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## ARGUMENT

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

Of course a district court's factual findings must be given deference by this Court. R.B. 6.<sup>1</sup> For example, the District Court's determination that the notification provisions of the Minnesota Citizens' Personal Protection Act of 2003 ("the Act") upset the special relationship between the Appellants and the State, cause irreparable harm, and are an unconstitutional burden on the free exercise of religion would be entitled to deference had the State appealed the partial grant of preliminary relief. These findings and conclusions were based on the detailed facts presented by Appellants unrebutted by the State.

But the District Court's decision to deny further injunctive relief was not based on factual findings. It was based on a conclusion of law that Appellants lacked standing. This conclusion was, essentially, unexplained. See Minn. R. Civ. P. 52.01 (requiring sufficient findings and conclusions for meaningful review of decisions granting or refusing interlocutory injunctions); Minn. R. Civ. P. 65.04 (injunction order should set forth the reasons for its issuance).

Standing and justiciability are issues of jurisdiction. The existence of jurisdiction is a question of law, subject to de novo review. Kellar v. Von Holtum, 605 N.W.2d 696, 700 (Minn. 2000). Accordingly, this Court must first determine whether it has jurisdiction. If it does, it should then make determinations on, and

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<sup>1</sup> "R.B." denotes respondent's brief to this Court.

weigh, the factors in Dahlberg Bros. Inc. v. Ford Motor Co., 137 N.W.2d 314, 321-22 (Minn. 1965).

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

The State does not dispute that Appellant religious institutions' ownership and control of real property is integral to their religious mission and is recognized by the Minnesota Constitution and statutes that predate the Act. A.B. 17.<sup>2</sup> The State does not deny that Appellants' parking lots are used not only by worshippers to park their cars, but also for worship and other religious activities, and that the presence of firearms in such "holy places" is contrary to Appellants' sincere religious beliefs. A.B. 18-19. Nor does the State deny that the Act contains a straightforward command that Appellants may not prohibit firearms, including those possessed by employees,<sup>3</sup> in their parking lots. See Minn. Stat. § 624.714, subd. 17(c).

Similarly, the State does not dispute that Appellants' roles as landlords are integral to their religious mission. A.B. 20. The State does not deny that the presence of firearms in the tenant space of Appellants is contrary to Appellants' sincere religious beliefs. A.B. 20. Nor does the State deny that the Act contains a straightforward command that Appellants may not prohibit firearms (even by

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<sup>2</sup> "A.B." denotes appellants' brief to this Court.

<sup>3</sup> Appellants note the State's concession that, notwithstanding the Act, Minn. Stat. § 624.714, subd. 18(c), Appellants' employees may be discharged for violating Appellants' religious beliefs if employees bring firearms onto Appellants' parking lots. See R.B. 10.

contract) possessed by tenants and their guests. See Minn. Stat. § 624.714, subd. 17(e).

In other words, Appellants must obey the Act and violate their religious beliefs, or disobey the Act and violate the law. Appellants submit that the State's imposition of that dilemma is sufficient to confer standing and creates a justiciable case.

While the State admits that the Act has, in essence, forced Appellants to choose between God and Caesar, the State asserts that Appellants have no standing and the case is not justiciable because the Act does not specify how the State will enforce it. It is true that, while the Act gives certain responsibilities to the Commissioner of Public Safety, the Act does not specify which state agency will enforce its commands regarding real property. But, tellingly, the State does not deny that the Attorney General has authority to enforce all state laws. See State ex rel. Hatch v. American Family Mutual Ins. Co., 609 N.W.2d 1, 3 (Minn. Ct. App. 2000).

Appellants are aware of no Minnesota case where a plaintiff alleging that a State law infringes or chills the plaintiff's own rights of speech, association, or religion has been denied standing. For example, assume that the State enacted a law requiring every Minnesota newspaper to give free advertising space to political candidates but that the law did not specify which state agency would enforce it. Can it be doubted that a newspaper would have standing to challenge the law in court without waiting for the Attorney General or a candidate to take

action? Cf. Channel 10, Inc. v. Independent School Dist. No. 709, 215 N.W.2d 814, 821 (Minn. 1974) (media outlet had standing to claim violation of Open Meeting Law based on “the right of the people to be informed in a practical way by the news media”). The very existence of an unconstitutional command to a religious institution, abridging the precious liberty of the free exercise of religion, constitutes irreparable injury, see Kirkeby v. Furness, 52 F.3d 772, 775 (8<sup>th</sup> Cir. 1995), and itself confers standing on the party whose rights have been abridged.

