

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

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

Case Type: Other Civil
File No.: 62-CV-12-443
Judge: John H. Guthmann

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,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER FOR JUDGMENT**

Defendants.

The above-entitled matter came before the Honorable John H. Guthmann, Judge of District Court, for trial on March 4-5, 2013 at the Ramsey County Courthouse, St. Paul, Minnesota. Katelynn K. McBride, Esq., and Wesley Hottot, Esq., appeared on behalf of plaintiffs Verlin Stoll, Crescent Tide LLC, and Funeral Consumers Alliance of Minnesota. Assistant Attorneys General Scott A. Grosskreutz, Esq., and David F. Strohkirch, Esq., appeared on behalf of defendants Minnesota Department of Health Mortuary Science Section, Edward P. Ehlinger, and Timothy J. Koch. The record closed on July 12, 2013 following the filing of proposed findings and written final arguments from the parties.

Based upon the entire record herein, the Court issues the following findings of fact, conclusions of law, and order for judgment:

FINDINGS OF FACT

I. THE PARTIES

1. Plaintiff Verlin Stoll (“Stoll”) is a 28-year-old, Minnesota-licensed mortician and the owner of plaintiff Crescent Tide LLC (“Crescent”), a Minnesota-licensed funeral home located in St. Paul. (T1. at 78, 81.)¹

2. Plaintiff Funeral Consumers Alliance of Minnesota (“FCA-MN”) is the state chapter of the Funeral Consumers Alliance—a national nonprofit organization. FCA-MN was established in 1942. Its mission is to advocate for dignified, affordable after-death arrangements for its members and the general public. (T2. at 26).

3. Defendant Minnesota Department of Health’s Mortuary Science Section is an agency of the State of Minnesota charged with enforcing the funeral-industry licensing laws under Minnesota Statutes Chapter 149A and developing and adopting regulations necessary to carry out those laws.

4. Defendant Edward P. Ehlinger is the Commissioner of the Minnesota Department of Health, and is named as a defendant in his official capacity.

5. Defendant Timothy J. Koch is the former Acting Supervisor of the Mortuary Science Section of the Minnesota Department of Health, and is named as a defendant in his official capacity.

¹ A trial transcript was ordered by the parties. Citations to the trial record are to “T” for transcript, followed by an Arabic numeral denoting the transcript volume, and the page number. References to “Ex.” are to the trial exhibits.

II. STATUTES APPLICABLE TO FUNERAL ESTABLISHMENTS²

6. Minnesota Statutes sections 149A.01-.98 deal with the regulation of mortuary science and the disposition of deceased bodies in Minnesota. Minn. Stat. §§ 149A.01-.98 (2012). The statute was written “for purposes of public health and protection of the public.” *Id.* § 149A.01, subd. 1.

A. General Provisions.

7. “In Minnesota, no person shall, without being licensed by the commissioner of health: (1) “take charge of or remove from the place of death a dead human body; (2) prepare a dead human body for final disposition, in any manner; or (3) arrange, direct, or supervise a funeral, memorial service, or graveside service.” *Id.* § 149A.01, subd. 2.

8. A “mortician” is “any person who, for compensation, practices the art of embalming and arranges, directs, or supervises funerals, memorial services, or graveside services, or engages in the business or practice of preparing dead human bodies for final disposition.” *Id.* § 149A.02, subd. 29.

9. Subject to exceptions not applicable to this case, “no person shall maintain, manage, or operate 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” without a license issued by the Commissioner of Health. *Id.* § 149A.50, subd. 1.

² The Findings of Fact in this section identify the statutes applicable to this case. To the extent the Findings include an interpretation of each statute’s meaning, they are intended to be mixed Findings of Fact and Conclusions of Law.

10. A “funeral establishment” is “any 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 of any person that provides funeral goods or services to the public.”³ *Id.*, § 149.02, subd. 20.

11. “Preparation of the body” means “embalming of the body or such items of care as washing, disinfecting, shaving, positioning of features, restorative procedures, application of cosmetics, dressing, and casketing.” *Id.*, § 149.02, subd. 34.

12. Minnesota law regulates where and the conditions under which dead human remains may be prepared:

The preparation of a dead human body for final disposition shall be performed in privacy. No person shall be permitted to be present in the preparation room while a dead human body is being embalmed, washed, or otherwise prepared for final disposition, except:

- (1) licensed morticians;
- (2) registered interns or students as described in subdivision 6;
- (3) public officials or representatives in the discharge of their official duties; and
- (4) licensed medical personnel.

Licensed funeral homes may work with family and friends of the deceased to allow for their participation in washing and dressing of the body in a private location other than the preparation room of the funeral home.

Id. § 149A.91.

³ To remain consistent with the statute, the colloquial term “funeral home” is replaced by the statutory term “funeral establishment” throughout this Order.

13. “Embalming” is “the process of disinfecting and preserving a dead human body by chemically treating the body to reduce the presence and growth of organisms, to retard organic decomposition, and to restore an acceptable physical appearance.” *Id.* § 149A.02, subd. 15. In practice, embalming involves evacuating the circulatory system and body cavities, then filling them with preservative chemicals. (T1. at 97.)

14. Minnesota law identifies four situations in which a dead human body requires embalming, refrigeration, or packing in dry ice: (1) the final disposition occurs more than seventy-two hours after death; (2) remains are transported by common carrier; (3) remains are placed on display for the general public; or, (4) by order of the Commissioner of the Minnesota Department of Health for the control of infectious disease and to protect public health. Minn. Stat. § 149A.91, subd. 3(a) (2012); *see id.* § 149A.94, subd. 1.

15. There is no evidence that Commissioner of the Minnesota Department of Health has ever ordered a body embalmed. (T1. at 50, 64; T2. at 40.)

B. Statutes Applicable to Preparation Rooms.

16. By law, “[e]very funeral establishment must have a preparation and embalming room.” *Id.* § 149A.92, subd. 2; *see id.* § 149A.50, subd. 2(1). The preparation and embalming room must be private and meet certain minimum specifications, such as nonporous floors, special plumbing, and special ventilation. *Id.* § 149A.92, subds. 2-7.

17. Funeral homes lacking a preparation and embalming room or having a room that was not used in the twelve months before July 1, 1997 were grandfathered in and are

exempt from the statutory preparation and embalming room requirements. Minn. Stat. § 149A.92, subd. 1.

18. There is no requirement that a preparation and embalming room contain an embalming table, embalming machine or embalming chemicals unless embalming is actually performed in the room. *Id.* § 149A.92, subd. 6.

19. A preparation and embalming room not equipped for embalming costs eighty percent as much to build out as a room that is fully equipped for all preparation of the body, including embalming. (T1. at 95.)

20. According to the statute, “[a] preparation and embalming room shall not be used for any other purposes.” *Id.* § 149A.92, subd. 8. Defendants’ inspectors have found preparation and embalming rooms used for storage or as lunch rooms and, in such instances, the funeral establishment is tagged with a violation. (T1. at 33-34, 39-40.)

