STATE OF WISCONSIN CIRCUIT COURT BRANCH 9 DANE COUNTY

Amy Lynn Photography Studio, LLC

and

Amy Lawson

Plaintiffs,

v.

City of Madison, Wisconsin Department Of Workforce Development, Ray Allen and Jim Chiolino,

Defendants.

Hon. Richard G. Niess

Case No. 2017-CV-000555
Case Code: 30701- Declaratory Judgment

THE CITY OF MADISON'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS THE VERIFIED COMPLAINT

Defendant City of Madison, by its attorneys, Deputy City Attorney Patricia A. Lauten and Assistant City Attorney Lara M. Mainella, respectfully submit this brief in support of the City's Motion to Dismiss Plaintiffs' Verified Complaint.

INTRODUCTION

On March 7, 2017, Plaintiffs Amy Lynn Photography Studio, LLC and Amy Lawson filed a Verified Complaint ("Complaint") alleging Madison General Ordinances ("MGO") 39.03(5)(a) and 39.03(5)(b) violate the Wisconsin Constitution, specifically, Article 1, §3 (Freedom of Speech), Article 1, §18 (Freedom of Conscience), Article 1, §1 (Equal Protection) and Article 1, §1 (Due Process). The

City filed its Answer and Affirmative Defenses on April 14, 2017 alleging, among other affirmative defenses, Plaintiffs' Complaint did not state a claim upon which relief could be granted, Plaintiffs lacked standing to bring the action, and Plaintiffs' claims are not ripe as there is no present threat of enforcement action. The City of Madison (City) files this brief in support of its motion to dismiss the complaint in this matter.

Plaintiffs' complaint is prolix: over 450 separate paragraphs much of it extraneous material with some important admissions but lacking some key allegations. Under normal circumstances, sorting this morass of allegations would be difficult for the parties and for the court. But this case does not come to the Court under normal circumstances. The same arguments were made by this same law firm in a number of other states. At least one of the attorneys for the plaintiffs (Mr. Tedesco) represented parties presenting similar claims in the states of Colorado, New Mexico and Washington. In each case, operating under anti-discrimination laws indistinguishable in any relevant sense from the City's Equal Opportunities Ordinance, the appellate courts in those states rejected the legal viability of plaintiffs' claims. These decisions give the court a roadmap to analyze and dispose of this fourth attempt by counsel to find a court willing to accept an unusual legal theory. The City refers to these cases by the names of plaintiffs' counsel's clients in

the cases: *Arlene's Flowers, Masterpiece Cakeshop* and *Elane Photography*[1] and will rely on them in its brief[2]:

- **Wedding photography.** In *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert denied*, 134 S.Ct. 1787 (2014), the New Mexico Supreme Court upheld an antidiscrimination law challenged by a wedding photography business that refused, on religious grounds, to provide photography services for a same-sex couple's wedding.

- **Wedding flowers.** In *Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), the Washington Supreme Court upheld an antidiscrimination law challenged by a florist that refused, on religious grounds, to make flower arrangements for a same-sex couple's wedding.

- **Wedding cake.** In *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *petition for cert. filed*, No. 16-111 (U.S. July 22, 2016), the Colorado Court of Appeals upheld an antidiscrimination law challenged by a baker that refused, on religious grounds, to make a wedding cake for a same-sex couple's wedding.

FACTS RELEVANT TO THE CITY'S MOTION

Amy is a commissioned photographer and writer. *Complaint* ¶30. In August 2014 she started a Facebook page for her photography business. *Complaint ¶39.* Amy formally launched Amy Lynn Photography and registered her business with Dane County on September 17, 2015. *Complaint ¶41.* She then started her business Instagram account on October 7, 2015 and her business website on October 29, 2015. *Complaint ¶ 42.* Within the next month, Amy started her business Pinterest page and blog. *Complaint ¶43.*

[1] Plaintiffs make a fleeting reference to these cases in footnote 16 of their injunction brief.
[2] Because these are cases from other jurisdictions, the City is providing copies to the court in an appendix to this brief.

Amy organized her business, Amy Lynn Photography Studio, LLC (the Studio), as a limited liability company under Wisconsin law in January 2017. *Complaint* ¶*45*. The Studio is a for-profit photography studio that provides visual storytelling services to clients on a commission basis. *Complaint* ¶52. Amy operates the Studio out of her Madison apartment. *Complaint* ¶*54*. The Studio offers two types of commissioned visual storytelling services. *Complaint* ¶55. First, the Studio photographs a client, their event, or their organization, edits those photographs and proves those edited photographs to the client. *Complaint* ¶56. Second, the Studio posts some of those photographs on the Studio's blog and social media sites and writes commentary alongside the photographs in those posts. *Complaint* ¶57.

At the top of the Studio's website, blog, Instagram, Facebook and Pinterest accounts appears the name "Amy Lynn Photography Studio." *Complaint* ¶63. Amy's name, her picture, and the Studio's logo also appear sporadically throughout these sites. *Complaint* ¶64. The Studio's website also links to the Studio's social media sites and blog. *Complaint* ¶65. The Studio entertains requests for its visual storytelling services from the general public. *Complaint* ¶***66***. But the Studio does not automatically accept every request for visual storytelling services sent to it. *Complaint* ¶67. The Studio reviews each request it receives and makes a case-by-case determination whether the Studio will accept each request based on Amy's editorial, artistic, religious and political judgment. *Complaint* ¶*68*.

Typically, the Studio receives a request for its visual storytelling services through the "contact me" page on the Studio's website. *Complaint* ¶*91*. After

receiving a request, Plaintiff emails the requestor, asks follow up questions, and holds a consultation in person or by Skype, phone or email. *Complaint* ¶*92*. When meeting with a potential wedding client, Plaintiff typically conducts the consultation face-to-face and asks about the engaged couple, their relationship and their wedding day. *Complaint* ¶*96*. If a client wants to use the Studio, that client must sign a customized version of the Studio's form contract. *Complaint* ¶100. Among other things, this form client contract specified the following: *Complaint* ¶101.

- ✓ That the Studio "is not obligated to accept any job. Photographer reserves the right to decline any request that is inconsistent with Photographer's artistic, religious or political beliefs."
- ✓ That the Studio retains the right to use the photographs of the client for the Studio's "electronic and printed publications, and publication on blogs, social media or other websites."

The Studio must charge commission for its visual storytelling services for practical financial reasons. *Complaint* ¶103. The Studio breaks its commission pricing into packages. *Complaint* ¶106. Every one of the Studio's packages include the Studio's two types of visual storytelling services – the Studio's photography and internet posting. *Complaint* ¶108. Each of the Studio's packages include the following services: at least one consultation, time for Amy to photograph, time for Amy to edit photographs, provision of some digital images, a social media "sneak peak" and a blog post. *Complaint* ¶112. For the Studio's sneak peak, Amy takes one or a few photographs she has taken for a client and then posts them on the Studio's

Facebook page or Instagram site or both. *Complaint* ¶113. Amy links to each blog post from the Studio's Facebook and Instagram sites. *Complaint* ¶120.

