STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

CASE TYPE: Civil

Verlin Stoll, Crescent Tide LLC, and Funeral Consumers Alliance of Minnesota,

Plaintiffs,

v.

Minnesota Department of Health, Mortuary Science Section, Edward P. Ehlinger, in his official capacity as Commissioner of the Minnesota Department of Health, and Timothy J. Koch, in his official capacity as Acting Supervisor of the Mortuary Science Section,

Defendants.

Civil File No. 62-CV-12-443

The Honorable John H. Guthmann

PLAINTIFFS' PRETRIAL BRIEF

INTRODUCTION

This case poses a simple constitutional question: Can the government force entrepreneurs to do useless things? Specifically, can Minnesota force Plaintiff Verlin Stoll to build a preparation room for human remains that he doesn't want, doesn't need, and won't use, as a condition of expanding his funeral-home business? The word *useless* is no exaggeration. The challenged statute does not require a preparation room to have the equipment (such as a "preparation and embalming table," Minn. Stat. § 149A.92, subd. 6) necessary to do preparation work on the deceased. Even more baffling, when not equipped for preparation work, a so-called "non-functional preparation room" cannot legally be used at all—not for working on bodies, not for storage, not for an office, not for meetings, not for anything. It is a total waste of time, space, and money.

Entrepreneurs are not the only victims of this irrationality. Consumers also suffer when the government forces businesspeople to do useless things. Plaintiff Stoll, who operates the most affordable funeral home in the Twin Cities, serves many low-income minority families and the elderly with modest incomes. The success of his low-price, full-service model is the result of his deliberate effort to strip every needless expense from the funeral process and pass those savings on to the families he serves. Dr. David Harrington—the nation's leading funeral-industry economist—will testify that forcing funeral homes to build non-functional preparation rooms inflates the cost of burial and cremation by hundreds of dollars with zero benefit.

The answer to the constitutional question in this case is no, the government cannot force people to do useless things. Because there is no difference between a non-functional preparation room (legally required) and no preparation room (legally forbidden), Plaintiffs respectfully ask the Court to strike down this arbitrary classification as a violation of the equal-protection and substantive due-process guarantees of the Minnesota Constitution.

REQUESTED FINDINGS OF FACT

I. Verlin Stoll and His Low-Cost, Full-Service Revolution.

Plaintiff Verlin Stoll is a Minnesota-licensed mortician and the owner of Plaintiff Crescent Tide, a Minnesota-licensed funeral home in St. Paul.[1] Although only 28, Plaintiff Stoll has already built two successful businesses. In December 2008, he opened Twin Cities Trade Services, which provides preparation services to area funeral homes on a contract basis. He then

[1]A licensed mortician is defined as "any person who takes charge of or removes from the place of death a dead human body, or prepares a dead human body for final disposition in any manner, or arranges, directs, or supervises a funeral, memorial service, or graveside service." Minn. Stat. § 149A.20, subd. 1 (2012). A funeral home is referred to as a "funeral establishment" and is defined as "a place or premise devoted to or used in the holding, care, or preparation of a dead human body for final disposition, or any place used as the office or place of business for the provision of funeral services." *Id*. § 149A.50, subd. 1.

sold Twin Cities in October 2010 and used his capital to open Crescent Tide in April 2011. At first, he was the only employee. He was able to hire his wife a few months later, and he recently hired a second mortician.

Crescent Tide's motto is "The New Generation of Service." This represents Plaintiff Stoll's strategic decision to break from the traditional funeral-home practice of sky-high mark-ups and unnecessary facilities. Plaintiff Stoll foresees a shift toward simpler, greener, and more economical funeral customs, and in particular a shift towards cremation and away from burial. To pioneer his innovative model, Plaintiff Stoll opened his funeral home in an industrial-park suite on Transfer Road next to the Amtrak station. There are no faux-marble columns or ornate facades. He did not build a space for public visitations, funerals, or memorial services. Instead, he contracts with chapels, churches, and cemeteries when he needs a viewing space. He does not own a hearse, and transports remains in an ordinary car for free. If a client wants a hearse, Plaintiff Stoll will hire one. In short, a family can have any kind of funeral—from modest to elaborate—without the hefty price tag.

