONN. DEP'T PUB. HEALTH (2024), <https://perma.cc/8SQ6-WYDW>.

88. *E.g.*, MD. CODE ANN., HEALTH OCC. §§ 7-101, 7-205, 7-310, 7-409 (2023).

89. *See* MD. CODE. REGS. 10.29.03.05 (2022) (describing areas of funeral establishments subject to inspection by health department).

90. *See, e.g.*, HAW. CODE R. § 11-22-3(b) (2024).

91. *See id.*

92. *See, e.g., Funeral Inspection Report*, VA. DEP'T HEALTH PROS. (July 17, 2018), <https://perma.cc/4FTD-Q4B2>.

93. *See id.; see also* WYO. STAT. ANN. § 35-1-418(c).

94. *See, e.g., Understanding the Enforcement Process*, VA. DEP'T HEALTH PROS. (2024), <https://perma.cc/MM97-DNSL>.

95. *See id.*

96. *See* 216-40-05 R.I. CODE R. § 25.6 (2024).

97. *See id.*

response, including mass fatality incidents and pandemics.⁹⁸ They work closely with funeral directors, medical examiners, coroners, and other stakeholders to develop protocols for managing human remains safely and efficiently during emergencies.⁹⁹ State health departments provide education, training, and guidance to funeral industry professionals on regulatory requirements, best practices, and emerging issues.¹⁰⁰ They may offer workshops, seminars, and online resources to help funeral directors and embalmers stay informed and compliant with applicable regulations.¹⁰¹ Given the important role state health departments play in the regulation of the funeral industry, it makes sense to transfer federal oversight to HHS.

The availability of “new” methods of disposition—including alkaline hydrolysis, natural organic reduction, and green burial—expands consumer choice and provides individuals with alternative options for end-of-life arrangements.¹⁰² Reforming funeral regulations now can help ensure that consumers are informed about these options, including their benefits, environmental impact, and regulatory oversight, allowing consumers to make choices that align with their values and preferences. Standardizing regulations across states can facilitate interstate recognition and adoption of new methods of disposition, ensuring consistency and clarity for funeral providers and consumers alike. This can help prevent regulatory barriers and promote access to alternative disposition options regardless of geographic location.

C. Public Funeral Insurance

Colorado’s public health insurance program, known as the Colorado Option, was established in 2021 to create a more affordable health insurance option for the state’s residents and to drive down overall healthcare costs.¹⁰³ It began as a state initiative to provide public option-style health insurance plans that are not part of state ACA exchanges, but which compete with them.¹⁰⁴ As it works now,

98. Robyn R.M. Gershon et al., *Mass Fatality Preparedness in the Death Care Sector*, 53 J. OCCUPATIONAL & ENV’T MED. 1179, 1179–80 (2011).

99. *See id.* at 1179.

100. *See, e.g., Training for Funeral Directors*, PA. DEP’T HEALTH (2024), <https://perma.cc/6MRZ-XFSH>.

101. *E.g., Funeral Director/Home Training Guide*, MO. DEP’T HEALTH & SENIOR SERVS. (July 2, 2024), <https://perma.cc/44GQ-474P>.

102. *See* Philip Olson et al., Panel Discussion: Regulating New Methods of Disposition at the Wake Forest University Law Review Symposium: The Future of Death Care in America (Mar. 1, 2024).

103. *Biden Administration Recognizes Colorado’s First in the Nation Health Cost Savings Program and Awards \$245 Million to State*, COLO. DEP’T REGUL. AGENCIES DIV. INS. (Aug. 30, 2023) [hereinafter *Biden Administration*], <https://perma.cc/95XP-BXT7>.

