

No. A07-0131

STATE OF MINNESOTA

IN COURT OF APPEALS

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

Respondents,

v.

State of Minnesota,

Appellant.

RESPONDENTS' BRIEF

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LEGAL ISSUES

1. Do the challenged provisions of the Minnesota Citizens' Personal Protection Act as reenacted ("2005 Act") violate Respondents' religious freedom guaranteed by Article I, Section 16 of the Minnesota Constitution?

The District Court ruled in the affirmative.

Most apposite authorities:

Minn. Const. Art. I, § 16.

State v. Hershberger, 462 N.W.2d 393 (Minn. 1990).

Edina Community Lutheran Church v. State of Minnesota, 673 N.W.2d 517 (Minn. Ct. App. 2004).

State v. French, 460 N.W.2d 2 (Minn. 1990).

2. Do the challenged provisions of the 2005 Act violate Respondents' freedom of religious association guaranteed by the First and Fourteenth Amendments to the United States Constitution?

The District Court ruled in the affirmative.

Most apposite authorities:

U.S. Const., amends. I and XIV.

Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

Wooley v. Maynard, 430 U.S. 705 (1977).

First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174 (Wash. 1992).

3. Do the challenged provisions of the 2005 Act violate the Religious Land Use and Institutionalized Persons Act of 2000?

The District Court ruled in the affirmative.

Most apposite authorities:

42 U.S.C. § 2000cc, et seq.

4. Was the equitable relief granted by the District Court appropriate?

The District Court appropriately fashioned declaratory and permanent injunctive relief with respect to the challenged provisions of the 2005 Act, and only as they applied to religious institutions.

Most apposite authorities:

Edina Community Lutheran Church v. State of Minnesota, 673 N.W.2d 517
(Minn. Ct. App. 2004).
Elrod v. Burns, 427 U.S. 347 (1976).

5. Does the equitable relief granted by the District Court constitute an establishment of religion in violation of Article I, Section 16 of the Minnesota Constitution and the First and Fourteenth Amendments to the United States Constitution?

The equitable relief granted by the District Court does not constitute an unconstitutional establishment of religion.

Most apposite authorities:

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).
Cutter v. Wilkinson, 544 U.S. 709 (2005).
State v. Sports & Health Club, 370 N.W.2d 844 (Minn. 1985).

STATEMENT OF THE CASE

The State has appealed from a judgment entered on decision of the Hon. William R. Howard, Judge of District Court, Fourth Judicial District, granting declaratory relief and a permanent injunction with respect to certain challenged provisions of the Minnesota Citizens' Personal Protection Act, as reenacted ("2005 Act"). The Legislature passed, and the Governor signed, the 2005 Act after this Court declared its predecessor, the 2003 Act, unconstitutional as a law containing more than one subject in violation of the Minnesota Constitution.

This case was commenced by two plaintiffs, who were the lead plaintiffs in previous litigation against the 2003 Act. In a previous Fourth Judicial District case, Edina Community Lutheran Church ("Edina") and many other religious institutions sought to have similar provisions of the 2003 Act declared constitutional. See Edina Community Lutheran Church v. State of Minnesota, 673 N.W.2d 517 (Minn. Ct. App. 2004). Temporary relief was granted in that case. Unity Church of St. Paul ("Unity") and many other religious institutions pursued the case in the Second Judicial District that resulted in the 2003 Act being declared unconstitutional. See Unity Church of St. Paul v. State, 694 N.W.2d 585 (Minn. Ct. App. 2005).

In this case, Edina and Unity challenge four provisions of the 2005 Act:

1. The provision containing exquisitely detailed signage and notification procedures which religious institutions must follow if they ban firearms from their houses of worship.

2. The provision which prohibits religious institutions from banning firearms in their parking areas.

3. The provision which prohibits religious institutions from banning firearms from their tenant spaces.

4. The provision which prohibits religious institutions from banning firearms from their tenant spaces.

Edina and Unity contend that these provisions violate the Minnesota Constitution, the United States Constitution, and federal statute.

Shortly after commencing this lawsuit, Edina and Unity moved for a temporary injunction. The motion was granted, allowing Edina and Unity to ban firearms on all of their religious real properties and to provide notice thereof in any lawful manner. See A-37.¹

Thereafter, the parties agreed that the case would be submitted to the District Court on a written record (rather than on live testimony) and that the District Court would decide the case on the merits based on the written record. Edina characterized its request for decision on the merits and final judgment as a motion for a permanent injunction, while Unity characterized its request as a motion for summary judgment and for a permanent injunction. The State characterized its request for a decision on the merits and a final judgment as a motion for summary judgment.

¹ "A" references are to Appellant's Appendix. Respondents' Appendix is referred to as "RA."

On November 14, 2006, the District Court denied the motions for summary judgment, proceeded to the merits, found for Edina and Unity on each claim, and issued declaratory relief and a permanent injunction. A-1. The District Court declared that the challenged provisions of the 2005 Act violate the Minnesota Constitution, the United States Constitution, and federal statute. As did the temporary injunction, the permanent injunction allows Edina and Unity to ban firearms on all of their religious real properties and to provide notice thereof in any lawful manner.

STATEMENT OF FACTS

I. THE MINNESOTA CITIZENS' PERSONAL PROTECTION ACT OF 2003 REDUCED THE RIGHTS OF RELIGIOUS INSTITUTIONS THAT OWN RELIGIOUS PROPERTIES.

On May 28, 2003, the Minnesota Citizens' Personal Protection Act of 2003 ("the 2003 Act") became law. See Appellant's Brief Add-9. In the days leading up to passage of the 2003 Act, public debate was dominated by the issue of what discretion, if any, law enforcers should have in the issuance of permits to carry firearms: whether Minnesota should be a "may-issue" state or a "shall-issue" state. This issue was hotly debated.

However, the 2003 Act also made dramatic changes to the law of where firearms could be carried, significantly reducing the traditional right of property owners to control their own properties. This was of particular concern to many religious institutions, including Edina and Unity, whose religious beliefs include worship without the presence of instruments of violence.

The stated purpose of the 2003 Act was set out at Minn. Stat. § 624.714, subd. 22. The Legislature declared that it was “necessary to accomplish compelling state interests in regulation of” what it described as “the fundamental, individual right to keep and bear arms” under the “second amendment of the United States Constitution.”

The 2003 Act substantially changed the rights of “private establishments” to restrict persons carrying firearms from entering and remaining on private property. A private establishment was defined as any “building, structure, or portion thereof, owned, leased, controlled or operated by a nongovernmental entity for a nongovernmental purpose.” Minn. Stat. § 624.714, subd. 17(b)(4). By this definition, Edina and Unity were “private establishments.”

Accordingly, the 2003 Act had a significant impact on the real property of Edina, Unity, and other religious institutions. Specifically:

1. The 2003 Act commanded that a private establishment, such as a religious institution, may prohibit firearms from its building only if it made a “reasonable request” that firearms not be brought into the building, whether by persons carrying “under a permit or otherwise.” Minn. Stat. § 624.714, subd. 17(a).

A “reasonable request” consisted of two notices. Minn. Stat. § 624.714, subd. 17(b)(1)(i)&(ii). These notification requirements were “exclusive.” Minn. Stat. § 624.714, subd. 17(f).

The first notice was a “conspicuous” sign “prominently” posted at “every entrance.” The statute set detailed location, size, typeface, and content requirements. For example, the required sign lettering was “black Arial typeface at least 1-1/2 inches in height against a bright contrasting background that is at least 187 square inches in area.” The sign was required to “contain the following language: ‘(INDICATE IDENTITY OF OPERATOR) BANS GUNS IN THESE PREMISES.’” Minn. Stat. § 624.714, subd. (b)(1)(i), (2)&(3).

The second notice was personally informing the person of the posted request. The private establishment was required to “demand[] compliance.” Minn. Stat. § 624.714, subd. (b)(1)(ii).

If a gun-carrier entered the premises despite a “reasonable request,” the private establishment could order the person to leave. Minn. Stat. § 624.714, subd. 17(a). A person who failed to leave committed a petty misdemeanor. (Under Minnesota law, a petty misdemeanor is not a crime. Minn. Stat. § 609.02, subd. 4a.) The fine for a first offense was not more than \$25. This penalty was “exclusive” and overrode Minn. Stat. § 609.605, the general trespass statute. Minn. Stat. § 624.714, subd. 17(f). The trespasser’s firearm was not forfeited. Minn. Stat. § 624.714, subd. 17(a); compare Minn. Stat. § 609.531 et seq. (forfeiture of weapon used in furtherance of a crime).