While Minnesota standing requirements are more relaxed than federal law, the federal cases cited by the State support the proposition that important rights of speech and religion may be vindicated judicially before enforcement action is taken. For example, in Virginia Society for Human Life, Inc. v. Federal Election Comm’n, 263 F.3d 379 (4<sup>th</sup> Cir. 2001), an advocacy organization challenged a federal election law as violating the first amendment. The Commission urged lack of standing on the ground that the Commission had adopted a policy not to enforce the challenged law. The court nevertheless found standing. “[T]he policy [not to enforce] is recorded in FEC minutes that do not have the force of law. The commissioners who adopted the policy might be replaced with ones who disagree with it.” Id. at 388.

Similarly, in Babbitt v. United Farm Workers Nat’l Union, 442 U.S. 289 (1979), an Arizona law prohibiting advocacy of agricultural boycotts was claimed to violate the first amendment. The state said that the statute hadn’t been enforced and might not be in the future. The U.S. Supreme Court found standing because

the union's concern about enforcement was "not imaginary or speculative," *id.* at 298 (citation omitted). Even if Arizona chose not to enforce the statute criminally, it had the right to proceed by civil action. Accordingly, the positions of the parties were sufficiently adverse for justiciability. *Id.* at 299.

In Epperson v. Arkansas, 393 U.S. 97 (1968), the U.S. Supreme Court found standing in a first amendment declaratory judgment case even when there had been no record of enforcement. A teacher challenged the Arkansas "anti-evolution" or "monkey" law that prohibited her from referring to evolution. The Court acknowledged that there was no record of any prosecution under the statute; indeed, it "is possible that the statute is presently more of a curiosity than a vital fact of life in these States. Nevertheless, the present case was brought . . . and it is our duty to decide the issues presented." *Id.* at 101-02. In this case, the State's commands to religious institutions are not a "curiosity" -- they are direct and chilling. This State has promulgated the Act and its Attorney General defends it as constitutional. The Attorney General has proclaimed his general authority to enforce any state law by civil suit. In open court, his Deputy declined to stipulate that the Act would not be enforced against Appellants. A.A. 149.<sup>4</sup> That is sufficient adversity so that "the facts and issues will be vigorously, fairly, and adequately presented in an adversary setting," Channel 10, Inc. v. Independent School Dist. No. 709, 215 N.W.2d 814, 821 (Minn. 1974).

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<sup>4</sup> "A.A." refers to the appendix to appellants' brief to this Court.

Further, the State completely ignores Appellants' argument that they have standing even without state enforcement. Appellants need to know whether they have the right to prohibit firearms from parking lots and tenant space or whether the State has abolished their civil cause of action. They need to know whether, if they disobey the State's commands, they put their insurance coverage at risk.

A.B. 24. One of the salutary purposes of the Minnesota Declaratory Judgment Act is to allow "one who walks in the dark to turn on the light before – rather than after – one steps in a hole." Cincinnati Ins. Co. v. Franck, 621 N.W.2d 270, 273-74 (Minn. Ct. App. 2001).

In the same vein, standing was found in Meese v. Keene, 481 U.S. 465 (1987). A film exhibitor challenged the Department of Justice's designation of three Canadian films as "political propaganda." The exhibitor had standing because the designation had put the exhibitor to the "Hobson's choice" of foregoing exhibiting the films or suffering an injury to reputation. Id. at 475. Meese v. Keene was simply a case of designation, not enforcement. But the threat to first amendment interest created a real case or controversy.

Finally, the State's expropriation of a property right is sufficient to confer standing, even though Appellants have not (yet) asserted a claim in inverse condemnation. Under the Minnesota Constitution, Article I, Section 13, even alleged "damage" to a property interest is sufficient to make a claim.

