
IN THE
SUPREME COURT OF THE UNITED STATES

Amos Mast, Menno Mast, Sam Miller, and Ammon Swartzentruber,

Petitioners,

vs.

County of Fillmore and Minnesota Pollution Control Agency,

Respondents.

PETITION FOR WRIT OF CERTIORARI

**MINNESOTA POLLUTION CONTROL AGENCY
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Appendix A



KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Limited on Constitutional Grounds by [Lighthouse Institute for Evangelism, Inc. v. City of Long Branch](#), 3rd Cir.(N.J.), Nov. 27, 2007

[United States Code Annotated](#)

[Title 42. The Public Health and Welfare](#)

[Chapter 21C. Protection of Religious Exercise in Land Use and by Institutionalized Persons](#)

42 U.S.C.A. § 2000cc

§ 2000cc. Protection of land use as religious exercise

Effective: September 22, 2000

[Currentness](#)

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

CREDIT(S)

(Pub.L. 106-274, § 2, Sept. 22, 2000, 114 Stat. 803.)

[Notes of Decisions \(257\)](#)

42 U.S.C.A. § 2000cc, 42 USCA § 2000cc

Current through P.L. 116-282. Some statute sections may be more current, see credits for details.

Appendix B

BRANDON MONTGOMERY

Direct Examination by Ms. Brown

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1 system to be compliant in Minnesota. How does a person
2 determine whether their gray water system complies with
3 those rules?

4 A. So in order to make sure that everything is complying
5 with the rule, you go through a design process with an
6 MPCA certified and licensed designer.

7 Q. Okay. And can you tell us what that design process
8 entails?

9 A. Yes. So the design process entails essentially a site
10 evaluation and a soil evaluation. There's also a
11 preliminary evaluation. But the pain part is that you're
12 going out assessing how the property looks, what the use
13 is going to be on that property, looking at what your
14 flow might be, going out and looking at the site and
15 saying, okay, here's where the house is located, here's
16 where the building sewer comes out of the house, where
17 might we like to place this site on the lot. And then
18 the soil evaluation component, you go out and actually do
19 soil borings to determine what type of soil you have
20 there, which helps you determine the absorption area
21 sizing or the sizing horizontally that we were talking
22 about earlier, how big of a drain field you're going to
23 need, as well as the soil borings would tell you where
24 you have saturated and unsaturated soil, and the
25 elevation that the drain field needs to be in order to

BRANDON MONTGOMERY

Direct Examination by Ms. Brown

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1 of the dwelling. Because we're seeing a reduction in
2 flow, we have a reduced septic tank size here as well.

3 Q. What would happen if a person discharged toilet waste
4 into the gray water system?

5 A. So if it was -- toilet waste was in the gray water
6 system, it wouldn't function as we're expecting the
7 system to. Because we've undersized the system, we're
8 not providing as much treatment for the BOD, TSS fats,
9 oils, and greases that I talked about earlier. So you'd
10 have the potential to either (A) fill the tank up sooner,
11 or (B) push those solids and fats, oils, and greases into
12 the drain field, which could cause a failure once that
13 plugs.

14 Q. Okay. And it looks like under Subpart 3 when we're
15 talking about sewage tanks, we're deciding the size of
16 the tank based on the number of bedrooms; is that
17 correct?

18 A. That is correct.

19 Q. Okay. And does Minnesota define the term bedroom in its
20 rules?

21 A. Yes. That is defined in 7080.1100, and I believe it's
22 like Subpart 9.

23 Q. We've already viewed this as Exhibit 339. Can you read
24 the definition of bedroom for us?

25 A. Yes. Bedroom means, for the sole purpose of estimating

LAURA ALLEN

Direct Examination by Mr. Lipford

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1 extremely low risk to the level that states feel
2 comfortable not requiring a permit or any oversight at
3 all, though there are basic health and safety regulations
4 that people have to follow; and if they don't, they're
5 not in compliance.

6 Q. And I guess does it have bacteria?

7 A. It has bacteria.

8 Q. Can it have viruses?

9 A. It could have viruses.

10 Q. What would the source of those bacteria and viruses be?

11 A. From the people in the home.

12 Q. So I guess gray water, I mean, would gray water just
13 generate this on their own? Or I guess what are the
14 sources of the bacteria and viruses be?

15 A. Well there's, you know, bacteria everywhere, you know,
16 every place in the world. The concern in bacteria is
17 things that can make humans sick and those kind of
18 viruses and pathogens are going to come from the humans
19 generating the -- it would be coming from the people in
20 the home making the gray water.

21 Q. And so things like colds and bacterial infections, stuff
22 like that, is that what we're talking about?

23 A. Yeah. I mean, anything that someone could have on their
24 body that could get in the water is going to be -- could
25 be in gray water.

SARA HEGER

Direct Examination by Mr. Corson

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1 department -- with MnDOT. We're actually evaluating rest
2 stop systems and how they perform.

3 Q. Okay. And in Minnesota, how would you define this idea
4 of sewage?

5 A. So sewage is defined as basically the -- I think the
6 simple way is like anything that we come in contact with,
7 that we contaminate the water. So that means, like,
8 washing our hands, doing our -- doing the dishes. And
9 certainly toilet water is kind of one more obvious to all
10 of us when there's carry-water with the toilet waste.
11 That's certainly sewage. But it's really anything that,
12 again, has a contaminant that would have either an impact
13 often to public health and the environment or usually
14 both together. Yeah.

