

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

RABBI DANIEL E. WASSERMAN,)
individually and in his official capacity as)
director of funerary practices of the *Vaad*)
Harabonim of Pittsburgh and its *Chevra*)
Kadisha,)

Plaintiff,)

v.)

GREGORY T. BURRELL, JOSEPH A.)
FLUEHR III, MICHAEL GERDES, WILLIAM)
GEORGE HARRIS, DONALD J. MURPHY,)
JAMES O. PINKERTON, RICHARD B.)
STARR, MICHAEL J. YEOSOCK, MEMBERS)
OF THE COMMONWEALTH OF)
PENNSYLVANIA, STATE BOARD OF)
FUNERAL DIRECTORS, in their official and)
individual capacities, STEVEN V. TURNER,)
CHIEF COUNSEL, DEPARTMENT OF)
STATE, COMMONWEALTH OF)
PENNSYLVANIA, in his official capacity,)
AND MARK E. TALBOT, SR., DIRECTOR,)
BUREAU OF ENFORCEMENT AND)
INVESTIGATION, DEPARTMENT OF)
STATE, COMMONWEALTH OF)
PENNSYLVANIA, in his official capacity,)

Defendants.

C.A. No.
Electronically Filed

**COMPLAINT OF UNCONSTITUTIONALITY OF STATE STATUTE,
FOR LEGAL AND EQUITABLE RELIEF**

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. JURISDICTION	5
III. PARTIES.....	6
IV. FACTS.....	8
A. The Law Enforcement Investigation Of Rabbi Wasserman.....	8
B. The Pennsylvania Funeral Director Law	17
C. The Funeral Director Law: Intended Scope, Selective Observance By Its Licensees — And Selective Enforcement By Its Board.....	19
D. The Regulation Of Health And Safety For The Commonwealth	22
E. The Funeral Board, The Profession And Trade Associations Of Funeral Directors, And Jewish Death And Burial Rituals.....	26
V. CAUSES OF ACTION.....	32
COUNT I THE STATE BOARD’S ARBITRARY AND DISCRIMINATORY ENFORCEMENT OF THE FUNERAL DIRECTOR LAW IN REGARD TO PLAINTIFF’S TRADITIONAL RELIGIOUS PRACTICES VIOLATES THE FREE EXERCISE OF RELIGION GUARANTEE OF THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS.....	32
COUNT II THE STATE BOARD’S ARBITRARY AND DISCRIMINATORY ENFORCEMENT OF THE FUNERAL DIRECTOR LAW IN REGARD TO PLAINTIFF’S TRADITIONAL RELIGIOUS PRACTICES, WHILE ACCOMMODATING THE TRADITIONAL RELIGIOUS PRACTICES OF OTHER GROUPS, VIOLATES THE FIRST AMENDMENT’S ESTABLISHMENT CLAUSE AND ARTICLE 1, SECTION 3 OF THE PENNSYLVANIA CONSTITUTION	34

COUNT III	THE STATE BOARD’S ARBITRARY AND DISCRIMINATORY ENFORCEMENT OF THE FUNERAL DIRECTOR LAW IN REGARD TO PLAINTIFF’S TRADITIONAL RELIGIOUS PRACTICES VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS	36
COUNT IV	THE STATE BOARD’S ENFORCEMENT OF THE FUNERAL DIRECTOR LAW AGAINST PLAINTIFF SUBSTANTIALLY BURDENS HIS FREE EXERCISE OF RELIGION IN VIOLATION OF THE PENNSYLVANIA RELIGIOUS FREEDOM PROTECTION ACT	38
V. REMEDIES		40

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I. INTRODUCTION

1. This is an action for injunctive and declaratory relief and for damages to protect fundamental guarantees of religious freedom and equal protection under the United States and Pennsylvania Constitutions, as well as under the Pennsylvania Religious Freedom Protection Act (“RFPA”). Plaintiff brings suit here to preserve and restore the historical right of clergy to conduct religious burial and funeral rites free from interference and harassment by the

Commonwealth of Pennsylvania and professional, secular funeral directors who serve no health or safety interest. Plaintiff — unlike some clergy from other religions — is now being threatened with civil action and criminal prosecution, including stiff fines and even imprisonment, for conducting religious funerals in place of licensed funeral directors who, under color of state law, interfere in purely religious observances for no other justification than personal profit.

2. Current enforcement of the Commonwealth’s law by the Pennsylvania Board of Funeral Directors (“the State Board,” or “the BFD”) violates the religious freedom of some Pennsylvania clergy, their lay assistants, and all of the religious persons they serve, who collectively seek only to practice their faith free from state intervention — all the while adhering to all applicable regulations of the Commonwealth’s Department of Health.

3. The State Board claims to act for the protection of public health and safety. This is only a pretext. The State Board selectively applies the Funeral Director Law, 63 P.S. § 479 *et seq.*, (“the Funeral Director Law” or “the FDL”) without cause or legal basis, to capture a lucrative revenue stream for its licensees.

4. The language of the FDL demonstrates that the legislature intended only to regulate the for-profit, commercial business practices of undertakers, morticians, and embalmers (those who engage in “scientific” preparation of deceased persons through the “restorative art” of cosmetizing bodies and preserving them through embalming).¹

¹ The original FDL (Act No. 107, Session of 1895) was intended to regulate only “[t]he *business* of undertaking, care, preparation, disposition and burial of the dead . . .” Ex. 1, FDL, Section 5, Act No. 107, Session of 1895 (emphasis added), as well as the practice of embalming. *Id.* The law’s stated focus has never changed. It did not then and does not now reach clergy who are not involved in the *business* of funeral rites and who do not charge for their services, and who do not engage in embalming (which is forbidden in the Jewish faith).

5. Defendants, without regard for legislative intent, selectively and arbitrarily enforce without cause the statute and regulations promulgated thereunder to apply to some – and not other – clergy who do not engage in embalming, cosmetizing, or any commercial practice involving the sale of goods or services whatsoever. Never have courts allowed religious freedoms to be so restricted.

6. Plaintiff is an Orthodox Jewish rabbi in Pittsburgh who is engaged in centuries-old prayer, practices and custom of religious burials and funerary rites, without payment or profit, and without the use of preservatives or cosmetics for the deceased whatsoever. The United States and Pennsylvania Constitutions do not allow the Commonwealth to selectively usurp Plaintiff's religious freedom in the pursuit of profit, and without good cause, under the pretext of public health and safety.

7. Plaintiff brings this action to protect his sincerely-held beliefs and to fulfill a religious obligation for burials dictated by ancient texts and teachings that Jews have considered holy for literally thousands of years. These rituals were practiced in Pennsylvania without state interference for over a century before the enactment of the first Funeral Director Law in the 19th century, and for decades ever since then, including after the last major overhaul of the FDL statute in 1951. Only now has the state's BFD attempted to regulate clergy such as Plaintiff and their followers in overseeing ritual cleansing (using tap water only), physical carrying, dressing, watching (as in, an honor guard), praying over, burying, speaking about, and mourning deceased members of their community.

8. Selective application of the Funeral Director Law to Plaintiff here cannot be justified on the basis of public health needs. Pennsylvania's statutory regulation of transportation, handling, and burial of deceased persons is regulated by the Commonwealth Department of Health. The

state's justification of acting to protect health and safety, rooted in the decades-old Funeral Director Law, moreover, has been superseded by a modern understanding of communicable diseases and "universal" precautions.

9. Plaintiff here, the lead rabbi for funerary practices of the supervising authority of Orthodox Jewish rabbis in Pittsburgh, thus brings this action to vindicate fundamental guarantees of religious freedom and equal protection under the Constitutions of the United States and the Commonwealth of Pennsylvania, as well as the Pennsylvania RFPA, denied to him by Pennsylvania's State Board of Funeral Directors and the Funeral Director Law it enforces. In short, Plaintiff seeks only the right to continue doing what he and his colleagues and predecessors, have done for their religion's deceased persons, their families and mourners, and their communities — here and throughout the world — for centuries.

10. This use of the Commonwealth's police powers under the pretext of protecting "health and safety" to restrain organized clergy for the benefit of professional funeral director licensees who seek only to profit is as shocking as it is unconstitutional. Even more shocking is the selective enforcement of the FDL against an Orthodox Jewish clergyman while the State Board knowingly allows the same or similar practices by persons of other faiths in instances where no profit can be expected by its licensees.

11. The State Board further knowingly allows licensed funeral directors, operating in their normal for-profit capacity, to delegate these same or similar functions (from which it seeks to restrain Plaintiff) to non-licensed employees and third parties who operate under contract to licensed funeral directors, even though the law provides for no such delegation.