The State concedes that private property rights include the right to exclude others, and that the Act deprives Appellants of "their right to exclude others based

on what the Legislature has determined to be an improper classification.” R.B. 26. The State’s concessions alone give Appellants standing to challenge the Act. See Bormann v. Board of Sup’rs, 584 N.W.2d 309, 313 (Ia. 1998), cert. denied, 119 S. Ct. 1096 (1999) (declaratory judgment action appropriate to determine whether establishment of “agricultural area” including plaintiffs’ property was a taking; no actual wrong need have been committed or loss incurred to obtain declaratory judgment relief); Yee v. City of Escondido, 503 U.S. 519, 534 (1992) (challenge to statute on its face as a taking is ripe for adjudication without further proceedings).<sup>5</sup>

The fact that neither Appellants nor the State have joined permit holders does not deprive this Court of jurisdiction. The commands in the Act to religious institutions are the State’s directives. The fact that Appellants have not joined the thousands of beneficiaries of the State’s commands does not destroy jurisdiction. The State does not deny that, under the Act, Appellants cannot lawfully identify those permit holders. See Minn. Stat. § 624.714, subd. 15(a)&(b).

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<sup>5</sup> Contrary to the State’s analysis, the Act’s grant to permit holders of access to parking lots and tenant space is not a mere “regulation” by which, to constitute a taking, property owners would have to show deprivation of all economically beneficial uses of property. See Johnson v. City of Minneapolis, 667 N.W.2d 109 (Minn. 2003). This is a taking “per se.” See Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979) (law requiring property owner to allow public access to marina was taking); Nollan v. Calif. Coastal Comm’n, 483 U.S. 825, 831 (1987) (appropriation of public easement as distinguished from “mere restrictions on” property’s use); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (law requiring landlords to allow cable was minor but permanent taking).

The cases cited by the State regarding joining all necessary parties are not on point. See R.B. 6-7. In Frisk v. Board of Ed. of City of Duluth, 75 N.W.2d 504 (Minn. 1956), teachers asked for a declaration regarding their rights to retirement benefits. This claim was dismissed as non-justiciable because the defendant Board of Education did not administer the teachers retirement fund. Very simply, on that claim the plaintiffs sued the wrong party. The same was true in Cincinnati Ins. Co. v. Franck, 621 N.W.2d 270 (Minn. Ct. App. 2001). An umbrella insurer commenced a declaratory judgment action, not against its insured, but against the injured party. As Minnesota is not a direct action state, the umbrella carrier should have sued the primary carrier and the insured.

Here, Appellants have sued the right party: the State.

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

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

The State acknowledges that the District Court found a special relationship between the parties governed by Article I, Section 16 of the Minnesota Constitution. R.B. 14. However, it attempts to diminish that special relationship, arguing that the relationship “is also one of regulation.” R.B. 14 (citing Minnesota Human Rights Act and Americans with Disabilities Act).

But statutory regulation yields to the Minnesota Constitution. Article I, Section 16 is a check on the power of the State to regulate. For example, by statutory exemption and court decision, the Minnesota Human Rights Act may not

be applied to burden sincerely held religious beliefs. See Minn. Stat. § 363.02, subd. 1(2) (religion exemption to employment provisions); Minn. Stat. § 363.02, subd. 3(a) (religious education exemption); State v. French, 460 N.W.2d 2, 9-10 (Minn. 1990) (landlord need not lease space in violation of religious beliefs). Similarly, the Americans with Disabilities Act allows religious entities to give preference based on religion and to require employees to conform with religious tenets. See 42 U.S.C. § 12113(c); Starkman v. Evans, 198 F.3d 173 (5<sup>th</sup> Cir. 1999) (free exercise clause bars ADA claim by choir director), cert. denied, 531 U.S. 814 (2000). Unless overridden by a compelling state interest, religious freedom includes the right to discriminate based on religious beliefs. See Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 866 (Minn. 1992); Geraci v. Eckankar, 526 N.W.2d 391, 399 (Minn. Ct. App. 1995), review denied (Mar. 14, 1995), cert. denied, 516 U.S. 818 (1995).