The 2003 Act excluded from the notification requirements “private residences.” Residential owners could prohibit firearms and provide notice “in any lawful manner.” Minn. Stat. § 624.714, subd. 17(d).

2. The 2003 Act commanded that a private establishment, such as a religious institution, could not prohibit the lawful carrying of firearms in its parking facility or parking area. Minn. Stat. § 624.714, subd. 17(c).

3. The 2003 Act commanded that an employer, such as a religious institution, could not prohibit its employees from carrying firearms in the employer's parking lots. Minn. Stat. § 624.714, subd. 18(c).

4. The 2003 Act commanded that a private establishment, such as a religious institution, could not prohibit the carrying of firearms by tenants and their guests. Minn. Stat. § 624.714, subd. 17(e). In other words, even a negotiated lease provision banning firearms was illegal.

The 2003 Act was signed into law by the Governor on April 28, 2003, with an effective date of May 28, 2003.

II. THE 2003 ACT HAD A SIGNIFICANT IMPACT ON EDINA AND UNITY.

The Statement of Facts in the State's brief is entirely silent on the impact of the 2003 Act, later reenacted in almost identical form as the 2005 Act, on Respondents. As the District Court determined below, Respondents' affidavits were uncontroverted. A-7. Given the State's apparent reluctance to discuss these facts, a detailed summary is required here.

Edina was affected by the 2003 Act and the 2005 Act as an owner of religious real property, including a house of worship, a parking lot, and tenant space, and as an employer.

The Affidavit of Pastor Pamela Fickenscher (“Fickenscher Aff.”), RA-1, one of Edina’s pastors, explains as follows:

Edina’s policy, based on a resolution of its Council of Ministers, acting with pastoral spiritual counsel and the support of the congregation, is that firearms are prohibited on all of its real property. The pastors retain discretion to allow onto Church property licensed peace officers acting on official business. Fickenscher Aff. ¶ 8, RA-2.

The ban on firearms is based on the Church’s governing documents and its worship practices, which emphasize peacemaking and nonviolence. Edina’s position, based on the sincere religious beliefs of its members through its Council of Ministers and through its co-pastors, is that the presence of firearms on Church property is completely inconsistent with its commitment to peacemaking and nonviolence and to the Church as a place of sanctuary. Fickenscher Aff. ¶ 4, RA-1-2.

The firearms ban includes the Church building and the contiguous parking lot. The parking lot is an integral part of Edina’s worship space. Edina uses its parking lot as part of its religious mission, including for worship activities on the Vigil of Easter, the holiest night of the church year. Fickenscher Aff. ¶ 5, RA-2; Rebuttal Affidavit of Pastor Erik Strand (“Strand Aff.”) ¶ 2, RA-17-18.

Also as part of its religious mission, Edina leases its Sunday School classrooms, located within the church building, and playground to a licensed day care center. Fickenscher Aff. ¶ 6, RA-2.

To notify others of the ban on firearms, Edina has chosen to post signs. In the Lutheran tradition, the front entrance of the church building is reserved for religious communications of particular importance. Fickenscher Aff. ¶ 11, RA-3. Edina has posted a sign with a religious message that reads as follows: “Blessed are the peacemakers. Firearms are prohibited in this place of sanctuary.” However, signs are not posted at other entrances. A similar sign with a religious message is posted at the entrance to the parking lot. Fickenscher Aff. ¶ 10, RA-2-3.

Edina chose to communicate the ban on firearms by religious signs because it believes that providing personal notification and a “demand for compliance,” in the words of the 2005 Act, would, as Pastor Fickenscher states, “profoundly burden and harm our Church’s worship experience.” It would detract from the message of welcome and reconciliation delivered by ushers and greeters. Fickenscher Aff. ¶¶ 12-13, RA-3-4.

Edina’s ban on firearms “is entirely consistent with and furthers the religious teachings and witness of the Evangelical Lutheran Church in America,” states Bishop Craig Johnson, the Bishop of the Minneapolis Synod of which Edina is a part. Affidavit of Bishop Craig Johnson (“Johnson Aff.”) ¶ 5, RA-7. “Edina’s action advances its and the Lutheran Church’s commitment to peacemaking, non-violence, and being a place of sanctuary. Knowing the congregation and the pastors, there is no question in my mind that Edina’s decision is based on sincere religious beliefs.” Id.

Not only does Bishop Johnson ratify the sincerity of Edina's beliefs, the Minneapolis Synod Council has adopted a resolution urging each of the Synod's 169 congregations, with 230,000 members, to take the steps already taken by Edina. Johnson Aff. ¶ 6, RA-7.

As does Pastor Fickenscher, Bishop Johnson states that the provisions of the 2003 Act and the 2005 Act that prevent Lutheran churches in the Minneapolis Synod from prohibiting firearms in their holy places, including parking lots and tenant spaces, control and interfere with Lutherans' rights of conscience and the free exercise of religious beliefs. Johnson Aff. ¶¶ 7-9, RA-7-8. Bishop Johnson also confirms that the challenged signage and personal notification provisions burden Lutherans' rights of conscience and the free exercise of religious beliefs. Johnson Aff. ¶¶ 10-11, RA 8-9.

While Unity Church of St. Paul is a member of a different denomination than Edina, many of its religious beliefs and ecclesiastic actions are similar.

Unity, located in the heart of St. Paul, near Summit Avenue and Dale Street, conducts a variety of activities in addition to its traditional religious mission as a house of worship. It has 13 full-time and 10 part-time employees. Affidavit of Co-Ministers Rob and Janne Eller-Isaacs ("Eller-Isaacs Aff.") ¶ 14, RA-14. Within its 54,000 square feet as well as its two parking areas and adjacent multi-unit buildings, it has a sanctuary, chapel, variety of business offices, kitchen, meeting rooms, and a number of business offices and other facilities that furnish a

“free and welcome religious community” for some 1,200 members, visitors, tenants, and others. Eller-Isaacs Aff. ¶¶ 2, 3, 8, RA-10-12.

The two parking areas adjacent to its main building are filled for Sunday worship services and other activities during the week. Eller-Isaacs Aff. ¶ 8, RA-12. The parking areas are used for various religious-related activities, including youth car washes, church fundraising, and transportation of Unity members to various events, including youth activities. Eller-Isaacs Aff. ¶¶ 9-10, RA-12-13.

In addition to conventional religious activities, many portions of Unity’s building are used for other community activities, including sheltering the homeless, in conjunction with Project Home, run by Ramsey County for homeless families, which consists of the homeless staying as guests on the church premises. Eller-Isaacs Aff. ¶ 12, RA-13.

Unity also leases portions of its property to a German-American preschool, Webster Elementary School, Summit University Living At Home Block Nurse Program, and an elder care program. The facility is also used for the Twin Cities One Voice Mixed Choir, yoga and tai chi instructional groups, the New Century Club, and Alcoholics Anonymous, among other guests and tenants of the facility. Eller-Isaacs Aff. ¶¶ 11-12, RA-13; Affidavit of Marshall Tanick Exhibit 1, RA-22.

According to Unity’s Co-Ministers, the 2003 Act and now the 2005 Act impede Unity’s religious activities and mission. The signage and personal notification requirements, at all of Unity’s multiple entries, in writing or orally,

could force Unity to make statements that it believes “contradicts the idea of safe sanctuary and a purpose of worship” on its premises. Eller-Isaacs Aff. ¶ 6, RA-11.

Unity has, through its Board of Trustees, adopted a resolution characterizing its sincerely-held religious beliefs which state the measures in the 2003 Act (now the 2005 Act) violate Unity’s right to use its property, communicate its religious beliefs, and exercise its religious rights, including the “right to welcome worshippers and visitors as the Church sees fit.” Eller-Isaacs Aff. ¶¶ 15-17, RA-14-15.

III. EDINA AND UNITY CHALLENGED THE 2003 ACT IN SEPARATE LAWSUITS.

Days before the 2003 Act went into effect, Edina commenced a lawsuit against the State of Minnesota, seeking to have provisions of the 2003 Act declared unconstitutional as violating Edina’s right of religious freedom under the Minnesota Constitution. Edina was quickly joined by many other religious institutions, including the Episcopal Bishop of Minnesota on behalf of all Episcopal churches. See Edina Community Lutheran Church, et al. v. State of Minnesota, Court File No. MC 03-00815 (Rosenbaum, J.) (“Edina I”).

On June 6, 2003, Judge Marilyn Rosenbaum issued a temporary injunction against the signage and personal notification provisions of the 2003 Act. RA-41. However, she denied the motion as to the parking area, employer, and tenant provisions on the ground that the religious institutions lacked standing.

