No. 2017CV555

In the Circuit Court for 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

BRIEF OF DEFENDANTS WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, RAY ALLEN, AND JIM CHIOLION IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND IN RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Amy Lawson and her photography studio (collectively "Lawson") brought a pre-enforcement challenge against the Department of Workforce Development ("Department"),[1] based upon her concern that the Department will imminently prosecute her under Wis. Stat. § 106.52. Section 106.52 prohibits "public places of accommodation" from discriminating against individuals on the basis of, as relevant here, their sexual orientation. Lawson claims that the Department will use this statute to force her to communicate messages contrary to her sincere religious belief in traditional marriage.

Lawson's lawsuit against the Department is based upon a hypothetical prosecution that would not come to pass. In the more than 30 years that Section 106.52 has been on the books, the Department has never applied it to independent contractors like Lawson who operate out of their own homes and provide their services on location. Moreover, the Department has never applied Section 106.52 to tread upon an individual's rights under the Wisconsin Constitution's

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[1] Lawson also named as defendants—in addition to the Department—Ray Allen, the Secretary of the Department, and Jim Chiolino, the Administrator for the Equal Rights Division within the Department. Compl. p. 1. This brief will refer to these Defendants collectively as "the Department." In a separate claim, unrelated to this motion, Lawson also named the City of Madison as a defendant. This motion does not address that portion of Lawson's lawsuit.

Conscience Clause. The reason for this lack of relevant prosecutions is simple: Section 106.52 simply does not apply to independent contractors like Lawson and does not apply to anyone who declines to provide services based upon a constitutionally protected religious objection.

Accordingly, Lawson lacks standing *and* her complaint alleges no constitutional violation. She lacks standing because there is no credible threat that the Department will abandon its 30-year policy of non-enforcement in cases like hers. And she alleges no constitutional violation because the statute simply does not prohibit her constitutionally protected conduct. This Court should thus dismiss Lawson's Complaint against the Department.

STATEMENT OF THE CASE

I. Statutory Background

A. Wisconsin Statute § 106.52 prohibits discrimination by "public places of accommodation or amusement" "because of" a variety of characteristics. The Legislature enacted this law in its current form in 1982. 1981 Assembly Bill 70.[2]

As relevant here, Wis. Stat. § 106.52(3) contains four prohibitions that apply to "public places of accommodation or amusement." First, "[n]o person may . . . [d]eny to another or charge another a higher price than the regular rate for the

[2] The Legislature has renumbered this law three times. The Legislature first enacted the law as Wis. Stat. § 942.04 (1983), then the Legislature renumbered it to Wis. Stat. § 101.22 (1989), then to Wis. Stat. §106.04 (1995), and then finally to Wis. Stat. § 106.52 (1999).

full and equal enjoyment of any public place of accommodation or amusement because of sex, race, color, creed, disability, sexual orientation, national origin or ancestry." Wis. Stat. § 106.52(3)(a)(1). Second, "[n]o person may . . . [d]eny to an adult or charge an adult a higher price than the regular rate for the full and equal enjoyment of a lodging establishment because of age, subject to [a statutory exception related to alcohol regulation]." § 106.52(3)(a)(1m). Third, "[n]o person may . . . [g]ive preferential treatment to some classes of persons in providing services or facilities in any public place of accommodation or amusement because of sex, race, color, creed, sexual orientation, national origin or ancestry." Wis. Stat. § 106.52(3)(a)(2). Finally, "[n]o person may . . . [d]irectly or indirectly publish, circulate, display or mail any written communication which the communicator knows is to the effect that any of the facilities of any public place of accommodation or amusement will be denied to any person by reason of sex, race, color, creed, disability, sexual orientation, national origin or ancestry or that the patronage of a person is unwelcome, objectionable or unacceptable for any of those reasons." Wis. Stat. § 106.52(3)(a)(3).

Wisconsin Statute § 106.52(1)(e)1 defines what constitutes a "public place of accommodation or amusement." Specifically, "'[p]ublic place of accommodation or amusement' shall be interpreted broadly to include, but not be limited to, places of business or recreation; lodging establishments; restaurants; taverns; barber, cosmetologist, aesthetician,

electrologist, or manicuring establishments; nursing homes; clinics; hospitals; cemeteries; and any place where accommodations, amusement, goods, or services are available either free or for a consideration, subject to [Wis. Stat. § 106.52(1)(e)2]."[3]

For purposes of these statutes, "'sexual orientation' has the meaning given in s. 111.32(13m)," Wis. Stat. § 106.52(1)(g): "'Sexual orientation' means having a preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference or being identified with such a preference," Wis. Stat. § 111.32(13m).

B. The Wisconsin Department of Workforce Development is charged with enforcing Section 106.52. *See* Wis. Stat. § 106.52(4)–(5). Generally, when the Department makes a determination in any public-accommodation case, that decision may be appealed to the Labor and Industry Review Commission, Wis. Stat. § 106.52(4)(b), and then to the courts, Wis. Stat. § 106.52(4)(c).