12. This lawsuit asserts that the FDL, as applied, violates multiple provisions of the United States Constitution, including the First Amendment's promise of the free exercise of religion and

the Fourteenth Amendment's guarantee of equal protection (along with the corresponding provisions of the Pennsylvania Constitution and the RFPA). Accordingly, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, Plaintiff seeks this Court's order that the FDL not be enforced to restrict religious clergy from caring for deceased persons and their families by officiating at funerals, burials, and preparation rites that do not involve embalming, cosmetizing, or any sale of goods or services, while adhering to all regulations of, and obtaining all permits required by, the State Department of Health. As demonstrated below, Plaintiff does not seek or accept remuneration for his services, must conduct burials promptly (within 24 to 48 hours), and shuns the practice — forbidden under Jewish law — of embalming and cosmetizing.

13. This action is filed against the following parties: the members of the State Board of Funeral Directors in their individual and official capacities; the Commonwealth's Chief Counsel, Department of State,² in his official capacity; and the Director of the Department of State Bureau of Enforcement and Investigation, in his official capacity.

II. JURISDICTION

14. This Court has original jurisdiction pursuant to 28 U.S.C. § 1331 over Plaintiff's federal claims, which are made actionable by 42 U.S.C. § 1983. In addition, this Court has original jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) because Plaintiff seeks to redress the deprivation, under color of state law, of equal rights secured by the Constitution of the United States. This Court also has original jurisdiction pursuant to 28 U.S.C. § 1343(a)(4) because Plaintiff seeks to recover damages and secure equitable relief under an Act of Congress that provides for the protection of civil rights. Declaratory relief is authorized by 28 U.S.C. § 2201 and Rule 57 of the

² The Commonwealth's Board of Funeral Directors is part of Pennsylvania's Department of State.

Federal Rules of Civil Procedure. Injunctive relief is authorized by Rule 65(a) of the Federal Rules of Civil Procedure.

15. Plaintiff requests that the Court assume supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over the claims arising under state law. Federal court jurisdiction over claims seeking declaratory and injunctive relief in regard to violations of the Pennsylvania Constitution is proper. *Pocono Mountain Charter School v. Pocono Mountain School District*, 442 Fed.Appx. 681, 688 (3d Cir. 2011); *Moeller v. Bradford County*, 444 F.Supp.2d 316, 320-21 (M.D.Pa. 2006).

16. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because the events and occurrences herein alleged took place in part, among other locations, in Harrisburg, Dauphin County, in the Middle District of Pennsylvania.

III. PARTIES

17. Plaintiff Rabbi Daniel E. Wasserman (“Rabbi Wasserman”) is a citizen and resident of Allegheny County, Pennsylvania, and is an Orthodox Jewish rabbi. Rabbi Wasserman is the Rabbinic leader of an Orthodox Jewish Congregation in Pittsburgh (<www.shaaretorah.net>). Rabbi Wasserman received his rabbinical ordination in 1988 from Rabbi Berel Wein through the seminary Rabbi Wein founded in Monsey, New York (<www.rabbiwein.com>). Rabbi Wasserman leads the initiative for the Pittsburgh *Vaad HaRabonim* on funeral and burial practices. The Pittsburgh *Vaad HaRabonim* (from the Hebrew language, meaning the “Rabbinical Board”) (<www.pittsburghvaad.org>) is the local body of Orthodox rabbis. The *Vaad HaRabonim* is responsible for interpreting religious law and is the recognized authority for religious practice in Pittsburgh for its Orthodox Jewish community. Rabbi Wasserman is also a

director of the *Chevra Kadisha*³ of the *Vaad Harabonim*. Orthodox Judaism practices the strict interpretation of the Jewish religion and the literal reading of its ancient, sacred texts.⁴

18. Defendants Gregory T. Burrell, Joseph A. Fluehr III, Michael Gerdes, William George Harris, Donald J. Murphy, James O. Pinkerton, Richard B. Starr, and Michael J. Yeosock are members of the Commonwealth of Pennsylvania, State Board of Funeral Directors, which regulates the licensure and practice of funeral directors in the Commonwealth of Pennsylvania. The State Board's functions include the promulgation of regulations for the conduct of the business or profession of funeral directing. The State Board may maintain civil actions on behalf of the Commonwealth for an injunction or other process against any persons in violation of the Pennsylvania Funeral Director Law. The State Board may also prosecute persons and practices criminally for what it perceives are violations of the Funeral Director Law.

19. Defendant Steven V. Turner is the Chief Counsel, Department of State, Commonwealth of Pennsylvania, Office of General Counsel.

20. Defendant Mark E. Talbot, Sr. is the Director, Bureau of Enforcement and Investigation, Department of State, Commonwealth of Pennsylvania.

³ *Chevra Kadisha* (literally, "Burial Society") is the Hebrew/Aramaic/Yiddish term for the group of lay assistants that assist in religious preparation of and burial rites for deceased persons under the rabbi's direction. The Orthodox *Chevra Kadisha* in Pittsburgh is organized by the *Vaad Harabonim*, and operates under the direction of Rabbi Wasserman as representative for the *Vaad Harabonim*.

⁴ As described more fully below, Rabbi Wasserman oversees fulfillment of fundamental religious obligations in the final days and moments of life, as well as before and after death, of religious Orthodox Jews, including: the ritual procession of taking the remains from place of death to place of interment ("*LeVaya*"); spiritual preparation (using only tap water, and involving recitation of prayers and scripture) of the deceased ("*Tahara*"); the placing of the burial shroud ("*Halbasha*"); leading memorial prayers ("*Tefillah*"), watching over the deceased ("*Shemira*"); giving eulogies ("*Hesped*"); participating in the interment of the casket (shovelful of dirt by shovelful) together with the gathered family, mourners, and community members ("*KeVura*"); supervising the involvement of the cemetery staff; and, attending to all spiritual needs of the survivors throughout the period of mourning, all according to fundamental, sincerely-held beliefs of Orthodox Jews.

IV. FACTS

A. The Law Enforcement Investigation Of Rabbi Wasserman

21. On or about Monday, December 28, 2009, at approximately 10:00 a.m., Plaintiff Rabbi Daniel Wasserman served as the rabbi at the burial of a deceased member of the Jewish community at the *Gemilas Chessed* Jewish Cemetery in McKeesport, Pennsylvania. The deceased person, who had died in Chicago two days before the funeral, had been transported to Pennsylvania the previous day for burial. The deceased's coffin had rested overnight at a licensed funeral home. Rabbi Wasserman officiated at the interment the next morning. He had prepared a eulogy for the mourners (but did not give it because of the extreme cold temperature of that winter day). The mourners held a funerary procession with the deceased ("*LeVaya*") and an interment ("*KeVura*") at the graveyard, all under Rabbi Wasserman's direction. No licensed Pennsylvania funeral director was present there.

22. Plaintiff Rabbi Wasserman never accepted nor sought any payment for his services as officiant for this ritual. Rabbi Wasserman was not involved in the sale of any goods for this funeral. The deceased person was not embalmed nor made up with cosmetics. Rabbi Wasserman adhered to all applicable regulations of the State Department of Health.

23. Following the funeral, Rabbi Wasserman received a letter from Daniel T. D'Alessandro, D'Alessandro Funeral Home & Crematory Ltd. dated January 18, 2010. *See* Ex. 2. In the letter, D'Alessandro, a licensed funeral director, complained that ". . . [Y]ou handled the burial of [a deceased individual] last month in McKeesport . . . there was not a PA licensed funeral director in attendance . . . it is illegal in this state to do so [T]he law requires a PA licensed Funeral Director to supervise the service and interment at the cemetery . . . I am obligated, as are all licensees, to report violations of the law to the State." The letter of complaint indicated that a

copy was forwarded to the BFD, as well as to a number of other prominent funeral homes in Pittsburgh, including ones that primarily serve the Jewish community.

24. Shortly thereafter, Rabbi Wasserman was contacted by H. Joel Hubbard, Investigator, Bureau of Enforcement and Investigation, Commonwealth of Pennsylvania. Mr. Hubbard is a licensed funeral director. The FDL requires that all of its investigators must be licensed funeral directors in good standing. *See* 23 P.S. § 479.16(b) (“Duties of Board”). Mr. Hubbard stated that he was directed by the State Board and/or Counsel for the Commonwealth to investigate a complaint that Rabbi Wasserman had “conducted a funeral without a funeral director present,” in violation of Pennsylvania civil and criminal law.

25. Following Mr. Hubbard’s contact on April 8, 2010, Rabbi Wasserman, through Counsel Efreem M. Grail, Esq., Reed Smith LLP, contacted Michael J. Yeosock, Chairperson of the State Board of Funeral Directors, to discuss Mr. Hubbard’s investigation of Rabbi Wasserman for having “performed a funeral without a funeral director present.” Counsel specifically noted, “From our reading of the statutes, at 63 P.S. § 479.1 *et seq.*, we do not see any provision under Pennsylvania law which would preclude such action. We therefore are writing the Board to seek clarification and obtain the Board’s interpretation of this purely legal issue.” Ex. 3, Letter from Counsel Efreem M. Grail, Esq. to Michael J. Yeosock, Chairperson, State Board of Funeral Directors, April 8, 2010.

