

No. A07-0131

STATE OF MINNESOTA
IN COURT OF APPEALS

Edina Community Lutheran Church and Unity Church of St. Paul,

Respondents,

vs.

State of Minnesota,

Appellant.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE CHALLENGED PORTIONS OF THE 2005 ACT AS APPLIED TO RESPONDENTS DO NOT VIOLATE ARTICLE I, SECTION 16 OF THE MINNESOTA CONSTITUTION.

A. The “Reasonable Request” Provisions Of The 2005 Act Do Not Impose A Burden On Respondents That Is Substantially Different From The Burden Imposed By The General Trespass Law.

In order to have a claim under Article I, Section 16 of the Minnesota Constitution, Respondents must demonstrate that the 2005 Act burdens the exercise of their religious beliefs. One of the burdens alleged by Respondents relates to the difference between the general trespass statute, Minn. Stat. § 609.605, and the “reasonable request” provisions of the 2005 Act. Respondents imply that prior to the effective date of the 2005 Act (retroactive to April 28, 2003), any person who carried a firearm, concealed or unconcealed, onto Respondents’ property could be arrested and prosecuted for trespass under Minn. Stat. § 609.605, simply because the person was carrying the firearm, and without any notice to the person or demand to depart. Respondents argue that the 2005 Act deprives them of the protection of section 609.605 and requires them to either provide “burdensome” notice or else “tolerate” guns on their property. However, Respondents’ implications about the operation of the trespass statute, section 609.605, are simply wrong.

The general trespass statute, Minn. Stat. § 609.605, does not specifically mention churches but contains some generally applicable provisions in subdivision 1(b). All of the provisions that might apply to Respondents require some form of notice to the

purported trespasser, and none of the provisions specifically mentions firearms. Minn.

Stat. § 609.605, subd. 1(b) provides, in pertinent part:

(b) A person is guilty of a misdemeanor if the person intentionally: . . .

(3) trespasses on the premises of another and, without claim of right, *refuses to depart from the premises on demand of the lawful possessor*;

(4) occupies or enters the dwelling or *locked or posted building* of another, without claim of right or consent of the owner or the consent of one who has the right to give consent, except in an emergency situation; . . .

(7) returns to the property of another with the intent to abuse, disturb, or cause distress in or threaten another, *after being told to leave the property and not to return*, if the actor is without claim of right to the property or consent of one with authority to consent;

(8) returns to the property of another within one year *after being told to leave the property and not to return*, if the actor is without claim of right to the property or consent of one with the authority to consent;

(9) enters the *locked or posted* construction site of another without the consent of the lawful possessor, unless the person is a business licensee; . . .

(Emphasis added.) In each of the situations delineated in the statute, an offense occurs only after the purported trespasser remains on or in the property after encountering a locked door or a sign, or after being told to leave. There is nothing in the trespass statute that declares it a crime to carry a firearm onto a church parking lot or into the open door of a church building. Thus, contrary to Respondents' argument, the general trespass law has never provided churches with the basis for a criminal complaint against a person who, without notice or a demand of any kind, carried a firearm onto church property.

The general trespass law imposed upon Respondents the same type of obligation that they have under the 2005 Act: if they choose to exclude people carrying guns, they must notify the public generally or give individual notice. Because the 2005 Act does not impose a substantially different “burden” on Respondents than the law in existence, the 2005 does not unconstitutionally burden the exercise of Respondents’ religious beliefs.

Even if Respondents could show (which they cannot) that the 2005 Act imposes a greater burden and/or provides them less protection than the general trespass statute, Respondents still have failed to articulate how the change in the law has forced them to change their religious conduct or philosophy. Both laws apply alike to religious and non-religious institutions, and both require notice in order to be effective. A religiously neutral law like the 2005 Act does not lose its neutral character just because religious institutions do not like the statute.

B. Individual Words Cannot Be Separated Into Categories of “Religious Words” and “Non-Religious” Words.

Respondents claim that the signage requirements of the “reasonable request” portion of the 2005 Act violate their right to exercise their religious beliefs because compliance involves the display of “non-religious words” on signs on their property. *See* Respondents’ Brief at 24. Thus it appears that, according to Respondents, some or all of the following words are “non-religious”: (1) [Name of Respondents’ establishment]; (2) bans; (3) guns; (4) in; (5) these; and (6) premises. By contrast, Respondents apparently believe that all of the words in Edina’s sign are “religious,” i.e., “Blessed are the peacemakers. Firearms are prohibited in this place of sanctuary.” However,

Respondents offer no explanation why the phrase “bans guns” is non-religious but the phrase “firearms are prohibited” is religious.

