

A03-723

STATE OF MINNESOTA  
IN COURT OF APPEALS

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EDINA COMMUNITY LUTHERAN CHURCH, et al.,

Appellants,

v.

STATE OF MINNESOTA,

Respondent.

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APPELLANTS' BRIEF

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS .....	2
I. THE MINNESOTA CITIZENS’ PERSONAL PROTECTION ACT OF 2003.....	2
II. THE LAWSUIT.....	5
III. THE DECISION BELOW.....	7
ARGUMENT .....	10
I. THE STANDARD OF REVIEW IS DE NOVO.....	10
II. APPELLANTS HAVE STANDING AND THIS CASE IS JUSTICIABLE.....	11
A. Appellants As Owners Of Religious Real Property .....	14
B. Appellants As Religious Landlords .....	20
C. Appellants As Religious Employers.....	21
D. The State’s Arguments.....	22
III. THIS COURT SHOULD GRANT TEMPORARY RELIEF.....	26
A. The Act Upsets The Existing Special Relationship Between The State And Appellants .....	27
B. The Act Violates The Minnesota Constitution, Article I, Section 16 .....	30
C. The Constitutional Violations Amount To Irreparable Injury.....	36

D. Public Policy Favors Injunctive Relief..... 37

E. There Is No Administrative Burden From An Injunction ..... 37

CONCLUSION AND RELIEF REQUESTED ..... 38

## **TABLE OF AUTHORITIES**

### **FEDERAL CASES**

<u>Elrod v. Burns,</u> 427 U.S. 347 (1976).....	37
<u>Jolly v. Coughlin,</u> 76 F.3d 468 (2nd Cir. 1996).....	37
<u>Kaiser Aetna v. United States,</u> 444 U.S. 164 (1979).....	14
<u>Kedroff v. St. Nicholas Cathedral,</u> 344 U.S. 94 (1952).....	32
<u>Kirkeby v. Furness,</u> 52 F.3d 772 (8th Cir. 1995) .....	37
<u>Nollan v. California Coastal Commission,</u> 483 U.S. 825 (1987).....	14
<u>PruneYard Shopping Center v. Robins,</u> 447 U.S. 74 (1980).....	16
<u>Roberts v. United States Jaycees,</u> 468 U.S. 609 (1984).....	33
<u>Ruckelshaus v. Monsanto Co.,</u> 467 U.S. 986 (1984).....	14
<u>U.S. v. James Daniel Good Real Property,</u> 510 U.S. 43 (1993).....	14

### **STATE CASES**

<u>Application of Atkinson,</u> 291 N.W.2d 396 (Minn. 1980).....	9, 15
<u>Bormann v. Board of Sup'rs,</u> 584 N.W.2d 309 (Ia. 1998), <u>cert. denied,</u> 119 S. Ct. 1096 (1999).....	16
<u>Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.,</u> 624 N.W.2d 796 (Minn. Ct. App. 1991).....	16

<u>Crowley Co. v. Metropolitan Airports Commission,</u> 394 N.W.2d 542 (Minn. Ct. App. 1986).....	10
<u>Culligan Soft Water Service v. Culligan International Co.,</u> 288 N.W.2d 213 (Minn. 1979).....	12
<u>Dahlberg Brothers, Inc. v. Ford Motor Co.,</u> 137 N.W.2d 314 (Minn. 1965).....	8, 10, 27
<u>Joel v. Wellman,</u> 551 N.W.2d 729 (Minn. Ct. App. 1996).....	11
<u>Eakman v. Brutger,</u> 285 N.W.2d 95 (Minn. 1979).....	10
<u>Frost-Benco Electric Association v. Minnesota Public Utilities Commission,</u> 358 N.W.2d 639 (Minn. 1984).....	10
<u>Geraci v. Eckankar,</u> 526 N.W.2d 391 (Minn. Ct. App. 1995), <u>review denied</u> (Mar. 14, 1995), <u>cert. denied</u> , 516 U.S. 818 (1995).....	32, 34
<u>Hill-Murray Federation of Teachers v. Hill-Murray High School,</u> 487 N.W.2d 857 (Minn. 1992).....	1, 21, 32, 34
<u>Metropolitan Sports Facilities Commission v. Minnesota Twins Partnership,</u> 638 N.W.2d 214 (Minn. Ct. App. 2002).....	27
<u>Rice Lake Contracting Corp. v. Rust Environmental &amp; Infrastructure, Inc.,</u> 549 N.W.2d 96 (Minn. Ct. App. 1996).....	1, 13, 24
<u>Schiff v. Griffin,</u> 639 N.W.2d 56 (Minn. Ct. App. 2002).....	11
<u>Special Force Ministries v. WCCO Television,</u> 584 N.W.2d 789 (Minn. Ct. App. 1998).....	15
<u>State by Humphrey v. Philip Morris Inc.,</u> 551 N.W.2d 490 (Minn. 1996).....	12
<u>State ex. rel. Hatch v. American Family Mutual Insurance Co.,</u> 609 N.W.2d 1 (Minn. Ct. App. 2000).....	23
<u>State v. French,</u> 460 N.W.2d 2 (Minn. 1990).....	30, 31, 33, 34

<u>State v. Haveland,</u> 25 N.W.2d 474 (Minn. 1946).....	13
<u>State v. Hershberger,</u> 462 N.W.2d 393 (Minn. 1990).....	passim
<u>State v. Scholberg,</u> 412 N.W.2d 339 (Minn. Ct. App. 1987).....	16
<u>State v. Wicklund,</u> 589 N.W.2d 793 (Minn. 1999), <u>affirming</u> 576 N.W.2d 753 (Minn. Ct. App. 1998).....	16
<u>Theide v. Town of Scandia Valley,</u> 14 N.W.2d 400 (Minn. 1944).....	15
<u>Twin Ports Convalescent, Inc. v. Minnesota State Board of Health,</u> 257 N.W.2d 343 (Minn. 1977).....	13