26. In response, Assistant Board Counsel Shawn E. Smith, Prosecution Division, Governor’s Office of General Counsel, Commonwealth of Pennsylvania Department of State, sent an electronic mail message to counsel for Rabbi Wasserman, stating that Pennsylvania law “prevents Board members or counsel from being involved in ongoing investigations. Nor is the Board or its counsel permitted to give advisory opinions” *See* Ex. 4, E-mail Message from

Shawn E. Smith, Esq., Prosecuting Attorney, Commonwealth of Pennsylvania, Governor's Office of General Counsel, to Efreem M. Grail, Esq., April 14, 2010.

27. Mr. Smith's email carried the following warning to Rabbi Wasserman: "I would note to you the definition of [F]uneral [D]irector in Section 2 of the Act, including supervising the burial or disposal of deceased human bodies, and likewise includes anyone who in any way holds themselves out as someone skilled in the practice of funeral directing, as defined (Section 15(1)). There are several other provisions within the Act that deal with unlicensed practice (such as Section 13 and entering into any contracts with living persons to render services, etc.). We are investigating this matter to obtain the full facts. Once I have a full picture of what activity your client engaged in, and I am able to confirm that information, I can make a determination . . ."

Id.

28. Rabbi Wasserman voluntarily submitted to an interview by Mr. Hubbard on May 4, 2010 without court order or subpoena, and gave a tour of his *Shaare Torah* synagogue to Mr. Hubbard.

29. Rabbi Wasserman answered all of Mr. Hubbard's questions completely and truthfully during the interview, and also gave a tour of his *Shaare Torah* synagogue to the State Board Investigator. Rabbi Wasserman also offered to provide additional information and assistance to Mr. Hubbard, should he so request.

30. At that time, Mr. Hubbard stated that it was his job to investigate under the rules that govern the profession of funeral directors, that he was a neutral "fact finder," that he would submit a report to the State Board for decision, and that there was then pending an open investigation (No. 10-48-01132) involving Rabbi Wasserman.

Mr. Hubbard also informed Rabbi Wasserman that the State Board would normally process the complaint against him with a “60-90 day turnaround,” and that Rabbi Wasserman should hear from the State Board concerning the results of his investigation by August 4, 2010. Mr. Hubbard further stated that Rabbi Wasserman was subject to a warning, a civil penalty, or more.

31. Although Mr. D’Alessandro had previously sent his personal letter of complaint to Rabbi Wasserman indicating he was copying the BFD, Mr. Hubbard would not disclose the complaint or its source to Rabbi Wasserman, citing “confidentiality provisions” of the FDL.

32. During the interview, Mr. Hubbard represented that at least one religious group in Pennsylvania, the Amish, conducted funerals and performed burials of their co-religionists without licensed Pennsylvania funeral directors. He also represented that funeral directors hired to embalm deceased Amish persons regularly returned the bodies after embalming them to Amish religious leaders and mourners for their burial of the deceased person, without any licensed funeral director’s engagement in the religious ritual, transportation to the cemetery, funeral, and ultimate burial. State Investigator and Licensed Funeral Director Hubbard also said that other religious groups in Lancaster County conducted burials without embalming and without any funeral director present and without enforcement action by the State Board. Finally, Mr. Hubbard said that the Department of Health (without official protest by the State Board) had changed the language of Pennsylvania’s Certificate of Death and Disposition/Transit Permit to reflect this allowance for non-licensed persons. *See* Ex. 5, Commonwealth of Pennsylvania, Department of Health, Local Registrar’s Certification of Death,⁵ (“Signature of Funeral Service

⁵ The Certificate of Death is filed either with and certified by the local registrar, who then files it with the State Department of Health, *see* Ex. 5, Commonwealth of Pennsylvania, Department of Health, Local Registrar’s Certification of Death, or it can be filed directly with a branch office of the State Department of Health, *see* Ex. 6, Commonwealth of Pennsylvania, Department of Health, Certificate of Death.

Licensee or person acting as such”⁶ (emphasis added); and *see* Ex. 8, Commonwealth of Pennsylvania, Department of Health, Disposition/Transit Permit (“Signature of Funeral Service Licensee or person acting as such”) (emphasis added).

33. Shortly after Mr. Hubbard’s interview of Rabbi Wasserman, counsel for Rabbi Wasserman followed up with a letter to Mr. Hubbard, reiterating Rabbi Wasserman’s offer to provide additional information and/or answer any further questions he might have, and confirming Mr. Hubbard’s representations: “We also appreciate you informing us about the Board and the Funeral Directors’ practice with respect to Amish ‘last rites’ in the eastern part of Pennsylvania. We were unaware that the Board and the Funeral Directors participated only in the embalming of the deceased there, thereafter ceding Amish funerals and burials to elders in the Amish communities and families of the deceased, to affect funerals and burials there. We appreciate your candor and frank explanation of the Board’s established practice and protocol with respect to this religious denomination.” Ex. 9, Letter from Efreem M. Grail, Esq. to Horace J. Hubbard, Investigator, Commonwealth of Pennsylvania, May 11, 2010.

34. Neither Mr. Hubbard nor the BFD responded to the letter or contacted Rabbi Wasserman until on or about January 26, 2011. On that occasion, Mr. Hubbard again sought to interview Rabbi Wasserman, concerning an alleged subsequent complaint. Also on that occasion, Mr. Hubbard was not able to report the result of any State Board action concerning his first investigation, then more than five months overdue.

⁶ The State Department of Health, Division of Vital Statistics, revised the Certificate of Death in 2011 without official protest by the State Funeral Director Board and changed the relevant language to “Signature of Funeral Service Licensee or Person in Charge of Interment.” This language change thus strengthens the long-standing policy of the Commonwealth to allow persons who are non-Board licensed funeral directors to officiate at burials, transport deceased persons, and engage in other tasks over which the State Board claims exclusivity for its licensees. Ex. 7, Commonwealth of Pennsylvania, Department of Health, Local Registrar’s Certification of Death, 2012 (emphasis added).

35. According to Mr. Hubbard, the subsequent complaint to the State Board alleged that Rabbi Wasserman had performed funeral services for another deceased Orthodox Jew on or about June 22nd of the preceding year. Again, Mr. Hubbard refused to disclose to Rabbi Wasserman the source of the complaint, presumably from another Board licensee, that he was investigating.

36. The family members of the deceased individual identified in the second complaint were long-time members of Rabbi Wasserman's congregation for whom the Rabbi had long conducted religious rituals, including weddings, funerals, *Bar Mitzvahs*, and other life-cycle events.

37. On or about June 21, 2010, the deceased passed away at his residence. Rabbi Wasserman and his lay assistants (from the *Chevra Kadisha* of the Pittsburgh *Vaad Harabonim*) removed the body from the residence in religious procession to a room at a local synagogue where it was watched and prayed over by a religious honor guard continuously throughout the night (no refrigeration was necessary since the interment was within 24 hours of death). The next morning, the *Chevra Kadisha* transported the body to a local funeral home where, under the direction of Rabbi Wasserman, they rented the use of a preparation room and conducted the religious washing service ("*Tahara*"), all without the involvement of a licensed funeral director. The body was then placed in a casket and brought in religious procession to a local synagogue for a funeral prayer service. Afterwards, the religious procession resumed in order to bring the deceased to the *Poale Zedeck* Memorial Park Cemetery in Gibsonia, Pennsylvania for the completion of the prayers and burial rites.

38. Two licensed funeral directors attended the funeral service at the local synagogue, not to pay respects, but to gather information as they stood in the back of the room, apart from the service. They intimidated the mourners through their actions. The deceased's son reported to

Rabbi Wasserman that he was personally offended and distraught that the funeral directors would attend the service only to gather evidence for a complaint to the Commonwealth in order to secure future revenue streams.

39. Subsequent to this incident, Rabbi Wasserman, through counsel, attempted on numerous occasions to contact the State Board's Counsel regarding the State Board's interpretation of the FDL and the State Board's official enforcement priorities. *See* Ex. 10, Letter from Efreem M. Grail, Esq. to Shawn E. Smith, Esq., Prosecuting Attorney (Department of State, Bureau of Professional and Occupational Affairs), Commonwealth of Pennsylvania, Governor's Office of General Counsel, March 1, 2011 ("I have tried to reach out to you by e-mail several times since we spoke last week to set a date for our meeting with you in Harrisburg. I am writing in the off-chance that I have the wrong e-mail address for you, and that you have not received my several messages. (If on the other hand you are simply caught up in trial, don't worry, just touch base with me when your schedule clears).").