Respondents’ position that individual words are “religious” and other words are “non-religious” is unsupported by any precedent or even by any theory. Individual words are neither religious or non-religious. It is the combination of words or the context in which individual words are found that conveys a message. For example, Respondents do not object to posting the word “EXIT” in their buildings. *See* Respondents’ Brief at 26-27. Yet it is doubtful that their lack of objection rests on the belief that the word “EXIT” is “religious.”

The words required by the signage provision in the 2005 Act are neither religious or non-religious. The message they convey is clearly religiously neutral, and the posting of those words does not require Respondents to change their religious conduct or philosophy.

C. The “Basic Functional Test” Interpretation Of The Statute Is Reasonable And Consistent With The Fundamental Principle Of Constitutional Law Requiring Courts To Interpret Statutes To Preserve Their Constitutionality Whenever Possible.

Respondents wish to ban firearms in their parking areas. The State interprets the statute as providing a basic, functional test that would allow Respondents to ban firearms in these areas when the space is used for religious purposes (e.g., worship services, prayer vigils) rather than for parking cars. Respondents argue against this interpretation, even though it would allow them to ban firearms in their parking areas at times when religious activities are taking place. *See* Respondents’ Brief at 28-29.

Respondents' opposition to the "functional test" approach to the parking area issue flies in the face of their own acceptance of the district court's functional approach to distinguish between a church's "commercial property" (i.e., not part of the church's religious mission) and its property that is "used for charitable, educational or other non-profit purposes." A-12. A "functional test" is also employed in the tax exemption statute, Minn. Stat. § 317A.909, subd. 3 (2006) (cited by Respondents at page 23 of their Brief), which provides: "Except for property *leased or used for profit*, personal and real property that a religious corporation necessarily *uses for a religious purpose* is exempt from taxation." (Emphasis added.)

It is also noteworthy that the religious exemption language contained in other states' conceal-carry laws, cited with approval by Respondents at pages 37-38 of their Brief, generally refer to places or houses "worship" or places where people assemble "for worship." Like the 2005 Act, the applicability of these exemptions also depend on how property is *used*. Interpreting the 2005 Act to allow Respondents to ban firearms in parking lots when the lots are actually used for worship is not any different than interpreting the 2005 Act to allow a religious institution that does not own any property to ban firearms during religious services held in any type of building, such as a community center or part of a shopping mall.

The State's interpretation is reasonable, not only standing on its own, but also in light of the Minnesota Supreme Court's admonitions to interpret statutes to preserve their constitutionality wherever possible. *See Hutchinson Technology, Inc. v. Comm'r of Revenue*, 698 N.W.2d 1, 18 (Minn. 2005). The district court failed to follow this

principle, rejecting alternative statutory interpretations without considering whether they would cure an alleged constitutional defect. This Court should not follow the district court's example but rather should give effect to this fundamental principle of constitutional jurisprudence.

D. In Declaring One Of The Compelling State Interests Underlying The 2005 Act, The Legislature Did Not Defy Clear Second Amendment Jurisprudence And Law.

Respondents erroneously claim that the Legislature was “knowingly in defiance of existing, controlling law” when it declared in Minn. Stat. § 624.714, subd. 22 (2006) that “the second amendment of the United States constitution guarantees the fundamental, individual right to keep and bear arms” and that the provisions of section 624.714 are “necessary to accomplish compelling state interests in regulation of those rights.” *See* Respondents’ Brief at 33. However, the issue of whether the Second Amendment to the United States Constitution guarantees an individual right, versus a collective right, is most certainly a “live” controversy that is currently under debate and far from “settled.”

The recent decision of the United States Court of Appeals for the District of Columbia in *Parker v. District of Columbia*, __ F.3d __, No. 04-7041, 2007 WL 702084 (C.A.D.C. March 24, 2007), illustrates this point. In *Parker*, the court stated:

In the Second Amendment debate, there are two camps. On the one side, there are the collective right theorists who argue that the Amendment protects only a right of the various state governments to preserve and arm their militias. . . . On the other side of the debate are those who argue that the Second Amendment protects a right of individuals to possess arms for private use.

Id. at *6. The issue presented in *Parker* required the court to choose among these two opposing views. There is an extensive list of *amici curiae* that submitted briefs in the case, and the list includes numerous states' attorneys general, some on either side of the debate. See 2007 W.L. 702084, page 3. In *Parker*, Minnesota joined twelve other states in support of the argument that the Second Amendment provides an individual right.