15 Q. Does that include even water from your sink where you're
16 washing dishes, stuff like that?

17 A. Actually the kitchen sink is some of the dirtiest water
18 in our home after -- right after the toilet, because all
19 that stuff that we're washing in the sink. You think
20 about if you have a chicken that happens to have
21 salmonella on it, that's all going down the drain. So
22 when they look at different sources of gray water, which
23 is everything other than the toilet, generally, sometimes
24 they even don't put the kitchen sink waste in there
25 because the kitchen sink is known to have a much higher

SARA HEGER

Direct Examination by Mr. Corson

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1 virus and bacteria load than other sources. But it does
2 include -- every sink in your house, I mean, the only
3 potential would be if you had a floor drain in your
4 basement that was just draining, like, your furnace water
5 or -- because we haven't contaminated that water. So the
6 issue is have we made that water dirty; is there a risk
7 to public health and the environment from that water.

8 Q. Well, so what -- but what's the big deal? I mean, you
9 know, you all live in the house together already so
10 you've already caught everything you're going to catch;
11 right? So why worry about what you're sending down the
12 drain?

13 A. Well, maybe. I don't think -- every time my husband gets
14 sick, I don't get sick; but that's a whole other
15 conversation. What we're really also looking to protect
16 is not just the people who live in your house. All of
17 our water is connected, so when water leaves your home
18 when it's contaminated, it's going to end up in one of
19 two places. It's either going to end up reaching a
20 surface water or reaching groundwater, depending upon
21 where it's going. So that water -- all of our water is
22 connected. The water sitting here in front of me,
23 someone's used it before. So we want to make sure when
24 we send that water back into the environment, it'll be
25 safe for someone to use it again. So I think about the

BRANDON MONTGOMERY

Direct Examination by Ms. Brown

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1 A. So traditionally there are folks that want to have gray
2 water systems or look to use reduced systems don't always
3 have toilets within their house or what not, so we have a
4 definition of gray water that takes that toilet waste out
5 and allows us to create rules around that.

6 Q. Okay. And what does recognizing gray water mean in terms
7 of the effect on wastewater that's discharged from a
8 residence where occupants don't use toilets?

9 A. So we would see a reduction in wastewater flow typically.

10 Q. Okay. Would there'd be a reduction in any of the
11 constituents found in the gray water?

12 A. Yes. There's usually a reduction in those constituents I
13 mentioned earlier, the BOD and the TSS, the fats, oils,
14 and greases. Those will be smaller as well depending on,
15 you know, how much is found within each toilet waste.

16 Q. So in light of this reduced flow and reduced solids and
17 the absence of toilet water, why is MPCA concerned about
18 the discharge of gray water?

19 A. So gray water is still a subcomponent of sewage, so to
20 speak, and there are still all of the pathogenic
21 constituents found within that sewage. So those bacteria
22 and viruses, protozoa that I had mentioned earlier, all
23 of those things are still found in gray water.

24 Q. Okay. And what happens if you improperly dispose of gray
25 water?

MATTIE MAST

Direct Examination by Mr. Lipford

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1 A. Yes.

2 Q. And are you married to Amos Mast?

3 A. Yes.

4 Q. And where do you guys live?

5 A. On Game Road.

6 THE COURT: I missed the spelling of that the
7 first time. What was it again?

8 MR. LIPFORD: Game Road.

9 THE COURT: G-a-m-e?

10 MR. LIPFORD: Yes.

11 THE COURT: Got it. Thank you.

12 BY MR. LIPFORD:

13 Q. And how long have you guys lived there?

14 A. Since 2014.

15 Q. And what was that -- I guess, was there a home there when
16 you moved there in 2014 or was there a building there?

17 A. There was a building there.

18 Q. And what was that building used for?

19 A. School.

20 Q. The Amish schoolhouse?

21 A. Yes.

22 Q. And did you do renovations on that home or --

23 A. Yes.

24 Q. And the plan was to renovate it and live there; correct?

25 A. Yes.

MATTIE MAST

Direct Examination by Mr. Lipford

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1 Q. Now, did you -- did you ever move, I guess, to another
2 building on that land?

3 A. Yes.

4 Q. Where'd you move?

5 A. To the produce shed.

6 Q. And why did you -- why did you move there?

7 A. Because we poured the concrete floor.

8 Q. And how long had you planned on staying there?

9 A. Just over the weekend.

10 Q. And who was -- do you have any children?

11 A. Yes.

12 Q. How many children do you have?

13 A. Four.

14 Q. And what are their ages?

15 A. Five, four, two, and one.

16 Q. And so about when was that when you poured the concrete
17 floor and moved to the produce shed for that weekend?

18 A. September of 2016.

19 Q. And so your children would've been -- if I'm doing my
20 math correct -- would've been, like, three, two, and one
21 at that time?