104. Emily Johnson, *Public Option, Pressing Questions*, COLO. HEALTH INST. (Mar. 10, 2023), <https://perma.cc/U3P6-4MGY>.

the Colorado Option is not a single plan but a set of standardized health insurance plans offered by private insurers.¹⁰⁵ These plans must meet specific state requirements for coverage, benefits, and pricing.¹⁰⁶ The Colorado Option meets all federal and state ACA requirements, and the state works with insurers to set target premium reductions, aiming to make these plans more affordable than existing private plans.¹⁰⁷ This option also eliminates copays for primary care visits, mental and behavioral health office visits, and substance use disorder visits, while also reducing copays for other health services.¹⁰⁸

The Colorado Option is available to individuals purchasing insurance on the state health insurance exchange, and it is aimed at residents who do not qualify for Medicaid or employer-sponsored insurance and who are seeking more affordable coverage options.¹⁰⁹ Individuals and families may qualify for federal premium tax credits to reduce the cost of Colorado Option plans.¹¹⁰ Lower-income enrollees may also qualify for cost-sharing reductions, which lower out-of-pocket costs like deductibles, copayments, and coinsurance.¹¹¹ The Colorado Division of Insurance oversees the implementation and regulation of the Colorado Option.¹¹² This includes approving plan designs, ensuring compliance with state standards, and monitoring the impact on the insurance market.¹¹³

Ultimately, the Colorado Option seeks to improve overall health outcomes and health care equity by reducing the number of uninsured and underinsured individuals, and by increasing competition among insurers.¹¹⁴ It represents an innovative approach to addressing healthcare affordability and access within the framework of a public-private partnership, leveraging state oversight and regulation to create a standardized, cost-effective insurance option for residents.

The Colorado Option provides a blueprint for a potential public funeral insurance model. State insurance agencies could work with funeral insurance providers to (1) reduce the cost of funeral insurance premiums, (2) get those insurance providers to negotiate with death

105. See COLO. DEP'T OF REGUL. AGENCIES DIV. INS., COLORADO OPTION 2024 STANDARD PLANS 15 (2024), <https://perma.cc/WLQ9-9YRD>.

106. *Id.* at 13.

107. *Colorado: State Innovation Waiver*, CTRS. FOR MEDICARE & MEDICAID SERVS. (June 23, 2022), <https://perma.cc/VK53-6CJ9>.

108. *See id.*

109. *Id.*

110. *See id.*

111. Louise Norris, *Colorado Health Insurance Consumer Guide*, HEALTHINSURANCE.ORG (2024), <https://perma.cc/75RV-LPCH>.

112. *See Biden Administration*, *supra* note 104.

113. *See generally Colorado Option*, COLO. DEP'T REGUL. AGENCIES DIV. INS. (2024), <https://perma.cc/W5AL-GXXG>.

114. *See Colorado: State Innovation Waiver*, *supra* note 108.

care providers for reduced prices,¹¹⁵ and (3) promote sustainable death care options by incentivizing or requiring death care providers to offer green options such as natural organic reduction, alkaline hydrolysis, and green burial in states where those options are legal.

CONCLUSION

Philosophically, situating death care regulation under the FTC signals to industry actors, government actors, and private citizens that death care is ultimately a commercial arrangement between providers and consumers. Politically, this locates mourners' power in their position as commercial actors whom the FTC has the authority to protect from "unfair or deceptive acts or practices in or affecting commerce."¹¹⁶ However, these attitudes overlook the human and humane aspects of death care. Shifting oversight of death care to the HHS not only acknowledges the reality that death care is a human service but also allows for regulations that are better tailored to the industry that exists today.

Ultimately, ensuring that all Americans have access to dignified and affordable funeral services is essential for upholding the principles of social equity and compassion in end-of-life care. By addressing the current challenges associated with funeral costs, society can better support individuals and families during times of grief and loss. Rolling coverage of death care into the ACA can achieve these goals through individual tax-based savings incentives, increased direct payments for Medicaid beneficiaries, and incentives for states to adopt more sustainable regulations. These radical changes would help achieve safe, responsible disposition of remains done in a manner that is affordable for all Americans.

115. People's Memorial Association (PMA) does this kind of negotiating with death care providers in Washington. See *Mission and History*, PEOPLE'S MEM'L ASS'N (2024), <https://perma.cc/CCA9-UWFC>. The six plans available for PMA members range in price from \$845 for direct cremation to \$3,065 for a complete funeral service with a metal casket. *Frequently Asked Questions*, PEOPLE'S MEM'L ASS'N (2024), <https://perma.cc/F42Q-P2PU>. These plans cost considerably less than the median prices for equivalent services found in the NFDA Survey. See *2023 NFDA GPL Study*, *supra* note 4.

116. See 15 U.S.C. §§ 57a, 46.