The religious institutions appealed. The State did not cross-appeal.

On January 13, 2004, the Minnesota Court of Appeals reversed: “Because the act affects appellants’ property rights and their right to free religious exercise under the Minnesota Constitution, an actual controversy exists that involves adverse interests and is capable of specific relief. We therefore conclude that appellants have standing to challenge the act” Edina Community Lutheran Church v. State of Minnesota, 673 N.W.2d 517, 520 (Minn. Ct. App. 2004). See RA-54. The Court of Appeals remanded so that the District Court could make additional findings.

On March 16, 2004, the District Court made such findings and broadened the temporary injunction to include the parking area, employer, and tenant provisions of the 2003 Act. See RA-62. Judge Rosenbaum determined: “The Act threatens to impinge upon the use of Plaintiffs’ real property for their religious mission and worship practices. Also, by asking Plaintiffs to ‘tolerate’ actions that conflict with their religious beliefs, the State is infringing upon Plaintiffs’ right to free exercise of religion as guaranteed by the Minnesota Constitution.” She also held: “The challenged provisions of the Act impair Plaintiffs’ constitutional rights to worship and rights to conscience, and such loss of religious freedom, even for minimal periods of time, constitutes irreparable harm”

The State did not appeal the additional injunctive relief.

On October 7, 2003, Unity filed suit in the Second Judicial District, Unity Church of St. Paul, et al. v. State of Minnesota, Case No. C9-03-9570 (Finley, J.). Represented by counsel for Edina, many other religious institutions, including the

seven cathedral churches of the Roman Catholic Archdiocese of Minnesota, and the Minnesota UCC and Methodist Conferences, intervened in support of Unity's position.

On July 13, 2004, Judge John Finley determined that the 2003 Act was unconstitutional as part of a law embracing more than one subject in violation of Article IV, Section 17 of the Minnesota Constitution. See RA-67. In dictum, Judge Finley commented: "There is no question that the Act infringes upon those [religious] beliefs as it relates to the use of their properties, especially parking lots." He stated further that the State of Minnesota had not identified any compelling interest for such infringement of religious rights.

The State appealed. On April 12, 2005, without reaching the freedom of religion issue, the Court of Appeals affirmed Judge Finley's ruling. See 694 N.W.2d at 585. The State petitioned the Supreme Court for review.

IV. THE LEGISLATURE RESPONDED WITH THE 2005 ACT.

Without waiting for the Supreme Court to decide the State's petition for review, on May 13, 2005, the Minnesota Senate took up S.F. No. 2259, a retroactive reenactment of the 2003 Act. The Senate stripped from the bill provisions recommended by the Crime Prevention and Public Safety Committee that would have excluded religious institutions from the definition of "private establishments" and made it a crime to trespass with a firearm in a religious

establishment. Affidavit of David Lillehaug (“Lillehaug Aff.”) Exs. S, U.² Then, by a vote of 25-41, the Senate rejected an amendment that would have allowed religious institutions to give notice “by any lawful means” that firearms are prohibited on religious property. Lillehaug Aff. Ex. U, p. 2697; Ex. T, Disk 1, pp. 13-15.

The Senate passed S.F. No. 2259 by a 44-21 vote. Lillehaug Aff. Ex. U, p. 2710.

On May 18, 2005, the Minnesota House of Representatives considered S.F. No. 2259. By a vote of 60-73, the House rejected an amendment that would have allowed religious institutions to “prohibit firearms, and give notice thereof, on any of their real properties, in any lawful manner.” Lillehaug Aff. Ex. Q; Ex. P, pp. 7-12. The House passed S.F. No. 2259 by an 86-47 vote. Lillehaug Aff. Ex. P, p. 44.

S.F. 2259 was signed by the Governor on May 24, 2005, and the provisions challenged herein became effective immediately and retroactively to April 28, 2003. See Appellant’s Brief Add-1 (bill as passed). Thereafter, the State withdrew its petition for review and the Edina I case was dismissed.

In all respects material to this case, the challenged provisions of the 2005 Act are identical to the challenged provisions of the 2003 Act, except that the 2005 Act allows private establishments to notify by signage or personal notification.

² Due to its length, the Lillehaug Aff. submitted below is not part of Respondents’ Appendix.

Minn. Stat. § 624.714, subd. 17(b). Despite their knowledge that there were serious constitutional problems with the 2003 Act as it applied to religious institutions, and that injunctive relief had been entered by Judge Rosenbaum, the Legislature reenacted it in the form of the 2005 Act and the Governor signed it.

V. EDINA AND UNITY COMMENCED THIS CASE AND SECURED TEMPORARY AND PERMANENT INJUNCTIVE RELIEF.

Edina and Unity commenced this case on July 29, 2005. A-22. Their Complaint alleged that the Reenacted Act violated their religious rights in three ways:

Count One asserts violations of freedom of religion guaranteed by Article I, Section 16 of the Minnesota Constitution.

Count Two alleges violations of freedom of religious association guaranteed by the First Amendment to the United States Constitution.

Count Three claims violations of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, et seq. (“RLUIPA”).

Promptly after the State answered the Complaint, Edina and Unity moved for a temporary injunction.

By Order dated September 9, 2005, Judge LaJune Thomas Lange granted the relief requested. A-37. In applying the factors of Dahlberg Bros. Inc. v. Ford Motor Co., 137 N.W.2d 314, 321-22 (Minn. 1965), Judge Lange determined that Edina and Unity were likely to succeed on the merits of their constitutional claim. She held: “The 2005 Act impermissibly intrudes into the free exercise of religion

by arbitrary definitions, which dictate restrictions on the use of church property for worship, childcare, parking, and rental space.” Judge Lange identified a less restrictive alternative: “exempting religious organizations from coverage of the statute.”

Accordingly, the temporary injunction issued by Judge Lange allowed Edina and Unity to “prohibit firearms, and provide notice thereof, in any lawful manner,” in their houses of worship and on all of their religious properties.

Following Judge Lange’s retirement, this case was transferred to Judge William Howard. The parties stipulated to a record on which the case would be decided on its merits. Unity and the State cross-moved for summary judgment, and Edina moved for a permanent injunction. Judge Howard heard the motions on June 6, 2006. Following post-hearing briefing requested by the Judge, he issued Findings of Fact, Conclusions of Law, and Order Granting Permanent Injunction, along with a Memorandum. A-1.

Judge Howard concluded that the challenged provisions of the 2005 Act are unconstitutional because they violate the rights of Edina and Unity under the Minnesota Constitution, the United States Constitution, and RLUIPA.

STANDARD OF REVIEW

The parties agreed to a written record, which was submitted to the District Court. The parties further agreed that, based on the written record, the matter was ripe for decision on the merits. A-1. As a result, no trial was held and live testimony was not taken.

Accordingly, Edina and Unity concur with the State that the issue before the Court of Appeals is whether the District Court correctly or erroneously applied the law to the facts in the written record. Review is thus de novo. See State v. French, 460 N.W.2d 2, 4 (Minn. 1990).

SUMMARY OF ARGUMENT

The District Court correctly ruled for Edina and Unity on all three counts of the Complaint.

First, applying the four-prong Hershberger test discussed below, the District Court correctly ruled that the challenged provisions of the 2005 Act violate religious freedom guaranteed by the Minnesota Constitution, Article I, Section 16. This ruling is consistent with the views of the three other District Judges who have considered the conflict between the challenged statutory provisions and the precious constitutional freedom of religion.

Second, the District Court correctly ruled that the challenged provisions of the 2005 Act violate the freedom of religious association guaranteed by the First Amendment to the United States Constitution. Religious institutions have a right to ban firearms from their religious properties and decline to associate with those who insist on carrying weapons.

Third, the District Court correctly ruled that the challenged provisions of the 2005 Act violate RLUIPA.

The District Court appropriately issued declaratory and permanent injunctive relief. Such relief accommodates religious freedom and does not have

as its primary purpose the advancement of religion. Accordingly, the relief granted does not violate the Establishment Clause of the First Amendment.

LEGAL ARGUMENT

I. THE 2005 ACT VIOLATES THE MINNESOTA CONSTITUTION, ARTICLE I, SECTION 16.

A. Religious Freedom is a Precious Right Accorded the Highest Constitutional Deference.

Article I, Section 16 of the Minnesota Constitution guarantees that the right of every Minnesotan “to worship God according to the dictates of . . . conscience shall never be infringed.” It further prohibits “any control of or interference with the rights of conscience.” Section 16 is not to be construed to “excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.”