22 A. Yeah.

23 Q. Okay. And your youngest wasn't born yet?

24 A. No.

25 Q. Okay. And did anything happen to -- or I guess when did

1 THE COURT: And it's M-a-s-t; correct? M-a-s-
2 t.

3 THE PLAINTIFF: Yep, that's right.

4 THE COURT: Right. Thank you.

5 THE PLAINTIFF: Middle initial is R.

6 THE COURT: What's that?

7 THE PLAINTIFF: Middle initial is R.

8 THE COURT: Okay.

9 THE PLAINTIFF: There's more Menno Masts.

10 THE COURT: All right. Thank you.

11 And, Mr. Lipford, you may inquire.

12 DIRECT EXAMINATION

13 BY MR. LIPFORD:

14 Q. Mr. Mast, you're a member of the Swartzentruber Amish
15 community?

16 A. Yes.

17 Q. And which church do you belong to?

18 A. Canton. The Middle Canton. The regular Canton Church.

19 Q. Okay. So --

20 A. Swartzentruber.

21 Q. What we've been calling Original Canton?

22 A. Yeah.

23 Q. Okay. And you've been present for the other testimony
24 here today; correct?

25 A. Yes.

AMMON SWARTZENTRUBER
Direct Examination by Mr. Lipford

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1 DIRECT EXAMINATION

2 BY MR. LIPFORD:

3 Q. Mr. Swartzentruber, you're a member of the Swartzentruber
4 Amish community?

5 A. Yes.

6 Q. Which church?

7 A. The Canton Original.

8 Q. Okay. And what -- do you have a mulch system on your
9 property?

10 A. Yes.

11 Q. And was that installed after Menno Mast installed his?

12 A. Yes, I think it was.

13 Q. And what kind of -- or how many -- how many mulch beds do
14 you have?

15 A. I have one.

16 Q. So one pipe going to one mulch bed?

17 A. Yes.

18 Q. And can you describe how it works?

19 A. The pipe goes down to the mulch -- or to the cover box.
20 From there it goes down to the mulch and evaporates.

21 Q. I'm going to show you Exhibit 12. You said cover box.

22 A. I mean this box up here.

23 Q. Can you push harder on the screen?

24 THE COURT: Maybe that's not activated.

25 MR. LIPFORD: Okay. So my --

AMMON SWARTZENTRUBER
Cross Examination by Mr. Corson

1184

1 MR. CORSON: I won't, Your Honor.

2 BY MR. CORSON:

3 Q. And so it's fair to say that you can get rides from
4 Englishmen when it's -- when it's not an emergency;
5 right?

6 A. Yes.

7 Q. And you can pay him for those rides.

8 A. Yes.

9 Q. Also you said that you have five children?

10 A. Yes.

11 Q. What are their ages?

12 A. One to eight.

13 Q. So one is one-year-old.

14 A. The oldest one is eight years old.

15 Q. Is there -- It looks like there would be probably about a
16 two-and-a-half year old?

17 A. One, three, five, six, and eight.

18 Q. One, three, five, six, and eight.

19 A. Yes.

20 Q. The one and the three-year-old, are they in diapers?

21 A. The one-year-old is.

22 Q. And isn't it true that you and your wife use disposable
23 diapers; right?

24 A. Occasionally.

25 Q. And those disposable diapers are not allowed by your

SUZIE MAST
Direct Examination by Mr. Corson

1281

1 A. So you had

2 MR. LIPFORD: Judge, I'm sorry. When you -- I
3 know I'm interrupting. You had allowed him 15 minutes
4 time. Could we -- I realize there might be some follow-
5 up questions. Could it possibly be 10 and then give me
6 5?

7 THE COURT: I'm going to give Mr. Corson 15
8 minutes. I'm going to assume that there's probably not
9 going to be a lot of redirect.

10 MR. LIPFORD: Okay.

11 THE COURT: And, Ms. Brown, I guess I didn't
12 even think about the MPCA, but --

13 MS. BROWN: Unless there's something absolutely
14 glaring, Your Honor, we can defer to Mr. Corson.

15 THE COURT: I appreciate that.

16 Mr. Corson, you may go ahead.

17 MR. CORSON: Thank you, Your Honor.

18 BY MR. CORSON:

19 Q. So, Ms. Mast, would it be fair to say right now you have
20 12 kids at home?

21 A. Um hmm.

22 Q. Yes?

23 A. Yes.

24 Q. And there's no grandchildren that live with you?

25 A. No.

SAM MILLER

Direct Examination by Mr. Lipford

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1 MR. CORSON: No, we would not plan to.

2 THE COURT: Right. So she's around here. I'm
3 just thinking maybe she'd find it interesting to sit in
4 and she can now.

5 MR. LIPFORD: Okay.

6 THE COURT: All right. Mr. Lipford, you may
7 inquire.

8 DIRECT EXAMINATION

9 BY MR. LIPFORD:

10 Q. Mr. Miller, where do you live?

11 A. Canton, Minnesota.

12 Q. Okay. And, Judge, I apologize. In which -- you're a
13 member of the Swartzentruber Amish faith?

14 A. Yes.

15 Q. And which church do you belong to?

16 A. I believe it's Canton Original is what they call it.

17 Q. Okay. I want to ask you this. Is Menno Mast, here at
18 the table, is he in your church?

19 A. Yes.

20 Q. And Ammon Swartzentruber?

21 A. Yes.

22 Q. How long have you been a member of the church?

23 A. Around 24 years.

24 Q. Okay. Where were you born?

25 A. Ohio.

SAM MILLER
Cross Examination by Mr. Corson

1606

1 that right?

2 A. Yeah. Just the cost of the pump, yeah.

3 Q. Right.

4 A. The motor I don't worry about, but...

5 MR. CORSON: Okay. Thank you, sir.

6 I don't have any other questions.

7 THE COURT: Ms. Brown?

8 MS. BROWN: Thank you, Your Honor.

9 Good afternoon, Mr. Miller. I will try to keep
10 this brief. I am sure you are as tired of hearing me ask
11 these questions, as I am of asking them of you all, so I
12 apologize if I'm being redundant.