The Director of the Civil Rights Bureau within the Equal Rights Division of the Department, Larry Jakubowski,

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[3] Not directly relevant here, the above-mentioned exception to § 106.52(1)(e)1 reads as follows: "'Public place of accommodation or amusement' does not include a place where a bona fide private, nonprofit organization or institution provides accommodations, amusement, goods or services during an event in which the organization or institution provides the accommodations, amusement, goods or services to the following individuals only: a. Members of the organization or institution[;] b. Guests named by members of the organization or institution[;] c. Guests named by the organization or institution." Wis. Stat. § 106.52(1)(e)2 (formatting altered).

is the supervisor of the Department's enforcement of Section 106.52. Jakubowski Affidavit ¶¶ 1–3. Director Jakubowski averred that he is "familiar with the [Department's] application and interpretation of" Section 106.52 and the Department's "policies for investigating violations of the law." Jakubowski Affidavit ¶ 4. This law, in its current form, has been in place since 1982, and the Department "investigate[s] approximately 50 public accommodation complaints per year." Jakubowski Affidavit ¶ 5.

"[T]he [Department] has never, to its knowledge, enforced the public accommodation law against a photographer that operates as an independent contractor out of her residence." Jakubowski Affidavit ¶ 5. Indeed, it is the Department's policy that "these individuals are not operating a 'public place of accommodation or amusement,' as defined by Wis. Stat. § 106.52(e)1." Jakubowski Affidavit ¶ 6.

In the over 30 years since Section 106.52 was enacted, the Department "has never been squarely presented" with a possible enforcement scenario that would violate free-exercise rights under the Wisconsin Constitution. Jakubowski Affidavit ¶ 7. "[T]he [Department] is fully aware of its obligations under [the Wisconsin Constitution] to accommodate citizens' sincerely held religious beliefs, and any application of the public accommodation law by [the Department] would be done in a way that did not violate the guarantee of freedom of conscience found in Article I, Section 18 of the Wisconsin Constitution." Jakubowski Affidavit, ¶ 7.

II. Factual Background[4]

A. Lawson is the sole owner of Amy Lynn Photography Studio, LLC, a Wisconsin limited-liability company. Compl. ¶¶ 16–17. Through her company, Lawson provides "visual storytelling services" to her clients on a commissioned basis. Compl. ¶ 52. These services consist of photography, photo editing, blogging, and posting on her various business social-media profiles. Compl. ¶¶ 55–62. Lawson operates her business "out of her Madison apartment." Compl. ¶ 54. She does not invite the general public or her clients into her apartment. *See* App. 16 (listing her place of business as a post-office box); App. 31 (listing traveling expenses for photography sessions, with no reference to sessions that take place in her apartment); *see generally* Compl. ¶¶ 92–96, 112, 122, 124. Rather, she consults with her clients via email, Skype, or in-person meetings outside her apartment, and photographs her clients on location. *See generally* Compl. ¶¶ 92–96, 112, 122, 124, 140.

Lawson has no employees, although "her husband or friends occasionally volunteer [for her] as a second photographer." Compl. ¶ 53. She accepts a variety of client commissions: engagements and weddings; professional headshots and product photos; and other portraits, such as photographs for high-school seniors. Compl. ¶ 61.

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[4] For purposes of this motion to dismiss, the Department assumes that the facts in the complaint are true. *See Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693.

Lawson "has always operated the Studio in accordance with [her] beliefs, purposes, and goals." Compl. ¶ 51. While she "entertains requests for [her] visual storytelling services from the general public," Compl. ¶ 66, she "does not automatically accept every request for visual storytelling" she receives, Compl. ¶ 67. Lawson "is an evangelical Christian," Compl. ¶ 24, and would not promote, through her work, messages that conflict with her "editorial, artistic, religious, and political judgment." Compl. ¶ 68. Consistent with these editorial, artistic, religious, and political beliefs, Lawson "cannot provide visual storytelling services that promote racial division," nor can she "provide such services to organizations that promote racial division." Compl. ¶ 223. Thus, she will "not [ ] photograph people wearing the confederate flag, blog about the confederate flag, or offer her visual storytelling works to organizations that promote the confederate flag or use it as a symbol." Compl. ¶ 224. For similar reasons, Lawson "cannot create any visual storytelling works" promoting abortion or "organizations that promote abortion." Compl. ¶ 226; *see generally* Compl. ¶ 220 ("Amy believes that she cannot . . . use her talents to promote anything . . . dishonorable to God without violating her religious beliefs.").

Most relevant here, Lawson will not provide her services to promote same-sex marriage because that would be inconsistent with her religious beliefs. *E.g.* Compl. ¶¶ 203, 225. Lawson holds her "church's historic view on marriage,"

Compl. ¶ 202; namely, that "God created marriage as a gift to people of all faiths, races, and backgrounds and that God ordained marriage to be a covenant between one man and one woman," Compl. ¶ 203. Accordingly, Lawson "cannot create any visual storytelling work[ ] celebrating any marriage not between one man and one woman (such as photography for a same-sex wedding ceremony)." Compl. ¶ 225.