After the initial consultation with a client, Amy typically communicates with clients through email. *Complaint* ¶122. For her wedding clients, Amy typically photographs an engagement session with the engaged couple a few months before the wedding date. *Complaint* ¶123. After the engagement session, Amy begins to edit the photographs, selects one or a few of the photographs, posts those selected photographs as the sneak peek on the Studio's Facebook page or Instagram account, and writes a few comments in the sneak peak. *Complaint* ¶132. With the sneak peak done, Amy typically meets with the Studio's wedding clients in person once more, one or two weeks before the wedding. *Complaint* ¶133. Because Amy builds a relationship with the Studio's wedding clients, is physically present with the clients throughout the wedding day (often during special and private moments), encourages her clients, and directs them and their guests on the wedding day, Amy actively participated in every wedding she shoots. *Complaint* ¶140.

For a late afternoon wedding, Amy arrives at the wedding location in the morning and begins to photograph the physical wedding location and its details to capture a spirit of anticipation and any qualities unique to that wedding. *Complaint* ¶141. Amy then photographs the bride and groom during an intimate time in their dressing rooms as they prepare for the wedding and interact with their bridesmaids and groomsmen. *Complaint* ¶143. During this time, Amy photographs organic moments like the bride putting on her wedding dress and makeup, the groom

putting on his boutonniere, and the wedding party laughing and rejoicing together. *Complaint* ¶144. Because Amy photographs this first look[3] alone with the bride and groom, this is an intimate and special time that Amy shares with the couple *Complaint* ¶147.

Within a few days of the wedding, Amy reviews and begins to edit the digital photographs on her computer through a program called Adobe Lightroom. *Complaint* ¶165. Before finishing the editing process, Amy selects a few of the photographs and posts them on the Studio's blog alongside commentary from Amy. *Complaint* ¶172. After Amy does the wedding blog post, she finishes editing the wedding photographs. *Complaint* ¶177. Amy then delivers the edited photographs to the client with 30 days of the wedding by placing them in a password-protected on-line gallery. *Complaint* ¶178. Frequently, the Studio's wedding clients ask Amy if they can give their guests, friends, and family access to the on-line gallery to print and download pictures. Amy allows such access. *Complaint* ¶¶182, 183. The Studio operates its other photography sessions (organizations, high school seniors and portraits) in much the same way as its engagement and wedding sessions: initial contact, consultation, personal involvement, the photography shoot itself, sneak peek, photography editing, blog post, digital delivery of photographs. *Complaint* ¶189.

In January 2016, Amy decided the Studio would participate in the 2016 Wedding Planner & Guide Winter Bridal Show. *Complaint* ¶*233*. At the expo, a man and woman approached the Studio's booth, talked to Amy about the Studio's

[3] The time when the couple first sees each other on their wedding day. *Complaint* ¶*146*.

photography, and eventually asked if Amy photographed many same-sex weddings. *Complaint ¶236.* Amy responded politely that she does not photograph any same-sex weddings. *Complaint ¶237.* Around the same time as the expo, Amy posted a statement on the Studio's website saying: because of my religious beliefs, I do not photograph same-sex weddings. This statement stayed on the Studio's website for roughly three months. *Complaint ¶¶238, 240.*

In late Spring 2016, one of the Studio's wedding clients emailed and asked Amy to discuss her wedding contract. *Complaint ¶241.* Once there, the client said she noticed the statement about same-sex weddings on the Studio's website and disagreed with Amy's religious views on same-sex marriage. *Complaint ¶243.* The client also said that because of Amy's beliefs on marriage, she could not support Amy's business and wanted to cancel her wedding contract with the Studio. *Complaint ¶244.* Amy allowed the client to cancel the wedding contract without penalty and refunded the client her deposit. *Complaint ¶¶248, 250.* Within a few days after the Starbucks conversation, Amy removed the statement from the Studio's website. *Complaint ¶252.* Amy eventually realized she could no longer accept visual storytelling requests for weddings and organizations and operate her Studio in accordance with her artistic, political, and religious beliefs while complying with the law. *Complaint ¶255.*

LEGAL ARGUMENT

Although the City filed an Answer in this case it can bring this motion to dismiss because it preserved its defenses of failure to state a claim upon which relief

could be granted, standing and ripeness in its Answer to the Complaint. *See Eternalist Foundation, Inc. v. City of Platteville*, 225 Wis. 2d 759, 768, 593 N.W.2d 84 (1999) (City's failure to state a claim was properly before the court despite the City having previously answered the complaint). As it must do with a motion to dismiss, the Court examines Amy's Complaint to determine if a claim for relief is stated accepting as true all facts pleaded and all inferences that can reasonably be derived from those facts. *Id.*, at 770. Even with this presumption in favor of Amy's claims, Amy's complaint should be dismissed because:

(1) The City demonstrates there is no imposition on plaintiffs' free speech rights since any speech is commercial speech, not pure speech, and MGO 39.03(5) regulates conduct and not speech. Similarly, MGO 39.03(5) does not compel speech.

(2) Plaintiffs' alleged religious rights or rights of conscience are not infringed, even applying the strict scrutiny test set by Wisconsin courts.

(3) With the demise of Plaintiffs' substantive claims their derivate claims of due process and equal protection also fall.

(4) Plaintiffs are seeking an advisory opinion from the Court as there is no ripe case or controversy.

(5) Plaintiffs have not alleged facts sufficient to bring themselves within the definition of "public place of accommodation or amusement" within MGO 39.03(5). Even if Plaintiffs were a public place of accommodation, there is no enforcement action pending and no facts alleged showing a violation of the ordinance.

I. MGO 39.03(5) REGULATES CONDUCT, NOT SPEECH

This is not a case about speech. Although Amy spends countless paragraphs in her Complaint waxing poetic about her artistic abilities this case is about providing photographic services to the public. MGO 39.03(5) regulates commercial activity and conduct when providing services to the public. When bringing a free speech claim, "[i]t is....the initial duty of the person who claims the protection of the First Amendment to demonstrate the [regulated] conduct is speech or its equivalent, to which First Amendment protections apply." *City of Madison v. Baumann*, 162 Wis. 2d 660, 669, 470 N.W.2d 296 (1991). MGO 39.03(5) begins with a presumption of constitutionality. "Judicial review of legislation starts with a presumption of constitutionality and the requirement that the challenger prove unconstitutionality beyond a reasonable doubt. This is true whether the challenged legislation is a statute or an ordinance." *Laskaris v. City of Wisconsin Dells, Inc.*, 131 Wis. 2d 525, 533, 389 N.W.2d 67, 71 (Ct. App. 1986), internal citations omitted.

Anti-discrimination laws have been consistently upheld by courts as not violating the First Amendment. *Elane Photography, LLC v. Willock,* 309 P.3d 53 at 70–71. Determining whether a law violates free speech guarantees requires asking if the law regulates speech or conduct. If neither speech nor expressive conduct is being regulated, the law does not implicate the First Amendment. *State v. Baron*, 2009 WI 58, ¶ 14, 318 Wis. 2d 60, 68, 769 N.W.2d 34, 38 (2009). Amy discusses *Hurley* in her injunction brief but Hurley does not help her because it starts with

the proposition that anti-discrimination laws regulate conduct, not speech, and generally do not violate the First Amendment:

> Provisions like [Mass.Gen.Laws §272.98 (1992]..... do not, as a general matter, violate the First or Fourteenth Amendments.... Nor is this statute unusual in any obvious way, since it does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services....