13 CROSS EXAMINATION

14 BY MS. BROWN:

15 Q. In your house currently it's you, your wife, and eight
16 children that reside there; correct?

17 A. Yes.

18 Q. Okay. And your house has five bedrooms?

19 A. Yeah. I suppose you'd call that -- call it that way.

20 Q. And your house has a kitchen sink on your first floor
21 that is connected to your mulch system; correct?

22 A. Yes.

23 Q. Okay. And is this a sink where you and your family
24 members wash your hands after you do chores?

25 A. Yes.

MENNO MAST
Cross Examination by Mr. Corson

1032

1 code, what they put forward and what they've decided to
2 do is to say that no matter how many bedrooms, how many
3 kids, how many anything, we're going to determine it to
4 be 100 gallons a day, and so it is completely irrelevant
5 how many children he has. The county has decided to say
6 100 gallons per day no matter how many bedrooms. Doesn't
7 matter. So it doesn't matter how many children he has.

8 THE COURT: I hear you. And it may turn out
9 that I don't think it's a very important piece of
10 information, but I'm going to find out what it is.

11 Sir, you may answer.

12 BY MR. CORSON:

13 Q. Okay. So you have 13 children; is that right?

14 A. There's 12 living with us.

15 Q. Okay. The answer is you have 13 children; correct?

16 A. No, that's not correct.

17 Q. You don't have 13 children?

18 A. No. We got 16.

19 Q. Okay. Thank you.

20 A. But there's only 12 living with us.

21 Q. At one time was there -- all 16 living with you?

22 A. When they were younger.

23 Q. Sure. So at some point did you have like four kids in
24 diapers all at once?

25 MR. LIPFORD: Objection; relevance.

MENNO MAST
Recross Examination by Mr. Corson

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1 Amish community there was a time when you -- when your
2 forefathers got their water out of the well and brought
3 it to the house with a pail; right?

4 A. Same as I do.

5 Q. Yeah. Oh, you bring your water to the house in a pail?

6 A. With the pump and gravity flow.

7 Q. Oh, I see. So like your logic is -- or at least the
8 thought process is that by running the water through a
9 pipe is the same really as bringing it in a pail, it's
10 really no different.

11 A. And gravity flow. It's considered the same.

12 Q. Yeah. And if you pump it with a motor, that's still the
13 same; right?

14 A. If it goes in the supply tank, it's not pumped in the
15 house.

16 Q. Right.

17 A. We don't have pressurized water in the house.

18 Q. Right. Well, I'm just saying you recognize that your
19 forefathers at some point did not have pipes bringing
20 water into their house; right?

21 A. I assume they didn't, but I can't remember.

22 Q. Right.

23 A. They always had it that I remember of.

24 Q. And you recognize that your forefathers didn't have
25 motorized washing machines; right?

AMMON SWARTZENTRUBER
Cross Examination by Mr. Corson

1227

1 those tanks for fresh water; right?

2 A. Yes.

3 Q. And you can use tanks for other things; right?

4 A. Yes.

5 Q. So, for example, you could use this tank to transport
6 water or other things that you may need; right?

7 A. Yes.

8 Q. And then in the house that you build -- showing you
9 Exhibit 139. Do you recognize that?

10 A. Yes.

11 Q. You also had a thousand-gallon tank in the bottom of that
12 new house; didn't you?

13 A. Yes.

14 Q. You were going to use that for a rainwater cistern.

15 A. Yes.

16 Q. And then that was going to get pumped up to the upstairs
17 where you could use it for washing, sinks, whatever;
18 right?

19 A. Washing clothes. Laundry.

20 Q. Yep. Okay. And then just showing you this. This was
21 also out on your property with rubber tires; right?

22 A. Yes.

23 Q. This is just kind of a side view of your house, the new
24 house that you were building that you had Tyvek on the
25 side of it; right?

MATTIE MAST

Direct Examination by Mr. Lipford

139

1 Q. And so when you're -- after you scrape it, how much food
2 is left on the plate?

3 A. There's really not any left on the plate.

4 Q. And then you hand-wash them and put them up on dry --

5 A. Yes.

6 Q. Okay. And do you do the laundry for your family?

7 A. Yes.

8 Q. And your children, are any of them still in diapers?

9 A. One of them.

10 Q. Do they use -- do you use cloth diapers or --

11 A. Yes.

12 Q. Do you use the paper or the plastic diapers?

13 A. When we go traveling.

14 Q. Okay. So occasionally you'll use those, but you also --

15 A. Yeah.

16 Q. What about nighttime?

17 A. Yeah. Sometimes. Not always.

18 Q. And those cloth diapers, how do you -- how do you wash
19 those? How is that done?

20 A. We scrape them and put it in the outhouse. Then we
21 prewash them and put them in the washing machine.

22 Q. So what do you mean by -- just explain you scrape them.
23 What do you mean by that?

24 A. Well, we scrape them, then put it -- put the poop in the
25 outhouse.

BRANDON MONTGOMERY

Direct Examination by Ms. Brown

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1 THE COURT: Hold on. Right now we're talking
2 about definitions of gray water.

3 MR. LIPFORD: Okay.

4 MS. BROWN: Yeah.

5 THE COURT: Go ahead, Ms. Brown.

6 MS. BROWN: Okay.

7 BY MS. BROWN:

8 Q. Why does Minnesota not prohibit diaper water or water
9 used to wash diapers in their definition of gray water?

10 A. So we haven't put that into any rule. We allow all
11 laundry machine discharges to be considered gray water,
12 and there are many different definitions of gray water
13 out there that either include kitchen sinks, you know,
14 omit dirty diaper water from washing machines and what
15 not. So there's no standard definition, but in Minnesota
16 we've included gray water to mean everything except for
17 toilet wastes.