**FEDERAL STATUTES**

42 U.S.C. § 2000e(b)(1).....	17, 19
------------------------------	--------

**STATE STATUTES**

Ariz. Rev. Stat. § 13-3102(A)(10) .....	29
Ark. Code § 5-73-306(a)(17) .....	28
Ark. Code Ann. § 5-73-306(b)(1).....	29
Conn. Gen. Stat. § 29-28(e) .....	29
Ga. Code § 16-11-127(a)-(b) .....	28
Ky. Rev. Stat. Ann. § 237.110(14) .....	29
La. Rev. Stat. Ann. § 1379.3(N)(8).....	28
La. Rev. Stat. Ann. § 1379.3(O) .....	29
Mich. Comp. Laws § 28.425o, Section 5o(1) .....	28
Minn. R. Civ. P. 19 .....	25, 26

Minn. R. Civ. P. 52.01 .....	10, 25, 26
Minn. Stat. § 97B.001 .....	15
Minn. Stat. § 315.05.....	17
Minn. Stat. § 555.....	1
Minn. Stat. § 555.02.....	12
Minn. Stat. § 555.05.....	12
Minn. Stat. § 555.12.....	12
Minn. Stat. § 609.02.....	4
Minn. Stat. § 609.06.....	15
Minn. Stat. § 609.28.....	17
Minn. Stat. § 609.531 <u>et seq</u> .....	5
Minn. Stat. § 609.66.....	6, 35
Minn. Stat. § 609.605.....	4, 15
Minn. Stat. § 624.714.....	passim
Miss. Code § 45-9-101(13).....	28
Mo. Ann. Stat. § 571.030.1(8) .....	28
N.C. Gen. Stat. Ann. § 14-415.11(c) .....	29
N.D. Cent. Code § 62.1-02-05(1) .....	28
Okla. Stat., tit. 21, ch. 53, § 1290.22 .....	29
S.C. Code § 23-31-215(M)(9).....	28
Tenn. Code § 39-17-1315(b)(1).....	29
Tex. Gov't Code § 411.203 .....	29
Tex. Penal Code § 46.035(b)(6).....	28

Utah Code §§ 53-5-710(3).....	28
Va. Code § 18.2-308(O).....	29
Va. Code Ann. § 81.2-283 .....	28
Wyo. Stat. § 6-8-104(t).....	28

**MISCELLANEOUS**

Minnesota Constitution, Art. 1, § 8.....	25
Minnesota Constitution, Art. 1, § 16.....	passim
Senate File No. 842.....	2, 3

## STATEMENT OF THE ISSUES

1. Whether the District Court correctly denied Appellants temporary relief from the command of Minnesota Statutes § 624.714, subd. 17(c)(2003), that Appellants may not prohibit the carrying of firearms in their parking facilities or parking areas.

2. Whether the District Court correctly denied Appellants temporary relief from the command of Minnesota Statutes § 624.714, subd. 17(c)(2003), that Appellants may not prohibit the carrying of firearms by tenants and their guests.

3. Whether the District Court correctly denied Appellants temporary relief from the command of Minnesota Statutes § 624.714, subd. 18(c)(2003), that Appellants may not prohibit their employees from carrying firearms in Appellants' parking lots.

*As to each issue, the District Court denied temporary relief because it found "persuasive" the State of Minnesota's arguments on standing and justiciability.*

Apposite Authority: The Minnesota Declaratory Judgment Act, Minn. Stat. § 555; Rice Lake Contracting Corp. v. Rust Environmental & Infrastructure, Inc., 549 N.W.2d 96 (Minn. Ct. App. 1996); Minnesota Constitution Article I, Section 16; State v. Hershberger, 462 N.W.2d 393 (Minn. 1990); Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857 (Minn. 1992).

## STATEMENT OF THE CASE

On June 6, 2003, the District Court, Fourth Judicial District (Rosenbaum, J.) issued an Order and Memorandum granting in part and denying in part a motion for injunctive relief. This is an appeal from the portions of the Order and Memorandum denying relief.

## STATEMENT OF FACTS

### **I. THE MINNESOTA CITIZENS' PERSONAL PROTECTION ACT OF 2003.**

This case is a challenge under the Minnesota Constitution to what is known in the popular press as “the conceal-carry law,” although the law does not require that weapons carried by permit be concealed. The official name of the law is the Minnesota Citizens’ Personal Protection Act of 2003 (“the Act”). The text of the Act, now codified as Minn. Stat. § 624.714 is attached to the original Complaint. (App. 7-22.)

On March 24, 2003, the Minnesota Senate passed unanimously S.F. No. 842, which contained a number of non-controversial provisions about, among other things, state park fees, fish houses, and littering. On April 23, 2003, the Minnesota House of Representatives added the Act to S.F. No. 842, passed it, and sent it back to the Senate. No amendments were allowed on the Senate floor and,

on April 28, 2003, the Senate passed S.F. 842 including the Act. The Governor signed S.F. 842 the same day. The Act became effective May 28, 2003.<sup>1</sup>

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

While much of the debate on, and public attention to, the Act centered on provisions requiring that sheriffs “shall issue” permits, the Act also changed substantially the rights of “private establishments” to restrict persons carrying firearms from entering and remaining on private property. Under the Act, a private establishment is 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, the Appellant religious institutions are “private establishments.”

Accordingly, the Act affects substantially the rights of religious institutions. Specifically:

1. The Act commands that a private establishment, such as a religious institution, may prohibit firearms from its building only if it makes a “reasonable

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<sup>1</sup> Most newly enacted state laws go into effect on July 1. The Act provided (Article 2, Section 36) that it would become effective only 30 days after final enactment.

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” consists of at least two notices. Minn. Stat. § 624.714, subd. 17(b)(1)(i)&(ii). These notification criteria are “exclusive.” Minn. Stat. § 624.714, subd. 17(f).

First, a “conspicuous sign” must be “prominently” posted at “every entrance.” The statute sets detailed location, size, typeface, and content requirements. For example, the sign lettering must be “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 must contain the language “(INDICATE IDENTITY OF OPERATOR) BANS GUNS IN THESE PREMISES.” Minn. Stat. § 624.714, subd. (b)(1)(i), (2)&(3).

Second, a reasonable request includes personally informing the person of the posted request. The private establishment must “demand[] compliance.” Minn. Stat. § 624.714, subd. (b)(1)(ii).

If a gun-carrier enters the building despite the foregoing “reasonable request,” the private establishment may order the person to leave. Minn. Stat. § 624.714, subd. 17(a). A person who fails to leave is guilty of 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 is not more than \$25. This penalty is “exclusive” and overrides Minn. Stat. § 609.605, the general trespass statute. Minn. Stat. § 624.714, subd. 17(f). Unlike other gun crimes, the

trespasser's firearm is 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 Act carves out from the notification requirements “private residences.” Residential owners may prohibit firearms and provide notice “in any lawful manner.” Minn. Stat. § 624.714, subd. 17(d).