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 571-572 (1995) (internal citations omitted).

Amy would like this Court to find that photography and storytelling (blogging or commenting about the photos or wedding) are speech or expressive conduct, and therefore, her speech rights trump the public's right to be free from discrimination. To classify photography and storytelling as expression[4] does not mean Amy is allowed to discriminate against protected classes. MGO 39.03(5) regulates the operation of a business, not the act of taking photos. In *Elane*, the court found that the operation of a photography business was not expressive conduct: "While photography may be expressive, the operation of a photography business is not." *Elane Photography*, 309 P.3d 53 at 68. The Court went on to reject the idea that a photography business should be exempt from nondiscrimination laws, based on the expressive nature of photography. There is no reason for this Court to do any different:

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[4] The City does not dispute conduct can be afforded protection as speech (music, painting, flag burning, dancing, etc) but, even the most traditional First Amendment actors -the press and booksellers - cannot "claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986).

> We decline to draw the line between "creative" or "expressive" professions and all others. While individuals in such professions undoubtedly engage in speech, and sometimes even create speech for others as part of their services, there is no precedent to suggest that First Amendment protections allow such individuals or businesses to violate antidiscrimination laws. The wedding industry in particular employs a variety of professionals who offer their services to the public and whose work involves significant skills and creativity.
>
> A holding that the First Amendment mandates an exception to public accommodations laws for commercial photographers would license commercial photographers to freely discriminate against any protected class on the basis that the photographer was only exercising his or her right not to express a viewpoint with which he or she disagrees. Such a holding would undermine all of the protections provided by antidiscrimination laws.

Elane Photography, 309 P.3d at 71-72.

A. *MGO 39.03(5)(b) Prohibits Making A Statement Of Intent To Deny Services.*

Plaintiffs argue this subsection directly regulates speech because it deals with what words Amy can publish on her website. However, the ordinance deals only with the effect the words have to convey the person is "unwelcome, objectionable or unacceptable" to the public business. The *Sweetcakes* administrative case dealt with a similar law that made it unlawful to:

> publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of....sexual orientation." ORS 659A.409.

The *Sweetcakes* bakery owners 'published' both written and oral statements of their intent to discriminate. In a radio talk show interview they said, "We don't do same-sex marriage, same-sex wedding cakes." The owners also posted a sign on their

bakery door after the complaint was filed, stating "This fight is not over. We will continue to stand strong." *Klein,* 34 BOLI Orders 102 at 118. The Bureau of Labor and Industry rejected *Sweetcakes*' argument that prohibiting these statements amounted to an unconstitutional "speech code":

> Respondents assert that ORS 659A.409 prohibits Respondents from 'express[ing] their own position and that ORS 659A.409 amounts to 'a speech code.' To the contrary, the language of ORS 659A.409 focuses on the discriminatory effect that accompanies certain speech 'published, circulated, issued or displayed' on behalf of a place of public accommodation. It does ***not*** cover expressions of personal opinion, political commentary, or other privileged communications unrelated to the business of a place of public accommodation, and its breadth is narrowly tailored to address the effects of the speech at issue.

Klein, 34 BOLI Orders 102 at 122-23.

B. *MGO 39.03(5) Is Not Content-Based.*

Amy makes one novel speech argument –that MGO 39.03(5)(b) creates "content-based distinction" on speech under *Reed v. Town of Gilbert.*

i. *Reed Only Applies To Speech.*

> Government **regulation of speech** is content based if a law applies to particular **speech** because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to consider **whether a regulation of speech** "on its face" draws distinctions based on the message a speaker conveys. *Sorrell, supra,*

Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2227, 192 L. Ed. 2d 236 (2015). *Reed* is about a sign ordinance. The Town of Gilbert categorized signs based on what the sign was for – a temporary event, a store, a church, a politician – and treated them differently – some signs could be bigger, some could stay up longer. *Id.* The Supreme Court adopted the most strict view of what makes a law "content-based."

The rule declared in *Reed* is this – if you have to read the words on a sign to determine how the sign is treated by the law, the law discriminates on content and is subject to strict scrutiny.

The holding of *Reed* does not apply to the public accommodation ordinance:

> As we have explained, ***a speech regulation*** is content based if the law applies to particular ***speech*** because of the topic discussed or the idea or message expressed.

Id. at 2231, emphasis added. *Reed* only applies to a ***speech regulation***. The Seventh Circuit recently found the following scenarios do not regulate speech: regulation of magazine sales on public sidewalks, *Left Field Media LLC v. City of Chicago, Ill.*, 822 F.3d 988, 990 (7th Cir. 2016), cert. denied, 137 S. Ct. 1065, 197 L. Ed. 2d 176 (2017), and a law regulating robo-calls, *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 305 (7th Cir. 2017). Likewise, Madison's law regulates business conduct and prohibits discrimination. As applied to Amy, it requires her to treat customers equally. It does not regulate her speech.

ii. *MGO 39.03(5)(a) And (5)(b) Are Not Content Based.*

In *Reed*, signs for political and temporary events were treated more favorably than "ideological" signs. Unlike *Reed*, MGO 39.03(5) does not favor some businesses over others. Madison regulates all public accommodations equally regardless of the type of business. It is the effect the posting of the sign or statement that is prohibited. At one point in our history, it was necessary to prohibit posting signs over the lunch counter that read "Whites Only." Amy's desired statement is the electronic equivalent of "Whites Only" – a "Straights Only" message. Complaint

¶353. As the Supreme Court stated in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006): requiring "an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech." *Id.* No public business can have a sign or statement that has the effect of discriminating against a protected class. The City's public accommodation ordinance is content-neutral, does not violate *Reed*, and therefore should not be subject to strict scrutiny.

C. *The City Is Not Compelling Amy to Speak.*

Amy argues the City's ordinance compels her to speak a message in favor of same-sex marriage or in favor of a pro-abortion group if either group wants to hire her to take photographs. *Complaint ¶413.* Amy's argument relies on her assertion that photography, and writing about the pictures she takes, are pure speech that puts her outside the reach of the City's non-discrimination ordinance. Assuming *arguendo* there is some speech involved with taking pictures and writing nice things about her clients; her compelled speech argument does not apply. Compelled speech applies to exercises of pure noncommercial speech or industries/events more directly intertwined with pure speech.

Amy's business model has a "sneak peak" (*Complaint ¶¶162-163*) and a blog (*Complaint ¶¶174-175*) where she posts her personal comments about her client's wedding. MGO 39.03(5) does not require Amy to post the same type of comment, or any comment for that matter, about a same-sex wedding that she would for a wedding between a man and a woman. This is Amy's choice. Most people just want

nice pictures of their wedding and aren't concerned with the photographer's personal opinion about how great their wedding was. Even assuming Amy argues the "sneak peak" and the blog are central to her business model, MGO 39.03(5) does not dictate what she says about each wedding. Amy could photograph a same-sex wedding, post the pictures online as she does for other couples and blog that she does not condone a marriage between two women or between two men. She could even say, "This marriage is a sin in the eyes of the Lord." The City's ordinance does not prevent insults. The ordinance only says public businesses cannot deny (either in person or in writing) services to someone based on their membership in a protected category. While these comments might not be a wise business decision Amy could make them because they are not illegal.