"Although [Lawson] cannot create visual storytelling works that promote messages and organizations she objects to, [she] do[es] not object to and will happily create works for individuals regardless of their race, sex, religion, sexual orientation, or political beliefs." Compl. ¶ 228. "For example, [Lawson] will happily create visual storytelling works for lesbian, gay, or bisexual clients"; "for clients who support abortion"; or "for organizations run by such persons so long as the works or organizations themselves do not promote messages [Lawson] objects to." Compl. ¶ 229.

Lawson is forthright about her commitment to operate her business in accordance with her editorial, political, and religious beliefs. She is "honest and upfront with her clients, potential clients, and the public," Compl. ¶ 87, about what type of visual storytelling she "will and will not create," Compl. ¶ 88. The "operating agreement" she created for her business "specifies [her] core beliefs, practices, and policies." Compl. ¶¶ 49–50. When she agrees to provide services for a client, "that client must sign a customized version of [her] form contract," Compl. ¶ 100, which includes the following

statements: "[Lawson] retains complete artistic and editorial freedom with respect to every aspect of the creation of the photographs and internet posts," and "[Lawson] is not obligated to accept any job [and] reserves the right to decline any request that is inconsistent with [her] artistic, religious, or political beliefs." Compl. ¶ 101. By way of illustration, when one of her clients disagreed with these requirements, Lawson and the client ended their contract "without penalty." Compl. ¶¶ 241–50.

B. As relevant to this motion, Lawson asserts a concern that Section 106.52 could be interpreted to prohibit her current and future conduct—specifically, her willingness to accept commissions to photograph only those marriage ceremonies (and other events) that are consistent with her religious beliefs and her desire to communicate this limitation clearly to her potential clients through her various websites and business materials. Compl. ¶¶ 6–10. Accordingly, in March 2017, she filed a pre-enforcement challenge against the Department seeking: (1) an injunction against the Department prohibiting the enforcement of Subsection 106.52 (3)(a)(1)–(2) as applied to her current and future actions, Compl. pp. 48–49; (2) a declaratory judgment that these subsections violate the Wisconsin Constitution as applied to her current and future actions, Compl. p. 49; (3) an injunction against the Department, prohibiting its enforcement of Subsection 106.52(3)(a)(3) facially and as applied to her current and future actions, Compl. pp. 48–49; and (4) a

declaratory judgment that this subsection violates the Wisconsin Constitution facially and as applied to her current and future actions, Compl. p. 49.

Simultaneous to filing her complaint, Lawson moved for a temporary injunction under Wis. Stat. § 813.02. The Department now moves to dismiss the complaint for failure to state a claim.[5]

STANDARD FOR GRANTING MOTION

"A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693 (citations omitted); Wis. Stat. § 802.02(1)(a). In reviewing a motion to dismiss, this Court assumes the facts (but not the legal assertions) stated in the complaint are true. *Data Key Partners*, 356 Wis. 2d 665, ¶ 19. In order to survive

[5] Wis. Stat. § 813.02 provides that "a temporary injunction may be granted" "[w]hen it appears from a party's pleading that the party is entitled to judgment and any part thereof consists in restraining some act" that, if unrestrained during the litigation, would injure the party. Wis. Stat. § 813.02(1)(a). Thus, to receive a temporary injunction, the requesting party must show "a reasonable probability of ultimate success on the merits." *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). The Department argues here that Lawson cannot succeed on the claims she asserts in her Complaint. If the Court agrees, then it must necessarily deny Lawson's motion for a temporary injunction along with her Complaint. If the Court disagrees, concluding that Lawson might succeed on her claims, then the Department does not contest this Court's entering of a temporary injunction. Relatedly, the Department takes no position on any bond requirement securing any temporary injunction the Court may issue.

a motion to dismiss, the complaint "must plead facts, which if true, would entitle the plaintiff to relief." *Id.* ¶ 21.

SUMMARY OF ARGUMENT

Even if all the facts asserted in the Complaint are true, Lawson's Complaint should be dismissed.

I. Lawson lacks standing because there is no credible threat that she will be prosecuted under Section 106.52. *See generally Planned Parenthood of Wis., Inc. v. Schimel*, 2016 WI App 19, 367 Wis. 2d 712, 877 N.W.2d 604.

There are two independently sufficient reasons why Lawson lacks standing. First, Section 106.52 does not apply to Lawson's conduct at all because she does not operate a "place[ ] of public accommodation," which is a prerequisite for application of Section 106.52. Indeed, the Department has never—in its 30 years of enforcing Section 106.52—applied this provision to independent contractors like Lawson, who do not operate brick-and-mortar stores. Second, Lawson lacks standing because Section 106.52 does not apply to the conduct that she asserts she will engage in: refusal to provide services because of a sincere, constitutionally protected religious objection. The Department has never applied that provision to override sincere, constitutionally protected religious exercise.