Crescent Tide is the best price in town. Plaintiff Stoll's basic-services fee is just $250, compared with a Twin Cities average of approximately $2,500. Crescent Tide will do a funeral with burial for $1,650 and direct cremation for $750. The prices at other Twin Cities funeral homes for a funeral with burial range from $4,000 to $6,000. Direct cremation prices range from $1,300 to $3,000. Crescent Tide is one of a few Twin Cities funeral homes that puts its prices on its homepage.

Crescent Tide serves families from all backgrounds, but Plaintiff Stoll's low-cost, full-service model has had its greatest impact on economically disadvantaged families. Helen Williams will testify about the role that Plaintiff Stoll plays in the low-income African-American

community and other underserved areas. She began to assist families at no charge with their funeral plans after her grandson lost two lifelong friends to gang violence in 2006. Mrs. Williams was astonished by the expense of even a simple funeral. She found that no African-American funeral home would provide a burial package that African Americans tend to prefer culturally—metal casket with an extended public viewing—for the price of the Hennepin County burial-assistance allowance, which many people in her community use. Plaintiff Stoll is the only funeral director who will provide a traditional African-American funeral for the county allowance. As a result, Mrs. Williams broke ties with the African-American funeral homes and established a relationship with Plaintiff Stoll. Mrs. Williams—at absolutely no charge to anyone and strictly as a volunteer—directs three to four families to Crescent Tide each month.

Crescent Tide has also been a boon to the elderly. Wendy Jerome, chair of Plaintiff Funeral Consumers Alliance of Minnesota ("FCA-MN"), will testify about how elderly consumers benefit from Plaintiff Stoll's low-cost, full-service model. FCA-MN is the state chapter of the Funeral Consumers Alliance, a Vermont-based consumer-advocacy organization founded in 1963 to demystify the process of buying funeral goods and services, and to expose the anti-consumer practices of the funeral industry. A typical FCA-MN member is an elderly person on a fixed income. Ms. Jerome will testify that FCA-MN surveys funeral prices across the state and negotiates discounts for its members. Crescent Tide is the only full-service funeral home in Minnesota to which FCA-MN directs its members, and FCA-MN does so because Crescent Tide provides excellent, no-pressure service at the lowest prices.

In sum, Plaintiff Stoll is a young entrepreneur using innovation and hard work to take on an industry dominated by decades-old tradition, by multi-generational funeral establishments, and by high prices.

II. Defendants Require Funeral Home Entrepreneurs to Build Useless, Non-Functional Preparation Rooms.

The major obstacle thwarting Plaintiff Stoll's innovation and hard work is an arbitrary statutory requirement that entrenches the very *status quo* that he is determined to alter. As a condition of opening a second funeral home, Plaintiff Stoll must build a non-functional preparation room at the new location that he is legally forbidden from using for any purpose.

To understand the requirement to build a non-functional preparation room, it is helpful to first understand the preparation of human remains. The funeral statute defines "preparation" as any work that a mortician does on the deceased, from applying make-up to embalming to casketing. Minn. Stat. § 149A.02, subd. 34 (2012).

Embalming involves evacuating the circulatory system and body cavities, and filling them with preservative chemicals. The purpose of embalming is to slow decomposition and restore a lifelike appearance. *Id.* § 149A.02, subd. 15. Embalming is never required just because someone dies. And there is only one situation in which embalming is compulsory: when the Commissioner of the Department of Health specifically orders it, *id*. § 149A.91, subd. (4),[2] although this scenario is purely hypothetical (there is no evidence that it has ever occurred).

Embalming is in sharp decline while cremation has become the new norm. In Minnesota, more people are now cremated than buried. And when burial does occur, fewer and fewer families opt for embalming. Less than one fourth of Plaintiff Stoll's clients choose embalming.

[2] The statute identifies three other scenarios in which embalming *or* refrigeration is required—when: (1) final disposition will occur more than 72 hours after death; (2) remains will be transported by common carrier; or (3) the body is put on display for the general public. Minn. Stat. § 149A.91, subd. 3.

This trend is expected to accelerate as environmental concerns—such as pollution caused by burying remains suffused with embalming chemicals—become more central to funeral planning.