In the three cases most closely on point with this case, *Elane Photography,* 309 P.3d at ¶¶*25-47, Masterpiece Cakes*, 370 P.3d at ¶¶44-73 and *Arlene's* Flowers, 389 P.3d at ¶¶39-46, the Courts performed a compelled speech analysis on the *conduct* of taking wedding photographs, baking wedding cakes and providing wedding flowers. The Courts in those cases utilized a two-part test: (1) whether the government is compelling them to speak the government's message and (2) whether they are compelled to adopt the message of another (the customer) against their will. If compelled speech is found, it is subject to strict scrutiny. Under this analysis, it is clear MGO 39.03(5) does not compel Amy to adopt any City message. Nothing in MGO 39.03(5) requires a public accommodation to adopt, publish or speak *any* message, much less a City message. The ordinance regulates *conduct.* It

tells places of public accommodation or amusement that if your doors are open to the public you cannot shut your doors in the face of members of the public who fall into one of the enumerated protected categories in the ordinance.

D. *Amy Is Not Speaking City's Message.*

Amy cites cases in support of her argument involving newspapers[5], newsletters, parades and soliciting. The California utilities case involved pure speech and political commentary that the Court found was "the kind of discussion of 'matters of public concern' that the First Amendment both fully protects and implicitly encourages." *Pacific Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 9 (1986). The solicitation case regulated the compensation scheme for nonprofits to hire a fundraising organization. Typically, "solicitation" automatically invokes higher First Amendment protections. "Regulation of a solicitation "must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech." *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 790-796 (1988). *See also Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150 (2002).

Amy's pictures and blog for hire don't hit that bar. She is not exhibiting her photographs at an art gallery. She is not soliciting for a cause. Amy runs a for-profit photography business. Clients hire Amy to take photographs of their wedding or other photography project. It is the client – not Amy – whose interests are served

[5]The newspaper cases (*Tornillo*, etc.) were analyzed under the freedom of the ***press*** and should be excluded from this analysis for that reason.

and whose message is conveyed. Further, Amy places herself in this position by choosing to be open to the public (presumably to make more money) rather than being a private business. If Amy wishes to pursue a career as an artist or a writer, without taking business from the general public – she is out of reach of MGO 39.03(5). However, when Amy becomes a public business and enters the public marketplace she cannot refuse services based on someone's sexual orientation or political beliefs[6].

Amy cites *West Virginia State Bd. of Educ. v. Barnette,* 319 *U.S. 624 (1943)* (requiring school children to salute the flag and recite the Pledge of Allegiance) and *Wooley v. Maynard,* 430 U.S. 705 (1977) (requiring citizens to have a "live free or die" slogan on the license plates of their personal vehicle) in support of her compelled speech argument. In these cases speech was considered "compelled" because a *very* specific government sentiment was mandated and there was no good way for a person to disclaim their agreement with these statements. Here, the City is not compelling Amy to recite any pro-abortion or pro-same-sex marriage sentiment nor is it requiring her to display any government message on her license plate. The City has no government message in 39.03(5) other than public businesses must serve all members of the public. Finally, neither of these cases involved a public business – *Barnette* involved school children and *Wooley* involved individual vehicle owners.

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[6] Amy also discusses "physical appearance" (*Complaint ¶267*) but has only put forth claims based on sexual orientation and political beliefs so the City will not address physical appearance.

These cases are also distinguishable because there were no competing interests – the State was seeking only to promote its own specific ideology (saluting and reciting a pledge to the flag; "live free or die"). Here, the City is protecting the interest of protected classes from discrimination. The court in *Barnette* found it important that "The freedom asserted.... does not bring them into collision with rights asserted by any other individual.... the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so." *Barnette*, 319 U.S. at 630. The same cannot be said for Amy. Amy's refusal to serve same-sex couples or people with other political beliefs directly collides with their rights not to be discriminated against. This important distinction was also present in the Supreme Courts decision in *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006). In *Rumsfeld*, a law school was required to host a military recruiter in its building which the law school claimed would attribute a pro-military message to the law school itself – much like Amy is claiming if she takes pictures of a same-sex wedding or pro-abortion event and blogs about it people will think she supports same-sex marriage or abortion. The Court found allowing the military recruiter did not "limit what law schools may say nor requires them to say anything." *Id.* at 60. Further, *Rumsfeld* found the law requiring military recruiters at the law school regulated *conduct*[7], not speech:

> As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to

[7] Plaintiffs cite many cases listing occupations that involve protected expression but these aren't compelled speech cases. Amy argues compelled speech so the City won't respond to cases that are not compelled speech cases.

> military recruiters—not what they may or may not *say*. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 60, 126 S. Ct. 1297, 1307, 164 L. Ed. 2d 156 (2006). *Id.*

Amy cites one for-profit business case dealing with compelled speech but that case is the opposite of her claim. In *Hands On Originals, Inc. v. Lexington-Fayette Urban County Human Rights Commission et al.,* Case No. 14-CI-04474 (Ky. Cir. Ct. Apr. 27, 2015), a T-shirt printer refused to print T-shirts for a pro-gay organization's pride event. The Commission found this violated a public accommodations law similar to the City's. The Circuit Court reversed, finding that the company did not refuse to print the T-shirts for any particular reason. Rather, the company turned down a variety of customers because of disagreements with what the customers wanted printed on the T-shirts. In other words, the company did not refuse service based on the protected class status of the customer[8]. Similarly, Amy turning down customers because she already has an event booked for that day would not be a violation of MGO 39.03(5).

E. *The City Is Not Forcing Amy To Adopt The Message Of Another*.

The second prong in the compelled speech inquiry is whether MGO 39.03(5) forces Amy to adopt the message of her clients. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557 (1995) is the leading case. In *Hurley*, the City of Boston attempted to apply public accommodation law to a parade, one of the most protected

[8] The case was affirmed on appeal in an unpublished decision but on different grounds. The Court of Appeals found because it was an organization commissioning the T-shirts and not an individual there was no sexual orientation issue [since the organization couldn't have a sexual orientation]. The Kentucky appeals court expressly declined to take up the constitutional question. *Lexington Fayette Urban Cty. Human Rights Comm'n v. Hands on Originals, Inc.*, No. 2015-CA-000745-MR, 2017 WL 2211381 (Ky. Ct. App. May 12, 2017).

forms of speech. *Id.* at 573. Parades are held in a traditional public forum and are undoubtedly speech. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969). A photography business is not a parade. The court in *Elane Photography* conducted a through analysis of the compelled speech doctrine and dispensed with *Hurley* because it was about a nonprofit parade in a public forum. *See Elane Photography*, 309 P.3d at 68. Forcing a parade that was organized for one purpose (St. Patrick's Day) to include a group promoting another topic (gay pride) is forcing unwanted speech on the speaker. *Hurley*, 515 U.S. 557. The analogy here would be if the City forced Amy to include a blog written by a gay wedding advocate on Amy's website. *That* would be compelled speech.