“Religious liberty is a precious right,” said the Minnesota Supreme Court in the leading case of State v. Hershberger, 462 N.W.2d 393, 398 (Minn. 1990). See id. at 399 (religious freedoms “traditionally revered” in Minnesota); State v. French, 460 N.W.2d 2, 8 (Minn. 1990), rehearing denied (Oct. 8, 1990) (“The people of the State of Minnesota have always cherished religious liberty.”) Because the right to religious liberty is found in the Preamble of the Minnesota Constitution, religious liberty is even “more important than the formation of government.” Id. It is “coequal with civil liberty.” Hershberger, 462 N.W.2d at 398. Section 16 is “an enumeration of a primordial right and a limitation on the power of the state.” Id. at 400 (Simonett, J., concurring).

While religious liberty is part of the First Amendment to the United States Constitution, the language of Section 16 “is of a distinctively stronger character than the federal counterpart.” Id. at 397. “Minnesotans are afforded greater protection for religious liberties against governmental action under the state constitution than under the first amendment of the federal constitution.” Id. at 397. Therefore, government actions less than an outright prohibition on religious practices that do not violate the First Amendment can violate the Minnesota Constitution. Id. at 397.

The Minnesota Supreme Court in Hershberger further held that Section 16 “expressly limits the governmental interests that may outweigh religious liberty.” Id. at 397. As to the governmental interest in public safety referenced in Section 16, “only religious practices found to be inconsistent with public safety are denied an exemption.” Id. at 398 (emphasis in original). The burden is on the State. French, 460 N.W.2d at 9.

B. A Four-Prong Test is Applied.

As the District Court recognized, A-8, the interest in religious freedom is balanced against the state’s interest in peace and safety through a four-prong test. First, it must be determined whether the religious belief is sincerely held. Second, it must be determined whether the state law burdens the exercise of religious belief. Third, it must be determined whether the state interest in the law is overriding and compelling. Fourth, it must be determined whether the state law uses the least restrictive means. Hill-Murray Fed’n of Teachers v. Hill-Murray

High Sch., 487 N.W.2d 857, 865 (Minn. 1992); Geraci v. Eckankar, 526 N.W.2d 391, 398 (Minn. Ct. App. 1995), review denied (Mar. 14, 1995), cert. denied, 516 U.S. 818 (1995).

Applying the four-prong test, the 2005 Act clearly violates Article I, Section 16.

First, the religious beliefs of Edina and Unity are sincerely held.

Acting pursuant to their religious beliefs, Edina and Unity have prohibited firearms on all of their religious real properties, including their parking lots and tenant spaces. Edina has decided to communicate the prohibition of firearms by signage, not in the purely secular form dictated by the State, but by a religious message. Edina and Unity have declined to undertake the onerous personal notification requirements because they would substantially infringe on the worship experience.

In the Edina I case and in this case, the State concedes the sincerity of Edina's beliefs. See Edina Community Lutheran Church v. State of Minnesota, 673 N.W.2d 517, 521 (Minn. Ct. App. 2004). This approach is wise. In Edina I, this Court quoted Geraci v. Eckankar to the effect that: "If courts begin to question a church's basis for doctrinal decisions, a church may be compelled to confirm its religious beliefs with the government's or the majority culture's beliefs." Geraci v. Eckankar, 526 N.W.2d at 399. See Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952) (religious organizations should have the power to decide matters of faith and doctrine "free from state interference").

Second, the 2005 Act infringes, controls, and interferes with the exercise of the religious beliefs of Edina and Unity.

As a general matter, in Minnesota a property owner has the right to control property for First Amendment expression. As this Court recognized in Edina I, 673 N.W.2d at 522, all owners of real property, whether secular or religious, have always enjoyed the essential right to exclude others. See, e.g., State v. Wicklund, 589 N.W.2d 793 (Minn. 1999) (mall may exclude those claiming to exercise First Amendment rights), affirming 576 N.W.2d 753 (Minn. Ct. App. 1998).

More specifically, the provisions in the 2005 Act requiring religious institutions to accept firearms on their property, or to provide special notification, is a radical departure from the traditional Minnesota approach that religious institutions have the right to control their real property for the free exercise of religion through worship and mission. Article X, Section 1 of the Minnesota Constitution exempts from taxation “all seminaries of learning, all churches, church property, [and] houses of worship” This exemption is codified at Minn. Stat. § 272.02, subd. 6, and 317A.909, subd. 3. Property owned by religious institutions is exempt if it is “devoted to and reasonably necessary for the accomplishment of church purposes.” See Victory Lutheran Church v. Hennepin County, 373 N.W.2d 279, 280 (Minn. 1985), citing State v. Board of Foreign Missions of Augustana Synod, 22 N.W.2d 642, 645 (Minn. 1946).

Minnesota statute also expressly recognizes the right of religious institutions to “erect, acquire, and operate churches . . . and other buildings or

facilities for . . . religious, moral, and charitable activities.” Minn. Stat. § 315.05. Minnesota criminal law protects the access of worshipers to their houses of worship. See Minn. Stat. § 609.28 (prohibits interference with religious observance).

The 2003 Act and the 2005 Act completely upset the pre-existing constitutional and statutory right of Edina and Unity to control their religious real properties. As this Court determined in the Edina I case, 673 N.W.2d at 522, by asking religious institutions to tolerate firearms on their property, “the state arguably is infringing on appellants’ right to free exercise of religion, guaranteed by Minn. Const. art. I, § 16.” On remand, the District Court went further, finding that the 2003 Act’s provisions “impair” the right to worship and cause a “loss of religious freedom.” The District Court in this case made a similar holding as to the 2005 Act.

Here, the record shows that the 2005 Act burdens the free exercise of religion, in at least four ways.

A. The 2005 Act burdens Edina’s and Unity’s rights to communicate and worship as they see fit. For religious institutions that choose to ban firearms, the 2005 Act creates an onerous “exclusive” notification regime. Religious institutions that ban firearms have only two choices with respect to notification. They may provide notification by signage, but, if they do so, the notification is ineffective unless they post – not once, but at every entrance – conspicuous signs bearing non-religious words dictated by the State. Even the size and typeface of

the secular words are dictated. Alternatively, they may provide notification by spoken word, but, if they do so, they must personally notify every worshiper and visitor and “demand compliance.”

Under either alternative, if a firearm is seen, the religious institution must give the armed person an order to leave before there is even the most minimal consequence for the trespasser. Even a firearms-carrier who trespasses repeatedly is subject only to a petty misdemeanor, which is not a crime.

The burdensome signage and order to leave requirements are a radical departure from traditional trespass law. For example, it is a misdemeanor to enter a building and construction site if the exterior of the building is conspicuously posted with a sign at least 11 inches square with an “appropriate notice.” See Minn. Stat. § 609.605, subd. 1(a)(v) and 1(b)(9). Simply posting the hours a cemetery is closed is enough to notify an after-hours trespasser. See Minn. Stat. § 609.605, subd. 1(b)(6). By contrast, the 2005 Act requires a larger sign, specific wording, Arial typeface, sizable print, a contrasting background, and posting at all entrances. Most importantly, the 2005 Act requires secular words, even though a carefully-selected religious message, such as Edina’s, provides adequate notice. This is unconstitutional. See Hershberger, 462 N.W.2d at 396 (requiring Amish to use particular sign infringed religious beliefs).

Alternatively, religious institutions must undertake personal notification and then “demand compliance.” This is a significant departure from traditional trespass law, where a simple demand to depart has been deemed sufficient. See

Minn. Stat. § 609.605, subd. 1(b)(3). As the affidavits demonstrate, such individual notifications and demands seriously interfere with the free exercise of religion. To comply with the statute, religious institutions must modify substantially their traditional process of welcome and blessing to worshipers and visitors.

Edina and Unity have submitted affidavits from their co-pastors and, in Edina's case, from its Bishop, certifying that both the signage and the personal notification requirements in the 2005 Act are burdensome. Without a shred of contrary factual or expert support, the State asserts to the contrary.

As to the signage requirement, the State has two inconsistent theories. First, it argues that it is not a burden for a religious institution to display a non-religious, secular sign that is "religiously neutral" and carries a uniform message. Then, in almost the same breath, the State suggests that, without violating the 2005 Act, a religious institution may add other, religious words to its signs.

The State's arguments are made without any record support. As Pastor Fickenscher and Bishop Johnson testify by affidavit, the message a religious institution conveys, especially at the entrance to its place of worship, is central to its mission and to the religious experience. It is burdensome to that mission and worship experience for the State to require a secular sign.