40. During the many intervening months since Mr. Hubbard first notified Rabbi Wasserman of the original investigation, and the passage of many more months since Mr. Hubbard sought to interview the Rabbi for his second investigation, Rabbi Wasserman suffered from the threat of prosecution and civil enforcement action. This caused some members of his congregation, the *Shaare Torah* synagogue board, and the religious community as a whole not to have him conduct funerals, or to do so in a way which burdened his, their, and deceased persons' religious freedoms.

41. Rabbi Wasserman suffered other consequences as well. Prior to Mr. Hubbard's interview, Rabbi Wasserman and the *Chevra Kadisha* regularly rented the preparation room of two different funeral homes to perform the religious *Tahara* washing service, as these rooms

were set up with a table and a floor drain. No funeral director was ever present for the *Tahara*. In early June 2010, after Mr. Hubbard's interview, Rabbi Wasserman was informed by these funeral home directors that they were contacted by the General Counsel for the Pennsylvania Funeral Directors' Association ("PFDA") and instructed that if they continued to be associated in any way with such religious services performed by Rabbi Wasserman, the PFDA would see to it that they were brought up on charges in front of the State Board and that they would have their licenses revoked.

42. As a result, Rabbi Wasserman set up a room for religious *Tahara* service in his synagogue. Eventually, Rabbi Wasserman was forced to stop performing the *Tahara* service at the synagogue due to its Board's fear of prosecution and civil suit against the Congregation. Rabbi Wasserman has since been limited in his ability to serve those members of the community who are in need of Orthodox religious burial services. Such limitation constitutes an unconstitutional encroachment on Plaintiff's constitutional and statutory rights.

43. In addition, after Mr. Hubbard's interview, local cemeteries barred Rabbi Wasserman from performing religious rites unless they are done with a funeral home (and presumably, its licensed director). These cemeteries have informed Rabbi Wasserman that this is due to information received from funeral directors. Families have also informed Rabbi Wasserman that they were told by funeral directors "to be careful" about using the religious services offered by Rabbi Wasserman because they would not be in accordance with state law.⁷

⁷ One member of Rabbi Wasserman's congregation told Rabbi Wasserman that he was informed by a funeral director that Rabbi Wasserman would be found guilty by the State Board and that he would be liable for a \$10,000 fine. The member of the congregation said that the funeral director "warned" him that the synagogue should be very careful to watch that Rabbi Wasserman "does not take the money to pay the fine from the building fund." He also stated that since he is sure that Rabbi Wasserman does not have the money for the fine, Rabbi Wasserman would wind up in jail.

44. Rabbi Wasserman received no further communications from the State Board until late May of 2012.⁸ See Ex. 11, Letter from Shawn E. Smith, Esq., Prosecuting Attorney, Commonwealth of Pennsylvania, Governor's Office of General Counsel, to Daniel Wasserman, May 25, 2012 (Re: File No. 10-48-01132 & 10-48-10256) ("The Prosecution Division of the Bureau of Professional and Occupational Affairs, Office of Chief Counsel, on behalf of the State Board of Funeral Directors, has completed its inquiry into the complaint [sic] against you. On investigation, this Office has decided to **defer** formal prosecution against you, and therefore the complaint [sic] will be closed **The Prosecution Division reserves the right to reopen this matter [sic] for any reason**, such as should additional information be obtained.") (emphasis added).

45. The complaints of funeral directors, the investigations by state enforcement officers, and the repeated threats in written correspondence of the State prosecuting attorneys, have all constrained Plaintiff Rabbi Wasserman in exercising his sincerely-held religious beliefs and practices as to the care for the dead and dying. As a result, there has been a chilling effect throughout the Orthodox Jewish community in Pittsburgh with respect to its right to carry out ritual preparation, burial, and mourning of deceased persons according to its communal interpretation of Jewish law, tradition, custom, and practice.

⁸ The timing of the State Board's May 25, 2012 correspondence with Plaintiff, was apparently triggered by the Memorandum and Order of the Middle District of Pennsylvania in *Heffner v. Murphy*, No. 4:08-CV-00990-JEJ, *slip. op.* (May 8, 2012), finding aspects of the Funeral Director Law and the State Board's enforcement thereof to be unconstitutional, which was issued less than one month prior to the correspondence with Rabbi Wasserman.

B. The Pennsylvania Funeral Director Law

46. Pennsylvania's "Funeral Director Law" is found in the Professions and Occupations Code 63 P.S. § 479 *et seq.*

47. By its terms, it expressly regulates the "profession" of a "funeral director":

The term "funeral director" shall include any person engaged in the *profession* of a funeral director or in the care and disposition of the human dead, or in the practice of disinfecting and preparing by embalming the human dead for the funeral service, burial or cremation, or the supervising of the burial, transportation or disposal of deceased human bodies, or in the practice of funeral directing or embalming as presently known, whether under these titles or designation or otherwise.

48. Under the FDL, the term "funeral director" also means,

[A] person who makes arrangements for funeral service and who sells funeral merchandise to the public incidental to such service or who makes financial arrangements for the rendering of such services and the sale of such merchandise.

63 P.S. § 479.2(1) ("Definitions") (emphasis added).

49. The term "profession" is also defined:

The term "profession" as used in this act shall mean the aggregate of all funeral service licensees and their duties and responsibilities in connection with the funeral as funeral directors licensed under this act.

63 P.S. § 479.2(9).

50. In an antiquated, circular manner that defeats clarity, the FDL further attempts to define

"What Constitutes Practice":

A person . . . shall be deemed to be practicing as a funeral director within the meaning and intent of this Act who holds himself out to the public in any manner as one who is skilled in the knowledge, science and practice of funeral directing, embalming or undertaking, or who advertises himself as an undertaker, mortician or funeral director.

63 P.S. § 479.15(1).

51. Alleged violations of the FDL are subject to civil suit by, especially, licensed funeral directors and their trade association:

Any association of funeral directors or any person having an interest may, by an action in equity, obtain an injunction or prevent the illegal operation of a person, firm, corporation or establishment in violation of law or the regulations of the board [of funeral directors].

63 P.S. § 479.12(b) (“Procedure”), and by the Attorney General, who:

... may maintain an action in the name of the Commonwealth for an injunction or other process against any person to restrain or prevent his practicing the profession of a funeral director in a public or private capacity.

Id., at (c).

52. Violation of the Funeral Director Law can also be enforced by criminal prosecution, punishable by fine and imprisonment:

Any person violating any provisions of this Act or any rule or regulation of the Board promulgated pursuant thereto shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine of not less than One Hundred Dollars (\$100), no more than One Thousand Dollars (\$1000) or undergo imprisonment not exceeding one (1) year, or both.

63 P.S. § 479.17(a) (“Penalties”).

53. The Funeral Director Law in its current form is derived from predecessor Acts of 1895, 1905, 1925, 1927, 1929, 1931, and 1951. The FDL, §§ 471-78, *et seq.* (“Historical and Statutory Notes”). At no time until the present has there even been a reported case where the State Board sought to restrain the actions of religious clergy carrying out spiritual mourning and burial practices without embalming/cosmetizing and without commercial sales of goods and services. No reported case has ever enjoined rabbis, ministers, and other clergy in Pennsylvania from providing such spiritual guidance and services to their congregants.

C. The Funeral Director Law: Intended Scope, Selective Observance By Its Licensees — And Selective Enforcement By Its Board

54. The Funeral Director Law has twice already been found to violate both the United States and Pennsylvania Constitutions, *see Walker v. Flitton*, 364 F. Supp. 2d 503 (M.D. Pa. 2005) (statute unconstitutionally restricts commercial speech regarding pre-need funeral services), *see also Heffner v. Murphy*, No. 4:08-CV-00990-JEJ, slip. op., Memorandum and Order, (M.D. Pa. May 8, 2012) (statute violates Commerce Clause, First Amendment/commercial speech, and other grounds) (“taken as a whole, the statutory scheme of the FDL and the Board’s interpretation of this clearly outdated law, evince the urgent need for the Board to finally clarify and modernize the FDL . . .”).⁹

55. The FDL, by its terms and its history, was rightly intended to police business practices of for-profit undertakers and morticians in order to protect grieving persons at their most vulnerable, and further, to regulate the practice and the methods of scientific preparation of embalming and cosmetizing bodies, for the health and safety of the public, both living and dead.

⁹ The court in *Heffner* pointed out that Pennsylvania’s legislature is in accord. *See* Ex. 12, General Assembly’s Legislative Budget and Finance Committee “Performance Audit, State board of Funeral Directors” (1994) (select portion):

A comprehensive update and revision of the law, as well as consideration of various options for regulating the funeral directing profession and other components of the industry, appear necessary.

No matter what Board structure is ultimately decided upon, the Funeral Director Law needs to be rewritten

* * *

. . . many sections of the law are ambiguous and outdated and that, overall, it does not provide an adequate basis for regulating today’s funeral industry One Board member stated [that]:

. . . Some aspects of this law, as enforced, are unnecessary, self-serving for funeral directors, and add higher costs to funerals.