Finally, Amy argues she retains all copyright and intellectual property rights in the photographs and blog. *Complaint ¶101.* She argues because she retains full rights to the intellectual property it means the wedding is not the wedding couple's "message" but her personal message (she is the sole speaker) and, therefore, her speech is compelled. Retaining licensing rights does not transform somebody else's wedding into Amy's personal speech platform. If Amy were going to weddings, gathering images and writing stories on her own accord in order to turn the wedding into her own brand of artwork (without charging for her services) – perhaps some of these arguments would have merit. However, by her own admissions in her Complaint, that is not how her business works so this argument is a red-herring and a non-starter.

II. PLAINTIFFS' CLAIMS BASED UPON FREE EXERCISE OF RELIGION OR FREEDOM OF CONSCIENCE SHOULD BE DISMISSED.

While it is not always easy to determine which averments match each of plaintiffs' claims, it is clear that one of Amy's claims is based upon the free exercise of her religion or freedom of conscience. Plaintiffs do not bring their free exercise/conscience claim under the First Amendment to the U.S. Constitution, because it would clearly fail. Under the oft-cited case of *Emp. Div., Dep't of Human Resources v. Smith,* 494 U.S. 872 (1990), we know that a facially neutral statute that may have some minor effect on one's religious beliefs is constitutional. In two of the previous cases brought by plaintiffs' counsel, the courts applied this traditional analysis to reject any claims of interference with religion. As the Colorado Court explained in *Masterpiece Cakeshop,* 370 P. 3d at 289:

> In *Smith,* the Court disavowed *Sherbert's* balancing test and concluded that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religions prescribes (or proscribes). . . . The Court held that neutral laws of general applicability need only be rationally related to a legitimate governmental interest to in order to survive a constitutional challenge.

Applying that test, the Colorado court rejected the claim that antidiscrimination laws like Madison's MGO 39.03(5) violate the First Amendment. The same result was reached in the New Mexico Supreme Court in *Elane Photography* 309 P. 3d at 72-76. Thus, it is clear that if this case was brought under the First Amendment, plaintiffs would lose. But plaintiffs did not bring this case under the First

Amendment; they brought it under Wisconsin's constitutional guarantee of freedom of religion, Art. I, Sec. 18 of the Wisconsin Constitution[9] which reads:

> **Freedom of worship; liberty of conscience; state religion; public funds.** The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

While there might have been some question as to whether Wisconsin followed First amendment law in all respects in applying Sec. 18, see, e.g., *State v Miller,* 202 Wis. 2d 56 (1996), that issue was settled definitively in *Coulee Catholic Schools v. Labor and Industry Review Comm.*, 2009 WI 88, 320 Wis. 2d 275, 786 N.W. 2d 868 (2009). In *Coulee,* the Supreme Court held that Wisconsin's Constitutional protection for the free exercise of religion is broader than the U.S. First Amendment and it requires the strict scrutiny analysis afforded to the exercise of religious beliefs. As the Court stated (at ¶60-61, case citations omitted):

> When faced with a claim that a state law violates an individual or organization's freedom of conscience, we have generally applied the compelling state interest/least restrictive alternative test. ... Under this test, the religious organization has to prove (1) that it has a sincerely held religious belief, and (2) that such belief is burdened by the application of the state law at issue. Upon this showing, the burden shifts to the state to prove (3) that the law is based upon a compelling state interest (4) that cannot be served by a less restrictive alternative.

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[9] The City notes that the U.S. Supreme Court decision in *Smith* was effectively superseded by two statutes enacted by Congress, RFRA and RLUIPA, parts of which were found beyond the authority of Congress. See the explanation in *Holt v. Hobbs,* ___ U.S. ___, 135 S. Ct. 853, 859-60 (2015). The rule above remains the law for First Amendment analysis.

For purposes of this motion, the City assumes Amy has a sincerely held religious belief[10] and solely for purposes of this motion assumes, but does not concede, Amy's sincerely held religious belief is burdened by the ordinance. That said, the City's ordinance is based upon a compelling governmental interest that cannot be served by a less restrictive alternative. In its declaration of policy for the MGO 39.03, the Equal Opportunities Ordinance (EOO) the City found:

> Denial of equal opportunity in public accommodations subjects those discriminated against to embarrassment and creates distress and unrest within the community. . .
>
> In order that the peace freedom, safety and general welfare of all inhabitants of the City may be protected and ensured, it is hereby declared to be the public policy of the City of Madison to foster and enforce to the fullest extent the protection by law of the rights of all its inhabitants to equal opportunity to gainful employment, housing and the use of City facilities and public accommodations. *MGO 39.03(1).*

The eradication of discrimination based on sexual orientation is a compelling governmental interest. "The Supreme Court has consistently recognized that states have a compelling interest in eliminating such discrimination." *Masterpiece Cakeshop, Inc.,* 370 P.3d at 293.

> The compelling interests, therefore, that any state has in eradicating discrimination against the homosexually or bisexually oriented include the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit from society, and equal protection of the life, liberty and property that the Founding Fathers guaranteed to us all.

Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 37-38 (D.C. 1987).

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[10] The City believes that discovery in this case may show this not to be the fact and that Amy's beliefs are of a personal or philosophical nature, in which case her claim fails. *State v. Kasuboski,* 87 Wis. 2d 407, 417 (Ct. App 1978).

A sample of Wisconsin cases finding compelling governmental interests in a religion claim under Article 1, §18: *State v. Miller*[11], 196 Wis. 2d 238, 249, 538 N.W.2d 573 (Ct. App. 1995) aff'd, 202 Wis. 2d 56, 549 N.W.2d 235 (1996) (traffic safety), *Peace Lutheran Church & Acad. v. Vill. of Sussex*, 2001 WI App 139, ¶ 22, 246 Wis. 2d 502, 517–18, 631 N.W.2d 229 (saving lives and preservation of property via a sprinkler system), *State v. Caminiti*, 2016 WI App 41, ¶ 33, 369 Wis. 2d 223, 880 N.W.2d 182 (protecting children from certain types of harmful parental discipline), *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dep't of Workforce Dev.*, 2009 WI 88, ¶ 63, 320 Wis. 2d 275, 313, 768 N.W.2d 868 (racial discrimination recognized as a compelling government interest but not analyzed in that case.)

There can be no doubt that elimination of discrimination is a compelling governmental interest, and the City's ordinance is, like others examined by the courts and particularly the Washington court in *Arlene's Flowers*, is the only means of addressing the governmental interest in eliminating discrimination. This is not a case like *State v. Miller* where a less restrictive alternative emblem on the horse-drawn buggy could satisfy the government's interest. Amy's less restrictive alternative is an exemption to the protected categories of political beliefs and sexual orientation based on her personal religion – Evangelical Christian. In other words, she is asking this Court to re-write the City's ordinance carving out an exception for

[11] *State v. Miller* was upheld by the Wisconsin Supreme Court at 202 Wis. 2d 56, 549 N.W.2d 235 (1996) but portions of the decision were overturned on other grounds – by *Coulee*.

her personal religious belief that the City's Common Council and Wisconsin's legislature (with Wis. Stats. §106.52) have repeatedly declined to do. Being allowed to discriminate is not an acceptable lesser restriction. The court in *Arlene's Flowers* (at ¶65) addressed the issue of discrimination laws and/or legitimate governmental regulation v. personal religious belief head on finding:

> We do not mean to suggest that anything interfering with a religious organization is totally prohibited. General laws related to building licensing, taxes, social security, and the like are normally acceptable. Similarly, employment discrimination laws applying to employees who are not in positions that are important and closely linked to the religious mission of a religious organization also do not rise to the level of control or interference with the free exercise of religion. (Emphasis added).