18 Q. Are there any geographic features that are unique to
19 southeastern Minnesota that may pose additional risks to
20 Minnesota's groundwater?

21 A. So --

22 MR. LIPFORD: Object on foundation.

23 THE COURT: Overruled. Go ahead.

24 THE WITNESS: Southeast Minnesota has a feature
25 known as karst, which would be a -- is a feature that

MENNO MAST
Cross Examination by Mr. Corson

1030

1 A. Yes.

2 Q. Okay. And then you went on to say that part of the
3 reason was you just never had it before; right?

4 A. We never had it before.

5 Q. Okay. Never said that it was a burden on your religion;
6 did you?

7 A. I might've not.

8 Q. Okay. Okay. You, prior to September 2017, had a
9 straight-pipe where the drains from your bathtub, sink,
10 everything, it all went out a straight-pipe; right?

11 A. No --

12 Q. Prior to September 2017.

13 A. Which sink? Which sink are you talking?

14 Q. Okay. Well, help me out on that. So are there sinks and
15 bathtubs, things like that where that all went down the
16 drain and out the straight-pipe?

17 A. We got a dry sink. We got a sink where we wash our hands
18 when we come in from chores. That goes down the drain.
19 The bathtub goes down the -- that goes down the drain.

20 Q. Sure.

21 A. So --

22 Q. That's -- I mean that's what I was asking.

23 A. That the one you --

24 Q. That water goes somewhere else then than down the drain?

25 A. Dump it out on the ground. At times.

MATTIE MAST

Cross Examination by Mr. Corson

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1 about diaper, the scrapings from the diaper -- do you
2 remember that question?

3 A. Yes.

4 Q. You told Attorney Brown that you would take those
5 scrapings and you would take them to your outhouse;
6 right?

7 A. Yes.

8 Q. And what that meant is at that time is you were taking
9 those scrapings to the outhouse and putting them in those
10 pails; right?

11 A. Yes.

12 Q. And then you would throw it on the ground.

13 A. Yes.

14 Q. So just to kind of continue with that, is -- so back in
15 2014 you were -- you were stopped from building anymore
16 on the schoolhouse; right?

17 A. I can't remember.

18 Q. And the judge told you that you could -- the judge told
19 you you could live, though, in the produce house while
20 the case was pending; is that right?

21 A. I don't remember.

22 Q. Okay. And then you were -- so you were allowed to live
23 in the produce shed until at some point you said in 2017
24 when you moved into the schoolhouse; right?

25 A. Yes.

AMMON SWARTZENTRUBER
Cross Examination by Ms. Brown

1241

1 Q. And is that a wet sink or a dry sink?

2 A. I have both.

3 Q. Both. So the sink where you and your family members wash
4 your hands in after chores, is that a wet sink or a dry
5 sink?

6 A. It's a wet sink.

7 Q. And that goes into your gray water system; is that
8 correct?

9 A. Yes.

10 Q. Okay. And I know -- I don't know if your situation is a
11 little bit different because you work for a woodshop, I
12 believe, or furniture maker as opposed to farming, but
13 what type of chores do you and your family do?

14 A. We have a cow, a couple horses, some chickens.

15 Q. All right. So there is still a fair amount of farming
16 related chores going on; is that correct?

17 A. Some, yes.

18 Q. Okay. And I think it probably goes without saying, but
19 the sink that you mentioned, the wet sink, that's where
20 you and your family members wash your hands after chores

21 --

22 A. Yes.

23 Q. -- correct? Is that correct?

24 A. Yes.

25 Q. Sorry. I might've talked over you. In your kitchen, is

SAM MILLER

Cross Examination by Ms. Brown

1607

1 Q. Okay. And that sink drains to your current gray water
2 system; correct?

3 A. Yes.

4 Q. Okay. And do you use that same sink to wash eggs from
5 your chicken coop?

6 A. I don't know if they do or not.

7 Q. You wouldn't --

8 A. I'm not sure.

9 Q. -- handle that?

10 A. What's that?

11 Q. You would not handle the washing of the eggs?

12 A. Usually not. Of course we -- we didn't have chickens for
13 a long time that we were -- that, you know, were laying
14 eggs.

15 Q. Okay. And you have a bathtub in your washroom that's
16 attached to your home; is that correct?

17 A. Bathroom. You mean --

18 Q. I'm sorry, sir?

19 A. What do you mean about a bathroom?

20 Q. A bathtub?

21 A. Oh. Well, we wash in the wash house, yeah.

22 Q. So the bathtub is in your wash house --

23 A. Yes.

24 Q. -- correct? Yeah. Okay. And the water from your baths,
25 that goes down the drain to your gray water system, as

BRANDON MONTGOMERY

Direct Examination by Ms. Brown

1379

1 Q. I'm going to show you what's been marked as Exhibit 310.

2 And is this another SONAR?

3 A. This is another SONAR.

4 Q. Okay. And do you know what year this was from?

5 A. Not just from looking at the cover; no.

6 Q. Okay. Would you believe -- I guess, let's see. Based on
7 the language, I'll have you let me know whether you think
8 this SONAR comes after or before the SONAR that I just
9 previously showed you.

10 A. Okay. I mean, I can tell you it comes after already,
11 because it says that we have 7081, 82, and 83 in
12 existence. So it is after 2008 already.