All preparation, including embalming, must be done in a preparation room equipped according to statutory criteria. *Id*. §§ 149A.91-92. The statute distinguishes between functional preparation rooms that are actually used for preparation and embalming, and preparation rooms that are not so used. *Id*. § 149A.92, subd. 6. Preparation rooms that are actually used must have basic features such as, for example, nonporous flooring, an exhaust that provides at least 12 air changes per hour, and specialized plumbing. Importantly, if the preparation room is being used, it must have a "preparation and embalming table," as well as equipment specifically for embalming such as a functional method for the injection of fluids, and embalming chemicals and instruments. *Id*.

Plaintiffs do not challenge the requirements for preparation rooms that are in actual use. Plaintiffs agree that actual preparation should occur in a properly constructed and equipped facility. Nor do Plaintiffs dispute that actual preparation should be performed by a Minnesota-licensed mortician.

Plaintiffs' claims focus on two realities. First, Minnesota law does not require funeral homes to sell any particular preparation service (including embalming), much less require any preparation to be done onsite. The law nevertheless requires every funeral home that will not do any onsite preparation to build a superfluous onsite preparation room anyway. Second, the law does not require any preparation room to be equipped for actual preparation and embalming. Minn. Stat. § 149A.92, subd. 6. Defendants label these "non-functional prep rooms."

A non-functional preparation room requires the same costly basics as a functional preparation room—nonporous floors, special plumbing, and special ventilation, for example—

but does not need the preparation and embalming table, embalming fluids or instruments, or the machinery necessary to inject embalming fluids into remains. *Id*. § 149A.92, subds. 3-6. Building a non-functional preparation room costs at least 80 percent as much as building a functional one.

A non-functional preparation room is literally useless. It cannot legally be used for any preparation. Nor can a non-functional preparation room legally be used for any practical purpose: not for storage, not for an office, not for meetings, and not for employee breaks. A non-functional preparation room is a legally mandated waste of time, space, and money.

Funeral-home businesses build and maintain *non-functional* preparation rooms because building *functional* ones is frequently duplicative and economically irrational. The nationwide norm is to centralize preparation at one location. By centralizing preparation, funeral-home businesses can build specialized preparation facilities and employ specialists who do nothing but prepare remains. This eliminates redundant staffing and equipment. The largest funeral-home business in the Twin Cities has 17 branches, but centralizes all of its preparation at a single location. This is perfectly legal and commonplace in Minnesota.

Not only do funeral-home businesses centralize preparation, they sometimes outsource it entirely. There is no requirement that a funeral-home business do its own preparation or that a particular funeral director do his or her own preparation. Trade embalmers, who do preparation work on a contract basis, are freelance specialists. There are funeral homes in Minnesota that must outsource their preparation because they lack a preparation room altogether or have preparation rooms that do not comply with the statutory criteria even for non-functional preparation rooms. These funeral homes were grandfathered in when the present preparation-

room requirement was enacted. *Id.* § 149A.92, subd. 1. Outsourcing preparation is perfectly legal and commonplace in Minnesota.

III. Plaintiff Stoll Does Not Want to Waste Tens of Thousands of Dollars on a Useless, Non-Functional Preparation Room That He Will Never Use.

The negative impact of the challenged statute is not theoretical. Plaintiff Stoll wants to open a second location for Crescent Tide, but he does not want or need a second functional preparation room because he will centralize all preparation at his original St. Paul location. He has not opened his second location because it costs tens of thousands of dollars to satisfy the statutory minimum of building at least a non-functional preparation room. In fact, Plaintiff Stoll did not want to build a preparation room at Crescent Tide's first and so far only location. He would have preferred to contract out preparation, just as he contracts out other services. But he built a preparation room because doing so was a requirement for obtaining a funeral-establishment license. Minn. Stat. §149A.50, subd.2 (1).

Plaintiff Stoll has concrete plans to open his second Crescent Tide location in St. Louis Park to better serve Minneapolis, particularly Mrs. Williams's community. Mrs. Williams will testify that families with whom she works would feel more comfortable with their funeral home being in their area.

His preferred location is one of a series of storefronts along Excelsior Boulevard. Plaintiff Stoll has no intention of bringing bodies in there. Nor could he, even with a fully functional preparation room. There is nowhere to build the private garage necessary for transporting bodies privately to and from the building. Plaintiff Stoll's real-estate agent and contractors have determined that obtaining space for and building out a non-functional embalming room at this property will cost at least $30,000. That is $30,000 for a non-functional preparation room that could not even theoretically be converted to functional use.