The City submits that, just as employment discrimination laws apply to religious organizations (if the position is non-ministerial), anti-discrimination laws like MGO 39.03(5) apply without any interference with religious liberty. In fact, this was the exact finding in the Washington Supreme Court case, *Arlene's Flowers,* where the Washington Supreme Court applied the same strict scrutiny test required under Wisconsin law. *Id.*, at ¶65-78, 389 P. 3d at 562-567. As the Washington Supreme Court said in rejecting the arguments made by Amy's counsel in that case:

> [T]his court upheld numerous health and safety regulations under strict scrutiny ... [citations omitted]. To be sure, none of our previous article I, section 11 cases addressed an antidiscrimination law. But numerous other courts have heard religious free exercise challenges to such laws and upheld them under strict scrutiny. [More citations omitted].
>
> We emphatically reject this argument. We agree with [parties discriminated against] that "[t]his case is no more about access to flowers than civil rights cases in the 1960's were about access to

> sandwiches." [Citation omitted]. As every other court to address the question has concluded, public accommodations laws do not simply guarantee access to goods or services. Instead they serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace. Were we to carve out a patchwork of exceptions for ostensibly justified discrimination [footnote omitted], that purpose would be fatally undermined.
>
> In conclusion, we assume without deciding that strict scrutiny applies to the WLAD [Washington Law Against Discrimination] in this article I, section 11 challenge, and we hold that the law satisfies that standard.

The Washington Supreme Court, applying strict scrutiny to its State Constitutional provision of freedom of religion, found that an antidiscrimination law indistinguishable from MGO 39.03(5) was constitutional. Wisconsin has a similar legal structure. This court should do the same, and dismiss the complaint.

III. THE COURT SHOULD DISMISS PLAINTIFFS' DERIVATIVE CLAIMS BASED ON DUE PROCESS AND EQUAL PROTECTION.

Amy includes two add-on claims at the conclusion of her complaint for due process and equal protection claim alleging MGO 39.03(5)(b)[12] is vague. *Complaint ¶435-454.* Both claims are easily disposed of. Regarding the vagueness claim, a law "need not define with absolute clarity and precision what is and is not unlawful conduct." *State v Neumann*, 2013 WI 58, ¶¶3-4, 348 Wis. 2d 455, 479, 832 N.W.2d 560 (2013) (additional citations omitted.) However, it must be "definite enough to provide a standard of conduct for those whose activities are proscribed." *Id.*, at ¶2, 348 Wis. 2d at 478. Amy admits she had a statement on her website that said, "because of my religious beliefs, I do not photograph same-sex weddings."

[12] "directly or indirectly publish, circulate, display, mail or otherwise disseminate any written communication . . .that the patronage of a person is unwelcome, objectionable or unacceptable" because of sexual orientation or political beliefs. *Complaint ¶¶449-451.*

Complaint ¶*238*. She further admits after her conversation with the woman in Starbucks she removed the statement from the website. She is suing because she wants to put the statement back up on her website and is fearful she will be prosecuted under MGO 39.03(5)(b.) The ordinance cannot, by definition, be vague if Amy knows her statement is objectionable to the point where she reasonably believes she would violate the law if she continued to post it on her website.

Amy's equal protection claim is similarly misplaced. Wisconsin's equal protection clause is equivalent to the equal protection clause of the Fourteenth Amendment. *Reginald D. v. State*, 193 Wis. 2d 299, 306, 533 N.W.2d 181(1995). Because Amy is alleging violation of fundamental rights strict scrutiny applies. Amy alleges discriminatory enforcement because the City treats her refusal to serve same-sex couples differently than it does photographers who serve same-sex couples. Photographers who operate a public business must be open to the public – all of the public – and cannot refuse to provide services. Photographers who serve same-sex couples are not violating the City's ordinance – they are providing services to individuals in the protected category. Amy is refusing to provide her services to individuals based on their sexual orientation and political beliefs. That is a violation of the ordinance. There is no discriminatory enforcement – one act is within the law and one act is outside the law.

Finally, there simply is no separate due process claim or equal protection claim outside of the asserted rights of speech and religion. Given that these

derivative claims are restatements of claims the City has shown are insufficient, as a matter of law, the court should include them in the dismissal of the complaint.

IV. Plaintiffs' Are Not Public Places Of Accommodation[13].

Madison defines a "public place of accommodation or amusement" to include:

> Those accommodations, facilities and services that a person holds out to be open to the common and general use, participation and enjoyment of the public for any purpose. The term "public place of accommodation or amusement" shall be interpreted broadly to include, but not be limited to, places of business or recreation, hotels, motels, resorts, restaurants, taverns, barber or cosmetologist, aesthetician, electrologist or manicuring establishments, nursing homes, clinics, hospitals, cemeteries and anyplace where accommodations, amusements, goods or services are available either free or for a consideration, except where such a broad interpretation would deny to any person rights guaranteed by the constitution of Wisconsin and of the United States.

Complaint ¶260.

By definition, there must be some location. The location need not have 4 walls, a roof and a door – it could be a baseball diamond – as the City of Madison and the State have held - but there is some location. *See Tony Stubblefield v. Caron Ann Hewitt and Little League Baseball, Inc.*, MEOC, Case No. 3283, April 2, 1992; *Neldaughter v Dickeyville Athletic Club, Dennis Casper and Sharon Kaiser*, ERD Case No. 8900539 (LIRC, July 31, 1991)(public invited to form teams subject only to league fees). In addition to location for the accommodation or amusement, the public part of Public Place of Accommodation or Amusement refers to "openness and generalized lack of selectively." *Stubblefield*, at page 2 *citing Jones v Broadway*

[13] The City's assertion Plaintiffs are not public places of accommodation is narrowly construed based solely on the facts pled by Plaintiffs in their Verified Complaint and is not reflective of any legal position a Hearing Examiner or the MEOC would take on an actual complaint filed with the Department of Civil Rights.

Roller Rink Company, 136 Wis. 595, 118 N.W. 170 (1908). In other words, the "willingness to accept all comers." *Id.*

A. *Plaintiffs Have No Public Place of Accommodation Or Amusement.*

Examining Amy's Complaint, she gives her address and that of the Studio as a post office box and alleges no physical location for the business. Amy does not allege she conducts her business in or around the post office box so her self-reported physical address from the Complaint cannot serve to qualify the Studio as a public place of accommodation or amusement. Next, Amy alleges "[t]he Studio's principal place of business is located in Madison." *Complaint ¶18.* While the Court must accept all reasonable inferences from Amy's alleged facts it need not accept contradictory facts or unreasonable inferences. Amy alleges she incorporated her business as a limited liability company under Wisconsin law in January 2017. *Complaint ¶45.* A printout from the Wisconsin Department of Financial Institutions (DFI)[14] shows no entry for "principal place of business." The location of Amy's business is a blank space. The only address listed is the Studio's registered agent who resides in Verona – not Madison. Amy gets no help from the facts pled in her complaint, or from DFI, in establishing a public place of accommodation or amusement in Madison.