The State further argues that a temporary injunction is to preserve the status quo until adjudication on the merits. R.B. 14. Exactly so. Before May 28, 2003, when Appellants' motion for temporary relief was made, the status quo was a State of Minnesota in which all private property owners, including religious institutions, had the right to ban firearms from their real property. That right was enforceable through contract, through a common law cause of action for trespass, and through the State's police power. See A.B. 14-16. The Act is a radical departure from the pre-May 28 status quo.

Interestingly, the State completely ignores the undeniable truth that the Act also departs radically from the laws of other states with “shall issue” gun permit laws. At least twelve states prohibit carrying firearms into places of worship, and others specifically recognize the centuries-old right of private owners to ban firearms from their real property. See A.B. 28-29. The District Court should have maintained the pre-May 28 status quo.

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

In order to create a barrier that Appellants cannot scale, the State argues that a state law must be demonstrated to be constitutionally infirm “beyond a reasonable doubt.” R.B. 16. But the cases cited by the State do not go to the heart of fundamental rights, such as the free exercise of religion. See, e.g., In re Haggerty, 448 N.W.2d 363 (Minn. 1989) (constitutionality of Minnesota homestead exemption under “reasonable amount” provision in Article I, Section 12 of Minnesota Constitution). The infringement of a fundamental right is subject to strict scrutiny. See generally Carey v. Population Servs. Int’l, 431 U.S. 678 (1977). In Minnesota, fundamental rights are those “which have their origin in the express terms of the Constitution or which are necessarily to be implied from those terms.” State v. Gray, 413 N.W.2d 107, 111 (Minn. 1987)(citation omitted). Certainly the free exercise of religion is such a fundamental, “precious right.” State v. Hershberger, 462 N.W.2d 393, 398 (Minn. 1990).

The structure for scrutiny of a state law affecting religion is laid out specifically in Hershberger and its progeny. A four-prong test is applied. The religious institution has the burden on the first and second prongs; the State has the burden on the last two prongs. See State v. French, 460 N.W.2d 2, 9 (Minn. 1990), rehearing denied (Oct. 8, 1990). The four prongs show that the Act is an unconstitutional infringement on religious freedom.

**1. Whether Appellants' beliefs are sincerely held.**

First, the State concedes that Appellants' beliefs are sincerely held.

R.B. 17.

**2. Whether the Act interferes with Appellants' religious beliefs.**

Second, the Act interferes with Appellants' religious beliefs. The State asserts, without any record evidence, that the Act as applied to the religious institutions' parking lots and tenant space has only an insubstantial effect on Appellants' religious beliefs. See R.B. 19. However, Appellants have submitted overwhelming evidence on these issues.

Pastor Erik Strand of Edina Community Lutheran Church states that the presence of firearms on any church property, including its parking lot and day care space, is thoroughly inconsistent with the Edina church's history and commitment as a place of sanctuary. See A.A. 45-46. Pastor Strand notes that the church parking lot is used as a place of worship and that the licensed day care center is operated pursuant to religious mission. A.A. 46. The church has acted on its

beliefs by posting signs prohibiting firearms in the parking lot, the church building, and the rest of its real property. See A.A. 46-47.

Bishop Craig Johnson of the Minneapolis Area Synod of the Evangelical Lutheran Church opines that the presence of firearms on Lutheran church property is “entirely inconsistent with the Lutheran Church’s mission and its worship practices.” A.A. 50. He explains that the parking lot provision of the Act “substantially controls and interferes with Lutherans’ rights of conscience and the free exercise of religious beliefs.” Id. The tenant space provision of the Act, too, burdens the Lutheran churches as landlords. Id.

Bishop James Jelinek, representing 110 congregations in the Episcopal Diocese of Minnesota, including 32 mission congregations under his direct control, submitted similar facts and expert opinions. A.A. 52-54.