The *Parker* court noted the existence of a split in the United States circuit courts of appeal. The court stated that the federal appellate courts "have largely adopted the collective right model," but observed that the Fifth Circuit, in *State v. Emerson*, 270 F.3d 203, 264-65 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002), interpreted the Second Amendment to protect an individual right. *Parker*, 2007 WL 702084 at *7. Nevertheless, as the court notes, there is "no direct precedent" in the Supreme Court that provides a "square holding" or "unequivocal precedent" on the question.¹ *Id.* at *7, *17. Following its own thorough analysis of the Second Amendment and its historical underpinnings, the court concluded that the Second Amendment "protects an individual right to keep and bear arms." *Id.* at *21. The upshot of the *Parker* decision is that the

¹ The court exhaustively analyzes the holding in *United States v. Miller*, 307 U.S. 174 (1939), a case that Respondents cite at page 33 of their Brief in support of their Second Amendment argument. See *Parker*, 2007 WL 702084 at*18-21. The court notes that "both sides of the gun control debate have claimed [*United States v. Miller*] as their own." *Id.* at 18. The court concludes that the holding in *Miller* was based on the definition of "Arms" in the Second Amendment and did not squarely decide the "individual vs. collective rights" issue. *Id.* at 19. However, the court stated at the close of its analysis that *Miller* supports the "individual right" interpretation. See *id.* at 21.

split in the circuit courts of appeal has expanded, with both *Parker* and *Emerson* holding in favor of the individual rights interpretation.

Legislative and other activities also illustrate that the Second Amendment issue is the subject of active discussion and debate. A federal statute enacted in 2005 declares that “[t]he Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.” Section 2(a)(2) of the Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005), codified as 15 U.S.C. § 7901(a)(2). The *Parker* court also notes that in 2004, the United States Department of Justice adopted the “individual right” model regarding the Second Amendment. *See* opinion and memorandum cited in *Parker*, 2007 WL 702084 at *7.

Respondents claim that the Minnesota Supreme Court’s opinion in *Application of Atkinson*, 291 N.W.2d 396 (Minn. 1980), created the established, controlling Second Amendment law in Minnesota. However, the appellant in *Atkinson* based his claim of an absolute right to carry a loaded gun on public highways on Article I, Section 16 of the Minnesota Constitution, and *not* on the Second Amendment. *See id.* at 398 and n.1 (“Plaintiff has not grounded his argument on the Second Amendment to the United States Constitution”). Therefore, the holding in *Atkinson* did not establish “controlling” Second Amendment jurisprudence in Minnesota. The Minnesota Legislature did not, as Respondents argue, act “in defiance” of established, controlling law when enacting the 2005 Act.

II. THE CHALLENGED PORTIONS OF THE 2005 ACT DO NOT VIOLATE RESPONDENTS' FIRST AMENDMENT RIGHTS TO FREEDOM OF RELIGIOUS ASSOCIATION.

Respondents assert that they have a First Amendment right not to associate with people who wish to carry firearms in their leased spaces and parking areas. Respondents argue that the United States Supreme Court's 2006 decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, ___ U.S. ___, 126 S. Ct. 1297 (2006), is distinguishable from this case and thus is not persuasive. Respondents' attempt to distinguish *Rumsfeld* has no merit.

In *Rumsfeld*, the Court rejected a claim that the mere presence of military recruiters on a law school campus impaired the free expression rights of an association of law schools and law school faculties. The association argued that the presence of the recruiters created an unwanted association between itself and the military's policy regarding homosexuals in the military. A unanimous Court held that the law requiring access by the military recruiters to the campus did not affect the association's right to "associate to voice their disapproval of the military's message" and thus did not "violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message." 126 S. Ct. at 1312-13.

Respondents first attempt to distinguish *Rumsfeld* by noting that the statute at issue in that case, the Solomon Amendment, contains a religious exemption. Respondents' Brief at 45. The Solomon Amendment's religious exemption was not at issue in *Rumsfeld* and thus is irrelevant to this case.

Second, Respondents attempt to distinguish *Rumsfeld* based on the language of a paragraph in which the Court drew a “critical distinction” between military recruiters, who are on campus for a “temporary and limited purpose” and “members of the expressive association.” Respondents’ Brief at 45-46, citing *Rumsfeld*, 126 S. Ct. at 1312. Respondents point to the fact that the 2005 Act is “not limited to occasional visitors to religious institutions.” Respondents’ Brief at 45. Respondents ignore the context of the paragraph in *Rumsfeld* to which it refers. In that paragraph, the Court was distinguishing the facts of *Rumsfeld* from the facts of *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). In *Dale*, the Court struck down a law that forced an organization to accept *members* that it did not desire. See 530 U.S. at 648. The distinction drawn by the Court in *Rumsfeld* is that the Solomon Amendment did not force the law school association to accept military recruiters as members.

As previously discussed in Appellant’s Brief at 36, the 2005 Act does not require Respondents to accept anyone as members of their religious institutions. Under the principles announced in *Rumsfeld*, the district court’s ruling on Respondents’ freedom-of-association claim must be reversed.