21. Minnesota law requires every “funeral establishment” to build a preparation and embalming room, regardless of whether on-site preparation of human remains will be performed on site. (T3. at 14.)

22. Although Minnesota law mandates the construction of a preparation and embalming room by every funeral establishment, there is no requirement that the preparation and embalming room be used. (T1. at 48-49.)

23. No statute requires funeral establishments to provide preparation services nor does Minnesota law require that preparation be done on-site. (*Cf.* T1. at 31-32.)

24. When conducting compliance inspections of funeral establishments, the internal inspection form used by defendants asks the inspector to check the “Non-

functional prep room” box on the form if the business does not use its preparation and embalming room for the preparation of dead bodies. (T1. at 25-27; Exs. 43A, 43B.)

25. A designation as a “Non-functional prep room” on the inspection form does not mean that the room may not be used to prepare or embalm dead bodies. It only means that the funeral establishment made a business decision not to use the preparation and embalming room at that location at the time of the inspection. (T1. at 28-30, 48-49, 68-71.)

26. Minnesota statutes do not define, describe or discuss “non-functional prep rooms.” (*Id.* at 37, 46; T3. at 12.) There is no such statutory classification and Minnesota statutes treat all funeral establishments the same. (T3. at 14.)

27. If the preparation and embalming room meets minimum statutory requirements, all forms of defined preparation of the body may take place in the room, except embalming, which requires installation of the additional embalming table and embalming supplies. Minn. Stat. § 149A.92, subd. 6 (2012); *see* T1. at 38-39.

28. A preparation and embalming room that does not have an embalming table or embalming equipment may still be used to prepare dead bodies for cremation or direct burials. (T1. at 39.) For cremations, dead bodies may be rolled into the room on a cot or go directly into a cremation container and then be prepared for cremation. (*Id.* at 73-76; T2. at 112-14.) For direct burials, the funeral establishment may bring bodies into the preparation and embalming room on a cot or stretcher from the place of death and put them directly into a casket. (*Id.* at 73-76; T2. at 112-14.) In addition, a preparation and embalming room without an embalming table or embalming equipment may also be used

for ceremonial washings because the body can be bathed on the stretcher, a dressing table, or some other type of table. (*Id.* at 73-76; T2. at 112-14.)

29. Marguerite Slonine, who is defendants' funeral inspector, testified that the Minnesota Department of Health (the "DOH") does not scrutinize funeral homes with so called "non-functional preparation rooms" any more than they scrutinize funeral homes that use their preparation and embalming rooms to prepare human remains. (T1. at 34.)

30. The DOH does not believe that, absent the preparation-room requirement, there would be any shortage of preparation rooms in Minnesota. (T3. at 15; Ex. 21.) The DOH believes there would be more funeral homes and more consumer choice if the preparation and embalming room requirement was removed and funeral homes were allowed to centralize preparation and embalming. (Ex. 21.)

31. Defendants' witnesses agree that Minnesota's disaster response plans do not call for mass embalming in the event of a mass disaster. (T1. at 50-54.) To the contrary, Koch testified that Minnesota follows international disaster-response protocols that reject mass embalming. (T1. at 51-55.)

32. Preparation must be done in private with only certain people in attendance. Minn. Stat. § 149A.91, subds. 2, 9 (2012). In addition, every funeral establishment must have a preparation and embalming room. *Id.* § 149A.92, subd. 2. But, strangely, the statute contains no express requirement that all preparation and all embalming be done in a defined preparation and embalming room.

III. HEALTH ISSUES ASSOCIATED WITH THE PREPARATION OF HUMAN REMAINS

33. Dr. Richard Danila (“Danila”) testified as an expert on behalf of defendants. He has a Master of Public Health (M.P.H.) degree in epidemiology and a doctoral (Ph.D.) degree in epidemiology. He has held numerous positions with the Minnesota Department of Health over the last twenty-eight years. Dr. Danila is an expert in epidemiology. (T2. at 38.)

34. Epidemiology is the study of the distribution of diseases in the population. An epidemiologist studies population as a whole or as groups of people and then determines how diseases are spread in those populations.⁴

35. Dr. Danila’s expert opinions were unopposed by plaintiffs and his opinions are accepted as credible, accurate, and persuasive.

36. Dr. Danila opined that dead bodies pose infectious risks to other people, including morticians that come into contact with the body or fluids from that body. Dead bodies may harbor the following infectious agents which pose specific disease risks: the bacteria group A Streptococcus; bacteria and viruses that cause gastrointestinal infections; tuberculosis; agents that cause transmissible spongiform encephalopathies (such as Creutzfeldt-Jakob disease); the bacteria that causes meningococcal disease (*Neisseria meningitides*); and blood borne pathogens such as hepatitis B virus, hepatitis C virus, and human immunodeficiency virus (HIV). A person is not able to determine whether a dead body is harboring these infectious agents by visually inspecting the body.

⁴ Findings 30-37 are derived from Dr. Danila’s unopposed testimony. (T2. at 37-46; T3. at 19-31.)

37. Dr. Danila testified that the risk of contracting an infectious disease from a dead body exists even if the body is not being embalmed. Because an individual can be involved in traumatic death, traumatic injury, or in a motor vehicle accident, the dead body may not always be intact. Thus, there could be leakage of bodily fluids which would cause a risk to anyone touching, washing, disinfecting, or preparing the body or clothing.

38. Dr. Danila further testified that a preparation and embalming room minimizes the risk of acquiring an infectious disease from a dead body in several ways. First, it reduces the number of people exposed to the dead body. Sometimes the dead body is not whole and may be leaking fluids, have sharp bone splinters, or damaged bones. Having a preparation and embalming room onsite minimizes the number of people transporting and handling the body. Second, a preparation and embalming room allows for closed limited access to an area where a professional can properly and safely prepare a dead body for final disposition. Leakage of body fluids also occurs with an intact body. Thus, a preparation and embalming room is essential for safety of those employed to care for the deceased and for the family who wait to view and see the body. Third, if a body is embalmed, the process inactivates or kills most infectious disease risks.

39. Dr. Danila also explained that the items required by statute to be in a preparation and embalming room protect individuals handling dead bodies from contracting infectious diseases. According to Dr. Danila, tuberculosis can be transmitted when expelled from the dead body. This can occur when the lungs are opened, which can cause aerosolization of the tuberculosis. Ventilation and exhaust fans provide good air

exchange for removing unclean air. Emergency eye washes and emergency showers lower the risk from infectious disease because an individual would be able to wash out one's eyes, face, or head in the event the person was sprayed with blood or other bodily fluid when handling a dead body.

40. Dr. Danila agrees that his public health concerns are applicable only to funeral establishments that bring human remains on site. (T2. at 44-46.)

41. Koch also testified on his own behalf and on behalf of defendants. Based on his experiences as a mortician and mortician investigator, Koch believes there are health concerns when handling dead bodies and preparing them for final disposition. All bodies, whether embalmed or not, require some type of preparation. (T2. at 108-09.) Every dead body could potentially leak body fluids, including, vitreous fluid from the eyes, mucus from the nose or mouth, urine or fecal material, or blood or other infectious blood-borne pathogens. (*Id.* at 108-10.)