The State failed to submit any affidavits to contradict those of Pastor Strand, Bishop Johnson, and Bishop Jelinek. The State’s assertion that the burden of the Act is minimal because it “only requires” that the religious institutions “tolerate” permit-holders carrying guns is merely that: an assertion. The record is clear that the parking lot and landlord provisions of the Act are a substantial burden on the free exercise of religion.

### **3. Whether the State shows a compelling state interest.**

Third, the State has not shown a compelling interest. Appellants acknowledge readily that public safety is a compelling interest. But here, that interest is only generalized. The State has submitted no evidence whatsoever that there is any public safety concern about religious property. Similarly, there has been no showing that religious properties in the many “shall-issue” states with exceptions for religious institutions are in any way less safe. The State has not met its burden to show that a religious institution banning firearms is “inconsistent” with public safety. See State v. Hershberger, 462 N.W.2d 393, 398 (Minn. 1990).

The unrefuted evidence is the affidavit of Bishop Craig Johnson. As the Bishop of a Lutheran synod consisting of 169 congregations with a baptized membership of 230,000 people, he has received no indication from the State, nor is he aware of any facts or research, that the presence of firearms on church property, including parking lots, would enhance public safety. A.A. 51.

Indeed, the courts of this state have consistently recognized that the State has a compelling interest contrary to the thrust of the Act: to “prevent the possession of firearms in places where they are most likely to cause harm in the wrong hands, i.e., in public places where their discharge may injure or kill intended or unintended victims.” State v. Paige, 256 N.W.2d 298, 303 (Minn. 1977).

Even the Act itself recognizes that there are some places where guns should not be carried by permit holders. For example, under the Act, it is a misdemeanor for a permit holder to carry a firearm on school property. See Minn. Stat. § 609.66, subd. 1d(c). How can the State contend that it has a compelling interest in forcing religious institutions to “tolerate” guns on their religious property (which often includes Sunday Schools, day care centers, and nurseries where children are present), while the State makes it a crime to carry a firearm on school property?

The other purportedly compelling interest cited by the State is the right to keep and bear arms under the second amendment of the United States Constitution. See Minn. Stat. § 624.714, subd. 22. But, the Legislature declared that the compelling state interest is the “regulation” of the purported second amendment rights.

In any event, this Court should give little deference to the Legislature’s unprecedented venture into alternative second amendment jurisprudence. The well-established law in Minnesota is that the second amendment and the Minnesota Constitution confer no individual right to carry a gun. Application of Atkinson, 291 N.W.2d 396, 398 (Minn. 1980). See United States v. Miller, 307 U.S. 174, 178-79 (1937) (second amendment right is collective rather than individual). Just recently, the U.S. Court of Appeals for the Eighth Circuit confirmed that this remains settled federal and Minnesota law. See Iverson v. City of St. Paul, 2003 WL 21999248 (8<sup>th</sup> Cir. Aug. 25, 2003) (per curiam) (unpublished), affirming 240 F. Supp. 2d 1035 (D. Minn. 2003). As U.S. District

Court Judge Michael Davis held in the case affirmed, “there is no liberty interest in a right to carry a concealed weapon. Nor is there a constitutionally protected property interest in a permit to carry under Minnesota law.” 240 F. Supp. at 1038, citing Gross v. Norton, 120 F.3d 877 (8<sup>th</sup> Cir. 1997) (per curiam) (no constitutional right to carry handgun at work).

**4. Whether the Act uses the least restrictive means to accomplish the State’s objectives.**

Fourth, the Act does not use the least restrictive means to accomplish the State’s objectives. Citing the virtually identical affidavits of the bill’s authors, Senator Pat Pariseau and Representative Lynda Boudreau, A.A. 106-113, the State asserts that “permitting organizations to self-exempt would undermine the legislative policy behind the Act.” R.B. 23. Clearly, the goal of the authors was to make it as difficult as possible for private property owners to ban firearms from their real property. But the broad legislative policy is not the least restrictive means of regulation; it is the most restrictive means. See State v. Hershberger, 462 N.W.2d 393, 399 (Minn. 1990) (despite compelling interest in traffic safety, Amish buggies allowed different signage).