III. RELIGIOUS EXEMPTIONS CANNOT BE GRANTED IN VIOLATION OF THE ESTABLISHMENT CLAUSE.

Respondents challenge the State’s Establishment Clause argument by stating: “Religious exemptions from laws of general applicability to accommodate religious freedom are routine and do not violate the Establishment Clause.” Respondents’ Brief at 51. This statement fails to take into account the reality that the Establishment Clause

and the First Amendment's guarantee of free exercise of religion encompass competing values that must be carefully balanced. See *McCreary County v. American Civil Liberties Union*, 545 U.S. 844, ___, 125 S. Ct. 2722, 2742 (2005).

In *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 27 (1989), the Supreme Court held that a religious exemption excusing religious periodicals from paying sales tax failed to pass scrutiny under the Establishment Clause. In his concurring opinion, Justice Brennan stated that the "tension between mandated and prohibited religious exemptions is well recognized." *Id.* at 27 (1989) (Brennan, J., concurring, citing *Walz v. Tax Comm'r of City of New York*, 397 U.S. 664, 668-69 (1970)). Because of competing First Amendment considerations, "the Free Exercise and Establishment Clauses often appear like Scylla and Charybdis, leaving a State little room to maneuver between them. *Id.* at 28. In light of this discussion, is clear that Respondents' statement that religious exemptions "do not violate the Establishment Clause" is overbroad, because there is the inherent potential for failure to balance the competing values discussed herein.

As discussed at pages 45-49 of Appellant's Brief, enactment of the 2005 Act involved the need to carefully balance the free exercise of religion, the Establishment Clause, and the rights of persons lawfully carrying firearms. This need to balance competing interests distinguishes this case from that of *State v. Hershberger*, 462 N.W.2d 393 (1990) (*Hershberger II*), on which Respondents rely heavily for their argument. In

Hershberger, the Amish faced criminal penalties² if they failed to display on their slow-moving vehicles a fluorescent orange-red triangular emblem, which emblem violated their sincere religious beliefs against “loud” colors and “worldly symbols.” See *State v. Hershberger*, 444 N.W.2d 282, 284 (Minn. 1989) (*Hershberger I*). By striking down the emblem requirement as applied to the Amish, the *Hershberger* court did not simultaneously infringe the exercise of another set of rights held by another group of people. However, in this case, the district court’s injunction impinges upon the rights of law-abiding gun-permit holders by allowing religious institutions, based solely on their religious beliefs, to ban firearms without assurance of effective notice to the permit holder. This puts a law-abiding person in jeopardy of committing an offense under Minn. Stat. § 624.714, subd. 17(a) even though the permit-holder had no intent to violate a firearms ban. *Hershberger* lacked the competing-interests aspect that this case poses and thus provides no guidance on how competing interests should be weighed.

The district court’s injunction failed to properly balance competing First Amendment and Establishment Clause values, going too far in preferring religion over non-religion. The district court’s decision should be reversed.

IV. RESPONDENTS MISCHARACTERIZE THE NATURE OF PREVIOUS DISTRICT COURT AND COURT OF APPEALS RULINGS IN PRIOR LITIGATION CONCERNING THE 2003 ACT.

Part of the background of this case is the previous litigation regarding the 2003 Act, referred to as *Edina I* and *Unity I*. See Appellant’s Brief at 6-7. Neither of

² By contrast, Respondents do not face criminal penalties for failure to comply with the “reasonable request” notice requirements of the 2005 Act.

these cases adjudicated the merits of the Respondents' constitutional challenges to portions of the 2005 Act. Nevertheless, Respondents repeatedly refer to various rulings in *Edina I* and *Unity I* as "holdings" that the challenged portions of the 2005 Act are unconstitutional. This is contrary to the facts and to the law.

In *Edina I*, the district court's actions were limited to the grant of temporary injunctive relief, which "neither establishes the law of the case nor constitutes an adjudication of the issues on the merits." *Metro. Sports Facilities Comm'n v. Minn. Twins P'ship*, 638 N.W.2d 214, 220 (Minn. Ct. App. 2002), *rev. denied* (Minn. Feb. 4, 2002). This Court's ruling in *Edina I* adjudicated only the justiciability of the freedom of conscience issue and not the merits of the controversy. In *Unity I*, the district court's comments on Respondents' religious freedom claim were dicta. Thus, the above-mentioned rulings are neither binding nor precedential in this Court.

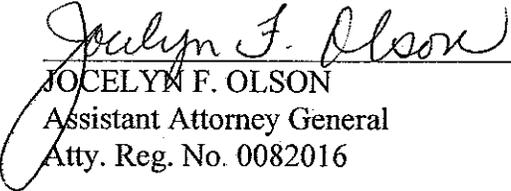
CONCLUSION

For the reasons stated in Appellant's Brief, and as supplemented herein, the State respectfully requests this Court to reverse the decision of the district court.

Dated: March 29, 2007

Respectfully submitted,

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