II. Standing aside, Lawson's as-applied constitutional challenges fail on the merits.

A. Lawson's as-applied claims fail because Section 106.52 applies only to "public place[s] of accommodation."

Businesses that do not fall within the enumerated businesses in Subsection 106.52(e)1 are "public places of accommodation" only if they meet a two-element test. First, they must be physical places (i.e., brick-and-mortar stores). Second, they must supply to the public the "necessities and/or comforts of the kind offered by the listed businesses [in the statute]"—that is, businesses like hotels, restaurants, and barbers. *Hatheway v. Gannett Satellite Info. Network, Inc.*, 157 Wis. 2d 397, 400, 459 N.W.2d 873 (Ct. App. 1990).

Here, Lawson fails both elements of the test and thus is not a "public place[ ] of accommodation" for two independently sufficient reasons. As to the first element, Lawson's business is not a physical "place": she operates solely out of her apartment, not a brick-and-mortar store. As to the second element, Lawson offers only bespoke photography, photo-editing, and blogging services, which do not qualify as the general comforts or necessities of the kind offered by hotels, restaurants, and barbers. And, again, she does not offer her services to any and all members of the public: she accepts clients only on a selective basis and at a customized price.

B. Lawson's as-applied claims also fail because the statute does not proscribe her conduct, even if her business qualified as a "public place[ ] of accommodation."

Wisconsin courts must interpret statutes to avoid constitutional conflicts whenever possible. Section 106.52(3)

provides that "[n]o person may . . . [d]eny to another . . . the full and equal enjoyment of any public place of accommodation [ ] *because of* . . . sexual orientation." Wis. Stat. § 106.52(3)1 (emphasis added). When a person declines to offer particular services due to their constitutionally protected right to sincerely exercise religion, the canon of constitutional avoidance dictates that the person has acted "because of" religious beliefs, not "because of" impermissible discrimination.

As Lawson's complaint makes clear, she is seeking *only* to engage in conduct that is protected by the Conscience Clause: she does not want to be forced to take photographs contrary to her genuine religious belief in traditional marriage. Accordingly, her conduct is outside the reach of Section 106.52's "because of" clause, under the canon of constitutional avoidance.

ARGUMENT

I. Lawson Lacks Standing To Bring This Declaratory Judgment Action

A. "In order to have standing . . . a party must have a personal stake in the outcome and must be directly affected by the issues in controversy." *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, ¶ 15, 259 Wis. 2d 107, 655 N.W.2d 189. In a pre-enforcement, declaratory judgment action, this element is satisfied if the plaintiff "bring[s] forth [ ] facts demonstrating" that a statute will cause her "pecuniary loss or the risk of [ ] substantial

injury to [her] interests." *Id.* ¶ 17; *Planned Parenthood of Wis., Inc. v. Schimel*, 2016 WI App 19, ¶¶ 13, 18, 367 Wis. 2d 712, 877 N.W.2d 604. Or, as the United States Supreme Court has put it, the plaintiff must show a "credible threat of prosecution" under the challenged statute. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010) (quotation omitted).

The Wisconsin Court of Appeals' decision in *Planned Parenthood* illustrates the proper application of this principle. There, Planned Parenthood challenged a statute requiring a physician to obtain "voluntary consent" from the woman requesting an abortion before the physician could perform that abortion. 367 Wis. 2d 712, ¶ 14 (citing Wis. Stat. § 253.10(3)). Yet, Planned Parenthood already observed this practice even before the statute was enacted. *Id.* ¶¶ 14–17. Indeed, after the challenged statute was enacted, Planned Parenthood did not alter its behavior in any way. *Id.* ¶¶ 17–18. The court of appeals held that Planned Parenthood did not have standing to bring a pre-enforcement, declaratory judgment action against the statute. *Id.* ¶¶ 13, 18. Planned Parenthood did not have "a personal stake" in whether the court issued a declaratory judgment since the statute did not cause it financial harm or, as already mentioned, force it to alter its behavior. *Id.* ¶ 18.

B. In the present case, Lawson lacks standing for two independently sufficient reasons.

First, in the 30-plus years since the enactment of Section 106.52(3), the Department has never "enforced the public accommodation law against a photographer that operates as an independent contractor out of her residence." Jakubowski Affidavit ¶ 5. The reason for that uniform history of non-enforcement is that the statute does not apply to such contractors because they do not operate out of a "public place[ ] of accommodation" under Subsection 106.52(1)(e)1, *infra* pp. 16–22. It follows that Lawson—as a photographer doing business out of her residence—has no credible fear of prosecution under Section 106.52, and thus has no "personal stake" in Section 106.52's constitutionality. *Planned Parenthood*, 367 Wis. 2d 712, ¶ 18.