42. Koch also explained how a preparation and embalming room protects individuals handling dead bodies. According to Koch, the eyewash and emergency shower in a preparation and embalming room protects individuals from infectious disease or blood-borne pathogens by providing the ability to quickly wash out the eyes or other parts of the body in the event they were splashed in some way. (*Id.* at 109-10.) A ventilation or exhaust fan in a preparation and embalming room protects an individual by drawing away embalming fumes. (*Id.* at 110.) It can also draw away the smell of decomposition, which makes the environment a better place to work. (*Id.*)

43. To safely prepare and embalm dead bodies, a funeral establishment that does not have a preparation and embalming room must either have the capability to centralize its preparation and embalming services or contract with a trade embalmer who has access to a preparation and embalming room.

44. Plaintiffs make no complaint about the health justifications advanced by defendants for the statutory requirement that funeral establishments construct preparation and embalming rooms, as long as the funeral establishment prepares human remains on site.

IV. CURRENT FUNERAL INDUSTRY PRACTICES

A. Centralization.

45. Centralization is a business model in which a funeral establishment with multiple locations in a geographical area decides to conduct all preparation and embalming of dead bodies in one location. (T2. at 111-12.) Some Minnesota funeral establishments have only a single location.

46. Centralization of the preparation of human remains is increasingly commonplace in the funeral industry in Minnesota and across the nation. (T1. at 32, 71-72, 103; T2. at 60.)

47. By centralizing preparation, funeral homes can build better facilities and employ specialists who do nothing but prepare remains, thereby eliminating redundant staffing and equipment. (T2. at 59-60.)

48. Funeral establishments that centralize typically build preparation and embalming rooms to meet no more than the minimum statutory requirements at branch

locations where no preparation of the body is intended (the so-called “non-functional” preparation rooms) because completing a full build out is duplicative and not economically sound. (T1. at 102-03; T2. at 59-60.)

49. For example, Washburn-McReavy—one of the largest funeral homes in the state—operates a sales office, which it calls a “Prearrangement Center,” in Blaine, Minnesota. This sales office is in a strip mall next to a Chipotle restaurant and a nail salon. Its doorways and hallways are not large enough to accommodate the ingress and egress of human remains and, even if the doorways and hallways were enlarged in the future, remains would still have to be wheeled through the front door, which faces the strip mall’s parking lot. (T1. 27, 30-32, 103-106; Exs. 43A, 43B.)

50. A sales office like Washburn-McReavy’s Prearrangement Center in Blaine is just a funeral store where goods and services are sold and where the bodies of deceased people are never brought. (T1. at 31-32.)

51. Sales offices are commonplace in the funeral industry. Under current law, sales offices where no bodies are brought still require construction of preparation and embalming rooms. For example, the Neptune Society—the nation’s largest provider of cremations—had to build a preparation room in their Golden Valley sales office. (T2. at 116-117; T3. at 4.)

52. A cremation-only business is not required to build a preparation and embalming room at its crematory, where bodies are actually brought. Minn. Stat. §§ 149A.02, subd. 12 (defining “crematory”); 149A.95 (2012) (building requirements for crematories different from those for preparation and embalming rooms). However, the

cremation-only business would be required to build a preparation and embalming room if it operates a sales office, where bodies are never brought. *Id.* §§ 149A.02, subd. 20 (defining “funeral establishment” to include just a sales office); 149A.50, subd. 2(1) (requiring construction of a preparation and embalming room by every funeral establishment).

53. Funeral establishments can charge lower prices when they are allowed to build one preparation and embalming room in a centralized facility, in lieu of a requirement to build such a room in every branch. (T2. at 78-79.)

54. Minnesota consumers are able to pay for their funeral arrangements before needing the services. Funeral prearrangements are typically funded by either an insurance policy or bank account (through a CD or savings account). (T2. at 114-15.) Most pre-arrangements are made through insurance policies rather than bank accounts because medical assistance laws limit the amount of money that may be placed in a CD, bank, or bank account. (*Id.* at 115-16.) Nevertheless, as of 2011, there was approximately \$97 million in Minnesota bank accounts for funeral prearrangements. (*Id.* at 115.)

B. Trade Embalmers.

55. Trade embalmers are licensed morticians that contract to perform preparation and embalming services for other funeral establishments. (T1. at 79-80; T3. at 6-7.)

56. Trade embalmers that do not have their own preparation and embalming room often rent the preparation and embalming room of the funeral establishment for which they are performing services. (T2. at 5; T3. at 6-8.) In such instances, the funeral

establishment needs to have an on-site preparation and embalming room so the trade embalmer prepares bodies in a space that complies with Minnesota law. (T3. at 6-8.)

57. Most of Minnesota's trade embalmers are located in the Twin Cities. (*Id.* at 9.) While many travel over 100 miles outside of the Twin Cities, the entire state does not have access to trade embalmers. (T2. at 3; T3. at 10.) Thus, where trade embalmers are not available, the funeral establishment needs its own preparation and embalming room to ensure that dead bodies are prepared in a space that complies with Minnesota law. (T3. at 11.)

IV. STOLL'S BUSINESS MODEL FOR CRESCENT

58. Stoll opened Crescent in 2011. He built the business in an industrial-park suite on Transfer Road in the St. Paul/Midway area. (T1. at 80-81, 103.)

59. Stoll opened Crescent because he saw a need in the market for low-cost funeral services. (*Id.* at 80-81.)

60. Crescent's motto is "The New Generation of Service." (*Id.* at 81.) The motto represents Stoll's business decision to break from the traditional funeral establishment that he views as too expensive and as involving high mark-ups due to expensive on-site facilities. (*Id.*)

61. Stoll foresees a shift toward simpler and more economical funeral customs, with a shift towards cremation and away from burial. (*Id.* at 81-82, 96-97.)

62. Crescent provides the lowest prices in the Twin Cities area. (*Id.* at 91; Exs. 6-8.) Stoll's basic-services fee is just \$250, compared with a Twin Cities average of

approximately \$2,500. (T.1 at 91; Exs. 6-8.) Crescent performs a funeral with burial for \$1,650 and direct cremation for \$750. (T1. at 89-90; Ex. 8.)

63. The basic-services fee at other Twin Cities funeral establishments ranges from \$4,000 to \$5,500. (T1. at 89-90; Exs. 7-8.) Direct cremation prices range from \$1,300 to \$3,000. (T1. at 89.)

64. Crescent is one of just a few Twin Cities funeral establishments that make their prices available online. (*Id.* at 85.)

65. Stoll built Crescent to minimize overhead. He did not build space for public visitations, funerals, and memorial services, or purchase a hearse. (*Id.* at 81.)