13 Q. Okay.

14 A. So likely 2010 for the 2011 rule change is my guess.

15 Q. So you had another proposed change to the hand-carried
16 gray water exception, and it looks as though you removed
17 the words primitive structures and titled that subpart
18 hand-carried gray water, and you took out the words from
19 structures without plumbing and now it just says gray
20 water that originated from hand-carried water. Why did
21 MPCA do that?

22 A. So we removed the primitive structures part because, like
23 we've been talking about, it's not necessarily the source
24 of the water that allows for this to be done, it's the
25 fact that it's in small quantities, and it is gray water

BRANDON MONTGOMERY
Direct Examination by Ms. Brown

1380

1 that we're allowing it to be done.

2 Q. Okay. But it still has to originate from hand-carried
3 water; correct?

4 A. Yes.

5 Q. So it's the -- and the point I'm trying to get at here is
6 hand-carried gray water refers to when you first get the
7 water; correct?

8 MR. LIPFORD: Objection. Leading.

9 THE COURT: Overruled. Go ahead.

10 THE WITNESS: So hand-carried gray water is
11 talking about water that you're hand-carrying into a
12 dwelling or a situation to utilize.

13 BY MS. BROWN:

14 Q. But if I had plumbing that brought water into my house
15 and then I hand-carried it out, that would not be hand-
16 carried gray water.

17 A. No. It's supposed to be hand-carried from outside the
18 dwelling.

19 Q. Okay.

20 A. And when I say outside the dwelling, I mean from, you
21 know -- not traditionally from like a hand pump well in
22 the yard, it's supposed to be something that's, you know,
23 hand-carried from a distance or, you know, something
24 that's inconvenient. That's the thing we're looking for.
25 It's not a -- it's not something that's convenient to do,

BRANDON MONTGOMERY

Direct Examination by Ms. Brown

1381

1 it's something where we're only going to have very small
2 quantities of water. So, like I said, those hunting
3 cabin type situations where they're bringing the water
4 with them from -- you know, they drive up from the cities
5 to, you know whatever, like Lake of the Woods County and
6 they're bringing 10 gallons of water with them, potable
7 water with them.

8 Q. That makes sense but, again -- but that would still mean
9 that if you bring water into your house using pipes, that
10 is not considered hand-carried gray water for disposal
11 onto the ground surface; correct?

12 A. No. Correct.

13 MS. BROWN: Your Honor, I offer Exhibit 310
14 into evidence.

15 MR. LIPFORD: No objection, Judge.

16 MR. CORSON: No objection.

17 THE COURT: 310 is received without objection.

18 BY MS. BROWN:

19 Q. So does Exhibit 310 that we just looked at, does that
20 reflect your understanding of how MPCA's hand-carried
21 gray water exception looks currently in statute or in
22 rule?

23 A. Yes.

24 Q. Okay. Does this provision apply to the mulch based
25 systems proposed by plaintiffs?

STEVEN OSCARSON
Direct Examination by Ms. Brown

1495

1 Q. Okay. Would you still need to be a licensed maintainer
2 to hand pump it?

3 A. If you pump -- farmers are exempt in our rules --

4 Q. Okay.

5 A. -- to pump their own septic tanks and to land apply on
6 their own property.

7 Q. Okay.

8 A. They still have to follow all the federal 503
9 requirements. It's still the same requirements that a
10 licensed maintainer does, they just don't have to get
11 that licensed to do it. They still have to follow the
12 rules.

13 Q. Okay. And the 503 requirements, what do those entail?
14 Or what do those -- what's the point of the 503
15 requirements?

16 A. The federal 503 requirements for the -- it's for the
17 treatment of the sewage.

18 Q. Okay. So before it's land applied?

19 A. Yeah. Before it's land applied. I guess it's kind of --
20 it's setting up your site to know how much you can land
21 apply, and then to treat it as well.

22 Q. Okay. Are you aware whether plaintiffs in this case
23 apply septage or would qualify for this exception if they
24 were to have a gray water system?

25 A. As farmers, they would qualify to land apply.

SARA HEGER

Direct Examination by Mr. Corson

924

1 that toilet actually doesn't fall under the septic code
2 at all, it falls under the plumbing code. So you need to
3 then install a toilet that meets the plumbing code. If
4 you had something like, for instance, a composting
5 toilet, that waste is still governed under the 503
6 federal regulations dealing with septage, and there's
7 very specific requirements about how that toilet waste
8 needs to be dealt with. And even if it wasn't being
9 composted, so if you just were collecting it and taking
10 it outside, you can't just spread that on the surface, it
11 actually needs to meet the requirement of the 503s.

12 Q. Does that also say that in the 7080 rules that you must
13 have a privy to accompany a gray water system?

14 A. The septic code says all wastewater has to be dealt with.
15 It does not specifically say you need to have a privy --
16 because there are other options. You could have an
17 incinerating toilet, for instance, that actually burns
18 your toilet waste. So there are other options, it just
19 says all the wastewater needs to be treated. But it
20 doesn't get into the plumbing code because that's what's
21 covered in the plumbing code. And we're kind of goofy.
22 Go next door to Wisconsin, plumbing and septic are in one
23 code, but here anything up until the septic tank is
24 actually considered plumbing. Anything past the first
25 treatment component -- it doesn't have to be a septic

SARA HEGER
Direct Examination by Mr. Corson

925

1 tank, but whatever is first after the pipe is considered
2 to be then under 7080.