2. The Act commands that a private establishment, such as a religious institution, may not prohibit the lawful carrying of firearms in its parking facility or parking area. Minn. Stat. § 624.714, subd. 17(c). In other words, the State has granted every gun permit holder an easement to enter and remain on the parking lots of private establishments.

3. The Act commands that a private establishment, such as a religious institution, may not prohibit the carrying of firearms by tenants and their guests. Minn. Stat. § 624.714, subd. 17(e).

4. The Act commands that a private establishment, such as a religious institution, may not prohibit its employees from carrying firearms in the employer's parking lots. Minn. Stat. § 624.714, subd. 18(c).

## **II. THE LAWSUIT.**

Edina Community Lutheran Church is a small congregation that owns real property, including a church building, a contiguous parking lot, and a parsonage

leased to a pastor. The Edina church leases Sunday School space and a playground to a child care center.<sup>2</sup> (App. 3-4; App. 46; App. 60.)

On May 15, 2003, the Edina church, acting with the spiritual counsel of its pastors, prohibited firearms from all of the church's real property, including the parking area and the parsonage. (App. 4; App. 46.) On May 18, 2003, the Edina church decided to notify those entering the church's real property of the prohibition of firearms by signs at the front entrance to the church building and at the entrance to the parking lot. The signs (in Roman type) read as follows: "Blessed are the peacemakers. Firearms are prohibited in this place of sanctuary." The Edina church further determined that the Act's allowance of firearms in parking areas and tenant spaces and the Act's particular signage and personal notification requirements conflicted with the church's mission and worship practices. (App. 4; App. 46-47.)

On May 20, 2003, Edina Community Lutheran Church, its pastors, and a member commenced this action. (App. 1-6.)

On May 27, 2003, other religious institutions of the Jewish, Baptist, Congregationalist, Presbyterian, Buddhist, Methodist, and Lutheran faiths joined the lawsuit. (App. 58-85.) The Bishop of the Episcopal Diocese of Minnesota

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<sup>2</sup> Under the Act, the carrying of firearms in child care centers is a misdemeanor. However, the prohibition applies only while children are present and may be waived by the director of the center. Minn. Stat. § 609.66, subd. 1d(d)(4)(ii)&(e)(7).

joined on behalf of 32 mission congregations and other Episcopal facilities. (App. 58-85; App. 52-54.)

The First Amended Complaint contains detailed allegations that the additional plaintiffs own buildings and parking lots and are landlords and employers. Each plaintiff alleges that the commands of the Act are inconsistent with, and substantially infringe and interfere with, each religious institution's mission and sincerely held religious beliefs. (App. 58-85.)

On May 27, 2003, the Edina church made a motion for temporary relief. (App. 24-26.) While the motion was for a temporary restraining order, the District Court did not hear it ex parte and did not decide it before the Act went into effect. She directed that the motion be fully briefed and affidavits submitted and scheduled a hearing for May 29, 2003. All of the briefs and affidavits in support of, and in opposition to, the motion are submitted herewith. (App. 27-41; App. 45-57; App. 86-122.)

A hearing was held in open court on May 29, 2003. The transcript of the proceeding is attached. (App. 123-171.) In the days after the hearing, the District Court accepted a letter brief and an additional affidavit. (App. 172-175; App. 176-181.)

### **III. THE DECISION BELOW.**

On June 6, 2003, the District Court issued its Order and Memorandum, granting the motion in part and denying it in part. (App. 182-194.) While the

motion was made only by the Edina church, the District Court applied its order to all plaintiffs named in the First Amended Complaint. (App. 182.)

In all respects, the District Court's Order and Memorandum treated the motion as one for a temporary injunction. The specific orders characterized the motion as "for temporary injunctive relief." In the Memorandum, the Court cited case law on temporary injunctions and applied the five factors of Dahlberg Bros., Inc. v. Ford Motor Co., 137 N.W.2d 314 (Minn. 1965). The District Court's order applies "pending resolution of the action for declaratory judgment." (App. 182.) No further proceedings have been scheduled.

The District Court granted temporary injunctive relief as to the building notification provisions, holding that:

1. The notification provisions upset the preexisting "special relationship" between the parties in that they "facially violate Plaintiffs' constitutional protections." (App. 189-190.)
2. The infringement of the religious institutions' constitutional rights to worship and rights of conscience constitutes irreparable injury. These constitutional rights must be favored if not inconsistent with the peace and safety of the State. The State's interests are furthered by allowing the religious institutions police protection for trespass. (App. 190-191.)
3. The notification provisions have a "coercive effect" and it is "arguably likely" that they violate the free exercise of sincerely held religious

beliefs. The State's interest in peace and safety can be achieved with less burden on the religious institutions. (App. 192.)

4. The State has a compelling interest in the "regulation" of the carrying of arms.<sup>3</sup> Allowing religious institutions to post or notify in the same manner as private residents will protect the public policy of regulation. (App. 192.)

5. There is no administrative burden in the temporary decree. (App. 193.)

The District Court declined to grant relief as to the provisions of the Act affecting Appellants' rights as owners of parking lots, as landlords, and as employers. The District Court denied relief solely because it found "persuasive" the State's arguments on standing and justiciability. (App. 192.) The District Court did not explain how it found the State's arguments persuasive. Importantly, nowhere in its decision did the District Court make any findings adverse to the religious institutions on the "special relationship," on the substantial burden that the Act imposes on religious institutions, or on irreparable harm.

This appeal was taken on June 16, 2003. The State has not cross-appealed

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<sup>3</sup> The Act asserts that the second amendment to the United States Constitution grants a fundamental, individual right to keep and bear arms. Minn. Stat. § 624.714, subd. 22. This assertion is contrary to settled Minnesota law. See Application of Atkinson, 291 N.W.2d 396 (Minn. 1980) (second amendment is not an individual right but a collective right to serve as militia). The District Court recognized that the compelling state interest identified in the Act is not the promotion of the right to bear arms; it is the "regulation" of that purported right.

the District Court's grant of injunctive relief on the notification provisions of the Act.