66. To comply with state law, Stoll outfitted Crescent with a preparation and embalming room. (*Id.* at 95-96, 107-09.) The cost of construction and extra rent during which time the space was unusable due to construction was approximately \$30,000, which is much less than what a typical preparation room costs because Stoll picked a location with an easily converted water supply, constructed much of the room himself, and found a free embalming machine. (*Id.*; Ex. 14.) Stoll did not want to build a preparation room at Crescent. (T1. at 94-95.) He did so only because defendants required him to do so as a condition of obtaining a funeral establishment license. (*Id.*)

67. At Crescent, a family can have any kind of funeral because Stoll uses outside contractors to supplement the services he offers. (*Id.* at 82.) For example, he works with chapels, churches, and cemeteries when customers need a viewing space. (*Id.*) He will transport remains in an ordinary car to save money, but if a client wants a hearse, Stoll will provide one. (*Id.* at 81-82.)

68. Rather than build a preparation and embalming room at Crescent, Stoll would have preferred to contract with trade embalmers for all of Crescent's embalming and preparation services, just as he uses outside contractors for other funeral services. (T1. at 94-95.)

69. Nevertheless, during its first year of operation, Crescent collected approximately \$15,000 in revenue from third parties who used its preparation and embalming room for embalming or storing human remains. (T1. at 118.)

V. CRESCENT'S CUSTOMERS

70. Crescent serves families from all backgrounds, but part of Crescent's emphasis is serving people in the North Minneapolis African-American community. (T1. at 109-10; T2. at 13-15, 19-20, 32-33.)

71. Helen Williams volunteers in the North Minneapolis community to help plan funerals. (T2. at 13.)

72. Mrs. Williams began to assist African-American families with their funeral planning at no charge after her grandson lost two lifelong friends to gang violence. She was astonished at the expense of even a simple funeral. (*Id.*)

73. Mrs. Williams has helped plan over 1,200 funerals since 2006. (*Id.* at 14.)

74. Mrs. Williams has worked with many funeral homes in Minnesota, including traditionally African-American funeral homes, and has found that no funeral home had a policy of providing a burial package that African Americans tend to prefer culturally—a metal casket with an extended public viewing—for the price of the Hennepin County burial-assistance allowance, which many people in her community use. (*Id.* at 13-15.)

75. Hennepin County will only provide burial assistance for a funeral costing \$3,500 or less, with the County providing up to \$2,100 and the deceased's family making up the difference. (*Id.* at 14-15.)

76. Stoll is the only funeral director who will provide a traditional African-American funeral for the county allowance to anyone Helen Williams sends to him, and Crescent is the only funeral home that has a policy of performing a full-service burial for the Hennepin County burial price in every case. (*Id.* at 18-19.) Stoll and Williams have a contract to this effect. (*Id.* at 18-20; Ex. 17.)

77. Because Crescent is the only funeral home that will regularly offer full-service burials for the Hennepin County burial assistance price, Mrs. Williams has recommended Crescent to hundreds of families. (T2. at 19-20; *see* Ex. 17.)

78. While some funeral homes may occasionally offer a deep discount to a family, the price lists to which Koch referred during his testimony prove that funeral homes do not regularly offer a full-service burial for the Hennepin County burial price. (T2. at 106-07; Exs. 6-7.) Koch testified that Washburn-McReavy charges \$4,790 for a full-service funeral, (T2. at 106), which is \$1,290 more than the Hennepin County burial allowance.

79. Mrs. Williams recommends Crescent to all of her families, but some decline because they perceive St. Paul as being outside of their North Minneapolis community. (*Id.* at 20-21.)

80. Mrs. Williams believes these families would perceive a location closer to them, such as in St. Louis Park, as within their community and would be more comfortable going there. (*Id.* at 21.)

81. FCA-MN was established in 1942 and is now a chapter in a national organization. (*Id.* at 27.) Its membership consists primarily of elderly funeral consumers and persons pre-planning their own funerals who are concerned about price. (*Id.* at 27-28.)

82. A common concern of FCA-MN members is that funeral prices are too high, which they believe is due in part to the preparation-room requirement, which forces funeral directors to spend money they do not want to spend. (*Id.* at 27, 30-32.)

83. From conducting funeral price surveys across the state, FCA-MN is familiar with Minnesota funeral prices and recommends Crescent to its members in part because Crescent has the lowest prices in the state. (*Id.* at 32-33; *see* Exs. 6-8.)

VI. PLAINTIFF STOLL'S EXPANSION PLANS

84. Stoll wishes to construct a sales-only office in St. Louis Park with no preparation room. The facility would be similar to Washburn-McReavy's sales office in Blaine, which has a preparation room. The business operation of each would be materially identical: funeral-home sales offices in strip malls with no plan to bring a body and where it would be impractical to ever bring a body with or without a preparation and embalming room on site. (T1. at 27, 30-32, 48-49, 104-06; Exs. 43A, 43B.)

85. Stoll does not want or need a preparation and embalming room at his proposed sales office in St. Louis Park because he intends to employ the centralization business practice. (T1. at 103.)

86. Stoll would like to centralize all of the preparation and embalming for the St. Louis Park location at Crescent's St. Paul location. (*Id.* at 102-03, 119.) Centralizing would save Stoll money, which he could then pass on to his customers in the form of lower prices. (*Id.* at 102-03.)

87. The purpose of the proposed expansion is to better serve North Minneapolis residents, such as Mrs. Williams African-American community. (T1. at 110) Stoll has taken concrete steps to expand by identifying a storefront location on Excelsior Boulevard in St. Louis Park that would ideally suit his plans. (*Id.* at 100-01, 110, 113.)

88. In the future, Stoll would also like to open branch locations in Duluth, St. Cloud, and/or Rochester. (T1. at 101.)

89. As a practical matter, human remains could never be brought to the proposed St. Louis Park sales office because it is located in a shopping complex with no private garage, and bringing a body into the sales office would require wheeling it through public parking. (T1. at 106-07.) Displaying remains in this way might be viewed as undignified. (*Id.*) Additionally, the hallways, doors, and corners of the facility are not wide enough to accommodate a body. (*Id.* at 107.)

90. Even though Stoll intends never to bring human remains to the proposed sales office in St. Louis Park, Stoll must nevertheless build a preparation and embalming

room at the location in order to receive a funeral establishment license under present law. (Exs. 43A, 43B; *see* Minn. Stat. § 149A.92, subd. 6 (2012).)

91. The capital required to build a preparation and embalming room that Stoll has no plans to use represents such a significant portion of Stoll's planned investment that he has put his St. Louis Park expansion plans on hold. (T1. at 94-96, 100, 102-03.)

92. The preparation room Stoll would have to build at his proposed St. Louis Park sales office would cost at least \$3000 more than the preparation and embalming room at his original location. (*Id.* at 107-09; Ex. 14.)

93. Plaintiffs do not challenge any statutory requirement that the actual preparation of human remains be done in a preparation and embalming room meeting statutory specifications. (T1. at 121-22; T2. at 4.) Rather, plaintiffs challenge the statute mandating the construction of preparation and embalming rooms that they do not want to use and do not intend to use. (*Id.*)

VII. THE IMPACT OF THE PREPARATION-ROOM REQUIREMENT ON CONSUMERS AND THE PUBLIC

94. Burial and embalming are in sharp decline as cremation has become the norm. (T1. 96-97; T2. at 97.)

95. When burial does occur, fewer families choose to embalm. For example, less than one fourth of Stoll's clients choose embalming. (T1. at 96-97; T2. at 97.)