3 Q. Have we adopted the entire Uniform Plumbing Code?

4 A. We have not. There's probably several sections -- so I'm
5 not a plumbing code expert, but I specifically know that
6 any portions dealing with the septic system or reuse of
7 gray water were excluded from our adoption of the UPC,
8 the Uniform Plumbing Code.

9 Q. So the alternate system that's in the plumbing code was
10 intentionally excluded from approval here in Minnesota?

11 A. Yes.

12 Q. Why?

13 A. I think there were concerns about its performance in our
14 environment. And there's actually a fair amount of lack
15 of specificity in that code. It leaves a lot of it up
16 to, like, the local board. Our rules are not --
17 particularly our septic rules are much more prescriptive
18 than that. We give much more clearer requirements about
19 what would be required. So, again, if an alternate
20 system was proposed, it would just need to go through --
21 we have a very outlined process in our state for new
22 technologies to come in. They require third party
23 testing to validate that treatment is occurring. So that
24 is our bar to determine. I mentioned that NSF committee
25 I sit on. That is their job is to review new systems as

BRANDON MONTGOMERY

Direct Examination by Ms. Brown

1388

1 Q. Okay. And do you have -- has MPCA received any
2 information from plaintiffs regarding soil borings or
3 soil studies that have been done regarding plaintiffs'
4 mulch systems?

5 A. The MPCA has not; no.

6 Q. Why are Minnesota's current gray water and SSTs
7 regulations the least restrictive means for protecting
8 the public health and environment in your opinion?

9 A. So in my opinion our rules are the least restrictive
10 thing that we can do in order to adequately ensure that
11 sewage and gray water is treated, that human health is
12 being protected, that the environment is being protected,
13 that we're not contaminating anybody's groundwater,
14 anybody's drinking water, and that everybody is remaining
15 safe, while at the same time our rules still are allowing
16 flexibility for individuals to choose different system
17 types, whether those be the types one through five that I
18 mentioned before. Additionally, there's other rules,
19 like we talked about the SDS permit. There's other
20 places that also could be applied for.

21 Q. Okay. And are Minnesota's rules set up in a way that
22 anybody can install a gray water system or anybody can
23 install a septic system?

24 A. So, no, they're not.

25 Q. Okay.

MENNO MAST
Cross Examination by Mr. Corson

1067

1 out on my property checking that thing out.

2 Q. Well, no, I'm just talking about the original design
3 because you kind of heard Ms. Allen yesterday saying,
4 hey, there's these issues. So do you understand you
5 would have to have a design that's appropriate for your
6 property and water usage? Do you understand that?

7 A. Yes.

8 Q. And do you understand that somebody that is way smarter
9 than me is going to have to figure out what that design
10 is for your property?

11 A. I can't answer that at this time.

12 Q. And so if somebody has to figure out what that right
13 design is for the mulch system, you're willing to pay for
14 that person to design it for you, aren't you?

15 A. I'm not quite sure if I am.

16 Q. Okay.

17 A. At this time.

18 Q. So it may be at some point you're going to just say, no,
19 I'm not even paying for somebody to design it for me.

20 A. Well, I'm not going to say that yet, but it's -- it
21 depends on how --

22 MR. CORSON: Well, Your Honor, I don't want to
23 badger this witness, but could you commit -- is it
24 appropriate for me to ask him if he could commit?
25 Because that's -- I think that might be important as to

MENNO MAST
Recross Examination by Mr. Corson

1121

1 Q. Well, it doesn't mean you necessarily have to agree with
2 their design, but you would agree that, hey, somebody can
3 provide me with their proposed design and I'm okay with
4 that.

5 A. Yes.

6 Q. But you would -- what you are opposed to -- again, I
7 don't want to put words in your mouth so you tell me if
8 I'm wrong -- but you are opposed if you have to pay
9 someone to design that for you.

10 A. Yes.

11 Q. Then another -- just a third component of that is you
12 understand there might be some type of maintenance. I'm
13 not saying I know what it is, but you are okay with
14 someone else maintaining that for you?

15 A. No.

16 Q. Okay. Even if it's free.

17 A. I'm not okay with that. I want something that we can
18 maintain ourselves.

19 Q. Right.

20 A. Then if we need help, we'll ask.

21 Q. Right. So you want whatever system it's going to be,
22 whether -- whatever the -- gets approved here or whatever
23 gets -- you want something that you can maintain
24 yourself.

25 A. That's what we're focusing on, trying to get something

MENNO MAST
Recross Examination by Mr. Corson

1122

1 like that.

2 Q. Would you -- are you okay, though, when we talk about all
3 these things whether it's design, whether it's
4 maintenance and operation, are you okay with if it's an
5 Amish person that went and got the education and they
6 came onto your property and they designed it for you,
7 they helped you maintain it? Are you okay if it's an
8 Amish person versus English?

9 A. Yes.

10 Q. Okay. Last part about that then is are you okay if that
11 Amish person, once they get licensed, certified, that --
12 to pay them to help you do that? Or would that be
13 against your Ordnung.

14 A. That would kind of be my decision.

15 Q. Okay. So under your rules and Ordnung, you could decide
16 whether you pay a fellow Amish person to help you do
17 these things versus asking them to do it for free.

18 A. I guess we'd discuss that with the group.

19 Q. So that's something that, again, kind of like you said,
20 you could make the proposal to the group and everybody
21 discusses it and you decide that; right?