## **ARGUMENT**

The primary issue on this appeal is whether the District Court was correct on the legal issues of standing and justiciability. As the District Court was incorrect, this Court should grant temporary injunctive relief.

### **I. THE STANDARD OF REVIEW IS DE NOVO.**

The usual scope of review of an order denying temporary relief is whether there was an abuse of the trial court's discretion. Eakman v. Brutger, 285 N.W.2d 95, 97 (Minn. 1979). The District Court must make sufficient findings to permit meaningful appellate review. Minn. R. Civ. P. 52.01; Crowley Co. v. Metro. Airports Comm'n, 394 N.W.2d 542, 544-45 (Minn. Ct. App. 1986).

An abuse of discretion standard is not proper here. In this case, the District Court granted temporary relief with respect to the Act's notification provisions, but denied it with respect to other provisions of the Act. In granting relief, the District Court made findings and ruled in appellants' favor on all five Dahlberg factors.

However, in denying relief, the District Court did not make or rely on any factual findings. Relief was denied, with little explanation, on the legal issues of standing and justiciability. This Court need not defer to the District Court's legal conclusions. See Frost-Benco Elec. Ass'n v. Minnesota Public Utilities Comm'n, 358 N.W.2d 639, 642 (Minn. 1984). Standing and justiciability are issues of

jurisdiction, reviewed de novo. Joel v. Wellman, 551 N.W.2d 729, 730 (Minn. Ct. App. 1996), rev. denied (Minn. Oct. 29, 1996); Schiff v. Griffin, 639 N.W.2d 56, 59 (Minn. Ct. App. 2002).

Accordingly, Appellants submit that the Court of Appeals may make its own decision on whether to grant temporary relief, without deference to the District Court.

**II. APPELLANTS HAVE STANDING AND THIS CASE IS JUSTICIABLE.**

This is an action by religious institutions with definite and concrete spiritual and property interests that, on an ongoing basis, are irreparably harmed by the Act's unconstitutional commands.

A principled reconciliation of the District Court's grant of relief on the Act's notification provisions with its denial of relief on the Act's other provisions is impossible. By granting relief, the District Court determined that Appellants have standing as religious property owners and that there is a justiciable controversy regarding the Act's notification requirements. The District Court determined that Appellants were irreparably injured and would be further injured by a denial of police protection.

Yet, in the same decision, without any substantive explanation, the District Court determined that there are "persuasive" issues of standing and justiciability with regard to Appellants as parking lot owners, landlords, and employers. This distinction is difficult to understand. While the building notification provisions

are “coercive,” as the District Court found, (App. 192.), at least the Act purported to allow Appellants to exclude firearms from some of their real property. The provisions of the Act that prohibit Appellants entirely from excluding firearms from other portions of their real property are even more coercive.

The Minnesota Declaratory Judgment Act, Minn. Stat. § 555.01 et seq., allows any person “whose rights, status, or other legal relations are affected by a statute” to “have determined any question of construction or validity arising under” the statute. Minn. Stat. § 555.02. The purpose of the Declaratory Judgment Act is to give the courts power to resolve proceedings “in which judgment or decree will terminate the controversy or remove an uncertainty.” Minn. Stat. § 555.05. The Declaratory Judgment Act is remedial; “its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.” Minn. Stat. § 555.12. Parties should be allowed to determine their rights and liabilities pertaining to an actual controversy before it leads to repudiation of obligations, invasion of rights, and the commission of wrongs. Culligan Soft Water Service v. Culligan Int’l Co., 288 N.W.2d 213, 215-16 (Minn. 1979).

Whether under the Declaratory Judgment Act or otherwise, standing requires “that a party have a sufficient stake in a justiciable controversy to seek relief from a court.” State by Humphrey v. Philip Morris Inc., 551 N.W.2d 490, 493 (Minn. 1996) (citation omitted). The purpose of the standing doctrine is to guarantee that there is sufficient controversy between the parties so that the issue

is properly presented to the court. Twin Ports Convalescent, Inc. v. Minnesota State Bd. of Health, 257 N.W.2d 343, 346 (Minn. 1977) (citation omitted).

Under the Declaratory Judgment Act, justiciability requires (1) a genuine or present controversy (2) presented by persons with truly adverse interests and (3) capable of specific rather than advisory relief by a decree of judgment. Rice Lake Contracting Corp. v. Rust Environmental & Infrastructure, Inc., 549 N.W.2d 96, 99 (Minn. Ct. App. 1996) (citation omitted). The “present controversy” requirement is viewed leniently and is satisfied if there is a controversy of sufficient immediacy and reality to warrant judgment. Id. Jurisdiction exists if the plaintiff possesses “a bona fide legal interest which has been, or with respect to the ripening seeds of a controversy is about to be, affected in a prejudicial manner.” State v. Haveland, 25 N.W.2d 474, 477 (Minn. 1946).

Applying these tests, appellants have standing and there is a justiciable controversy.

The Act’s commands have created enormous and understandable “uncertainty” and “insecurity,” to use the words of the Declaratory Judgment Act, among religious institutions in the State of Minnesota. As of May 28, 2003, the State took away from Appellants their right to exclude permit holders carrying guns from their religious properties and their religious activities thereon. This is not a generalized concern; Appellants’ bona fide interests in their religions and their real property have been prejudiced, in violation of the Minnesota Constitution.

**A. Appellants As Owners Of Religious Real Property.**

The record is clear that, as part of their religious mission and to assist their worshipers, the Appellants own parking lots. The Act contains a clear statutory command: no matter what its religious beliefs, a religious institution may not prohibit all firearms from all of its real property. The State has taken from Appellants the right to control their property and has conveyed an easement to firearms permit holders. This is an unprecedented intrusion on the rights of property owners.

The United States Constitution, by the fifth amendment, guarantees that private property shall not be taken for public use without just compensation. Individual freedom finds tangible expression in property rights. U.S. v. James Daniel Good Real Property, 510 U.S. 43, 61 (1993). As a general matter, a private property owner enjoys the right to exclude others. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984). The right to exclude others from real property is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). If government gives individuals a permanent right of access to a landowner’s premises, such taking is unconstitutional without compensation. Nollan v. California Coastal Comm’n, 483 U.S. 825, 831 (1987).

Minnesota has always recognized the right to exclude. Article I, Section 13 of the Minnesota Constitution prohibits the taking or damaging of private property for public use without just compensation, first paid or secured. Minnesotans are

guaranteed a certain remedy in the laws for all injuries or wrongs to their property, under Article I, Section 8.