96. Plaintiffs' expert, Dr. David Harrington, is an economist specializing in the market for funeral goods and services. He has conducted peer-reviewed studies of preparation-room requirements in all fifty states and the District of Columbia and has

found that preparation-room requirements increase funeral costs and decrease choices for consumers. (T2. at 47-51, 60-76; Exs. 31-32, 53-A.)

97. According to Dr. Harrington’s testimony and his study “Preserving Funeral Markets with Ready-to-Embalm Laws”, preparation-room requirements increase the cost of burial by an average of \$546 and increase the cost of cremation by an average of \$313 in the United States. (T2. at 63, 88; Ex. 32 at 4.)

98. Dr. Harrington testified that preparation-room requirements increase average consumer costs in two ways. First, funeral establishments attempt to recoup construction costs by charging more. (*Id.* at 64-65, 78-79.) Second, when funeral establishments have preparation rooms, they will push extra services, including embalming, on families to make some use of the rooms. (*Id.* at 74-75.)

99. According to Dr. Harrington’s testimony and his study “The Effect of State Funeral Regulations on Cremation Rates, Testing for Demand Inducement in Funeral Markets”, preparation-room requirements lead to funeral homes pushing consumers away from more affordable options like cremation. (*Id.* at 71-73; Ex. 53-A.)

100. Dr. Harrington opined that preparation-room requirements increase the cost of all funeral goods and services, including cremation. (*Id.* at 96.)

101. . As the prices of cremation and embalming come closer together, it makes it easier for funeral directors to nudge customers towards more expensive services. (*Id.* at 72-73.)

102. Dr. Harrington found no evidence that states without preparation-room requirements have higher rates of fraud than states with preparation-room requirements.

(*Id.* at 82.) To the contrary, Dr. Harrington expects preparation-room requirements to increase the likelihood that consumers will be defrauded because, when funeral directors have to invest in unnecessary facilities, funeral directors attempt to recoup their costs. (*Id.* at 81-82.)

103. According to Dr. Harrington, preparation-room requirements are unlikely to reduce fraud given that funeral directors must already make a substantial investment in their education, licensing, and funeral establishment. (*Id.* at 82.)

104. Defendants introduced no evidence of that instances of consumer fraud in the funeral industry can be traced to the absence of an unused preparation room or fraud that would have been prevented by the presence of an unused preparation room. In fact, the record is devoid of any evidence of fraud under any circumstances in the funeral industry.

105. In his many years of studying funeral markets and regulations, Dr. Harrington has encountered no evidence that preparation-room requirements protect consumers from fraud. (*Id.* at 80.)

106. On cross examination, Dr. Harrington agreed that requiring a financial investment into a business can be an incentive not to commit fraud. (*Id.* at 99.)

107. Dr. Harrington is unaware of any evidence that unused preparation and embalming rooms advance public health and safety or that states with preparation and embalming-room requirements have fewer health and safety problems than states without those requirements. (*Id.* at 79-80.)

108. Dr. Harrington cannot conceive of even a theoretical benefit of forcing funeral directors to build preparation rooms that they cannot or do not want to use. (*Id.* at 83-84.)

109. Defendants offered no testimony to rebut Dr. Harrington's testimony.

110. Due to the absence of any evidence of fraud in the funeral industry, and Dr. Harrington's lack of credentials and experience regarding fraud in the funeral industry, the court rejects as lacking in foundation and credibility Dr. Harrington's opinion testimony concerning any relationship, or lack thereof, between consumer fraud and preparation room building requirements.

111. However, for the same reason, the court finds as a matter of fact that there is no evidentiary support for defendants' hypothesis that the statutory preparation and embalming room requirement protects consumers from fraud. Defendants' bald assertion is speculative at best.

112. The court finds as a matter of fact that the preparation and embalming-room requirement does not advance any rational or legitimate governmental interest in public health, safety, or welfare if human remains are never present at or prepared on the premises of the particular funeral establishment.

IX. THE BRANCH EXEMPTION PROPOSED DURING THE 2013 LEGISLATIVE SESSION

113. Earlier this year, the DOH sought to amend the preparation-room requirement to allow funeral homes to open branch locations without building a preparation and embalming room in each location. H.R. 1233, 88th Leg., 1st Sess.

(Minn. 2013) (introduced version); S. 1034, 88th Leg., 1st Sess. (Minn. 2013) (introduced version); T1. at 55; Ex. 21.

114. The court takes judicial notice of the DOH's proposal and legislative testimony. *See, e.g., Lifteau v. Metro. Sports Facilities Comm'n*, 270 N.W.2d 749, 752-53 (Minn. 1978) (judicially noticing the fact that challenged legislation received more media coverage and was discussed more in legislative process than other laws); *In re Doyle*, 778 N.W.2d 342, 348-49 (Minn. Ct. App. 2010) ("The process for taking judicial notice of legislative facts is not addressed by rule, nor is the term defined.").

115. When offering the proposed amendment to the preparation and embalming room requirement, DOH officials agreed that eliminating preparation rooms at branch locations presented no danger to the public and would increase the total number of funeral establishments available to consumers. H.R. 1233, 88th Leg., 1st Sess. (Minn. 2013) (introduced version); S. 1034, 88th Leg., 1st Sess. (Minn. 2013) (introduced version); T1. at 55-56, 59-60; Ex. 21 ("Additionally, MDH has determined some funeral home licensing requirements may be eased without harm to the public. Specifically, the requirement that a funeral home contain an embalming and preparation room is removed provided all preparation is done at a central licensed location. It is estimated that elimination of the prep room requirement under certain circumstances may increase the total number of funeral home establishments by 12 per year The proposal lessening the physical plant requirements of all branch funeral offices may allow consumers more choices of services around Minnesota.").

116. The funeral industry, represented by the Minnesota Funeral Directors Association, opposed the amendments proposed by the DOH. Governor’s Budget Proposals for the Minn. Dept. of Health: Hearing on S. 1034 Before S. Comm. on Fin., Health & Human Servs. Div., 88th Leg. (Minn. 2013) (testimony of Roger Bengston, President, Funeral Directors Association).

117. Ultimately, the DOH proposal was amended and a deadline-free directive that the DOH study the preparation-room issue and report to the legislature was passed. Act of May 23, 2013, ch. 108, art. 12, § 101, 2013 Minn. Laws 1348.

CONCLUSIONS OF LAW

I. GENERAL PRINCIPLES APPLICABLE TO THE REVIEW OF A STATUTE’S CONSTITUTIONALITY

1. Courts “presume statutes to be constitutional and exercise the power to declare a statute unconstitutional ‘with extreme caution and only when absolutely necessary.’” *Irongate Enterprises, Inc. v. County of St. Louis*, 736 N.W.2d 326, 332 (Minn. 2007) (quoting *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989)). To prevail, the party challenging a statute must demonstrate beyond a reasonable doubt that the statute violates the Federal or Minnesota Constitution. *In re Individual 35W Bridge Litigation*, 806 N.W.2d 820, 829 (Minn. 2011).