Performance Audit, p. 25 (concluding numerous provisions of the Funeral Director Law are outdated, not needed, and require complete overhaul).

The FDL may still serve as a legitimate exercise of the state's "police power" against abusive commercial practices (i.e. selling overpriced and unnecessary goods and services) and to ensure safe practices of embalming with potentially dangerous chemicals.

56. The FDL was not, however, intended to apply to or restrict religious clergy, the religious bodies they represent, nor the families and deceased persons they serve, from engaging in wholly-religious practices in the death, religious preparation, mourning, and physical burial of a deceased person, provided those practices were not for-profit, did not involve embalming or cosmetizing, and were done in full compliance with Department of Health regulations and permits.

57. The FDL makes no mention of regulating clergy, who presided over the overwhelming majority of funerals and burials without funeral directors long after the statute's enactment. Indeed, a review of published death notices and other sources demonstrates that in the first half of the 20th century (and before,) including under previous State Board enforcement of the FDL, funerals were often held at home and places of worship without professional licensees' involvement whatsoever. As noted in Cecil D. Bradfield and R. Ann Meyers, "Clergy And Funeral Directors: An Exploration In Role Conflict," 21 Review of Religious Research, No. 3 (Summer 1980), pp. 343-50. *See* Ex. 13. "Traditionally, clergy have had the dominant role in planning and conducting the burial of the dead. As recently as half a century ago, funeral directors were little more than cabinet makers who assisted clergy with the physical arrangements of the funeral." However, since then the State Board has promulgated regulations and engaged in enforcement actions to bring religious clergy into their ambit and their facilities. As a result, its licensees "have largely 'seized' control of the funeral." *Id.*

58. The FDL, on its face, provides for no exceptions in regard to the handling, retrieval, and transport of human remains by non-licensed persons, including by employees of funeral directors or third-party contractors. See 63 P.S. § 479.13 (“Practice without License; Exceptions”) (no exception for unlicensed employees or third-party contractors), accord, 49 Pa. Code § 13.187 (“Preparation or Embalming of Body”) (“A person other than a currently licensed funeral director, or a registered resident intern under supervision, may not prepare or embalm the body of a deceased person Other persons present in the preparation room during the preparation or embalming, or both, of the body shall be authorized members of the funeral home staff, or persons authorized by law, the funeral director or the family of the decedent.”).¹⁰

59. This statutory provision is regularly ignored by Board licensees, see, e.g., *Heffner v. Murphy*, slip. op., at 110 (unlicensed staff regularly engage in “dropping the body off at the cemetery or crematory”). Indeed, licensed funeral directors throughout the industry — including, on information and belief, those licensed funeral directors who serve on the Commonwealth’s Board — regularly dispatch employees and third-party contractors to transport bodies of deceased persons, including to and from other cities inside and outside Pennsylvania.

60. Practitioners and clergy of other religions in the Commonwealth, including the Amish, the Quakers, the Old Order River Brethren (of Lancaster County), and, on information and belief, other religions (including the Muslims,) all conduct funerals in cemeteries openly and without oversight or involvement whatsoever of licensed funeral directors, with full knowledge

¹⁰ Compare, 49 Pa. Code § 13.213 (“Means of Transportation”) (“Transportation of the deceased by a funeral director or the director’s agent shall be only in or on a stretcher or container specifically designed for containment of human remains . . .”). In order for the delegation implied in this regulation not to conflict with the express terms of the statute, the “director’s agent” must refer to another licensee, or to a “resident intern,” see 63 P.S. § 479.2 (“Definitions”) (re: “resident interne” [sic]).

of licensees and agents/representatives of the State Board. *See, e.g.* Ex. 14, David R. Morrison, Statement of Beliefs.

61. On information and belief, practitioners and clergy of other religions in the Commonwealth desire to officiate at licensee-free funerals, but do not for fear of censure and prosecution in enforcement proceedings by the State Board.

62. Indeed, as noted above, Plaintiff Rabbi Wasserman's own *Shaare Torah* synagogue's Board of Directors has dissuaded him from conducting parts of the religious preparation (e.g. washing, or *Tahara*, and guarding, or *Shemira*) at the synagogue for fear of civil and criminal sanctions by the Commonwealth. Congregation members have also expressed reluctance to allow Rabbi Wasserman and the *Chevra Kadisha* to conduct funerals for their deceased family members without engaging a licensee, despite their belief that engagement of a funeral director burdens their free exercise of religion, for fear of the congregation and its board being subjected to an injunction or prosecution.

63. The State Board's enforcement of the Pennsylvania FDL is thus arbitrary and selective. This arbitrary and selective enforcement infringes upon Plaintiff's constitutional rights.

D. The Regulation Of Health And Safety For The Commonwealth

64. According to a January 1994 Performance Audit of the State Board of Funeral Directors by a Joint Committee of the Pennsylvania General Assembly (the "General Assembly Performance Audit" or "the Audit"), . . . "[A]dvances in mortuary science and health regulation have greatly minimized the risks involved in disposing of human remains The Board's functions do not, therefore, appear to be essential to protect public health and safety." Ex. 12,

General Assembly Performance Audit, Summary, pp. 14-18.¹¹ The Performance Audit further states, “Current medical opinion is that dead bodies pose little or no risk to the general public and that embalming is not necessary to protect public health. According to physicians from the Center for Disease Control, the need for embalming as a sanitary and public health measure has been greatly exaggerated.” Ex. 12, General Assembly Performance Audit, Need For Regulation To Protect Health And Safety, p. 15.

65. As noted previously, the State Department of Health, and not the State Board, is responsible for the regulation of the transportation and burial of the bodies of deceased persons. It is the Department of Health which issues permits for both. *See* Ex. 5, Local Registrar’s Certification of Death; and Ex. 8, Disposition/Transit Permit.

66. The State Department of Health’s Certificate of Death explicitly provides that a licensed funeral director need not be involved. *See* Ex. 5, Local Registrar’s Certification of Death, at ¶ 22A (“Signature of Funeral Service Licensee *or person acting as such*”) (emphasis added).

67. The State Department of Health, Division of Vital Statistics, regularly issues Disposition/Transit Permits to persons other than licensed funeral directors, including Plaintiff Rabbi Wasserman. *See* Ex. 15, at § C (“Signature of Funeral Service Licensee or person acting as such”).

68. The State Department of Health regularly issues burial permits to persons other than licensed funeral directors, including to Plaintiff Rabbi Wasserman. *See also* David R. Morrison, Distinterment/Reinterment Permit, at § A, at Ex. 14 (re: Statement of Beliefs).

¹¹ In point of fact, even the Pennsylvania Funeral Directors Association is in agreement that little public health purpose remains for the law (“ . . . public health aspects of funeral directing have receded somewhat . . .”). *See* the Pennsylvania Funeral Director’s Association as *Amicus Curiae*, in support of losing defendants in *Heffner v. Murphy*, No. 4:08-cv-00990-JEJ, at p. 12 (Oct. 19, 2011) (Dkt. No. 156).

69. The local registrar in Homestead, Pennsylvania, as directed and authorized by the Department of Health, Division of Vital Statistics, has issued these permits in blank to Plaintiff Rabbi Wasserman so that Plaintiff may engage in necessary services in support of immediate religious preparation/burial/mourning practices (and for which the board has twice investigated Rabbi Wasserman and threatened his prosecution), *i.e.*, when government offices are closed.¹² See Ex. 16, Disposition/Transit Permit, Department of Health (issued in blank).

70. The requirement that only funeral directors in Pennsylvania may conduct a funeral is also inconsistent with federal regulations. See, *e.g.*, the Federal Trade Commission's rule on Funeral Industry Practices (the "Funeral Rule"), 16 C.F.R. Sec. 453, and its official guidance, "Facts for Consumers," <<http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro19.shtm>>, attached as Ex.

¹² The regional office of the State Department of Health explicitly acknowledged to Plaintiff Rabbi Wasserman that he as a non-licensee may retrieve and transport deceased persons and bury them. See Ex. 18, Letter of Plaintiff Rabbi Daniel Wasserman to Lisa Croft, Department of Health, Division of Vital Records, January 11, 2012:

"I thank you for allowing me to open a channel of communication, and for giving me the security of knowing that if there is an issue in the future, I can have the branch office or local registrar contact you for guidance and direction regarding the correct application of the laws that allow a family to obtain a burial permit and register a death certificate on their own, without a licensed funeral director. I also want to especially thank you for taking the time at the end of a busy day — with the holiday looming (and all the pressure that comes with trying to finish things before the holiday break) — to research my question with your office. As I explained to you, Jewish tradition demands that if at all possible, a body be committed back to the earth from whence it came as soon as possible. We usually try to have the burial within 24 hours or less. Even in the middle of the night our community will spring in action to assist a family to help them fulfill this great responsibility of showing honor to the deceased by burying them before the next day's sun sets. Since a local registrar or branch office is not always available at off hours, I inquired about receiving authorization to have the local registrar issue one copy of a pre-signed burial permit, in the event a local registrar is unavailable or the branch office is closed ...