The right to exclude others is enforced through Minnesota criminal law. Prior to the special rights granted to firearms carriers by the Act, the law recognized the right of a property owner to be free from trespass by the posting of property or the ejection of unwanted intruders. See Minn. Stat. § 609.605, subd. 1(b) (lawful possessor of property has right to demand departure of trespasser). For example, a landowner may post the land to prohibit entry for outdoor recreation. Minn. Stat. § 97B.001, subd. 4. One may not enter agricultural land for outdoor recreation purposes without first obtaining permission of the owner, occupant, or lessee, and must leave any land when told to do so. Minn. Stat. § 97B.001, subd. 2-3. A person in lawful possession of real property has the right to use reasonable force in resisting a trespass or other unlawful interference with real property. Minn. Stat. § 609.06.

Further, at common law, “the right to acquire, possess, and enjoy property” is an “inherent and inalienable right,” Theide v. Town of Scandia Valley, 14 N.W.2d 400, 405 (Minn. 1944),<sup>4</sup> recognized by a common law cause of action. A person who enters land without the owner’s consent commits trespass. Special Force Ministries v. WCCO Television, 584 N.W.2d 789, 792 (Minn. Ct. App. 1998) (citation omitted), rev. denied (Minn. Dec. 15, 1998). Indeed, sending

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<sup>4</sup> By contrast, the individual right to carry weapons is not a fundamental right at common law. See Application of Atkinson, 291 N.W.2d 396, 398 (Minn. 1980).

bullets onto the land of another is a trespass. See Citizens for a Safe Grant v. Lone Oak Sportsmen’s Club, Inc., 624 N.W.2d 796, 805 (Minn. Ct. App. 1991).

This Court has recognized and enforced the rights of property owners to exclude others from their land, even when the trespassers claim important rights. For example, this Court and the Minnesota Supreme Court have held that a large shopping mall, open to the public, may exclude those claiming to exercise free speech rights. See State v. Wicklund, 589 N.W.2d 793 (Minn. 1999) (Mall of America may exclude those claiming to exercise first amendment rights), affirming 576 N.W.2d 753 (Minn. Ct. App. 1998). Similarly, in State v. Scholberg, 412 N.W.2d 339, 342 (Minn. Ct. App. 1987), rev. denied (Minn. Nov. 13, 1987), this Court held that a medical building had the right to exclude anti-abortion demonstrators, recognizing that the right to exclude others is “one of the essential sticks in the bundle of property rights,” quoting PruneYard Shopping Center v. Robins, 447 U.S. 74, 82 (1980). If government takes from a landowner the right to exclude and gives an easement to another, it has violated the landowner’s property rights. See Bormann v. Bd. of Sup’rs, 584 N.W.2d 309 (Ia. 1998), cert. denied, 119 S. Ct. 1096 (1999) (law that gave farmers immunity from nuisance suits unconstitutional because it created an easement on adjacent land; law “appropriates valuable private property interests and awards them to strangers”).

In this case, the moment the Act was signed into law, the State took a stick – the right to exclude – from each Appellant’s bundle of property rights and gave

an easement to firearms permit holders. Therefore, as of May 28, 2003, Appellants, as property owners, sustained immediate and concrete injury recognized by the law.

The injury is even more immediate, concrete, and serious because Appellants are religious institutions. Article I, Section 16 of the Minnesota Constitution prohibits “any control of or interference with the rights of conscience.” Further, by its prohibition of the compelled erection of “any place of worship,” Section 16 recognizes that religious ownership and control of real property is integral to freedom of conscience and the free exercise of religion.

The right of religious institutions to further their missions through the control of real property has been recognized expressly by Minnesota statute. In this state, religious corporations have the right to “erect, acquire, and operate churches, dwellings for their ministers, and other buildings for the use of the church, congregation, or society, hospitals, nurses’ homes and training schools missions, camps and recreational grounds, and other buildings or facilities for other religious, moral, and charitable activities.” Minn. Stat. § 315.05. Through the criminal law, Minnesota law protects the access of worshipers to their houses of worship. See Minn. Stat. § 609.28 (prohibits interference with religious observance).<sup>5</sup>

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<sup>5</sup> Federal law, too, recognizes the important role of ownership of real property in religious freedom. The Religious Land Use and Institutionalized Persons Act of 2000 provides protects religious institutions from discriminatory land use regulations. See 42 U.S.C. § 2000e(b)(1).

Appellants have pleaded specifically that the Act's prohibition on the ban of firearms in parking lots has injured their religious rights. As the District Court determined: "It is uncontroverted that Church real property, including its parking facilities or parking areas, is used at times for Church functions, as worship space and for other Church activities." (App. 188.)<sup>6</sup> Edina Community Lutheran Church, for one, admits that it has violated the Act by banning firearms on all of its property including the parking lot. Moreover, the Edina church has posted a sign at the entrance to the parking lot prohibiting firearms. (App. 46.) The Act has eliminated the Edina church's right to eject trespassers and call for police protection.

The Lutheran and Episcopal bishops have submitted affidavits that the real properties of their denominations, including parking lots, are "holy places" and that parking lots are integral parts of the Episcopal and Lutheran worship space in which firearms should not be carried. (App. 50; App. 53.) The Lutheran bishop notes that many churches, during summer or for designated holy days, begin or hold worship services in their parking areas. (App. 50.) "On a regular basis, discussions regarding sermons, worship and church affairs begin or continue in our parking areas," says Bishop Craig Johnson. (Id.)

Concrete injury is also pleaded by Mount Zion Hebrew Congregation and proved by affidavit. (App. 55-57.) The synagogue alleges that the presence of

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<sup>6</sup> The District Court referred to all plaintiffs collectively as "the Church." (App. 184.)

firearms in its parking lot is “a real and significant logistical and security burden.” (App. 56.) The presence of firearms poses security concerns which may be unique to a Jewish congregation. (Id.) The Act’s command also interferes with an ongoing parking contract. (App. 56-57.)