Plaintiff Stoll does not want to build a useless, non-functional preparation room at his second location. His business model is based on eliminating exactly this sort of superfluous facility. In addition, for a 28-year-old entrepreneur, the capital required to build a non-functional preparation room represents a significant portion of his planned investment; so significant, in fact, that he has put his expansion plans on hold. Building a pointless, non-functional preparation room will not simply be a waste of time, space, and money. It will also force him to charge more than he otherwise would.

Plaintiff Stoll's concern about the price-raising effect of building a useless preparation room is well founded. Plaintiffs' expert, Dr. Harrington, will testify that statutory preparation-room requirements drive up the cost of burials by, on average, $546 and cremation by $313. This is because funeral-home owners must recoup the cost of investment, and also because the overproduction of preparation rooms leads funeral homes to push embalming services that families would not otherwise purchase. Plaintiff Stoll does not want to be forced into a trap that requires him to maintain needless facilities and charge his customers needless fees to pay for those facilities.

Plaintiff Stoll has brought this lawsuit because the requirement to build useless, non-functional preparation rooms violates his economic liberty and that of other entrepreneurs, causes harm to consumers, and does nothing but perpetuate a *status quo* dominated by the traditional funeral-home model that he is determined to change for the better.

REQUESTED RULINGS OF LAW

The equal-protection and substantive due-process guarantees of the Minnesota Constitution forbid the government from forcing entrepreneurs to do useless things. A statutory requirement to do something useless is self-evidently arbitrary. Here, the statutory distinction

between a non-functional preparation room (required) and no preparation room (forbidden) is arbitrary because a non-functional preparation room is the same as no preparation room. Thus, Plaintiffs seek a declaratory judgment and permanent injunction enabling funeral-home entrepreneurs to obtain a funeral-establishment license under Section 149A without having to build non-functional preparation facilities. Plaintiffs also seek judgment and nominal damages on the ground that forcing Plaintiff Stoll to build a preparation room at Crescent Tide also violated his equal-protection and substantive due-process rights.

Defendants' argument is not difficult to predict. Their trial brief will be heavy with cherry-picked, boilerplate *dicta* from various constitutional cases that are presented as collectively standing for the proposition that "the government always wins." The premise of this argument is that the proper standard of judicial review is, in practice, judicial abdication—rationalizing and rubberstamping the challenged law.

But, as the following will show, the government does not always win, particularly under Minnesota's independent equal-protection test. Rational-basis review is a coherent body of constitutional jurisprudence under which plaintiffs do in fact prevail when they refute every plausible justification for a challenged law. The evidence at trial, and the post-trial briefing, will establish that this is indeed one of those cases where the plaintiffs have carried their burden under the rational-basis test.

I. The Equal-Protection Guarantee of the Minnesota Constitution Forbids Arbitrary Statutory Classifications.

The Minnesota Constitution includes an implicit equal-protection guarantee. *State v. Russell*, 477 N.W. 886, 889 n.3 (Minn. 1991) (citing *State v. Forge*, 262 N.W.2d 341, 347 n.23 (Minn. 1977)). Rational-basis review applies because the challenged classification does not encompass any suspect class. *See Gluba ex rel. Gluba v. Bitzan & Ohren Masonry*, 735 N.W.2d

713, 719 (Minn. 2007) ("If a constitutional challenge involves neither a suspect classification nor a fundamental right, we review the challenge using a rational basis standard under both the state and federal constitutions.").

The Minnesota Supreme Court has articulated a rigorous three-part test for analyzing an equal-protection claim under rational-basis review: (1) the statutory classification must not be "manifestly arbitrary or fanciful but must be genuine and substantial"; (2) "the classification must be genuine or relevant to the purpose of the law" with "an evident connection between the distinctive needs peculiar to the class and the prescribed remedy"; and (3) the government's purpose must be legitimate.[3] *Russell*, 477 N.W.2d at 888. This Minnesota test is a "stricter standard of rational basis review" than its federal-law counterpart. *Id.* at 889. Under "Minnesota rational basis analysis, [courts] have been *unwilling to hypothesize* a rational basis to justify a classification, as the more deferential federal standard requires." *Id.* (emphasis added). Thus, for a statute to survive equal-protection review under Minnesota's rational-basis test, the evidence must show an actual, concrete, non-arbitrary basis for the classification. *Id.* ("[W]e have required a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals.").