Second, the Department has never applied Section 106.52 in a manner that overrides a person's sincerely held religious beliefs. Jakubowski Affidavit ¶¶ 5, 7. This decades-long enforcement history is grounded in the statutory text and the canon of constitutional avoidance. *See infra* pp. 23–28. This means that Lawson has no "personal stake" in Section 106.52's constitutionality, as she claims that she wants to engage only in conduct that the statute does not cover. *Planned Parenthood*, 367 Wis. 2d 712, ¶ 18.

II. Lawson's As-Applied Claims Fail On The Merits

A. Section 106.52 Is Lawful Because It Applies Only To "Public Places Of Accommodation"

Lawson's claims that Section 106.52 is unconstitutional as applied to her should be dismissed because Section 106.52

does not apply to her at all, given that her business is not a "public place[ ] of accommodation."

A. Section 106.52 applies only to "public places of accommodation or amusement," defined as "includ[ing], but not limited to, places of business or recreation; lodging establishments; restaurants; taverns; barber, cosmetologist, aesthetician, electrologist, or manicuring establishments; nursing homes; clinics; hospitals; cemeteries; and any place where accommodations, amusement, goods, or services are available either free or for a consideration, subject to [an exception not relevant here]." Wis. Stat. § 106.52(e)1 (citations omitted).

Wisconsin courts have developed a two-element approach to determining whether a business falls within this definition, with both elements required. *See Barry v. Maple Bluff Country Club*, 221 Wis. 2d 707, 716, 586 N.W.2d 182, 185 (Ct. App. 1998); *Hatheway v. Gannett Satellite Info. Network, Inc.*, 157 Wis. 2d 397, 400, 459 N.W.2d 873 (Ct. App. 1990). Wisconsin's Labor and Industry Review Commission, which hears appeals from the Department's administrative-law judges' decisions in public-accommodation cases, Wis. Stat. § 106.52(4)(b), has consistently utilized this same two-element definition.

First, the business must be a physical "*place*." *Barry*, 221 Wis. 2d at 716 (emphasis added). "Wisconsin's public accommodation law[ ] protects access to *places*," and not every

business or organization is automatically a "place" for purposes of Section 106.52. 221 Wis. 2d at 716.

So, for example, in *Barry*, the Wisconsin Court of Appeals held that the board of directors of a golf course and its various committees were not *places* under Section 106.52. *Id.* A board or a committee is not a physical location that can be "access[ed]," in contrast to the facilities (such as a clubhouse) that these entities may operate. *Id.* Similarly, in *Wolff v. Middleton Basketball Club, Inc.* ERD Case No. 200401370 (LIRC 2005) (affirmed by circuit court in 2006),[6] Def. App. 12–14, Wisconsin's Labor and Industry Review Commission considered the petitioner's claim that the Middleton Basketball Club prevented her, for discriminatory reasons, from serving as an assistant basketball coach. The Commission held that the basketball club—"a private, non-profit corporation organized solely for the purpose of providing basketball training and competition for 2nd through 8th grade children"—was not a public place of accommodation. Def. App. 12. The right to coach on a basketball team is not a right to access a "*physical location*[ ] where goods and services are provided." Def. App. 13 (emphasis added) (quoting *Neldaughter v. Dickeyville Athletic Club*, ERD Case No. 8900539 (LIRC 1991)).

[6] http://lirc.wisconsin.gov/erdecsns/765.htm. A copy of this decision, along with the other Commission decisions cited within the Department's brief, is included in Defendants' Appendix.

Second, the business must either be one of the enumerated businesses in the statute or "be comparable to or consistent with the businesses enumerated in the statute itself." *Hatheway*, 157 Wis. 2d at 400–01 (resting this reading upon the *noscitur a sociis* and *ejusdem generis* canons of construction). This means the business "suppl[ies] necessities and/or comforts of the kind offered by the listed businesses." *Id.*; *see also Jones v. Broadway Roller Rink Co.*, 136 Wis. 595, 118 N.W. 170, 171–72 (1908) (in interpreting similar statute, contrasting a "public accommodation" with a "tender of accommodation offered by the ordinary merchant or professional man who, while he impliedly, by opening the door of his shop or office, invites every one to enter, does so only for the purpose of selling to each individually either service or merchandise"). As Section 106.52(3) makes clear, not "all places of business where goods or services are available are subject to the provisions of the public accommodation act." *Hatheway*, 157 Wis. 2d at 399. "[T]he legislature" did not "intend[ ] to subject every place of business where goods or services are provided to the provisions of the public accommodation act." *Id.* at 400.

To illustrate, "the classified advertising section of a newspaper" is not a place of public accommodation under the statute, even if the newspaper sells this ad space to the public. *Hatheway*, 157 Wis. 2d at 399. "Newspapers do not offer the public 'accommodations' in the sense that this term is normally understood. A newspaper does not supply

necessities and/or comforts of the kind offered by the listed businesses [in the statute]. Newspapers are totally dissimilar in nature from the businesses listed in the public accommodation act." *Id.* at 401.