2. Before addressing the merits of plaintiffs’ challenges, the court must determine whether plaintiffs present a facial or as-applied challenge to the statutory preparation and embalming room requirement. Plaintiffs’ intentions were not clearly

stated at trial and they make no mention of the distinction in their written final argument. Plaintiffs' counsel never suggested that FCA-MN asserts an as-applied challenge.⁵

3. In a facial challenge to constitutionality, the challenging party must prove the legislation is unconstitutional in all applications. *McCaughtry v. City of Red Wing*, 831 N.W.2d 518, 522 (Minn. 2013); see *United States v. Stevens*, 559 U.S. 460, 472 (2010) (a facial attack on a statute requires a showing “that no set of circumstances exists under which [the statute] would be valid” or the statute lacks any “plainly legitimate sweep.”). Therefore, if even a single situation exists in which the preparation and embalming room requirement may be applied constitutionally, the facial challenge fails.

4. “An as-applied challenge consists of a challenge to the statute's application only as-applied to the party before the court.” *Minnesota Majority v. Mansky*, 708 F.3d 1051, 1059 (8th Cir. 2013) (quoting *Republican Party of Minnesota v. Klobuchar*, 381 F.3d 785, 790 (8th Cir. 2004)). “If an as-applied challenge is successful, the statute may not be applied to the challenger, but is otherwise enforceable.” *Id.*

5. The distinction between a facial and as-applied challenge “goes to the breadth of the remedy employed by the Court . . .” *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 331 (2010).

⁵ Citing the fact that Stoll abandoned his planned St. Louis Park branch, defendants also appear to challenge the justiciability of plaintiffs' lawsuit on the basis that they did not receive a “direct and imminent injury” from the allegedly unconstitutional statute. *State v. Colsch*, 284 N.W.2d 839, 841 (Minn. 1979) (a justiciable controversy requires plaintiff to show a “direct and imminent injury” from defendants' conduct). The court views abandonment of economic expansion due to the onerous regulatory burden of a statute as an imminent injury. Even so, the parties agree that Stoll was required to build a preparation and embalming room at his primary Crescent location when he would have preferred to rely on trade embalmers. Thus, the case is ripe and therefore justiciable because the statute was already applied to the direct financial detriment of Stoll and Crescent.

6. Based upon legitimate public health concerns, plaintiffs concede that the statute is valid and enforceable to every funeral establishment that prepares bodies on its premises. Because they concede a valid application of the statute, any facial challenge to the statute must fail. Therefore, the court will analyze plaintiff's Complaint as an as-applied challenge to the statute's constitutionality.

II. EQUAL PROTECTION

7. To successfully challenge a statute on equal protection grounds, plaintiffs have the burden of proving beyond a reasonable doubt that the preparation and embalming room requirement for licensure violates the Equal Protection Clause of the Federal or Minnesota Constitutions.

8. Minnesota's version of the Federal Equal Protection Clause is found in Article I, Section 2 of the Minnesota Constitution. *Scott v. Minneapolis Police Relief Ass'n, Inc.*, 615 N.W.2d 66, 74 (Minn. 2000).⁶ "Both clauses have been analyzed under the same principles and begin with the mandate that all similarly situated individuals shall be treated alike, but only 'invidious discrimination' is deemed constitutionally offensive." *Id.* (quoting *In re Estate of Turner*, 391 N.W.2d 767, 769 (Minn. 1986)). In short, the State and Federal Equal Protection Clauses require the state to treat similarly situated individuals alike. *State v. Johnson*, 777 N.W.2d 767, 772 (Minn. Ct. App. 2010).

⁶ Without citing *Scott*, the Court of Appeals has described the concept of Equal Protection to be "an inherent but unenumerated right found and confirmed in Minnesota's State Constitution." *Studor, Inc. v. State*, 781 N.W.2d 403, 408 (Minn. App. Ct. 2010) (quoting *Murphy v. Comm'r of Human Services*, 765 N.W.2d 100, 106 (Minn. Ct. App. 2009)), *rev. denied* (Minn. July 20, 2010). However, a more recent Court of Appeals decision recognized Article I, Section 2 as Minnesota's Equal Protection Clause. *HealthStar Home Health, Inc. v. Jesson*, 827 N.W.2d 444, 448 (Minn. Ct. App. 2012).

9. “[U]nless a constitutional challenge to a statute involves a suspect classification or a fundamental right, [it is reviewed] under a rational-basis standard.” *Scott*, 615 N.W.2d at 74 (citations omitted). Plaintiffs make no claim that the legislation at issue involves a suspect classification or a fundamental right. Accordingly, the Court must determine whether the legislature enacted a classification that treats plaintiffs differently than those similarly situated and, if so, whether plaintiffs proved that the classification fails the rational basis test beyond a reasonable doubt.

10. Minnesota’s rational basis review test under the State Constitution’s equal protection clause is more stringent than under the Federal Constitution. *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991). Thus, the three-prong rational basis test for reviewing the validity of a classification-creating statute under the Minnesota Constitution, as set forth in *State v. Russell*, controls the Court’s analysis in this case:

- (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs;
- (2) The classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and,
- (3) The purpose of the statute must be one that the state can legitimately attempt to achieve.

Id. at 888.

11. According to plaintiffs: “The specific equal-protection problem in this case is that Plaintiff Stoll’s proposed St. Louis Park sales office *without* any preparation room is

illegal under Minnesota law whereas a sales office with an *unusable* preparation room, such as Washburn-McReavy's Blaine sales office, is perfectly legal." (Plaintiffs' Proposed Conclusions of Law ¶ 1 (emphasis in original).) Based upon the alleged classification, plaintiffs argue that an equal protection analysis is triggered "because Stoll's proposed St. Louis Park sales office is similarly situated to a sales office with an unusable preparation room. *See State v. Garcia*, 683 N.W.2d 294, 299 (Minn. 2004). Both types of sales offices are places where bodies could never be brought and are useless to their owner, yet one is legal and the other is illegal." (*Id.*)

12. The flawed premise of plaintiffs' argument is that the statute creates two categories of similarly situated funeral establishments that are not treated alike. Section 149A.50, subd. 2(1) contains no classification of funeral establishments. Plaintiffs offered no evidence and no statutory support for their argument that funeral establishments are required to build unusable preparation and embalming rooms. They offered no evidence or statutory support for their position that Washburn-McReavy is legally prohibited from using the preparation and embalming room at its Blaine sales office to prepare human remains. The so-called "non-functional prep room" does not exist in law or rule and exists only on a form created by the DOH so it can determine as a matter of administrative convenience which funeral establishments use their preparation and embalming rooms to prepare human remains and which do not. As such, any existing stratification of funeral establishments results solely from a business decision by the funeral establishments and not a government-imposed mandate.