[3] The simplest way to understand the equal-protection claim is that the law, and Defendants' enforcement, creates a distinction between non-functional preparation rooms (required) and no preparation rooms (forbidden), even though they are the same, equally useless. If the Court prefers a more technical, though less clear, articulation of Plaintiffs' equal-protection claim: Plaintiff Stoll is similarly situated to every other business in Minnesota that is not required to build a useless, non-functional preparation room as a condition of operating. Plaintiff Stoll is similarly situated because having a non-functional preparation room in a funeral home does not advance public health and safety any more than having a non-functional preparation room in, for example, a hospice, a crematory, or a cemetery (or, frankly, a hair salon or a coffee shop) would advance public health and safety.

The first prong of the three-part test is a gatekeeper. Minnesota courts have long been concerned about haphazard, imprecise overregulation. The crux of this concern is that statutory classifications are sometimes so disconnected from reality that they are inherently untrustworthy and therefore unconstitutional. The question at the prong-one stage is not whether the classification advances any government purpose—that is prong two—but simply whether the classification has a sufficient relationship with reality to be "genuine and substantial," as opposed to "fanciful." *Russell*, 477 N.W.2d at 888. To test the trustworthiness of a challenged classification, the prong-one inquiry asks whether the factual premises of the classification are true. *Id.* at 889. If the premises are false, or at least false in a large number of real-world cases, then the challenged law is unconstitutional because legislation predicated on falsehoods is inherently unlikely to achieve legitimate public purposes and particularly unlikely to do so in a manner that minimizes the loss of constitutionally protected liberty.

The Court of Appeals' recent decision in *Murphy v. Commissioner of Human Services* illustrates how Minnesota courts use the prong-one inquiry to protect economic liberty against arbitrary classifications with false premises. 765 N.W.2d 100, 102 (Minn. App. 2009). In *Murphy*, Shannon Murphy had her parental rights involuntarily terminated in the 1980s. *Id.* In 2007, she was forbidden by her employer from having direct contact with people receiving services at an adult-foster-care facility because a new statute permanently disqualified someone from such work if he or she had ever had parental rights involuntarily terminated. *Id.* at 102-03. There was no such removal from direct contact if the termination had been voluntary. *Id.* at 107. The factual premise for the statutory distinction between the involuntary and voluntary termination of parental rights was that those who had had their parental rights terminated

involuntarily had not accepted that they were a risk to their children, and thus could not be trusted to work in an adult-foster-care facility. *Id*.

The Court of Appeals invalidated the involuntary-termination/voluntary-termination classification under prong one because the court rejected the underlying factual premise: that people who had their rights terminated involuntarily were by definition people who refused to accept that they were a risk to their children, and therefore could not be trusted—even decades later—to work with adults in foster care. *Id.* at 107-08. Many people, perhaps most people, have very good reasons to contest an involuntary-termination proceeding, even if they ultimately lose. The false premises of the challenged classification rendered the distinction an unreliable basis for depriving Shannon Murphy of her economic liberty to work with adults in foster care. The court concluded that the law was as likely to ensnare good people as it was to identify the irredeemably untrustworthy adults that the government was actually targeting.

Prong two asks whether a challenged classification—assuming it is "genuine and substantial" and not "fanciful"—will actually advance the government's purpose. In particular, prong two concerns whether the evidence establishes a concrete *fit* between the classification's purpose and its real-world effects. For example, in *Russell*, the Minnesota Supreme Court struck down a crack/powder-cocaine distinction under prong two because the government's stated purpose—to identify and punish street dealers more harshly than simple users—did not *fit* with how cocaine was used in the real world. *Russell*, 477 N.W.2d at 891. Under the classification at issue, someone with only three grams of crack was presumed to be a dealer whereas one needed ten grams of powder to be considered a dealer. *Id.* But there was no evidence that the three-gram/ten-gram distinction actually distinguished dealers from users. *Id.* The lack of connection between this distinction and the law's purpose was especially evident in the fact that ten grams of

powder could easily be converted into more than three grams of crack. *Id.* Thus, the Supreme Court held the crack/powder distinction unconstitutional under prong two because there was no evidence that the classification advanced the government's purpose, which was to distinguish crack and powder users from crack and powder dealers in order to impose harsher punishment on the dealers.