The State raises the specter that affirming the District Court will somehow put at constitutional risk other kinds of useful, secular signs, such as "exit" and disability parking signs. Respondents are not aware of any religious institutions

whose beliefs conflict with fire safety or access for the disabled. Regardless, such a case is not before the Court. Further, as discussed below, the validity and strength of the State's interest in requiring signage for fire safety and disability access are considerably greater than its non-compelling interest in having firearms on religious properties.

As to the State's argument that the required language may be supplemented, this suggestion, of course, conflicts with the uniformity the State says the Legislature sought to achieve in the 2003 and the 2005 Acts. Further, the quotation marks around the language required by the 2005 Act speak for themselves. The exact words are both mandated and exclusive.

As to the personal notification requirement, the State again presumes to tell religious institutions that it is not burdensome to communicate the ban to the church attendees prior to, or at the start of, the church service. This assertion, again, is made without any record support. As the uncontroverted affidavits demonstrate, the 2005 Act's requirement of personal notification and a demand for compliance is very intrusive in the context of entering to worship.

B. The 2005 Act prohibits Edina and Unity from banning guns from their parking lots. This type of restriction on private property rights is, to Respondents' knowledge, unprecedented in Minnesota. "Constitutional protections for the free exercise of religion are not limited to houses of worship, but extend to church facilities intimately associated with the church's religious mission." Munns v. Martin, 930 P.2d 318, 324 (Wash. 1997). The District

Court's holding that church parking lots must be accorded the same protection as houses of worship, A-11, is entirely correct. See also Edina I, 673 N.W.2d at 522.

As the uncontroverted affidavits show, and as the District Court found, A-11, such parking lots are an integral part of Respondents' religious property and are used for activities in furtherance of their missions. Edina sometimes uses its parking lot, which is contiguous to the church building, for worship services. As is typical of most religious institutions, religious discussions often begin or continue in the parking lot.

The statutory prohibition on restriction of firearms in parking lots poses serious problems for Unity. Its two parking lots are integral parts of its religious mission, filled with congregants and other worshippers on Sundays and other days of the week. Additionally, these areas are used for religious purposes, including youth activities and fundraising events, which tie into Unity's overall religious mission.

In response, the State proposes a novel "basic functional test," arguing that sometimes a "parking area" is a parking area, and sometimes a parking area is not really a parking area. The State would have the religious institutions' rights turn on whether the parking area is or is not being used for a religious purpose at any given time.

First, the State's argument defies common sense. By the plain words of the 2005 Act, it is clear that the Legislature did not adopt the "basic functional test"

being urged by the State. This is a new argument, contrary to the position the State took in litigation in Edina I. Strand Aff. ¶ 3, RA-18.

Second, as the District Court determined, the State's "basic functional test" would be unworkable and confusing. Usually some cars are present during Edina's religious services in its parking lot. Strand Aff. ¶ 5, RA-18. Further, if Edina banned cars from its parking lot, it would be violating an agreement with the City of Edina to make available a certain number of off-street parking spaces. Strand Aff. ¶ 6, RA-18.

The State's "basic functional test" would coerce religious institutions into an unconstitutional choice: ban both firearms and cars from parking lots, or ban neither. By the State's test, the presence of even one automobile would thwart a ban on firearms. That would mean that Edina and Unity could ban firearms on days when the parking lots were empty, but that firearms must be allowed when members discuss the sermon on the way to their cars or the church youth wash cars to raise money for their mission trips. This test is both impractical and unconstitutional.

C. The 2005 Act burdens the religious rights of Edina and Unity as employers. Edina and Unity have exercised their religious beliefs by banning firearms from all of their real properties. However, the 2005 Act prevents such a ban on employees' possession of firearms in parking areas.

Under the Minnesota Constitution, a religious institution "retains the power to hire employees who meet their religious expectations, to require compliance

with religious doctrine, and to remove any person who fails to follow the religious standards set forth.” Hill-Murray Fed’n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 866 (Minn. 1992). For example, while matters of compensation are negotiable under the Minnesota Labor Relations Act, a religious institution need not negotiate “matters of religious doctrine and practice.” Id. Similarly, even though eradication of gender discrimination in employment is a compelling state interest, it is outweighed by the free exercise of religion. See Geraci v. Eckankar, 526 N.W.2d 391, 399 (Minn. Ct. App. 1995).

Plainly, a religious institution has the constitutional right to control its own employees’ conduct on religious properties. The 2005 Act’s provision is unconstitutional.

D. The 2005 Act further burdens the churches’ right to use their real properties in a manner consistent with their missions by prohibiting them as landlords from restricting the possession of firearms by tenants and their guests. The 2005 Act even prevents religious institution landlords from entering into or enforcing freely negotiated leases that prohibit all guns in tenant space. Compare State v. French, 460 N.W.2d 2, 9-10 (Minn. 1990) (exemption from discrimination statute allowed for landlord with sincerely held religious belief). The District Court found that this provision was “significantly burdensome.” A-12.

Again, in its self-appointed role as interpreter of religious doctrine, the State asserts that religious institutions’ desire to control their leased property has nothing to do with the exercise of their religious beliefs. Again, the State

completely ignores the uncontroverted record. As Bishop Johnson states, many churches, as part of their religious commitments, become landlords to licensed child care centers (as has Edina) or social service organizations (as has Unity). Johnson Aff. ¶ 9, RA-8. Unlike a health club run on non-religious property, see State v. Sports & Health Club, Inc., 370 N.W.2d 844, 853 (Minn. 1985), Respondents are religious, non-profit entities that are not “trafficking in the market place.”

Unity’s relationships with tenants are inextricably entwined with Unity’s religious beliefs. Unity participates in the Ramsey County overflow Homeless Shelter Program through the St. Paul Area Council of Churches, which houses families who cannot find available space in the county’s homeless shelter. Families arrive and leave through Unity’s parking lot, are housed in the Sunday School rooms, and are fed in other rooms. The homeless can either be viewed as “tenants” themselves or as “guests” of the tenant, Ramsey County.

Additionally, Unity leases a portion of its real property to a preschool, a nurse program, an elder care program, an alcohol rehabilitation program, and other programs. Under any definition, these organizations are “tenants” within the meaning of the 2005 Act.

Unity carries out these real property relationships with its tenants and their guests as part of its religious missions and beliefs. The 2005 Act’s requirement that tenants and their guests with firearms permits be allowed to carry while using or staying at the church clashes with Unity’s religious principles prohibiting guns

on the premises while providing sanctuary. As the District Court noted, under the 2005 Act, Unity may ban alcohol, drugs, and knives, but not firearms. A-13. This makes no sense.

Finally, the State notes that Edina's lease is with a day care center, and that there is a provision in the 2005 Act regarding day care centers. But under the 2005 Act, child care centers may, but are not required to, exclude guns, and they may not exclude guns when children are not present. See Minn. Stat. § 609.66, subd. 1d(3)(4)(2). This provision, shot with loopholes, does not rescue the challenged provision as to Edina.

In summary, the District Court, relying on an unrebutted record, correctly held that the 2005 Act infringes substantially on Edina's and Unity's sincere religious beliefs.

Third, the state interest in the offending provisions of the 2005 Act is not overriding and compelling.

Under Article I, Section 16, “[o]nly the government’s interest in peace or safety or against acts of licentiousness will excuse an imposition on religious freedom under the Minnesota Constitution.” State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990). To prove a compelling state interest, the State must show that the religious institution’s practices are “inconsistent with public safety,” id. at 398 (emphasis in original).

The State must show not only that it has a general interest, but that it has a compelling and overriding state interest in not granting the religious objector an

exemption from the general requirement. See State v. French, 460 N.W.2d 2, 9 (Minn. 1990). In other words, if the 2005 Act interferes with a religious institution's beliefs, the State must show that, as to that particular institution, there is a compelling reason to interfere.

In this case, by the express terms of the 2005 Act, the State's compelling state interest is not public peace or safety. In the 2005 Act, the Legislature itself declared the purported compelling state interest: regulation of the right purportedly granted by the Second Amendment to the United States Constitution that "guarantees the fundamental, individual right to keep and bear arms." Minn. Stat. § 624.714, subd. 22.

The Legislature's declaration that it is regulating an "individual right to keep and bear arms" does not provide any basis for infringing on the right of religious institutions to ban firearms from their real property.

First, the Legislature's declaration of an individual right was knowingly in defiance of existing, controlling law. The Minnesota Supreme Court has held that the Second Amendment "protects not an individual right but a collective right, in the people as the group, to serve as militia." Application of Atkinson, 291 N.W.2d 396, 398 (Minn. 1980), citing United States v. Miller, 307 U.S. 174, 178-79 (1939). Of course, the 2005 Act has nothing to do with regulating the militia.