Other Appellants that use their parking areas for worship and other church-related activities include Holy Trinity Lutheran in Minneapolis, Plymouth Congregational in Minneapolis, and Spirit of Hope United Methodist in Golden Valley. (App. 65; App. 67; App. 68.) St. Luke’s of Minnetonka Presbyterian uses its driveway for ice cream socials and allows the use of its parking lot for families and children participating in baseball games at the adjacent elementary school. (App. 72.) Mayflower Congregational in Minneapolis uses its parking lot for church youth group car wash fundraisers and as a gathering spot for Meals on Wheels volunteers. (App. 80.)

Certainly if a secular owner has the right, as this Court has held, to exclude from its property those seeking to exercise first amendment rights, Appellant religious institutions must have the constitutional right to exclude from their religious property those who carry firearms. But, as of 12:01 a.m. on May 28, 2003, the State took from religious institutions this essential stick in the property rights bundle: the right to exclude gun-toting trespassers from what the religious institutions understand to be holy places. Clearly, Appellants have alleged direct and concrete injury to their rights and missions by the State’s command.

**B. Appellants As Religious Landlords.**

The record is clear that, as part of their religious mission, the Appellants are landlords. The Act contains a clear statutory command: it is now against public policy for a religious institution to contract with its tenants to prohibit the carrying of firearms in leased space and any such lease terms cannot be enforced in our courts. This has an immediate and concrete effect on Appellant landlords who have sincere religious beliefs that firearms on their properties are inconsistent with their religious missions.

For example, Edina Community Lutheran Church leases its Sunday School rooms and playground to a licensed day care center and one of the pastors is a tenant in the parsonage. The church admits that it has violated the Act by banning firearms on all of its property, including in leased space. Further, the Edina church wishes to amend its lease with the child care center to include a prohibition of firearms by the center and its guests. (App. 46.) Under this Act, it cannot do so.

At least five other congregations allege that they are landlords to day care centers. Among the tenants of Appellants are the Metro Work Center for developmentally disabled adults, Habitat for Humanity, Alcoholics Anonymous, a theater company, a community council, an adoption agency, and Boy and Girl Scouts. (App. 65-67; App. 70; App. 79.)

By passing a law restricting religious institutions' rights to use their space and contract with others pursuant to their religious missions, the State has caused immediate, direct, and concrete injury to Appellants.

**C. Appellants As Religious Employers.**

The record is clear that, as part of their religious mission, the Appellants are employers. The Act contains a clear statutory command: no matter what its religious beliefs, a religious institution may not prohibit its employees from carrying firearms in the parking lot. This has an immediate and concrete effect on Appellants and their sincere religious beliefs. Most Appellants have prohibited firearms on all of their real property, with no exception for employees. (App. 46; App. 56; App. 61-82.) Minnesota constitutional law is clear that religious employers have absolute authority to require employees to comply with the employer's religious beliefs. See Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 866 (Minn. 1992). This Legislature has undermined that authority.

Accordingly, Appellants have standing because they have been directly and concretely injured by the Act's commands. The case is justiciable because: (1) there is a genuine and present controversy over the Act's constitutionality; (2) between Appellants and the State with truly adverse interests; and (3) capable of specific relief by way of injunction.

**D. The State’s Arguments.**

Before and during the District Court hearing on the motion for a temporary restraining order, the State disputed none of these facts regarding religious institutions as parking lot owners, landlords, and employers. Indeed, the State acknowledged that the Act requires that religious institutions “tolerate” the presence of firearms in their parking lots and tenant spaces. (App. 97.) But freedom of religion gives religious institutions the right not to tolerate such intrusions.

Instead, the State made two arguments below.

First, the State argued that religious institutions have no standing to challenge the Act’s command as to parking lots because the Act “contains no enforcement mechanism” and, as a result, “[w]ith no credible threat of prosecution or even civil enforcement, plaintiffs may choose to ignore this provision of the statute – and ban guns in their parking lot – without consequence.” (App. 90.) Similarly, the State argued that “Should plaintiffs decide to ban their tenants, by contract or otherwise, from possessing firearms in the leased areas of plaintiffs’ property, they will suffer no penalty under the Act, as it contains no enforcement mechanism.” (App. 92.)

The State’s theory that it cannot enforce the Act is of little comfort to Appellants. At oral argument, counsel for Appellants requested that the State stipulate that the religious institutions could violate the law and that the State

would take no action. The State declined to do so, saying “The State does have an interest in the laws being followed.” (App. 149.)

Appellants are aware of no other case in which this Attorney General has asserted that he lacks power to enforce a duly-enacted state law. Indeed, in other cases this Attorney General has argued, and this Court has agreed, that, at common law, the Attorney General “may institute, conduct and maintain all such actions as he deems necessary for the enforcement of the laws of this state . . . .” See State ex. rel. Hatch v. American Family Mutual Ins. Co., 609 N.W.2d 1, 3 (Minn. Ct. App. 2000) (citation omitted).

Regardless whether the Attorney General can or will commence a civil action against Appellants, they have suffered real and concrete injury. They have lost their rights to control their religious real property and their employees.

Moreover, Appellants’ concrete interest in knowing when they can rely on police assistance has been injured. As the District Court recognized with respect to the building notification provisions, Appellants are damaged if they cannot avail themselves of police protection. (App. 189-190.) They should not have to wait for a gun-packing trespasser to learn whether the Act is unconstitutional. Just as they needed certainty on the notification provisions, so Appellants need to know whether firearms-carriers in their parking lots and in their tenant spaces should be treated as trespassers and the police called, or whether permit holders are armed not only with guns but with rights granted by the Act that trump Appellants’ religious freedom.

Appellants also have a concrete interest in assessing their potential civil liability and their rights under their insurance policies. They need to know whether their actions to prohibit firearms are legal or whether they violate the law and put their insurance coverage at risk. See Rice Lake, 549 N.W.2d at 101 (“courts in some cases appropriately decide disputes without requiring the parties . . . to take the unacceptable risk of cementing legal positions carrying unknown consequences”). Religious institutions are rightly concerned about their exposure should a permit holder on their property be involved in the intentional or accidental discharge of a firearm. (App. 47.)

The proposition advanced by the State -- the idea that, notwithstanding the express statutory commands of the Act, religious institutions have no legal remedy to challenge an unconstitutional law -- is breathtaking. Article I, Section 16 of the Minnesota Constitution says that the right to worship God shall never be infringed, and it forbids “any control of or interference with the rights of conscience” (emphasis added), no matter how strong or weak the associated enforcement scheme.