* * *

I thank you again, on behalf of our community, for taking the time to deal with our request and for authorizing the local registrar to issue a signed permit to us for future use, allowing us to always have one on hand. We will, of course, keep it very safe and only use it in a case of great need. We will, of course, comply with all the applicable regulations and procedures."

See also Ex. 19, Statement of Janice Tumavichukal, Pennsylvania Department of Health, Division of Vital Records in Gail Franklin, "Rewriting Rules at Life's End," *Centre Daily Times*, p. 3, November 23, 2009, attached as Ex. 19. "Pennsylvania law allows a family member or friend to act as their own funeral director ... We do have a provision in the commonwealth law to allowed family (or friend) to bury their own."

17 (“Many people don’t realize that they are not legally required to use a funeral home to plan and conduct a funeral.”).

71. Pennsylvania courts have also recognized that the “purpose of [the] Funeral Director Law is to protect the public health and safety by assuring that the undertaking **business** is conducted only by qualified licensees under sanitary conditions.” *McKinley v. Commonwealth State Bd. of Funeral Directors*, 313 A.2d 180, 183 (Pa. Super. 1973) (emphasis added); *see also Ferguson v. Pa. State Bd. of Funeral Directors*, 768 A.2d 393, 397-98 (Pa. Commw. 2001) (“Courts recognize this law as to regulate the funeral industry to safeguard the interests of the public and the standards of the profession.”) (internal citations omitted).

72. Courts have also recognized the distinction between the acts of funeral directors and those of clergy in the context of preparation for death and burial. *See Ferguson*, 768 A.2d at 400, n.12 (“We reject the argument that taken to its logical extension, any individual, including one’s children and minister, who assists another in the planning of a funeral is in violation of the law Ministers . . . do not have a direct financial interest in the selection of funeral arrangements.”).

73. Indeed, Rabbi Wasserman could not be licensed as a funeral director because such a license requires training in embalming. *See, e.g.*, 63 P.S. § 479.3(c)(1) (requiring completion of course of study in embalming). Embalming is strictly forbidden in Orthodox Judaism and considered desecration. Cosmetizing a deceased person is also unfamiliar to Judaism, which shuns open caskets or “viewings,” even by family members. There is no license for funeral directing without embalming or cosmetizing available under the law of the Commonwealth, and no school of “mortuary science” in the Commonwealth offers a complete mortician’s course of study without requiring training and proficiency in embalming.

74. The health and safety aspect of the FDL is thus a mere pretext. As stated in the Performance Audit:

. . .adequate precautions and laws and regulations administered by various state and federal agencies are in place to address these health risks. Many public health laws and regulations deal with the control of infectious disease transmission and the safe handling and disposal of hazardous and infectious waste. Moreover, there is no epidemiological evidence showing funeral homes and funeral service workers as a source of disease transmission. In this regulatory environment, a state board such as the Funeral Directors Board does not appear to perform functions that are essential to protecting public health and safety.

Ex. 12, General Assembly Performance Audit, Need For Regulation To Protect Health and Safety, p. 18.

E. The Funeral Board, The Profession And Trade Associations Of Funeral Directors, And Jewish Death And Burial Rituals

75. Funeral directors, in their efforts to sell products and services and earn more money for their businesses, have struggled with organized clergy to wrest control of death and burial as a religious service away from clergy. In 1965, the Synagogue Council of America, representing all three branches of organized Judaism (Reform, Conservative, and Orthodox) issued a joint statement addressing the struggle:

That a funeral is a religious service; every congregation shall have a special committee, benevolent association, or Chevra Kadisha for the purpose of implementing the above and assisting the family in time of bereavement. The funeral—from death to interment—is a solemn religious service and, therefore, is completely under the spiritual guidance and regulation of the religious leader. The family should be encouraged to call the rabbi first when a bereavement occurs.

“Synagogue Council Issues Guide on Funeral Practices, The Jewish Chronicle [of Pittsburgh], p. 22, Col. 4-5 (July 30, 1965), at Ex. 20.

76. Over time, the organized funeral directors’ interests enlisted the state to impose and enforce restrictive regulations in their quest to capture and grow a revenue stream from grieving

family members and other mourners by supplanting ministers and rabbis, who emphasized the spiritual and religious elements of funerals, rather than the commercial. *See, e.g.*, Ex. 21, Robert Fulton, “The Clergyman and the Funeral Director: a Study in Role Conflict,” *Social Forces* 13 (Oct. 1961), pp. 317-323, *cited in* Ex. 13, Cecil D. Bradfield and R. Ann Meyers, “Clergy And Funeral Directors: An Exploration In Role Conflict,” 21 *Review of Religious Research*, No. 3 (Summer 1980), pp. 343-50.

77. Under Orthodox Jewish law, however, the entire process of dying and after is governed by religious belief and practice as noted in ancient texts and age-old traditions. A person must be attended to by family, clergy, and lay members of the community in the moments preceding death, as described above, through the mourning that follows for a period of time after the funeral which can last up to twelve months.

78. These are religious practices, involving purely personal obligations to be performed first and foremost by the immediate nuclear and extended family of the deceased, as well as by the entire religious community as a whole, directed by its clergy, with assistance from lay members of the community (as embodied by the *Chevra Kadisha*). Orthodox interpretation of Jewish law holds that these practices are essential and must be performed under the immediate direction and control of the local rabbinic authority — that is, the *Vaad HaRabonim* — in order to fulfill the religious mourning obligations.

79. Under Orthodox interpretation of Jewish law, these obligations cannot be delegated to anyone who does not answer directly to the community’s recognized religious authority, i.e. the *Vaad HaRabonim* and/or its Congregational rabbi members, especially a funeral director acting for profit, whether he or she is a member of the Jewish religion or not.

80. Licensed funeral directors do not answer to the religious authorities, and therefore are not qualified (i.e., ordained) to carry out religious obligations of Jewish rites in death, burial, and mourning. As noted above, Orthodox Jews cannot become licensed funeral directors, which requires competence in embalming, forbidden in the Jewish religion as desecration, and cosmetizing, which also has no place in Judaism.

81. The practice by members of the *Chevra Kadisha* emphasizes the essential point that these burial rites are essential components in the exercise of Orthodox Judaism. These members request forgiveness in every case from the soul of the deceased, in the event they have inadvertently not performed their religious funeral rite functions with the proper level of honor and religious intention. Additionally, for one day each year, usually on the 7th day of the Jewish month of *Adar* (which corresponded to March 1st this past year), the members of the *Chevra Kadisha* are directed to fast, do penance, and pray for an entire day. So important is their role that the *Chevra Kadisha* members are directed to recite special prayers of penitence (“*Selichot*”), see Ex. 22, authored specifically for them to seek heavenly forgiveness if they did not properly fulfill their great and serious religious responsibility (“*Mitzvah*”).¹³

¹³ "We, the members of the Holy group of buriers [literal; in context, the 'members of the *Chevra Kadisha*'], have chosen one day to fast, among the months of the year. We have come forward today with prayer to request mercy. We have knocked on Your door for we are worried [that is, 'in fear'], regarding the Holy ones who are hidden in the earth. This group [the *Chevra Kadisha*] does acts of loving kindness to bury the dead, and there is a concern [of ours] that perhaps we have not dealt with the dead properly. Our flesh is gripped by dread that perhaps in attempting to perform this *Mitzvah* [obligation mandated by the Pentateuch; one of the 613 commandments in the *Torah*, or Five Books of Moses, which every religious Jew must observe] we have, Heaven forbid, sinned in the process....rivers of tears fall from our eyes ... should we have injured the honor of those who are now hidden from our eyes...."

Prayer of Penitence (*Selichot*), Excerpt, See Ex. 22. In Jewish tradition, the written name of G-d in Hebrew, in all of its forms, is considered holy (just as the Bible forbids speaking G-d's name in vain); once committed to a writing, Jewish tradition thus forbids its desecration, destruction, and even erasure. To facilitate distribution of these Court filings in a manner consistent with this Jewish tradition, Plaintiff has redacted the Complaint to remove any form of God's name does not appear. This was accomplished by covering the references to the names of G-d in the printed source prayer and then copying it, thus producing a version in which none of the names of G-d appear.

82. Thus, the work of the *Chevra Kadisha* consists precisely of those specific actions which the State Board claims are reserved under the FDL exclusively to its licensees. These practices are essential religious acts and duties for Orthodox Jews acting under their ordained leader's direction.

83. Rabbi Wasserman, for himself and in his official capacity as director of funerary practices for the *Vaad Harabonim* neither seeks nor accepts payment for these funeral and mourning services.