During the debate on the 2005 Act, it was brought to the Minnesota Senate's attention that the U.S. Court of Appeals for the Eighth Circuit, of which the District of Minnesota is a part, had reaffirmed that the Second Amendment

relates to militias and does not confer an individual right. Lillehaug Aff. Ex. T, Disk 1, p. 15. See United States v. Hale, 978 F.2d 1016, 1019-20 (8th Cir. 1992); Iverson v. City of St. Paul, 240 F. Supp. 2d 1035 (D. Minn. 2003) (Davis, J.), aff'd, No. 03-1321 (8th Cir. 2003) (unpublished). See also United States v. Lippman, No. 03-3275 (8th Cir. 2004) (Murphy, J.) (Second Amendment “protects the right to bear arms when it is reasonably related to the maintenance of a well regulated militia”). This holding by the Minnesota Supreme Court and the Eighth Circuit is consistent with decisions of the U.S. Courts of Appeals for the First, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits. See Parker v. District of Columbia, No. 04-7041, slip op. at 16 & n.4 (D.C. Cir., March 9, 2007).

Accordingly, the “compelling state interest” declared by the Legislature is based on a premise unsupported by the law.

Recently, in Parker, a 2-1 majority of a D.C. Circuit panel joined the Fifth Circuit in recognizing an individual right to arms. However, in an observation particularly apt to this case, the majority stated:

The right to keep and bear arms – which we have explained pre-existed, and therefore was preserved by, the Second Amendment – was subject to restrictions at common law. We take these to be the sort of reasonable regulations contemplated by the drafters of the Second Amendment. For instance, it is presumably reasonable ‘to prohibit the carrying of weapons when under the influence of intoxicating drink, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror’ State v. Kerner, 107 S.E. 222, 225 (N.C. 1921). And, as we have noted, the United States Supreme Court has observed that prohibiting the carrying of concealed weapons does not offend the Second Amendment. Robertson, 165 U.S. at 281-82. . . . These regulations promote the government’s interest in public safety consistent with our common

law tradition. Just as importantly, however, they do not impair the core conduct upon which the right was premised.

Parker, slip op. at 53-54 (emphasis added).

In this case, the Legislature went far beyond even an individual rights model of the Second Amendment, infringing on the traditional, common law rights of property owners, including religious institutions.

The State contends that there is another compelling state interest: public safety. Interestingly, such interest is not cited in the 2005 Act. Regardless, and tellingly, the State has never attempted to show that public safety would be enhanced by firearms on religious properties or, conversely, that public safety has been harmed by banning firearms from religious properties.

Not only has the State proven nothing in the record, the record is to the contrary. Lutheran Bishop Johnson states in his Affidavit that he has never received any communication from the State that the presence of firearms on religious property would enhance public safety. Nor is he aware of any facts or research to support that proposition. Johnson Aff. ¶ 12; RA-9.

Most importantly, as the District Court noted, the State's claim of a compelling interest in public safety fails because temporary injunctions have been in effect for more than three years: in Edina I from May, 2003, to May, 2005, and in this case, from September, 2005 to the present. The State has not pointed to any harmful effects from these injunctions, and Edina and Unity are aware of none.

In this case, Edina tried to get the State to take a position on whether

Edina's ban on firearms had reduced public safety. The State objected to such interrogatories. RA-91-92. Edina also tried to get the State to take a position on whether Judge Rosenbaum's and Judge Lange's temporary injunctions had reduced public safety. Again, the State would not respond. RA-92. When Edina challenged the State to declare whether there was any alternative way, other than the 2005 Act, to "increase public safety on Edina's premises," the State objected that the term "increase public safety" -- the very concept which the State considers a compelling interest -- was vague and ambiguous! RA-93.

While the State remains silent in litigation, the 2005 Act speaks for itself. The exemptions the 2005 Act contains show there is no compelling state interest in requiring institutions, much less religious institutions, to allow guns. For example, under the 2005 Act, guns may not be carried in schools. Minn. Stat. § 609.66, subd. 1d(c). If they are not allowed in schools, then why is there a compelling state interest to have them in Sunday Schools? Under the 2005 Act, private residents may prohibit firearms and provide notice thereof "in any lawful manner." Minn. Stat. § 624.714, subd. 17(d). If guns can be banned from houses without uniform signage and personal notification, then where is the compelling state interest as to houses of worship? Further, the 2005 Act did not amend the statute limiting the carrying of firearms in the State Capitol, other state buildings, and courthouse complexes. See Minn. Stat. § 609.66, subd. 1g. If there is no compelling interest in having firearms in the halls of government, then where is the compelling state interest to have guns in the halls of religious institutions?

Given all of these exemptions, the State cannot provide any public safety rationale, much less a compelling one, why religious institutions should be compelled to accept firearms or notify in any particular manner.

Respondents are not aware of any other state that has gone so far in requiring religious institutions to accept firearms on their religious properties. Indeed, many other states have recognized that there is no good reason, much less a compelling one, to force firearms on religion. When the 2003 Act was enacted, twelve states with “shall-issue” conceal-carry laws prohibited the carrying of any firearm into a place of worship. See Ark. Code § 5-73-306(a)(17)(“church or other place of worship”); Ga. Code § 16-11-127(a)-(b)(“public gathering,” including “churches or church functions”); La. Rev. Stat. Ann. § 1379.3(N)(8)(“any church, synagogue, mosque, or other similar place of worship”); Mich. Comp. Laws § 28.425o, Section 5o(1)(e)(“any property or facility owned or operated by a church, synagogue, mosque, temple, or other place of worship, unless the presiding official or officials of the church, synagogue, mosque, temple, or other place of worship permit the carrying of concealed pistol on that property or facility”); Miss. Code § 45-9-101(13)(“any church or other place of worship”); Mo. Ann. Stat. § 571.030.1(8)(“any church or place where people have assembled for worship”); N.D. Cent. Code § 62.1-02-05(1)(“public gathering” includes “churches or church functions”); S.C. Code § 23-31-215(M)(9)(“church or other established religious sanctuary unless express permission is given by the appropriate church official or governing body”); Tex.

Penal Code § 46.035(b)(6)(“the premises of a church, synagogue, or other established place of religious worship”); Utah Code §§ 53-5-710(3)(“any house of worship”) and 76-10-530(1)(a)(i)(“a house of worship”); Va. Code Ann. § 81.2-283 (“in a place of worship while a meeting for religious purposes is being held at such place”); Wyo. Stat. § 6-8-104(t)(viii)(“any place where persons are assembled for public worship, without the written consent of the chief administrator of that place”).

Three states that have enacted “shall-issue” laws since 2003 similarly prohibit firearms on religious property. See Mo. Rev. Stat. § 571.107(14) (“Any church or other place of religious worship without the consent of the minister or person or persons representing the religious organization that exercises control over the place of religious worship”; however, firearms allowed in vehicles); Neb. LB 454 Sec. 15 (“place of worship”); Kan. Senate Bill No. 418 New Sec. 10 (“any church or temple”).

Clearly, the State has never established, and cannot establish here, any public safety interest in forcing religious institutions to accept weapons on their real properties.

Third, as to the State’s purported compelling interest in the right to travel, the State cites no case, nor can it, for the fantastic proposition that the right to travel includes the right to drive with a loaded firearm. Most certainly, there is no right, much less a compelling one, to drive into a private church parking area with

a loaded pistol. In any event, gun-carriers can usually park their vehicles on the street or in parking areas that do not ban firearms.

Finally, the State claims a compelling interest in “clarity and uniformity” of notification. However, the entire 2005 Act is replete with contradictions; some properties can bar firearms and some cannot. No uniform notification regime is established as to private residences, or as to schools, or as to courthouse complexes.

Further, mere “uniformity” is not sufficiently compelling to trump religious freedom. Otherwise, the Amish buggy drivers in Hershberger, who refused to display bright orange signs, should have been convicted.

Fourth, the Reenacted Act does not use the least restrictive means.

Even if the State could assert and prove a compelling public safety interest, which it has not, then it “must demonstrate that public safety cannot be achieved through reasonable alternative means.” State v. Hershberger, 462 N.W.2d 393, 399 (Minn. 1990).

In Hershberger, the Minnesota Supreme Court held that it was a violation of the Minnesota Constitution to require Amish persons to apply a particular form of sign to their buggies. The Court found a less restrictive alternative acceptable to the Amish: silver reflective tape along with a lighted red lantern.