Religious institutions care about their rights of conscience, but they also care about abiding by valid civil laws. (See App. 47.) (Pastor Erik Strand: “Our Church takes very seriously its obligation to abide by valid laws.”) A holding that this case is not justiciable would mean that religious institutions could not obtain a prompt judicial determination on the constitutionality of the State’s commands to them. They would be faced with the Hobson’s choice of adhering to their

religious beliefs but violating civil law, or abiding by the law and violating their religious beliefs. That cannot be what the framers of the Minnesota Constitution contemplated. Further, Appellants would be deprived of their rights to a certain remedy and justice without delay in violation of Article I, Section 8 of the Minnesota Constitution.

Second, in opposing the motion below, the State argued that this case is not justiciable because appellants have not joined as defendants all firearms permit holders. (The State does not explain how this would be done, by a defendant class or otherwise.) The State's argument does not truly go to this Court's jurisdiction; it is more in the nature of an argument under Minn. R. Civ. P. 19 regarding indispensable parties. In any event, the argument is absurd. It was the State, not permit holders, that promulgated the Act's unconstitutional commands. This is the State's law; the State must defend its constitutionality; and the State cannot evade its responsibility by demanding that Appellants undertake to identify and name as co-defendants an ever-expanding and secret group of tens of thousands of permit holders. See Minn. Stat. § 624.714, subd. 15(a)&(b) (state database of permit holders available only to law enforcement).

Applying the tests of Rule 19, complete relief can be accorded between the Appellants and the State. See Minn. R. Civ. P. 19.01(a). Any interest in the subject of this action can be claimed by permit holders only through the State's commands. See Minn. R. Civ. P. 19.01(b). The State is an adequate representative for any citizen who wants to defend the Act's constitutionality, and

the religious institutions would have no adequate remedy if denied relief because of the nonjoinder of thousands of permit holders. See Minn. R. Civ. P. 19.02. If the State were truly concerned about the legal rights of permit holders, it could have made a motion in the District Court that they be joined, or it could have sought to join them as third-party defendants.

Regardless, the fact that permit holders are not parties does not make this case non-justiciable nor should it deprive appellants of temporary relief.

### **III. THIS COURT SHOULD GRANT TEMPORARY RELIEF.**

The District Court's decision not to grant temporary relief to Appellants as parking lot owners, landlords, and employers rested solely on an issue of law. This Court has before it the entire record. Therefore, if this Court comes to a conclusion on standing and justiciability contrary to the District Court's decision, there is nothing to prevent this Court from entering temporary relief immediately to protect Appellants' constitutional rights.

This Court is well familiar with the standard for the issuance of a temporary relief. Five factors are to be weighed:

1. The nature and background of the relationship between the parties preexisting the dispute.
2. The harm to be suffered if relief is denied as compared to that inflicted if it is granted pending trial.
3. The likelihood that one party or the other will prevail on the merits.

4. The aspects of the fact situation, if any, which permit or require consideration of public policy.

5. The administrative burdens involved in judicial supervision and enforcement.

Metro. Sports Facilities Comm'n v. Minnesota Twins P'ship, 638 N.W.2d 214, 221 (Minn. Ct. App. 2002), rev. denied (Feb. 4, 2002) (citing Dahlberg Bros. v. Ford Motor Co., 137 N.W.2d 314, 321-22 (Minn. 1965)).

Applying these factors, Appellants are entitled to further injunctive relief.

**A. The Act Upsets The Existing Special Relationship Between The State And Appellants.**

The District Court found a preexisting and special relationship between the State and religious institutions based on Article I, Section 16 of the Minnesota Constitution.

The Act dramatically alters the relationship between the State and Appellants. The Act is an unprecedented, radical departure from the way the criminal and civil laws have treated religious institutions and their real properties.

As discussed above, by its Constitution and through statute, Minnesota has recognized that religious institutions have an inherent right to own and control real property. A survey of the laws of other states that require that firearms permits "shall issue" reveals no other state has so upset the special relationship between state government and religious institutions. Minnesota's Act is by far the most

intrusive on the rights of religious institutions and, for that matter, on the rights of all owners of private property.

Twelve states with conceal-carry laws specifically prohibit the carrying of a 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”).

At least ten states, by statute, expressly recognize the rights of private property owners to ban firearms (including those carried by permit) in the traditional manner: posting or personal notification. See ARIZ. REV. STAT. § 13-3102(A)(10)(reasonable request by the operator of public establishment); ARK. CODE ANN. § 5-73-306(b)(1)(placing of a written notice); CONN. GEN. STAT. § 29-28(e)(prohibition by the person who owns or exercises control over such premises); KY. REV. STAT. ANN. § 237.110(14)(post signs on or about premises open to the public); LA. REV. STAT. ANN. § 1379.3(O)(no limitation on right of property owner to prohibit or restrict access of persons with concealed handguns); N.C. GEN. STAT. ANN. § 14-415.11(c)(notice by conspicuous notice or statement); OKLA. STAT., TIT. 21, CH. 53, § 1290.22 (no limitation on existing rights of property owner to control possession of weapons); TENN. CODE § 39-17-1315(b)(1)(posting or notification to ban employee possession of weapons on premises); TEX. GOV'T CODE § 411.203 (no limitation on right of employers to prohibit carrying of concealed handguns on premises of business); VA. CODE § 18.2-308(O)(owner of private property may prohibit possession of handguns).

Most other conceal-carry statutes contain no provisions like Minnesota's that purport to override the traditional right of a property owner to exclude others or that eviscerate the traditional criminal and civil law of trespass. Appellants have not located a conceal-carry law in any other state that: (1) requires posting

and personal notification to prohibit firearms; (2) flatly prohibits property owners (including employers) from banning guns from all parking facilities; and (3) flatly prohibits landlords from negotiating leases that prohibit firearms. By any standard, as applied to religious institutions and other property owners, the Act is a substantial departure from any statutory precedent.

**B. The Act Violates the Minnesota Constitution, Article I, Section 16.**

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. The Minnesota liberty of conscience clause 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. 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. Consequently, “Minnesotans are afforded greater protection for religious liberties against governmental action under the state constitution than under the first amendment of the federal constitution.” Hershberger, 462 N.W.2d at 397.

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 regulation burdens the exercise of religious belief. Third, it must be determined whether the state interest in the regulation is overriding and compelling. Fourth, it must be determined whether the state regulation 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 Act clearly violates Article I, Section 16.