84. Rabbi Wasserman is not engaged in the "profession" of a funeral director. *See* 63 P.S. § 479.2 *et seq.*

85. Rabbi Wasserman does not hold himself out to the public in any manner other than as a Jewish rabbi and teacher. He does not engage in advertising of any funeral directing services. *See* 63 P.S. § 479.15 ("What Constitutes Practice").¹⁴

86. Plaintiff does not make "arrangements" nor accept/solicit "pre-need arrangements" for funeral services. Such arrangements, as defined by the statute, are for-profit, professional services. Plaintiff does not sell merchandise or goods in connection with funerals, and he does not make financial arrangements pursuant to funeral services.

87. At the heart of the mourning ritual is the burial. Jewish scripture mandates that this too is a religious act, which must be done by the immediate family, then the extended family, and finally by the entire community — shovelful by shovelful, until the casket is completely

¹⁴ A person, either individually or as a member of a partnership or of a corporation, shall be deemed to be practicing as a funeral director within the meaning and intent of this act who:

(1) holds himself out to the public in any manner as one who is skilled in the knowledge, science and practice of funeral directing, embalming or undertaking, or who advertises himself as an undertaker, mortician, or funeral director. . . .

covered — under the direction of a clergy member (i.e., a rabbi) answerable to the *Vaad HaRabonim*.

88. This insistence on a speedy burial, without further preparation of the body save for a ritual cleansing (with water) and covering in a shroud, applies even for persons who wish to be buried elsewhere. The rabbi and the *Chevra Kadisha* mobilize at all times of the day and night (with the exception of the Jewish Sabbath and certain other short Jewish holidays when such mobilization and transport is forbidden by religious law) to immediately transport, usually using common carriers, the body to burial as soon as physically possible.¹⁵

89. Throughout the United States, synagogues, burial societies, and organized Jewish community associations often own and maintain cemeteries (or sections of cemeteries). Thus, it is the entities (usually non-profit, responsible to a board of directors, not a rabbi who may conduct funerals,) which sells cemetery plots for burials.

90. Orthodox Judaism also demands that all members of the community, rich or poor, be buried in the same type of shroud and in the same type of casket (if in a casket at all). The shroud is simple, designed to traditional specifications, and made of pure linen. The casket (when used) must also be a very simple design, made of pine or other inexpensive wood, and is to be the same for all members of the community. There is no commercial, sale, or profit motive in these items for the rabbi, the *Chevra Kadisha*, or the *Vaad HaRabonim*. If possible, these objects are to be made locally to involve even more members of the community in this life-cycle event. Therefore, families are free to fabricate any of these items on their own or purchase them

¹⁵ This is true even for persons who wish to be buried in the Land of Israel, holy to the Jewish people. In such cases, the remains of the deceased person are rushed to an international airport to meet the next flight to Israel. Rabbi Wasserman often drives a van with the remains, accompanied by the deceased's immediate family from Pittsburgh to Kennedy Airport in New York, after having first secured a transport permit from the State Department of Health. Upon arrival, the plane in Israel is again met by a procession of honor to the cemetery. Even in instances where a body is so transported, embalming or any "scientific" preparation is strictly forbidden.

elsewhere (including online from Costco, *see* Ex. 23, (“Costco Funeral Products”)) for the funeral. Often, other religious organizations answerable to the *Vaad HaRabonim* fabricate or provide these items obtained from manufacturers to the families at cost in their difficult time of need.

91. Plaintiff here thus seeks this Court’s ruling that the FDL in Pennsylvania does not compel him or his community members under color of state law to engage the services of a commercial funeral director they often do not know, who does not share in their religious belief, practices, or obligations, and who is not responsible to the religious community and to its ordained leaders. Rather, the FDL, as it was intended, may rightly regulate embalming, the restorative art of cosmetizing, and the business practices of commercial morticians and undertakers – not the religious practices of prayer and ritual during mourning and burial conducted by clergy without charge.

V. CAUSES OF ACTION

COUNT I

THE STATE BOARD'S ARBITRARY AND DISCRIMINATORY ENFORCEMENT OF THE FUNERAL DIRECTOR LAW IN REGARD TO PLAINTIFF'S TRADITIONAL RELIGIOUS PRACTICES VIOLATES THE FREE EXERCISE OF RELIGION GUARANTEE OF THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS¹⁶

92. The averments of the preceding paragraphs are incorporated by reference as if set forth herein at length.

93. The Free Exercise Clause of the First Amendment provides that, "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*" U.S. CONST. amend. I (emphasis added).

94. The Fourteenth Amendment's fundamental concept of liberty has rendered the state legislatures as incompetent as Congress to enact laws prohibiting the free exercise of religion. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

95. If a law is not neutral to religion (i.e. if it discriminates against religiously motivated conduct) or is not generally applicable (i.e. if it proscribes particular conduct only or primarily when religiously motivated), strict scrutiny applies, and the law's burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest. *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002) citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

¹⁶ In addition to the First Amendment of the United States Constitution, Article 1, Section 3 of the Pennsylvania Constitution provides protection for the free exercise of religion. Indeed, Article 1, Section 3 has been argued to provide even greater protection for the free exercise of religion than the First Amendment of the United States Constitution. See Gary Gildin, *Coda to William Penn's Overture: Safeguarding Non-Mainstream Religious Liberty under the Pennsylvania Constitution*, 4 U. Pa. J. Const. L. 81 (2001). Thus, enforcement of the Funeral Director Law in regard to traditional religious practices violates the Pennsylvania Constitution's free exercise of religion guarantee as well.

96. A “neutral” law “does not target religiously motivated conduct either on its face *or as applied in practice.*” *Trefelner v. Burrell School District*, 655 F.Supp.2d 581, 590 (W.D.Pa. 2009) quoting *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (emphasis added).

97. Likewise, a law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated. *Lukumi*, 508 U.S. at 543-46; *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 364-66 (3d Cir. 1999).

98. The State Board’s enforcement of the FDL, specifically targeting religiously motivated conduct of the Orthodox Jewish faith, has left the law lacking in neutrality and general applicability. On information and belief, the State Board has targeted religiously motivated conduct in response to the complaints, and at the urging and behest, of its licensees, who fear the loss of an income stream whose funeral services and market share could be lucrative.

99. The State Board lacks any legitimate interest, let alone compelling interest, in regulating Plaintiff’s traditional religious practices. Plaintiff does not engage in embalming, the restorative art of cosmetizing, or commercial funeral practices. Furthermore, the Department of Health, and not the State Board, regulates the disposition/transit of bodies, and the Department of Health regularly issues permits to Plaintiff Rabbi Wasserman and other non-licensees.

100. Arbitrary and discriminatory enforcement of the FDL against Rabbi Wasserman is therefore a violation of the Free Exercise Clause of the First Amendment. The BFD’s arbitrary and discriminatory enforcement of the FDL demonstrates the pretext under which the BFD claims to act for the protection of safety and health for Pennsylvania.

COUNT II

THE STATE BOARD'S ARBITRARY AND DISCRIMINATORY ENFORCEMENT OF THE FUNERAL DIRECTOR LAW IN REGARD TO PLAINTIFF'S TRADITIONAL RELIGIOUS PRACTICES, WHILE ACCOMMODATING THE TRADITIONAL RELIGIOUS PRACTICES OF OTHER GROUPS, VIOLATES THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE AND ARTICLE 1, SECTION 3 OF THE PENNSYLVANIA CONSTITUTION¹⁷

101. The averments of the preceding paragraphs are incorporated by reference as if set forth herein at length.

102. The Establishment Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

103. The principle at the heart of the Establishment Clause is that government should not prefer one religion to another. *Bd. of Educ. v. Grumet*, 512 U.S. 687, 703 (1994); *Gillette v. United States*, 401 U.S. 437, 449 (1971).

104. The principle of neutrality is part of a "settled jurisprudence" that prohibits government from putting "an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8-9 (1989) (plurality opinion) *quoting Gillette*, 401 U.S. at 450.

105. The Establishment Clause applies equally to the states through the Fourteenth Amendment. *Borden v. Sch. Dist. of Twp. East Brunswick*, 523 F.3d 153, 175 (3d Cir. 2008) *citing Wallace v. Jaffree*, 472 U.S. 38, 49-50.

¹⁷ In addition to the First Amendment of the United States Constitution, Article 1, Section 3 of the Pennsylvania Constitution prevents the government from favoring one religion over another. Article 1, Section 3 states that "no preference shall ever be given by law to any religious establishments or modes of worship." Thus, enforcement of the Funeral Director Law in regard to Plaintiff's traditional religious practices violates the Pennsylvania Constitution as well as the United States Constitution.