In ordinary cases, the invalidated classifications are invalid from the outset. The crack/power distinction in *Russell*, for example, was fatally flawed at enactment. But statutes can also *become* unconstitutionally arbitrary under prongs one and two simply through the passage of time. In *Wegan v. Village of Lexington*, the Minnesota Supreme Court examined a law that created different statutes of limitations for dram-shop liability based on whether the person at issue got drunk on 3.2% beer or some other alcoholic intoxicant. 309 N.W.2d 273, 278 (Minn. 1981). The Supreme Court invalidated this classification because compensating someone grievously injured by a drunk should not depend on what the drunk drank to get drunk. *Id.* at 280. Importantly, the Supreme Court walked through the Prohibition Era history to explain why the classification may have had some rationality at one point (if it ever did), but the Court also realized that the context of selling alcoholic beverages had so thoroughly changed as to render the 3.2% distinction arbitrary. *Id.* Thus, statutory classifications may become irrational under prongs one and two because the evidence indicates that the original purpose can no longer be served by changed circumstances. *See, e.g.*, *Burlington N. R.R. Co. v. Dep't of Pub. Serv. Regulation*, 763 F.2d 1106, 1110 (9th Cir. 1985) (recognizing that a "statute and regulation can withstand constitutional attack today *unless* the railroad can prove that the regulatory scheme is *no longer* rationally related to that interest in fostering public convenience and necessity") (emphasis added); *Milnot Co. v. Richardson*, 350 F. Supp. 221, 225 (C.D. Ill.1972) (striking

down statute prohibiting interstate shipment of filled-milk because products sufficiently similar to filled milk had been introduced in the intervening decades, rendering the law's original rational basis no longer viable.).

Finally, the third prong of the equal-protection test asks whether the government's purpose is legitimate. There are no cases in Minnesota in which statutes have been invalidated under rational-basis review for want of a legitimate purpose under prong three. There are, however, instructive federal cases in the funeral-regulation context standing for the proposition that private economic protectionism is not a legitimate government interest. *See St. Joseph Abbey v. Castille*, 700 F.3d 154, 161 (5th Cir. 2012) (holding that economic protectionism is not a legitimate government purpose); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (same). These cases note that once all legitimate justifications have been refuted for economic regulation, then often the only plausible inference is that the purpose of the challenged statute is to protect existing businesses from competition. *See also Metro. Life Ins., Co. v. Ward*, 470 U.S. 869, 878-83 (1985) (invalidating a law designed to protect local insurance companies from out-of-state competition using rational-basis analysis under the Equal Protection Clause—not the Commerce Clause—because economic protectionism of one economic group over another violates equal protection); *Merrifield v. Lockyer*, 547 F.3d 978, 992 n.15 (9th Cir. 2008) (adopting *Craigmiles'* holding that economic protectionism is not a legitimate government purpose). In a case such as this one—in which the requirement to build a non-functional preparation room hampers innovation and perpetuates the high-price *status quo*—the economic protection of established funeral-home businesses may be the only plausible explanation for the law.

II. The Substantive Due-Process Clause of the Minnesota Constitution Also Forbids Arbitrary Government Action.

Minnesotans have the right to earn an honest living free from arbitrary government interference. *See State v. Century Camera, Inc.*, 309 N.W.2d 735, 745 (Minn. 1981) (citing *Connor v. Township of Chanhassen*, 81 N.W.2d 789, 797 (Minn. 1957)). "When the police power is exerted to regulate the conduct of a useful business or occupation, the Legislature is *not* the sole judge of what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling." *Johnson v. Ervin*, 285 N.W. 77, 79-80 (Minn. 1939) (emphasis added). In contrast to its independent equal-protection guarantee, Minnesota's substantive due-process doctrine is identical to federal rational-basis jurisprudence. *Mammenga v. State Dep't of Human Servs.*, 442 N.W.2d 786, 789 (Minn. 1989). A challenged statute will survive rational-basis review if the law exhibits a rational relationship with a legitimate government purpose. *Id*. Minnesota courts have a long tradition of invalidating statutes that violate substantive due process by arbitrarily interfering with the right to earn an honest living. *See, e.g. Fairmont Foods Co. v. City of Duluth*, 110 N.W.2d 155, 157 (Minn. 1961); *Connor*, 81 N.W.2d at 797-98; *City of St. Paul v. Dalsin*, 71 N.W.2d 855, 858-59 (Minn. 1955); *Ervin*, 285 N.W. at 88-89; *Pavlik v. Johannes*, 259 N.W. 537, 541 (Minn. 1935); *State v. Stewart*, 529 N.W.2d 493, 497 (Minn. App. 1995).