Similarly, in *Tabatabai v. Wisconsin Physician's Services Health Ins. Co.*, Wisconsin's Labor and Industry Review Commission determined that a health-insurance provider was not a public place of accommodation. ERD Case No. CR201101185 (LIRC 2012) (citing *Hatheway*, 157 Wis. 2d 397 (Ct. App.));[7] Def. App. 1–11. "First and foremost, [health-insurance providers] interact only with individuals they have . . . agreed by contract to take on as insureds," and they do so "on a selective basis." Def. App. 8. Second, the "services" which they provide "involve individualized and discretionary decision-making." Def. App. 8. Thus, these companies' relationship to their clients is "fundamentally dissimilar from the type of relationship that the public accommodations and amusement law was clearly designed to cover." Def. App. 8. "[T]he nature of the services provided within that relationship is also fundamentally dissimilar from the nature of the types of services to which the law is designed to insure equal access." Def. App. 8. Consistent with this decision, the Commission has also held that a commercial real-estate rental company, Def. App. 8 (citing *Young v. Trimble*, ERD Case No. 9253479 (LIRC 1994)), and a commercial property-

[7] http://lirc.wisconsin.gov/erdecsns/1272.htm.

management business, Def. App. 8 (citing *Wang v. Executive Management*, ERD Case No. 8900303 (LIRC 1990)), fall outside of the statute.

B. Lawson's photography business is not a "public place[ ] of accommodation" for two independent reasons, given that it fails both elements of the test.

As to the first element, Lawson's business is not a "place." Lawson operates "out of her Madison apartment." Compl. ¶ 54. She has not created a physical, brick-and-mortar photography studio open to the general public. *See* App. 16, 31; *see generally* Compl. ¶¶ 92–96, 112, 122, 124. Rather, the services she provides to her clients are either performed on location—for example, at the church where the clients' wedding occurs, *e.g.* Compl. ¶ 140—or away from the presence of her clients, *see, e.g.*, App. 32. And she communicates with her clients over email, Skype, or at in-person meetings outside her apartment. *See generally* Compl. ¶¶ 92–96, 112, 122, 124, 140.

Lawson's situation is analogous both to the golf-course board of directors at issue in *Barry*, 221 Wis. 2d at 716, and the basketball league at issue in *Wolff*, Def. App. 12, neither of which fall within the scope of Section 106.52. Like those entities, Lawson's photography business cannot be "access[ed]"; her business is only her offering of photography services, not the opening of a physical location. *Barry*, 221 Wis. 2d at 716. Although she has a physical space where she herself works, this is not enough to trigger Section 106.52—

the board of directors in *Barry* presumably used physical spaces (like meeting rooms) to complete its work. *Barry*, 221 Wis. 2d at 716. Indeed, *Wolff* recognized that, although the members of the basketball league met within a gym, this did not mean the league itself was somehow a physical place. Def. App. 13. In sum, a board of directors, a basketball league, and Lawson's studio are not physical locations that can be "access[ed]," unlike the facilities (a meeting space, a gym, or an apartment) that these entities may operate within. *Barry*, 221 Wis. 2d at 716. Therefore, the alleged discrimination by these entities cannot form the basis of a claim under the public-accommodations law. *Id.*; Def. App. 12 (*Wolff*).

As to the second element, Lawson is not one of the businesses enumerated in Section 106.52(3),[8] nor does she "supply necessities and/or comforts of the kind offered by the [enumerated] businesses." *Hatheway*, 157 Wis. 2d at 401. Lawson's business does not offer "health and beauty aids, food, drink, recreation [or] lodging to patrons," like the enumerated businesses. Def. App. 8 (citation omitted); *Hatheway*, 157 Wis. 2d 401. Lawson offers only customized photography, photo editing, and online postings for her limited client base, not necessities or comforts to the general public. In other words, she does not offer her services "broadly

[8] That is, Lawson's business does not fall within the categories of "lodging establishments; restaurants; taverns; barber, cosmetologist, aesthetician, electrologist, or manicuring establishments; nursing homes; clinics; hospitals; [or] cemeteries." Wis. Stat. § 106.52(1)(e)1.

to any interested member of the public willing to pay the price"—she caters *only* to "a small, finite group" of clients on a case-by-case basis. *E.g.* Compl. ¶¶ 66–67.