Finally, there is the Verified Complaint itself. Amy's Complaint, all 256 personal facts, is a story unto itself telling how Amy became interested in

[14] The Court can take judicial notice of the Wisconsin Department of Financial Institutions records particularly as the incorporation is pled in Plaintiffs' Complaint. *De La Trinidad v. Capitol Indemnity Corporation*, 2009 WI 8, 315 Wis. 2d 324, 759 N.W.2d 586 (2009).

photography and how she started her business. She takes great pride in describing with particularity exactly how she operates her business to include:

- ✓ Starting a Facebook page, Instagram account and Pinterest page *Complaint ¶¶39, 42, 43.*
- ✓ The request for services comes through the "contact me" page on the Studio's website. *Complaint ¶91.*
- ✓ Amy emails the requestor asking follow up questions and holds a consultation in person or by Skype, phone or email. *Complaint ¶92.*
- ✓ The Studio photographs a client, their event, or their organization. *Complaint ¶56.*
- ✓ The Studio's package of services includes at least one consultation, time for Amy to photograph, time for Amy to edit photographs, provision of some digital images, a social media "sneak peak" and a blog post. *Complaint ¶112.*
- ✓ After the initial consultation with a client, Amy typically communicates with clients through email. Complaint ¶122.
- ✓ Amy reviews and begins to edit the digital photographs on her computer. *Complaint ¶165.*
- ✓ Wedding photographs are of the bride and groom during intimate times in their dressing room including the bride putting on her wedding dress and makeup. *Complaint ¶¶143, 144.*
- ✓ Amy puts the photographs in a password protected on-line gallery accessible to the client and any approved guests, friends or family. *Complaint ¶¶178, 182, 183.*
- ✓ At various points in the process, photographs are displayed on Facebook Instagram, the Studio's blog, *Complaint ¶¶113, 172.*
- ✓ Amy operates her other photography sessions in much the same way as the engagement and wedding sessions. *Complaint ¶189.*

The facts in support of Amy's claims allege no public place of accommodation or amusement for the business. Amy communicates with clients through Skype or

electronic mail, edits her photographs at home and distributes her photographs through social media and the Internet. Her own description of the photographs she takes includes descriptions of private and intimate places where the public would not be allowed entrance or access. Giving the broadest reading possible to her facts, as the MEOC does, the only two references to physical places in the Complaint include meeting clients occasionally in person and the location(s) where she takes her pictures. If she meets her clients at their homes or her home that is certainly not a public place for "all comers." Amy does not allege she works regularly out of a public building like a library, restaurant or hotel. None of Amy's proffered locations can be reasonably determined to be a public place of accommodation.

Finally, Plaintiff claims at paragraph 54 of her Complaint that she "operates the Studio out of her Madison apartment." However, nowhere in her complaint does she allege her apartment is a public place of accommodation or amusement. It is unlikely the general public is coming in off the street traipsing in and out of her apartment while she is editing photographs in the same manner as the public would enter hotels, motels, resorts, restaurants, taverns, barber or cosmetologist, aesthetician, electrologist or manicuring establishments, nursing homes, clinics, hospitals, or cemeteries.

B. *Amy Selectively Determines Who Can Use Her Services.*

In *Schneider v. Domestic Abuse Interventions Services, Inc., f/k/a Dane County Advocates for Battered Women,* the Madison Equal Opportunities Commission held:

> The essence of a public place of accommodation or amusement is the open availability of the business or enterprise to the public as a whole. One of the keystones of open availability is the lack of selectivity exercised by the organization in determining who may avail themselves of the service or organization.

Schneider v Domestic Abuse Intervention Services, Inc., f/k/a Dane County Advocates For Battered Women, MEOC Case No. 03384, March 26, 1999. Adopted in full by reference, Equal Opportunities Commission decision August 20, 1999. Request for Reconsideration denied September 27, 1999.

The hallmark of "public" in public place of accommodation or amusement is openness to the public. Of her "public" business Amy states, "the Studio does not automatically accept every request for visual storytelling services sent to it." *Complaint ¶67.* It "reviews each request it receives and makes a case-by-case determination whether the Studio will accept each request based on Amy's editorial, artistic, religious and political judgment." *Complaint ¶68.* Further, Amy's contract, which each client must sign, specifies the following agreement:

> That the Studio "is not obligated to accept any job. Photographer reserves the right to decline any request that is inconsistent with Photographer's artistic, religious or political beliefs." *Complaint ¶101.*

Amy's business is not open to the public. She does not accept "all comers." Rather, becoming Amy's client depends on whether Amy deems you worthy. Such self-selection is the antithesis of a public place of accommodation. Amy's Complaint, on its face, fails to establish she operates a public place of accommodation or amusement. Because the Studio is not a public place of accommodation MGO 39.03(5) does not apply and the Complaint must be dismissed.

V. The Complaint Must Be Dismissed When There Are No Allegations Any Person Was Denied Services And Plaintiffs Are Only Seeking An Advisory Opinion.

Amy's Complaint outlines the process for making complaints under Madison General Ordinance MGO 39.03(5). That process starts with receiving a complaint, performing an investigation, making a finding of probable cause or no probable cause and, if there is a finding of probable cause, conducting a hearing via a hearing examiner. *Complaint* ¶¶*276-281.* It is through the Department of Civil Rights Division Investigator, pursuant to a "timely filed and valid complaint[]" that there is a determination as to whether MGO 39.03(5) is violated. *Id., at* ¶*277.* The determination of whether a particular set of facts violates MGO 39.03(5) rests with the Department of Civil Rights investigator, the MEOC Hearing Examiner[15] and, ultimately, the MEOC Commission. The MEOC Commission's final order is subject to certiorari review pursuant to Wis. Stat. §68.13. *See MGO §39.03(10)(c)4.*

Nowhere in her Complaint does Amy allege a complaint was filed against her or the Studio with the Madison Equal Opportunities Commission. In fact, the facts alleged in the Complaint show just the opposite. Amy avers she told prospective clients in January 2016 she did not photograph same sex weddings; had her website statement that she does not photograph same-sex weddings up for roughly three months and had a client cancel their contract for services because the client did not agree with her religious beliefs on marriage. Yet, there are no allegations in her

[15] While Plaintiffs colorfully refer to the Respondent as the "accused" the City stresses this is not a criminal procedure and that for purposes of MGO 39.03 there is a Complainant and a Respondent (*Complaint* ¶*279*).

complaint that any person filed a complaint against her or her Studio based on the behavior she describes in her Complaint.