In this case, it is difficult to hypothesize less restrictive alternatives because the State has not demonstrated any danger on the real properties of religious institutions that must be remedied. However, there are many less restrictive

alternatives to increase security. For example, if there was really a compelling state interest to reduce crime in the buildings, parking lots, and tenant spaces of religious institutions, the State could encourage local police departments to patrol more frequently. Or, the State could strengthen (rather than weaken, as does the 2005 Act) the criminal penalties for trespassing with a firearm on religious property.

If it is necessary to increase safety and security on religious real property, there are many ways to do so, short of granting new rights to gun-carriers at the expense of the traditional, constitutionally-recognized rights of religious institutions. As three District Court judges have held, an exemption for religious institutions -- similar to that for residences -- is an appropriate, less restrictive, alternative to the dictates of the 2003 Act and the 2005 Act.

II. THE 2005 ACT VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The District Court determined that the 2005 Act violates the First Amendment to the United States Constitution because it violates Edina's and Unity's freedom of religious association. "Constitutional freedom of association protects the right of an individual to associate with others for the purpose of expressing and advancing ideas and beliefs." Metropolitan Rehabilitation Services, Inc. v. Westberg, 386 N.W.2d 698, 700 (Minn. 1986). Respondents and their members have a right to associate for religious purposes with those who do not carry firearms. Conversely, they have a right not to associate with gun-carriers

in parking lots and tenant spaces, and to choose, free of state coercion, the manner in which they provide notice to keep from associating with gun-carriers in houses of worship.

The constitutional principle of freedom of association is explained in Boy Scouts of America v. Dale, 530 U.S. 640 (2000). In Dale, the Supreme Court held that New Jersey's public accommodations law, which required the Boy Scouts to admit a gay member, violated the right of association. The Court determined that the right to associate with others, including in pursuit of religious ends, "plainly presupposes a freedom not to associate." Id. at 647-48, quoting Roberts v. United States Jaycees, 468 U.S. 609, 622-23 (1984) (internal quotations omitted). As the District Court recognized, Dale established a three-part inquiry on freedom of association.

The **first** inquiry is whether Edina and Unity, like the Boy Scouts, engage in "expressive association." Id. at 648. The District Court found that Edina and Unity, like most religious institutions – associations of long standing recognized by Minnesota law – engage in expressive, religious activities protected by the First Amendment and have a corresponding right to associate with others in pursuit of those ends. A-17.

The **second** inquiry is whether the state law significantly affects Edina's and Unity's expression. In Dale, the Supreme Court recognized that the Boy Scouts take an official position with respect to homosexual conduct, and "that is sufficient for First Amendment purposes." An expressive association "has a First

Amendment right to choose to send one message but not the other.” Id. at 656. Here, Edina and Unity have taken formal, spiritual positions regarding the carrying of firearms on their religious properties, and, in the words of Dale, that is sufficient for First Amendment purposes.

In the 2005 Act, the State controls the expression -- in writing, through signs, and verbally, through personal notice -- of religious institutions that wish to ban firearms. “[A]ll speech inherently involves choices what to say and what to leave unsaid.” Pacific Gas & Elec. Co. v. Public Util. Comm’n, 475 U.S. 1, 11 (1986). The 2005 Act both forces speech and silences speech. The signage and personal notification provisions of the law impose an unconstitutional choice. If a religious institution wishes to post a sign, it must do so in certain words of a specific size and typeface dictated by the State, at every entrance to the house of worship. If a religious institution chooses not to post the State-mandated signs, then it must personally notify and “demand compliance” of every worshiper. Simultaneously, the 2005 Act silences speech by prohibiting signs banning firearms from parking lots and tenant spaces. These restrictions on religious expression are grossly unconstitutional.

The State’s insistence on either particular signs or particular personal notice through a “demand for compliance” is reminiscent of Wooley v. Maynard, 430 U.S. 705, 713 (1977), in which the U.S. Supreme Court held that a Jehovah’s Witness could not be forced to display the motto “Live Free or Die” on his New Hampshire license plates. Similarly, in Gralike v. Cook, 191 F.3d 911, 917-18,

921 (8th Cir. 1999), the U.S. Court of Appeals for the Eighth Circuit struck down as “compelled speech” a Missouri constitutional amendment that compelled candidates to express a particular view on term limits.

Further, the State forces religious institutions to associate with gun-carriers on their parking lots and in their tenant spaces. Prior to the Act, the right of religious institutions not to associate with those carrying firearms was supported by criminal and civil trespass laws. See, e.g., State v. Wicklund, 589 N.W.2d 793 (Minn. 1999) (mall may exclude those claiming to exercise First Amendment rights); Minn. Stat. § 609.605, subd. 1(b) (crime of trespass). Now, under the 2005 Act, religious institutions cannot expel those carrying firearms from their parking lots and tenant spaces, and unlawful carry in their houses of worship is only a petty misdemeanor, which is not even a crime. Forced association with gun-carriers dilutes Edina's and Unity's spiritual message of non-violence and peacemaking.

The **third** inquiry is whether there is a compelling state interest that overrides the First Amendment associational right. In so-called “hybrid” cases, like this one, where there are alleged violations of the free exercise of religion and another constitutional right, such as freedom of speech, the State must show a compelling interest. Black v. Snyder, 471 N.W.2d 715, 719 (Minn. Ct. App. 1991). As discussed above, the State has not established any compelling interest.

Further, if a plaintiff makes a colorable claim that the free exercise clause and another constitutional right are violated, the law is subject to strict scrutiny as

to each claim. See, e.g., Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999); Swanson v. Guthrie Ind. Sch. Dist., 135 F.3d 694, 700 (10th Cir. 1998). Strict scrutiny is an extraordinarily difficult burden for the State to meet. Indeed, the requirement that the State “demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law,” City of Boerne v. Flores, 521 U.S. 507, 534 (1997) (emphasis added).

The District Court applied strict scrutiny, and held that the 2005 Act cannot pass this most demanding test. A-17. Whatever the State’s interest, there are less restrictive alternatives, including a religious exemption.

A similar religious expression claim was made, and a First Amendment violation was found, in First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174 (Wash. 1992) (en banc). A Seattle ordinance designated a church as a landmark. The Washington Supreme Court determined that the designation infringed on the church’s religious freedom and that there was no compelling state interest.

In so holding, the Washington Supreme Court noted that the church building itself was an expression of religious belief and message and that “conveying religious beliefs is part of the building’s function.” Id at 217. It held that a limitation on the building’s exterior “impermissibly infringes on the religious organization’s right to free exercise and free speech.” Id.

The same is true here. All of Edina's and Unity's religious real property expresses, conveys, and facilitates religious association.

The State relies heavily on Rumsfeld v. Forum for Academic and Institutional Rights, Inc., No. 04-1152 (U.S., March 6, 2006), in which the Supreme Court upheld the constitutionality of the Solomon Amendment that required educational institutions to allow military recruiters or lose federal funding. Rumsfeld is easily distinguishable.

First, the very statute at issue -- the Solomon Amendment -- contains exactly what Respondents urge here: a religious exemption. Congress recognized the associational rights of religious institutions guaranteed by the First Amendment by providing an exception for every educational institution with "a longstanding policy of pacifism based on historical religious affiliation." See 10 U.S.C. § 983(c)(2).

Second, in ruling that the Solomon Amendment did not violate freedom of expressive association, the Rumsfeld court carefully distinguished military recruiters, who are on campus for a temporary and limited purpose, from law schools, their faculty, their students, and the rest of the law school community. By contrast, the 2005 Act is not limited to occasional visitors to religious institutions: it prevents religious institutions from expelling from parking lots and leased spaces all persons carrying firearms pursuant to permit, including employees and parishioners who are themselves "members of the [organization's] expressive

association.” “This distinction is critical,” said the Supreme Court in Rumsfeld, slip op. at 19.

III. THE 2005 ACT VIOLATES THE FEDERAL RELIGIOUS LAND USE STATUTE.

The federal Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”) protects persons and institutions that engage in religious activities from burdensome governmental land use regulation. 42 U.S.C. §§ 2000cc, et seq. RLUIPA is the successor to the Religious Freedom Restoration Act, in which Congress found that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise” 42 U.S.C. § 2000bb(a)(2). The District Court agreed with Edina and Unity that the 2005 Act violates RLUIPA.

The threshold issue is whether the 2005 Act is a “land use regulation” under RLUIPA. Under RLUIPA, “land use regulation” is defined as “a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land)” 42 U.S.C. § 2000cc-5(5). Here, there can be no dispute that the 2005 Act “limits or restricts” Edina's and Unity’s “use of land.”