This feature of Lawson's business is comparable to the operation of the newspaper classifieds in *Hatheway*, 157 Wis. 2d at 401, and the health-insurance provider in *Tabatabai*, Def. App. 8. Newspaper classifieds do not "supply necessities and/or comforts" to the general public "of the kind offered by," for example, hotels, restaurants, or nursing homes. *Hatheway*, 157 Wis. 2d at 401. Rather, they publish unique print ads for select clients, *id.*, much like how Lawson creates unique photographs for a limited client base. So too with health-insurance providers: they interact only with individuals on a "selective basis," rather than the general public, and they offer "individualized and discretionary" services, rather than standard goods or services. Def. App. 8 (*Tabatabai*). This is also how Lawson operates.[9]

B. Section 106.52 Is Lawful Because It Has No Application To Actions Taken "Because Of" Constitutionally Protected Religious Beliefs

Even if this Court holds that Lawson's business is a "public place[ ] of accommodation," her as-applied challenges

[9] To be clear, brick-and-mortar photography studios that *do* offer fixed services to the general public fall squarely within the definition of "public place[ ] of accommodation." That is, not every photography studio exercises a sufficient degree of customization like Lawson to bring it out of the definition of public place of accommodation. Such studios must therefore comply with all the provisions of the public-accommodations law.

to Section 106.52 should still be dismissed. Lawson's argument is that Section 106.52 is unconstitutional because it requires her to provide services promoting same-sex marriage, in violation of her sincerely held religious beliefs. But, under the canon of constitutional avoidance, Lawson's refusal to provide services is not "because of . . . sexual orientation," as that phrase is used in Section 106.52, meaning that Lawson's as-applied claims fail.

A. Wisconsin courts must interpret statutes to avoid constitutional conflicts. *See Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶¶ 63–64, 357 Wis. 2d 469, 851 N.W.2d 262. If a statute appears to conflict with the Wisconsin Constitution, the Court must adopt "a saving construction i[f] fairly possible." *Id.* ¶ 63 (citations omitted).

Section 106.52(3)1 provides that "[n]o person may . . . [d]eny to another . . . the full and equal enjoyment of any public place of accommodation [ ] *because of* sex, race, color, creed, disability, sexual orientation, national origin or ancestry." Wis. Stat. § 106.52(3)1 (emphasis added). The phrase "because of" is inherently ambiguous, involving concepts ranging from but-for causation to mere motivation behind the action taken, or some combination of both. *See, e.g.*, *U.S. ex rel. Vaughn v. LaVallee*, 318 F.2d 499, 499 (2d Cir. 1963); *State Farm Mut. Auto. Ins. Co. v. Shaffer*, 888 S.W.2d 146, 148–49 (Ct. App. Tex. 1994); *see also* 2 *Oxford English Dictionary* 520 (J.A. Simpson & E.S.C. Weiner eds.,

2d ed. 1989) ("a. [b]y reason *of*, on account *of*"; "b. [f]or the sake *of*, for the purpose *of*").

In light of the ambiguity in the phrase "because of" in Section 106.52(3)(1), this phrase must be read to avoid any constitutional conflict if at all possible. *Milwaukee Branch of NAACP*, 357 Wis. 2d 469, ¶¶ 63–64. Accordingly, if an individual refuses to provide particular services "because of" constitutionally protected religious beliefs, that denial of services is simply not "because of" (as relevant here) sexual orientation. Put another way, declining services "because of" constitutionally protected religious beliefs is not invidious discrimination "because of" sexual orientation, which is what Section 106.52 targets. *See Novak v. Madison Motel Assocs.*, 188 Wis. 2d 407, 414–15, 525 N.W.2d 123 (Ct. App. 1994) ("the obvious purpose of [the public-accommodations law] is to prohibit . . . discrimination"); *accord Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 274 (1993) (opposition to abortion "does not remotely qualify" as "invidiously discriminatory animus" toward women or "for such derogatory association with racism," even though only women obtain abortions).[10]

[10] Importantly, this limiting construction of the phrase "because of" is inextricably tied to the canon of constitutional avoidance and thus would not apply to a situation where the conduct is not constitutionally protected. *See, e.g.*, *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971) (interpreting 42 U.S.C. § 1985(3), which prohibits conspiracies to deprive others of equal protection of the law, to be violated only when the conspirator acted with "invidiously discriminatory animus" in order to avoid constitutional concerns).

B. Lawson's proposed conduct is protected by the Conscience Clause; that is, it is sincere religious exercise that the State could not constitutionally prohibit. Therefore, Lawson's conduct falls outside of the scope of Section 106.52 under a proper constitutional-avoidance reading of the "because of" clause.

1. Under the Wisconsin Constitution, "[t]he right to practice one's religion according to the dictates of conscience is fundamental." *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dep't of Workforce Dev.*, 2009 WI 88, ¶ 32, 320 Wis. 2d 275, 768 N.W.2d 868. "The Wisconsin Constitution uses the strongest possible language in the protection of th[e] right" to free exercise, providing that "the right to worship as one is so convinced 'shall *never* be infringed,'" and that, "nor shall *any control of, or interference with,* the rights of conscience be permitted." *Id.* "It is difficult to conceive of language being stronger than this." *Id.* Notably, the Wisconsin Constitution offers *more* protection of free-exercise rights than does the federal Constitution. *Id.* ¶ 60.