13. The evidence presented in this case and the applicable statutes are unequivocal. As a matter of law, all funeral establishments are required to build preparation and embalming rooms meeting minimum requirements and the rooms may be used to prepare human remains regardless of whether the business intends to use the rooms. So, all funeral establishments are required to build preparation and embalming rooms meeting the same requirements, all may be used, and the manner in which they may be used is the same.⁷ Minn. Stat. § 149A.50, subd. 2(1) (2012). Consequently, plaintiffs cannot meet the threshold requirement that exists in all equal protections cases. Section 149A.50, subd. 2(1) does not treat similarly situated persons differently. *Schatz v. Interfaith Care Center*, 811 N.W.2d 643, 656 (Minn. 2012) (determining the existence of a classification is a threshold requirement).

14. The record contains no evidence that the preparation and embalming room requirement was arbitrarily applied or enforced against Stoll or Crescent in a manner that was any different than any other funeral establishment. In fact, the statute treats similarly situated people and businesses the same. There is no need to proceed to *Russell's* Minnesota Equal Protection Test. Any as-applied Equal Protection challenge to the

⁷ Unlike the statute at issue herein, the authorities relied upon by plaintiffs scrutinized statutes in which the legislature plainly created classifications and regulated persons in the categories it created differently. *See, e.g., State v. Garcia*, 683 N.W.2d 294, 299 (Minn. 2004) (statute differentiated between two categories of juvenile offenders); *State v. Russell*, 477 N.W.2d 886, 887-88 (Minn. 1991) (statute imposed different penalties on persons possessing different formulations of the same drug); *Wegan v. Village of Lexington*, 309 N.W.2d 273, 279-80 (Minn. 1981) (statute imposed different requirements on persons suing a dram shop that hinged upon whether the person causing the injury consumed 3.2 beer or stronger liquor); *HealthStar Home Health, Inc. v. Jesson*, 827 N.W.2d 444, 452-53 (Minn. Ct. App. 2012) (medical assistance statute compensated relative and non-relative PCA's differently).

preparation and embalming room requirement under Minn. Stat. § 149A.50, subd. 2(1) fails for lack of a legislative classification to challenge.

II. SUBSTANTIVE DUE PROCESS

15. The Minnesota Constitution protects a person's substantive due-process right to conduct his or her business free from arbitrary government interference.⁸ *State v. Century Camera, Inc.*, 309 N.W.2d 735, 745 (Minn. 1981); *see, e.g., Fairmont Foods Co. v. City of Duluth*, 260 Minn. 323, 326, 110 N.W.2d 155, 157 (1961) *reh'g denied* (August 4, 1961) (striking down milk regulations designed to reduce contaminants because the regulations would make milk less widely available, with little or no health benefits); *Connor v. Township of Chanhassen*, 249 Minn. 205, 215-217, 81 N.W.2d 789, 797-98 (1957) (striking down ordinance prohibiting a repair business that was condemned for a highway from rebuilding on the remaining portion of its land); *City of St. Paul v. Dalsin*, 245 Minn. 325, 329-331, 71 N.W.2d 855, 858-59 (1955) (striking down ordinance that required roofers to learn heating, ventilation, and sheet metal work because heating and ventilation had no reasonable relation to the regulation of roofing and roofers only used sheet metal as an incidental part of roofing); *Johnson v. Ervin*, 205 Minn. 84, 88-91, 285 N.W. 77, 79-80 (1939) (striking down statute requiring licensed beauticians to become licensed barbers before they trimmed hair); *Pavlik v. Johannes*, 194 Minn. 10, 17-21, 259 N.W. 537, 540-41 (1935) (striking down ordinance limiting the hours when a licensed barbershop could operate); *State v. Stewart*, 529 N.W.2d 493, 497 (Minn. Ct. App. 1995)

⁸ Plaintiffs' Complaint is based solely on Minnesota's Constitution and does not seek the protection potentially supplied by the Federal Constitution.

(striking down ordinance requiring licensing for on-site pipefitters while exempting off-site pipefitters).

16. To prevail, plaintiffs must prove beyond a reasonable doubt that their alleged interest is a constitutionally protected liberty or property interest and that the interest has been interfered with to an extent that violates their substantive due process rights. *In re Individual 35W Bridge Litigation*, 806 N.W.2d at 829.

17. The test for determining whether there was a substantive due-process violation is identical under the Minnesota and Federal Constitutions. *See, e.g., In re Individual 35W Bridge Litigation*, 806 N.W.2d at 829 (citing *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988)); *Mammenga v. State Department of Human Services*, 442 N.W.2d 786, 789 (Minn. 1989); *Contos v. Herbst*, 278 N.W.2d 732, 741 (Minn. 1979). When determining whether legislation violates substantive due process rights, courts apply the rational basis test unless a fundamental right is at issue. *In re Individual 35W Bridge Litigation*, 806 N.W.2d at 830. “Under the rational basis test, legislation is examined to determine whether it is rationally related to a legitimate government interest.” *Id.* If not, the regulation is irrational and, thus, unconstitutional.

18. Plaintiffs make no claim that a fundamental right is at issue. Therefore, the rational basis test is applicable.

19. When reviewing a statute being challenged on substantive due process grounds, courts do not sit as a “super legislature to weigh the wisdom of legislation.” *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963). Moreover, courts do not use the due process clause “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.” *Id.* at 731–32. A state statute “may be wise or unwise. But relief, if any be needed, lies not with [the courts] but with the body constituted to pass laws for the [state].” *Id.* at 732. The existence of facts supporting a legislative judgment is to be presumed. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). As long as legislative responses are not arbitrary or capricious, judges should refrain from reviewing the wisdom of those laws. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398 (1937).

20. Before applying the rational basis test, a threshold question must be addressed: do plaintiffs have a “property interest” entitled to due process protection? A protectable property right is one that is created and defined by “existing rules or understandings that stem from an independent source, such as state law, rules, or understandings that support claims of entitlement to certain benefits.” *In re Individual 35W Bridge Litigation*, 806 N.W.2d at 830 (quoting *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 791 (Minn. 1989)).

21. Defendants concede that Stoll has a property interest in pursuing a chosen livelihood and operating a lawful business without unreasonable government interference. However, while courts have recognized that an individual may have a property interest in pursuing private employment, that property interest is not absolute. *See, e.g., Pomrenke v. Commissioner of Commerce*, 677 N.W.2d 85, 91-92 (Minn. Ct. App. 2004) (individual’s “property interest in pursuing employment in the mortgage origination/servicing industry is subject to the economic regulations implemented

pursuant to the state's police power.”); *Minnesota Association of Public Schools v. Hanson*, 287 Minn. 415, 424-425, 178 N.W. 2d 846, 853 (1970) (teacher's contractual right under tenure statute is subject to the state's power to limit private rights when necessary to better the general welfare); *Humenansky v. Minnesota Board of Medical Examiners*, 525 N.W.2d 559, 566 (Minn. Ct. App. 1994) (right to practice medicine is subject to strict regulation under state's police power).