Amy's argument for the "as applied" violations are "applications and statements by Madison officials." *Complaint* ¶¶*294-296*. Amy frequently uses the phrase "Madison interprets" when discussing what she *thinks* Madison would do or say but Madison has not rendered a decision on the facts presented in her Complaint, or any other facts, because there is no complaint against Amy or the Studio. Nothing has been applied for her "as applied" challenge. Plaintiffs' statement "Madison interprets" in regard to same-sex marriage is based on "applications" which are complaints filed since 2006 with the Department of Civil Rights alleging violations of the ordinance based on sexual orientation. Plaintiffs admit Madison investigated these claims and determined no probable cause existed to find discrimination, meaning, the City sided with the Respondents (which Plaintiffs would be). *Complaint* ¶*297-299*. The "statements by Madison officials" consist of a single statement by Madison Mayor Paul Soglin after the U.S. Supreme Court's June 26, 2015 decision on same-sex marriage. Mayor Soglin was commenting on current events not applying a particular set of facts to MGO 39.03(5) as it is not his job to perform that analysis. *Complaint* ¶*287*.

For political beliefs, Plaintiffs state Madison's interpretation of "political beliefs" is a broad one covering pro or anti union activities and tenant organizations. This statement is taken from a 1977 legal opinion by the Madison City Attorney to the Madison Common Council quoted by the Circuit Court in

Northport Apartments vs. MEOC, et al., Case No. 80-CV-2680 (Dane County Cir. Ct., 1981). From the City Attorney's legal opinion regarding union activity and tenant organizations (or tenant unionism as Judge Jones termed it) Plaintiffs' then leap to the legal conclusion that "views about same-sex marriage" and "views about abortion constitute political beliefs under Madison law". *Complaint ¶¶ 290-291.* Plaintiff provides no citations to MEOC decisions in support of her claim. The lack of MEOC case law for her conclusion does not stop Plaintiffs from further concluding that "[a]s Madison interprets it, the bar on 'political belief' discrimination in the Madison law forbids public accommodations from taking any action prohibited in this law on the basis of or because of an objection to abortion or same-sex marriage." *Complaint ¶292.* While Amy attempts to shoehorn abortions and same-sex marriage into "political beliefs" her allegations in the Complaint show her opposition to same-sex marriage (*Complaint ¶204*) and abortion (*Complaint ¶226*) is religion-based. The complaint alleges no facts based on political beliefs – only religion.

With no concrete set of facts before a Madison hearing examiner or the MEOC and no legal cases interpreting Amy's self-serving legal conclusions she is essentially asking the Court for an advisory opinion preempting Madison's enforcement provisions of its own laws and to make an assumption the Madison Investigator and/or Hearing Examiner and/or MEOC Commission would decide a complaint (that hasn't been made yet) in a particular way based on a political statement of its Mayor, a past history of 11 cases in which it sided with the

Respondent, and one case dealing with tenant unionism. Courts look with disfavor on advisory opinions for many reasons a few of which are directly applicable to Amy's Complaint.

First, and perhaps most importantly, there is no application of MGO 39.03(5) to Plaintiffs. There is no complaint. Without a complaint, Amy asks the Court to assume:

- ✓ Someone will seek out Plaintiffs to take photos for a same-sex wedding or pro-choice photo shoot.
- ✓ Or someone will read the "about" page on Plaintiffs webpage and see her statement about marriage.
- ✓ A person(s) will file a complaint with the Department of Civil Rights based on #1 and/or #2 above.
- ✓ The investigation into the complaint and hearing would go against her.
- ✓ She would lose every appeal including losing in the Circuit Court.

Is such an injury likely or imminent? Amy admits she turned away two individuals based on her religious beliefs and had her religious statement on her website for nearly three months – all without a complaint.

Madison's ordinance is presumed constitutional. *State v. Pocian*, 2012 WI App 58, ¶6, 341 Wis. 2d 380, 384, 814 N.W.2d 894, 895 (Ct. App. 2012) For an as-applied challenge Amy has to prove the ordinance "as-applied to him or her is unconstitutional beyond a reasonable doubt." *Id., citing State v Smith*, 2010 WI 16, ¶10 n. 9, 323 Wis. 2d 377, 780 N.W.2d 90 (2010). Amy cannot meet this first hurdle because she has no application of facts to law. She presents the Court with a hypothetical and assumptions as to how the City would act and asks the Court to

make a leap to those assumptions with her. Her burden is to show the Court that MGO 39.03(5) (a presumed constitutional ordinance) is unconstitutional is a heavy one. Plaintiffs cannot get there on speculation and unfounded assumptions.

This issue was addressed in *City of Milwaukee v. Milwaukee County,* 256 Wis. 580, 42 N.W.2d 276 (1950) when the court was asked to rule on the constitutionality of Wis. Stats. §346.38 which the Milwaukee County Sherriff asserted gave him the right to command officers from the Milwaukee police department to respond to his call for aid. The factual controversy arose over the Milwaukee City Attorney's legal opinion to the Milwaukee Chief of Police that the City had no legal authority to respond to the Sheriff's request for aid outside of the City of Milwaukee. Amy similarly relies on a legal opinion, from the Madison City Attorney, in her case. *See Complaint ¶290 citing Northport Apartments.* In declining to provide the advisory opinion the Court stated, "[t]he court ordinarily will not decide as to future or contingent rights, but will wait until the event giving rise to rights has happened, or, in other words, until rights have become fixed under an existing state of facts." *Id.*, at 585 (additional citations omitted).

The United States Supreme Court takes a similar approach. In *Poe v. Ullman,* 367 U.S. 497 (1961), the Court was asked to rule on a Fourteenth Amendment challenge to Connecticut statutes prohibiting the use of contraceptive devices and giving medical advice about the use of the devices. The Court found no clear threat of prosecution – only an allegation that the State's Attorney had a public duty to prosecute violations of Connecticut law (*Id.* at 501) in much the same

manner as the Department of Civil Rights has a duty to investigate complaints and remedy violations of Madison's ordinance. The Court went on to find:

> The various doctrines of 'standing,' 'ripeness,' and mootness,' which this Court has evolved with particular, though not exclusive, reference to such cases are but several manifestations -- each having its own 'varied application' -- of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the insistence of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Id.*, at 504 (additional citations omitted).
>
> This court can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such law must be brought into actual or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here. *Id.* (additional citations omitted). *Compare Doe v Bolton*, 410 U.S. 179, 188-189 (1973)(Doe had a justiciable controversy when she was denied an abortion under Georgia law and physicians were prosecuted under it).

Finally, in *Schenk v Domestic Abuse Intervention Services, Inc., f/k/a/ Dane County Advocates for Battered Women*, Madison's Hearing Examiner refused to issue an "entirely advisory opinion" when there was no allegation Schenk was "denied service at a public place of accommodation or amusement [the shelter]." *Schenk v Domestic Abuse Intervention Services, Inc., f/k/a/ Dane County Advocates for Battered Women*, MEOC Case No. 03384, March 26, 1999, page 5[16]. Amy has no ripe case or controversy. The Complaint should be dismissed.

CONCLUSION

Based on the foregoing reasons, the Court should dismiss the Verified Complaint because Amy has failed to state a claim upon which relief can be granted

[16] *Adopted in full by reference*, Equal Opportunities Commission decision August 20, 1999, *request for reconsideration denied*, September 27, 1999.

as MGO 39.03(5) regulates conduct not speech, her right of conscience is not infringed, her derivative claims fail, there is no ripe case or controversy, Amy is seeking an advisory opinion and finally, Plaintiffs are not public places of accommodation.

Dated this 12th day June, 2017.

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