To show a violation of the Conscience Clause, a person must first prove two elements: that the person "has a sincerely held religious belief, and [ ] that such belief is burdened by the application of the state law at issue." *Id.*

¶ 61.[11] The scope of the right to exercise one's religious conscience of course includes the right to "worship Almighty God according to the dictates of [one's] conscience." *Coulee Catholic Sch.*, 320 Wis. 2d 275, ¶ 58 (citations omitted). It also extends to, among other things, the right of churches to select their religious ministers, *id.* ¶ 40, the right of parents to raise their children according to their religious beliefs, *Wisconsin v. Yoder,* 406 U.S. 205 (1972),[12] and the right of commercial actors (like sole proprietors, LLCs, and corporations) to conduct their business activities in a manner consistent with their religion, *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014).[13]

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[11] In discussing the petitioner's religious conduct in *Coulee Catholic Schools*, the Wisconsin Supreme Court observed that petitioner's conduct related to "one of the central acts of worship" in the petitioner's religion. 320 Wis. 2d 275, ¶ 11. However, the centrality of a person's particular religious exercise to her religion is not mentioned as an element of a Conscience Clause claim; rather, the exercise need only be sincere. *Id.* ¶ 61. Accordingly, consistent with the federal Constitution, *see Empl't Div. v. Smith*, 494 U.S. 872, 886 (1990), centrality should not be relevant to a Conscience Clause claim, *see Coulee Catholic Sch.*, 320 Wis. 2d 275, ¶ 60 (Wisconsin Constitution more protective than federal Constitution).

[12] In *Wisconsin v. Yoder,* the Supreme Court interpreted the First Amendment identically to how the Wisconsin Supreme Court interprets the Conscience Clause. *Compare* 406 U.S. 205, 219–21 (1972), *with Coulee Catholic Sch.*, 320 Wis. 2d 275, ¶ 61. The Supreme Court subsequently altered its interpretation of the First Amendment in *Smith*, 494 U.S. at 877–79, making it less protective of free-exercise rights. Nevertheless, the Conscience Clause would still compel the holding of *Yoder*. *Coulee Catholic Sch.*, 320 Wis. 2d 275, ¶ 60 (Conscience Clause more protective than First Amendment).

[13] In *Hobby Lobby*, the Supreme Court held that the federal government could not force Hobby Lobby to comply with "the HHS

After the person makes this two-element showing, the burden shifts to the State to prove that the application of the law satisfies strict scrutiny; that is, that the law "is based on a compelling state interest [ ] that cannot be served by a less restrictive alternative." *Coulee Catholic Sch.*, 320 Wis. 2d 275, ¶ 61. Thus, for example, the State may prohibit parents' excessive physical discipline of their child, even if the parents engage in that discipline pursuant to religious beliefs, because this prohibition furthers a compelling interest by using the least restrictive means available. *State v. Caminiti*, 2016 WI App 41, ¶¶ 46–50, 369 Wis. 2d 223, 880 N.W.2d 182 (unpublished).

2. In the present case, it is clear from the face of complaint that the conduct that Lawson wishes to engage in could not be prohibited by the State, consistent with the Conscience Clause. Namely, Lawson alleges that, due to her Evangelical Christian beliefs, she wishes to refrain from using her "visual storytelling services" to create messages that conflict with these beliefs about traditional marriage. Compl. ¶ 203. Similarly, Lawson further asserts that prohibiting this conduct would substantially burden her free

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contraceptive mandate." 134 S. Ct. at 2775. The Supreme Court reached this holding by applying the Religious Freedom Restoration Act ("RFRA"), *id.*, which protects free exercise at the federal level to the same extent that the Conscience Clause protects free exercise in Wisconsin. *Compare id.* at 2760–61 (explaining RFRA's strict-scrutiny standard), *with Coulee Catholic Sch.*, 320 Wis. 2d 275, ¶ 61 (explaining the Conscience Clause standard in materially identical language).

exercise by compelling her to communicate messages directly contrary to her religious beliefs. *E.g.*, Compl. ¶ 428. The State has no basis to dispute either the genuine nature of Lawson's claimed religious belief, or the claim that forcing her to violate those beliefs would substantially burden those beliefs. Further, the State does not contend that it could satisfy the demanding strict-scrutiny standard for prohibiting such conduct. *Coulee Catholic Sch.*, 320 Wis. 2d 275, ¶ 61. Accordingly, Lawson's proposed conduct is entirely protected by the Conscience Clause and could not be prohibited.

Given that Lawson's proposed conduct consists solely of protected religious beliefs, that conduct falls outside the scope of Section 106.52. As explained above, under the canon of constitutional avoidance, since Lawson's proposed conduct is "because of" her protected free-exercise rights, it cannot be "because of" sexual orientation, as that phrased is used in Section 106.52. This means that Section 106.52 has no application to Lawson, and thus her as-applied claims should be dismissed.

CONCLUSION

The Plaintiffs' complaint should be dismissed for failure to state a claim.

Dated this 12th day of May, 2017.

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