The State fails to grapple with the real issue: if there is a compelling state interest in public safety on religious property, and if safety on such property is threatened (yet unproven), is there a means to increase safety less restrictive than dictating that religious institutions must accept firearms on their property? There are many such means.

In sum, application of the four prong-test from Hershberger demonstrates that the Act is an unconstitutional infringement on religious freedom. Because of this, appellants are likely to succeed on the merits of their free exercise claim.

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

The State does not deny that a violation of religious freedom, even for a minimal period of time, constitutes irreparable injury. A.B. 36-37. Instead, the State makes two arguments.

First, the State argues that the religious institutions do not face civil or criminal penalties. As discussed above, the Attorney General claims full authority to enforce all Minnesota laws. His representative has declined to stipulate that the commands of the Act will not be enforced against Appellants. Regardless, Appellants are damaged.

Second, the State asserts that the violation of religious freedom is minimal because the religious institutions are merely required “to tolerate the presence of persons with different views.” R.B. 15. The State analogizes association with gun-carriers to association with persons with disabilities, in that “the Act simply disallows what the Legislature determined to be an improper reason for refusing to associate with a group sharing a certain characteristic.” R.B. 15.

The State’s comparison of persons carrying firearms onto religious property with persons with disabilities is outrageous and its call for “tolerance” is disingenuous. The United States and Minnesota Constitutions provide the solid basis for laws against discrimination based on immutable characteristics. A

person cannot leave his or her race, gender, or disability at the door before entering a restaurant or an office. In stark contrast, a permit holder has a choice whether or not to carry a concealed firearm onto another's property.

While the constitutional right to be free from invidious discrimination is well established, there is no individual right, under the second amendment or otherwise, to carry a gun. Further, under both the Minnesota and the United States Constitutions, religious institutions need not, and cannot be compelled to, "tolerate" the presence of persons who insist on carrying firearms onto religious property. The right to religious association "plainly presupposes a right not to associate." See Roberts v. U.S. Jaycees, 468 U.S. 609, 622-23 (1984). Even in a non-religious context, the forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints. New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 13 (1988).

Even if the purported individual right to carry a firearm were somehow comparable to the right to be free from discrimination based on disability, Appellants would still be injured irreparably by the Act. "In a pluralistic and democratic society . . . the government has a responsibility to afford its citizens equal access to all accommodations open to the general public." State by McClure v. Sports & Health Club, 370 N.W.2d 844, 853 (Minn. 1985). But, as State by McClure recognized, a religious institution is not a public accommodation; there is

an exemption in the Minnesota Human Rights Act for religious corporations. Id. at 853. By contrast, said the Supreme Court, a health club that discriminates on the basis of religious beliefs “is not a religious corporation – it is a Minnesota business corporation engaged in business for profit. By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs.” Id.

Appellants are not business corporations operating for profit. Worship is not a public accommodation. Their exercise of belief is protected by the federal and state constitutions. They exist and act to further their religious missions. When the State told Appellants, through the Act, that they cannot control their religious property consistent with their beliefs, they were injured irreparably at the moment the Act went into effect.

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

Again, the State cites the Legislature’s legally erroneous reference in the Act to the second amendment, discussed above. R.B. 28. As the District Court determined, the Act cites as its compelling interest the “regulation” -- not the advancement -- of the purported right to bear arms. A.A. 192.

In any event, the overriding public policy is Article I, Section 16 of the Minnesota Constitution and the long-recognized statutory and common-law rights of religious institutions to exclude others. As the District Court said, “When balancing the Minnesota Constitution against an Act of the Minnesota Legislature, the constitutional guarantees must be given more weight.” A.A. 193.

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

The State acknowledges, and the District Court held, that there are no relevant administrative burdens. R.B. 28.

**F. This Court Should Stay The Act As To Appellants And Enjoin The State.**

Before the Act went into effect, Appellants sought to have the challenged provisions of the Act stayed. See A.A. 1-85. Now that the Act is in effect, this Court should exempt Appellants from the challenged provisions of the Act and enjoin the State (including the Attorney General) from enforcing those provisions.

Dated: August 28, 2003

Respectfully submitted,

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