22. By enacting Chapter 149A, which includes the preparation and embalming room requirement, the legislature sought to promote public health and protect the public. Minn. Stat. § 149A.01, subd. 1.

23. Defendants' public health expert conceded at trial that there is no public health benefit to requiring the construction of a preparation and embalming room that is never used.

24. Defendants advised the legislature that the preparation and embalming room requirement may be eliminated at branch locations without risk of harm to the public.

25. Defendants maintain that there is a public health issue when a funeral establishment has no branches and when there is no available trade embalmer. However, defendants' argument is inapplicable to the application of the law being challenged herein. Plaintiffs do not challenge application of the preparation and embalming room requirement to funeral establishments that prepare human remains on the premises.

26. If Stoll and Crescent are required to build a preparation and embalming room at branch locations where preparation and embalming will never be performed, the cost

will be passed on to consumers and funeral services will be more expensive than they would otherwise have been.⁹

27. Having all but conceded that there is no public health benefit to requiring the construction of a preparation and embalming room at funeral establishments where preparation and embalming are not performed, defendants also argue that the requirement protects the public from fraud.

28. In support of the fraud prevention argument, defendants note the significant annual consumer investment in pre-paid funeral services in Minnesota and contend that a meaningful capital investment requirement will dissuade con artists and shady operators from getting into the funeral business. Unfortunately for defendants, the argument appears to have been condensed out of thin air with absolutely nothing to back it up. There is no evidence that any such consideration played a role in the enactment of section 149A.01, subd. 1, nor did defendants offer any expert testimony, study, or statistics in support of the notion. In their final argument, defendants cite the testimony of plaintiffs' expert, Dr. David Harrington, in support of their position, but he provided speculation supporting both sides of the issue. His speculation is no better than defendants' speculation. There is no rational basis to conclude that the preparation and embalming

⁹ Defendants' argument that Stoll's existing preparation and embalming room generates rental revenue and that his prices are already the lowest in the state are unconvincing. Stoll described other strategies he uses to keep prices low. Avoiding the cost of building a preparation and embalming room that is useless to his planned business application is an additional strategy Minnesota law presently precludes. Thus, if anything, defendants' position solidifies plaintiffs' argument that lowering costs facilitates lower prices.

requirement contained in section 149A.01, subd. 1 has any impact on the frequency of fraud by operators of funeral establishments.¹⁰

29. Section 149A.01, subd. 1, which would require Stoll to expend \$30,000 or more to build a preparation and embalming room at any funeral establishment where no preparation and embalming is performed, constitutes an irrational exercise of the state's police power as applied to Stoll and Crescent.¹¹

30. The court finds persuasive a recent federal district court decision that struck down Pennsylvania's preparation-room requirement as a substantive due-process violation. *Heffner v. Murphy*, 866 F. Supp. 2d 358, 401-02 (M.D. Pa. 2012).

31. In *Heffner*, like this case, the government acknowledged that many preparation rooms are unwanted and go unused. *Id.* at 402. The defendants in *Heffner*, like the defendants in this case, proposed legislation that would have exempted branch locations. *Id.* at 400-01. In doing so, the defendants in *Heffner*, like the defendants in this case, told lawmakers that eliminating the preparation-room requirement at branch locations "can be employed without harm to the public or the services provided." *Compare id.* at 402 with Ex. 21 ("MDH has determined some funeral home licensing requirements may be eased without harm to the public. Specifically, the requirement that a funeral home contain an embalming and preparation room is removed provided all

¹⁰ Taken to its logical end, defendants' argument would permit legislation requiring life insurance companies to build funeral homes they do not intend to operate on the theory that such a mandate would prevent the fraudulent collection of premiums.

¹¹ Plaintiffs' written final argument anticipated that defendants would raise two additional justifications for the preparation and embalming room requirement: insuring a sufficient supply of preparation and embalming rooms and disaster preparedness. However, defendants conceded an adequate supply and never asserted the latter argument at trial. Accordingly, defendants waived these issues.

preparation is done at a central licensed location.”) *and* T1. at 60. Like the court in *Heffner*, this court does not credit defendants’ speculation that the preparation and embalming room requirement is rationally related to protecting the public at locations where the room goes unused. 866 F. Supp. 2d at 402.

32. Plaintiffs proved beyond a reasonable doubt that, as applied to Stoll and Crescent’s plan to operate a funeral establishment where no preparation of human remains takes place, the preparation-room requirement is not rationally related to a legitimate governmental objective. On the other hand, defendants offered either no evidence or sheer speculation to support its argument that the preparation-room requirement is rationally related to a legitimate governmental objective when applied to a funeral establishment where no preparation of human remains takes place.

33. The court finds that the preparation-room requirement contained in Minn. Stat. § 149A.01, subd. 1 is an irrational policy that serves no legitimate governmental objective insofar as it is applied to a Crescent funeral establishment where no preparation of human remains takes place. To that extent, the statute is unconstitutional under the Article I, § 7 of the Minnesota Constitution as-applied to plaintiffs Stoll and Crescent Tide LLC.

ORDER FOR JUDGMENT

IT IS HEREBY ORDERED:

1. Judgment shall be entered in favor of defendants in connection with the Equal Protection claim asserted in plaintiffs’ Second Cause of Action.

2. To the extent plaintiffs' First Cause of Action asserts a facial due process challenge to the constitutionality of Minn. Stat. § 149A.50, subd. 2(1), judgment shall be entered in favor of defendants.

3. To the extent plaintiff's First Cause of Action asserts a due process challenge to the constitutionality of Minn. Stat. § 149A.50, subd. 2(1) as applied to plaintiffs Verlin Stoll and Crescent Tide, LLC, judgment shall be entered against defendants.

4. Because only plaintiffs Verlin Stoll and Crescent Tide, LLC are entitled to relief based upon application of Minn. Stat. § 149A.50, subd. 2(1), to them, the claims brought by Funeral Consumers Alliance of Minnesota are dismissed with prejudice.

5. The Court **DECLARES** that Minn. Stat. § 149A.50, subd. 2(1) is unconstitutional as applied to plaintiffs Verlin Stoll and Crescent Tide, LLC to the extent it requires them to build a preparation and embalming room at locations where the preparation of human remains does not take place. As to them, the requirement violates of Article I, Section 7 of the Minnesota Constitution.

6. The Court **PERMANENTLY ENJOINS** defendants, their successors, agents, servants, employees, and representatives, from enforcing Minn. Stat. § 149A.50, subd. 2(1) and any regulations or policies originating therefrom, to the extent the statute requires plaintiffs Verlin Stoll and Crescent Tide, LLC to build a preparation and embalming room at locations where the preparation of human remains does not take place.

7. As the prevailing party, plaintiffs may be entitled to costs allowable by statute and rule. If plaintiffs believe they are entitled to costs, they shall file a motion

within thirty days of the date of this Order, together with one or more affidavits supporting their costs. Defendants may file a response within seven days of the date of any costs motion filed by the plaintiffs, after which the court will take the issue of costs under advisement.

THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 9, 2013

BY THE COURT:

John H. Guthmann
Judge of District Court