106. “[T]he challenged action violates the Establishment Clause if (1) it lacks a secular purpose; (2) its primary effect is to either advance or inhibit religion; *or* (3) it foster an excessive entanglement of government with religion.” *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 283 (3d Cir. 2011) (emphasis added) *citing Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

107. The State Board’s arbitrary and discriminatory enforcement of the FDL against Plaintiff, while exempting members of other religious groups, violates the first two prongs of the *Lemon* test listed above, as well as the endorsement test of *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring), which recognizes that when government transgresses the limits of neutrality and shows religious favoritism, it violates the Establishment Clause. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F.Supp.2d 707, 714 (M.D.Pa. 2005) *citing Lynch*, 465 U.S. at 690.

108. In regard to the first prong of the *Lemon* test, even if the State Board had a legitimate public health interest in enforcing the FDL against Plaintiff (which it does not), such an interest could not possibly justify, with a secular purpose, the State Board’s discriminatory enforcement of the FDL against Plaintiff while exempting other religious groups who desire to conduct funeral services without interference from a licensed funeral director.

109. In regard to the second prong of the *Lemon* test and the endorsement test, the State Board’s discriminatory enforcement of the FDL against the religious practices of Plaintiff, while making exceptions for the religious practices of other faiths, conveys a government message of disapproval for one religion and endorsement of others.

110. The State Board’s arbitrary and discriminatory enforcement of the FDL against Rabbi Wasserman, and not members of other faiths, is therefore a violation of the Establishment Clause of the First Amendment.

COUNT III

THE STATE BOARD'S ARBITRARY AND DISCRIMINATORY ENFORCEMENT OF THE FUNERAL DIRECTOR LAW IN REGARD TO PLAINTIFF'S TRADITIONAL RELIGIOUS PRACTICES VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS¹⁸

111. The averments of the preceding paragraphs are incorporated by reference as if set forth herein at length.

112. The Equal Protection Clause of the Fourteenth Amendment states, "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend.

XIV.

113. Under the Equal Protection Clause, "all persons similarly situated should be treated alike." *Artway v. Attorney General of N.J.*, 81 F.3d 1235, 1267 (3d Cir. 1996) quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

114. The Equal Protection Clause provides a basis not only for challenging legislative classifications that treat one group of persons as superior or inferior to others, but also for contending that general laws and rules are being applied in an arbitrary or discriminatory manner. See *Jones v. Helms*, 452 U.S. 412 (1981).

115. Strict scrutiny of a law or regulation is warranted when a state actor is shown to discriminate against certain individuals based on their membership in a protected class.

¹⁸ In addition to the Fourteenth Amendment of the United States Constitution, the Supreme Court of Pennsylvania has identified sources of equal protection law in Article 1, Section 1 and Article 1, Section 26 of the Pennsylvania Constitution. See *Erfer v. Commonwealth*, 568 Pa. 128, 138-39 (2002); Russell Gerney, *Equal Protection Under the Pennsylvania Constitution*, 42 Duq. L. Rev. 455, 491 (2004). The equal protection provisions of the Pennsylvania Constitution are analyzed under the same standards used to review equal protection claims under the Fourteenth Amendment to the United States Constitution. *Love v. Borough of Stroudsburg*, 528 Pa. 320, 325 (1991), and thus enforcement of the Funeral Director Law in regard to traditional religious practices violates the Pennsylvania Constitution's equal protection guarantee as well.

Trefelner, 655 F.Supp.2d at 589 citing *Tillman v. Lebanon County Corr. Facility*, 221 F.3d 410, 423 (3d Cir. 2000).

116. Protected classes include those based upon suspect distinctions, such as race, *religion*, and alienage, and those impacting fundamental rights. *Trefelner*, 655 F.Supp.2d at 589 citing *Artway*, 81 F.3d at 1267.

117. Orthodox Jewish clergy are arbitrarily discriminated against while members of the Amish, Quaker, Old Order River Brethren, and, on information and belief, other faiths, with the knowledge and tacit approval of the State Board of Funeral Directors and its agents, conduct their own funeral services, without the assistance of a licensed funeral director.

118. As noted, the State Board lacks a legitimate interest, let alone compelling interest, in regulating Plaintiff's traditional religious practices. Plaintiff does not engage in embalming, the restorative art of cosmetizing, or commercial funeral practices. Furthermore, the Department of Health, and not the State Board, regulates the disposition/transit of bodies, and the Department of Health regularly issues permits to Plaintiff Rabbi Wasserman and other non-licensees.

119. Arbitrary and discriminatory enforcement of the FDL against Rabbi Wasserman is therefore a violation of the Equal Protection Clause of the Fourteenth Amendment. The BFD's arbitrary and discriminatory enforcement of the FDL demonstrates the pretext under which the BFD claims to act for the protection of safety and health for Pennsylvania.

COUNT IV

THE STATE BOARD'S ENFORCEMENT OF THE FUNERAL DIRECTOR LAW AGAINST PLAINTIFF SUBSTANTIALLY BURDENS HIS FREE EXERCISE OF RELIGION IN VIOLATION OF THE PENNSYLVANIA RELIGIOUS FREEDOM PROTECTION ACT

120. The averments of the preceding paragraphs are incorporated by reference as if set forth herein at length.

121. The Pennsylvania RFPA provides that “an agency shall not substantially burden a person’s free exercise of religion, including any burden which results from a rule of general applicability.” 71 P.S. § 2404(a).

122. The RFPA’s reference to “free exercise of religion” is a reference to the practice or observation of religion under Article 1, Section 3 of the Pennsylvania Constitution, which states: “All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences ... no human authority can, in any case whatever, control or interfere with the rights of conscience.” 71 P.S. § 2403 *citing* PA. CONST. art. 1 § 3.

123. The State Board’s enforcement of the FDL against Plaintiff is a substantial burden on Plaintiff’s free exercise of religion.

124. Strict Orthodox interpretation of Jewish law holds that funerary practices are essential and must be performed under the immediate direction and control of the local rabbinic authority (i.e. the *Vaad HaRabonim*).

125. These religiously-mandated obligations cannot be delegated to anyone who does not answer directly to the community’s recognized religious authority, i.e. the *Vaad HaRabonim* and/or the congregational rabbi, especially a funeral director acting for profit, Jewish or not.

126. Licensed funeral directors do not answer to the religious authorities, and therefore are not qualified (i.e. ordained) to carry out religious obligation of Jewish rites in death, burial, and mourning.

127. According to the RFPA, a substantial burden on the free exercise of religion can be excused only if the state agency uses the “least restrictive means” to further a “compelling interest.” 71 P.S. § 2404(b).

128. The State Board lacks a legitimate interest, let alone a compelling interest, in enforcing the FDL against Plaintiff. Even if the State Board had a compelling interest, the State Board has certainly not used the least restrictive means to further that interest. Therefore, the State Board’s enforcement of the FDL against Plaintiff is a violation of the Pennsylvania RFPA.

129. The RFPA contains a requirement that a plaintiff must give notice to the state agency defendant at least 30 days prior to bringing a RFPA claim. 71 P.S. § 2405(b). As noted above, and in the attached exhibits, Plaintiff has satisfied the notice requirement through the April 8, 2010 letter to State Board Chairperson Michael J. Yeosock, the May 11, 2010 letter to Investigator Horace J. Hubbard, and the March 1, 2011 letter to Assistant Counsel Shawn E. Smith.

130. The RFPA contains an exception to the notice requirement if “[t]he exercise of governmental authority which threatens to substantially burden the person’s free exercise of religion is imminent.” 71 P.S. § 2405(c)(1). Therefore, because the State Board’s substantial burden on Plaintiff’s free exercise of religion is ongoing and imminent, even if counsel’s communications do not suffice to satisfy the RFPA’s notice requirement, Plaintiff may still bring suit against the State Board under the RFPA at this time.

V. REMEDIES

131. Plaintiff asks that the Court declare the State Board's enforcement of the Funeral Director Law against Plaintiff to be unconstitutional and in violation of the Free Exercise Clause of the First Amendment to the United States Constitution; the Establishment Clause of the First Amendment to the United States Constitution; the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; Article 1, Section 1 of the Pennsylvania Constitution; Article 1, Section 3 of the Pennsylvania Constitution; Article 1, Section 26 of the Pennsylvania Constitution; and the Pennsylvania Religious Freedom Protection Act.

132. Plaintiff asks that the Court enter a preliminary and permanent injunction in his favor and against Defendants, restraining them from applying the state Funeral Director Law to clergy who neither charge nor embalm as part of their services, on the form submitted herewith.

133. Plaintiff asks that, in addition to the equitable relief requested above, this Court enter judgment of monetary damages in an amount according to proof but in any case more than \$75,000.

134. Plaintiff requests an award of attorneys' fees and costs pursuant to 42 U.S.C. § 1988(b), and such other relief as is just and appropriate.

Respectfully submitted,

/s/ Jeremy D. Feinstein
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