Under RLUIPA, the 2005 Act is a “zoning law.” RLUIPA does not define zoning. However, under well-accepted definitions, “Zoning is the public regulation of the use of land,” www.legal-definitions.com. Minnesota statutes agree. The statute that gives municipalities “authority for zoning” states that “a

municipality may by ordinance regulate . . . the uses of buildings and structures for trade, industry, residence, recreation, public activities, or other purposes” Minn. Stat. § 462.357, subd. 1. Another Minnesota statute, granting town boards authority to regulate “the uses of buildings and structures,” uses the terms “land use” and “zoning” synonymously. Minn. Stat. § 366.12.

The 2005 Act regulates the use of religious institutions’ real property. It distinguishes between and among the uses of residences, schools, “private establishments,” parking areas, and tenant space.

In addition, the 2005 Act is a zoning law because it prevents localities from using their own authority to zone against firearms. For example, until the 2003 Act was passed, the City of Saint Paul restricted the carrying of firearms based on “zones.” Among the different zones were park zones, schools zones, public events, churches, licensed day care facilities, and public buildings. See Saint Paul Legislative Code, Public Health, Safety, and Welfare, Section 225. Now, the 2005 Act “sets forth the exclusive criteria to notify a permit holder when otherwise lawful firearm possession is not allowed in a private establishment and sets forth the exclusive penalty for such activity.” Minn. Stat. § 624.714, subd. 17(f). The 2005 Act further “sets forth the complete and exclusive criteria and procedures for the issuance of permits to carry and establishes their nature and scope.” No “governmental authority may change, modify, or supplement these criteria or procedures, or limit the exercise of a permit to carry.” Minn. Stat. § 624.714,

subd. 23. Thus, any local government that wishes to restrict firearms by zones no longer has authority to do so.

Further, by its provisions regarding the size, color, and type of signage at building entrances, the 2005 Act preempts municipal control of signage, a traditional subject of zoning. See, e.g., Edina City Code § 460 (signs in various zoning districts); Saint Paul Legislative Code, Zoning Code, Section 66.101-66.415 (same).

Similarly, the 2005 Act preempts municipal control of parking lots, including safety and security thereon, another traditional subject of zoning. See, e.g., Edina City Code §§ 475 (parking ramp licensing); § 850.08 (parking and circulation in various zoning districts); § 845 (restricted access parking lot license and regulations); § 1046 (parking in various zoning districts); Saint Paul Legislative Code, Zoning Code, Section 61.102(i)(2) (non-conforming uses for parking lots).

Clearly, firearms, signage, and parking lots are traditional subjects of local zoning. The 2005 Act preempts and prohibits such zoning.

If there is any doubt on the issue of whether the 2005 Act as a “land use regulation” is a “zoning” law, the Court should construe the term broadly. RLUIPA directs that it be “construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” 42 U.S.C. § 2000cc-3(g).

The 2005 Act violates RLUIPA, in two ways:

First, the 2005 Act implements or imposes a land use regulation in a way that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution. 42 U.S.C. § 2000cc(b)(1). Under the Act, every religious institution is a “private establishment,” and may prohibit firearms from its house of worship only in specified ways. Violation by a firearms-carrier is only a petty misdemeanor. Firearms may not be prohibited from parking lots and tenant space.

By contrast, certain non-religious assemblies and institutions have preference. Residential owners -- who may have assemblies of people in their homes for social purposes -- may prohibit firearms and provide notice “in any lawful manner.” Minn. Stat. § 624.714, subd. 17(d). Schools (other than Sunday Schools) may ban firearms, and possession of a firearm by a permit-holder on school property is a misdemeanor. This includes school administration buildings that are “prominently posted.” Minn. Stat. § 609.66, subd. 1d. Similarly, courthouse complexes and the State Capitol “area” enjoy the special protection of the criminal law. Minn. Stat. § 609.66, subd. 1g.

Religious assemblies are “similarly situated” to those other assemblies and, under RLUIPA, should have at least the same rights. Yet, the 2005 Act treats religious institutions on less than equal terms with certain favored nonreligious institutions. The District Court noted that the State has not articulated any basis for this distinction. A-20. Thus, the 2005 Act violates RLUIPA.

Second, the 2005 Act implements or imposes a land use regulation that unreasonably limits religious assemblies, institutions, and structures. 42 U.S.C. § 2000cc(b)(3)(B). In this regard, Edina and Unity incorporate all of their arguments and affidavits on the Minnesota constitutional freedom of religion issue.

For all of these reasons, this Court should affirm the District Court's holding on RLUIPA.

IV. THE DISTRICT COURT'S GRANT OF EQUITABLE RELIEF WAS APPROPRIATE.

The District Court ruled that Edina and Unity may prohibit firearms on all of their religious properties and give notice in any lawful manner. Such declaratory and permanent injunctive relief was appropriate.

This is not a case of a private wrong where money damages can compensate the plaintiffs. Respondents have alleged and proved violation of a precious, fundamental right secured by the Minnesota Constitution, the United States Constitution, and federal law. Respondents have already suffered, and will continue to suffer, irreparable injury through the unconstitutional provisions of the 2005 Act. According to the United States Supreme Court, and as the District Courts in Edina I and in this case recognized, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). See Kirkeby v. Furness, 52 F.3d 772, 775 (8th Cir. 1995) (overturning district court's refusal to enjoin

enforcement of city ordinance restricting residential picketing); Jolly v. Coughlin, 76 F.3d 468, 482 (2nd Cir. 1996) (denial of right to free exercise of religious beliefs is harm that cannot be adequately compensated monetarily).

Respondents do not agree with the State's argument that the District Court declared unconstitutional the entire 2005 Act. If it had, Respondents trust that the State would have made an immediate announcement to the public and then taken emergency steps to prevent the issuance of additional permits to carry. Of course, the State did not do so. Any fair reading of the District Court's order and memorandum shows that the District Court granted relief only as to the challenged provisions and only as to how such provisions infringed on the rights of religious institutions.

V. THE EQUITABLE RELIEF DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The State's position that the religious exemption created by the equitable relief violates the Establishment Clause of the First Amendment is wrong.³ Religious exemptions from laws of general application to accommodate religious freedom are routine and do not violate the Establishment Clause. This has been recognized both legislatively and judicially.

It is well recognized that the federal Free Exercise Clause allows exemptions from burdensome laws without violating the Establishment Clause. See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day

³ The State did not appeal the temporary injunctions in Edina I and in this case, as violating the Establishment Clause.

Saints v. Amos, 483 U.S. 327, 334-38 (1987) (Title VII exemption for religious employers does not violate Establishment Clause). Most on point is Cutter v. Wilkinson, 544 U.S. 709 (2005). In that case, the U.S. Supreme Court upheld the constitutionality of RLUIPA, which provided religious exemptions from land use and prison regulations, as a permissible accommodation of religion that is not barred by the Establishment Clause.

Similarly, under the Minnesota Constitution, religious exemptions from laws of general application to accommodate religion, and laws to protect free exercise, are entirely appropriate. For example, there is a religious exemption in the Minnesota Human Rights Act, Minn. Stat. § 363A.20, subd. 2, noted approvingly by the Minnesota Supreme Court in State v. Sports & Health Club, 370 N.W.2d 844 (Minn. 1985). As another example, Minnesota makes it a crime to interfere with religious observance. See Minn. Stat. § 609.28. It is difficult to imagine that the Minnesota Attorney General would contend that such statutes violate the Establishment Clause.

A religious exemption is unconstitutional only when it has “the ostensible and predominant purpose of advancing religion . . . when the government’s ostensible object is to take sides.” McCreary County v. American Civil Liberties Union, 554 U.S. 844, slip op. at 11 (2005). In this case, the District Court’s equitable relief does not advance religion; it merely accommodates religion by restoring rights taken away by the 2005 Act. The accommodation simply reduces a profound and ongoing violation of religious institutions’ traditional right to

worship without firearms. Such accommodation is entirely reasonable and constitutional.

CONCLUSION

In 2003 and 2004, in a previous case, the District Court held that the challenged provisions of the 2003 Act unconstitutionally infringed on the rights of religious institutions. In defiance of these rulings, the Legislature passed the 2005 Act and rejected a religious exemption thereto. Accordingly, the religious institutions have again been forced to resort to the judicial branch to enforce the guarantees of the Minnesota and United States Constitutions and federal law.

For all of these reasons, Edina and Unity request that this Court affirm the judgment below.

Dated: March 19, 2006

Respectfully submitted,



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**CERTIFICATE OF COMPLIANCE
WITH MINN. R. CIV. APP. P. 132.01, subd. 3**

The undersigned certifies that Respondents' Brief, submitted in 13 point typeface, complies with Rule 132. According to Microsoft Word, it contains 12,636 words and 1,207 lines of text.

Dated: March 19, 2007


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