**First**, Appellants' beliefs are sincerely held. They believe that the presence of firearms on their religious property is inconsistent with their doctrines and missions. The sincerity of religious beliefs is supported by the affidavits of Pastor Erik Strand, Bishop Craig Johnson, and Bishop James Jelinek. (App. 45-54.) The Affidavit of Steven Silverman of Mount Zion Hebrew Congregation, and the allegations of the First Amended Complaint, demonstrate that the belief that religious property is a sanctuary in which firearms are not allowed is widely and sincerely shared by many faith communities. (App. 55-57; App. 58-87.)

Below, the State did not question the sincerity of the beliefs of Appellants. (App. 153.) Nor should it do so here. "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 Act infringes, controls, and interferes with the exercise of Appellants' religious beliefs. The affidavits show that the Act is an extraordinary

infringement on Appellants' right to use their real properties for worship and religious mission. The Act prohibits the Appellants from banning guns from their parking lots. As discussed above, Appellants' parking areas are not only places for worshipers to leave their cars; they are sometimes used as worship space and the activities in the religious buildings spill over into the parking areas. In essence, the Act forces Appellants and their worshipers to associate with gun-carriers. Cf. Roberts v. United States Jaycees, 468 U.S. 609, 622-23 (1984)(right to associate with others for religious ends "plainly presupposes a right not to associate").

The Act further burdens the Appellants' rights to use their real property in a manner consistent with their missions by prohibiting them as landlords from restricting the possession of firearms by their tenants. As part of religious mission, a number of Appellants are landlords to licensed day care centers and other social service organizations. The Act unconstitutionally burdens Appellant landlords from negotiating amendments to their leases to prohibit all guns in tenant space. Compare State v. French, 460 N.W.2d 2, 9-10 (Minn. 1990) (exemption from discrimination statute for landlord with sincerely held religious belief).

Finally, the Act unconstitutionally burdens Appellants' religious rights as employers.

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).

The Act prevents religious institutions from prohibiting their employees to possess firearms on religious property. The Act cannot constitutionally prevent the Appellants from imposing these belief-related restrictions on their employees.

**Third**, the State interest in the offending provisions of the 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 statutory purpose, 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).

It is not even clear from the Act that the State's compelling state interest is public peace or safety. The Act itself declares, at Minnesota Statutes § 624.714, subd. 22, that there is a compelling state interest in the "regulation" of the individual right to keep and bear arms. Precisely what this means is not apparent.

In any event, the State has not shown that public safety will be threatened if persons carrying guns by permit are not allowed in religious institutions' parking lots and leased space. As discussed above, many "shall issue" states not only allow religious institutions to prohibit firearms, they have enacted laws that make it a crime to carry firearms, whether by permit or otherwise, on religious property. Certainly, religious institutions should be entitled to the same right the legislators continue to grant themselves through the statute limiting the carrying of firearms in the State Capitol, other state buildings, and courthouse complexes. See Minn. Stat. § 609.66, subd. 1g.

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

Even if the State could assert a compelling public safety interest, 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 upheld the less restrictive alternative: 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 evil on the real property of religious institutions that must be remedied. However, there are many less restrictive alternatives to increase security. For example, if the State was genuinely concerned about crime in the parking lots of religious institutions, it could encourage local police departments to drive by more frequently. Or, it could strengthen (rather than weaken) the criminal trespass law for those who carry firearms.<sup>7</sup> The Lutheran Bishop states that his synod is willing to work with the State on ways “to enhance safety in ways other than adding weapons to our worship.” (App. 51.)

Clearly, there are many ways to increase safety and security on religious real property short of requiring that religious institutions allow access to gun-carriers.

**C. The Constitutional Violations Amount To Irreparable Injury.**

This is not a case of a private wrong that can be fully compensated by money damages. This is a case alleging violation of a precious, fundamental right secured by the Minnesota Constitution. Appellants have already suffered, and will continue to suffer, irreparable injury through the unconstitutional provisions of the Act. According to the United States Supreme Court, and as the District Court recognized, “[t]he loss of First Amendment freedoms, for even minimal periods of

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<sup>7</sup> In fact, the State has reduced to a petty misdemeanor the penalty for trespassers who carry firearms without a permit! See Minn. Stat. § 624.714, subd. 17(a) (applies to persons carrying “under a permit or otherwise”).

time, unquestionably constitutes irreparable injury.” Elrod v. Burns, 427 U.S. 347, 373 (1976). See Kirkeby v. Furness, 52 F.3d 772, 775 (8<sup>th</sup> Cir. 1995) (overturning district court’s refusal to enjoin enforcement of city ordinance restricting residential picketing); Jolly v. Coughlin, 76 F.3d 468, 482 (2<sup>nd</sup> Cir. 1996) (denial of right to free exercise of religious beliefs is harm that cannot be adequately compensated monetarily).

By contrast, the State will sustain little harm from temporary relief. The State’s first interest, of course, should be to comply with the Minnesota Constitution. In any event, its “compelling state interest,” according to the Act, is the regulation of the carrying of firearms. If the parking lot, landlord, and employer provisions of the Act are declared unconstitutional, the possession of firearms, at least on the property of religious institutions, will still be regulated.

**D. Public Policy Favors Injunctive Relief.**

Injunctive relief would further the public policies of the free exercise of religion and the right of real property owners to exclude trespassers.

**E. There Is No Administrative Burden From An Injunction.**

An injunction as to the provisions of the Act regarding parking areas and leased space would not impose any administrative burden. The District Court already found that injunctive relief as to the notification provisions of the Act would not be a burden.

**CONCLUSION AND RELIEF REQUESTED**

For all of these reasons, Appellants request that the Court of Appeals maintain the pre-Act status quo and grant the temporary relief denied by the District Court.

Specifically, Appellants request that:

1. Pending further order of this Court, Minnesota Statutes § 624.714, subd. 17(c) and 18(c) (parking areas and parking facilities) be stayed as to Appellants.
2. Pending further order of this Court, Minnesota Statutes § 624.714, subd. 17(e) (tenant space) be stayed as to Appellants.
3. Pending further order of this Court, the State of Minnesota and its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them be enjoined from enforcing or attempting to enforce against Appellants the provisions of the Act stayed as to Appellants.

Dated: July 16, 2003

Respectfully submitted,

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