III. Forcing Plaintiff Stoll to Build a Non-Functional Preparation Room Fails Both the Equal-Protection and Substantive Due-Process Standards.

Minnesota has a more rigorous standard for equal-protection review than for substantive due-process, but the standard that the Court applies is irrelevant because the challenged statute fails both. A non-functional preparation room cannot be used for anything. A non-existent preparation room also cannot be used for anything. They are the same, equally useless. Whether this is framed as an equal-protection violation—non-functional preparation room (required)

versus no preparation room (forbidden)—or a substantive due-process violation—making people do useless things—the result is identical: The law is unconstitutional.

With respect to equal protection, Plaintiffs have no deeper analysis than the obvious at this juncture because, after months of discovery, there is no evidence whatsoever of a real-world basis for the challenged classification. Because a non-functional preparation room and a non-existent preparation room are equally useless, it is difficult to fathom how the statutory distinction between them could be anything but "fanciful" under prong one of the equal-protection test. The prong-two analysis is the same. Plaintiffs have no idea what public health-and-safety menace or threat to consumer well-being could be nullified by forcing funeral-home owners to build non-functional preparation rooms that they are legally forbidden from using. There is not even a plausible theoretical purpose. For example, Minnesota has no plans to engage in mass embalming in the event of a mass-casualty disaster, much less plans to convert non-functional preparation rooms to a functional state to cope with a catastrophe. Frankly, merely reciting the requirement—build something no one can use—is sufficient to prove its unconstitutionality.[4]

Perhaps there once may have been a reason for the distinction, though Plaintiffs cannot imagine what it was, which is now lost in the mists of time. But even if such a reason once existed, the ubiquity of centralization and trade embalming has stripped that reason of any contemporary relevance. There is simply no need in 2013 to force people to build non-functional

[4] Defendants appear to agree. They have stated to the Minnesota Legislature, as part of an effort to amend the challenged statute, that the public would come to no harm by abolishing the requirement to build non-functional preparation rooms at branch locations of the same funeral-home business. 2013 MDH Legislative Budget Fact Sheets, Minnesota Department of Health, "Modify Mortuary Science Regulations" (Jan. 2013).

preparation rooms. Thus, even if the distinction may have been constitutional long ago, it is unconstitutional today.

The substantive due-process analysis is even easier despite the fact that it involves a more lenient standard because there is directly on-point federal precedent under identical facts. Just last year, a federal district court struck down Pennsylvania's preparation-room requirement as a violation of substantive due-process under the Fourteenth Amendment. *Heffner v. Murphy*, 866 F. Supp. 2d 358, 402-03 (M.D. Pa. 2012) ("any interest Defendants have in maintaining a preparation room at each funeral home is not rationally related to the requirement at issue herein."). *Heffner* was correctly decided and this Court should simply follow it rather than break new constitutional ground by declaring that forcing funeral-home entrepreneurs to build useless preparation rooms is rational.

CONCLUSION

Plaintiffs Verlin Stoll and the Funeral Consumer Alliance of Minnesota have brought this constitutional challenge to vindicate the basic principle of economic liberty that the government cannot force entrepreneurs to do useless things. The evidence at trial will establish that a non-functional preparation room (required) is the same as no preparation room (forbidden), and that no legitimate government purpose justifies this arbitrary classification. In their post-trial briefing, Plaintiffs will respectfully ask the Court to strike down this statutory distinction and enable Plaintiff Stoll—and others like him—to run their businesses and serve their clients without unreasonable interference.

Dated: February 27, 2013.

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