22 A. Right.

23 Q. Okay. And I don't want to belabor this too much, but
24 there's been -- since -- I know you talked about when you
25 grew up in Ohio, came to Minnesota, there's been a fair

LAURA ALLEN

Cross Examination by Mr. Corson

831

1 and there. I don't -- I would have to look into my email
2 to tell you the dates.

3 Q. You understand that in Minnesota there's a process that
4 if you have some type of system that you think is going
5 to work that you apply to the MPCA, provide them with the
6 analytical data, and see if it's something that'll get
7 approved? Do you understand that?

8 A. You're telling me that, so I -- I have not, like you
9 mentioned, worked in Minnesota and gone through that
10 process.

11 Q. Okay. Well, I know you were pretty involved in San
12 Francisco, the legislatures, you know, in these various
13 states, so in those states you had a process, didn't you,
14 to somehow try and get mulch systems approved; right?

15 A. In those states they were revising the gray water codes,
16 so I was invited to join as a stakeholder or an expert --
17 not witness, that's what I'm doing right now --

18 Q. Yep.

19 A. -- as a technical advisor --

20 Q. Yep. Yep.

21 A. -- for those processes that were kind of in place. So
22 the states were at a point where they were revising their
23 regulations and at that point they invited people who are
24 knowledgeable to join them and to bring that information
25 to help guide their revisions.

Appendix C

1 sincerely held religious belief that is -- that is
2 substantially intruded upon by the governmental
3 regulation, because they haven't come forward with an
4 alternative, they lose. The state is never put to its
5 burden on the final questions. I haven't seen that case.
6 I don't think there is one.

7 The exception, and I mentioned it in my memo,
8 is the 2015 *Newstrand* case. It's described at Pages 13
9 and 14 of my memorandum, in which the court observed that
10 the contesting party had -- and here I'm quoting -- "not
11 provided the district court with any specific less
12 restrictive alternatives to the government requirement."
13 If *Newstrand* is the law, then Ms. Brown is exactly right
14 that the contesting party has to bring forward an
15 alternative.

16 That, by the way, isn't -- at least it's not
17 the entirety of why the contesting party lost in
18 *Newstrand*, but the court came out with that statement. I
19 question whether the *Newstrand* court's observation
20 conforms to Minnesota law. I see no other indication in
21 the case law that there is any precondition to the state
22 bearing the burden of proof to show no less restrictive
23 means of accomplishing its compelling state interest.
24 And I would point out, I have not applied a burden that
25 in any way requires only that the state show that the

1 plaintiffs' proposed alternative does not accomplish the
2 compelling state interest; rather, I have required that
3 the state show that there is no less religiously
4 intrusive alternative, proposed or not proposed. And I
5 think I stated as much in my memo.

6 MPCA notes at footnote 2 of its memorandum, Ms.
7 Brown has stated it again here today and Mr. Corson has
8 echoed that, that this is a difficult standard for the
9 government to meet, and I agree with that. It is a
10 difficult standard. It is a standard that, as Mr.
11 Lipford has noted, is an exceptionally demanding
12 standard, but I also find that the government has met
13 that standard here. My inquiry was not specifically
14 limited to the systems that the plaintiffs built nor to
15 the failure of those systems.

16 At Page 49 of my memorandum I noted that I was
17 setting aside for purposes of analysis the arguably
18 correctable problems with the mulch system, including the
19 small capacity that had been used in the home-built
20 systems that had been put in place. Assuming greater
21 capacity, assuming cooperation with government
22 inspections, assuming compliance with three feet of
23 separation, and all of the rest, the question is could it
24 work. That's why I put to Dr. Heger the question that I
25 did. My conclusion based on all the evidence, of course

Appendix D

STATE OF MINNESOTA
IN SUPREME COURT

Amos Mast, Menno Mast,
Sam Miller, and
Ammon Swarzenruber,

Petitioners,

vs.

County of Fillmore, and
Minnesota Pollution
Control Agency,

Respondents.

PETITION FOR REVIEW OF
DECISION OF COURT OF
APPEALS

APPELLATE COURT CASE
NUMBER: **A19-1375**

DATE OF FILING OF COURT
OF APPEALS DECISION:
June 8, 2020

To: **The Supreme Court of the State of Minnesota:**

Petitioners request Supreme Court review of the above-entitled decision of the Court of Appeals upon the following grounds:

1. Statement of Legal Issues and their Resolution by the Court of Appeals.

Petitioners belong to the Old Order Amish Mennonite Swarzenruber church community residing in rural Fillmore County. Add-28. State rules and Fillmore County's ordinance require petitioners to install a full subsurface septic system with a 1,000-gallon tank to dispose of the gray water from their homes. Add-76, 87 ["Amish Gray Water System"]. The gray water is all the non-toilet¹ household wastewater from bathing,

¹ Petitioners use an outhouse for toilets. See Minn. R. 7080.2280, defining "privy."

washing, and meal preparation. Add-6 n. 1.

Petitioners brought this action asserting that the state rules and county ordinance as applied to them impose a substantial burden on their rights to free exercise of their religious beliefs that are protected under article I, § 16, of the Minnesota Constitution. Petitioners also claim protection of their religious liberty under 42 U.S.C. § 2000cc(a)(1), the Religious Land Use and Institutionalized Persons Act of 2000 [RLUIPA]. Add-2, 3. Petitioners sought an exception from installing the full septic system, proposing as an alternative to pipe their gray water into a system of basins filled with wood chip mulch in a pasture, a disposal option approved by the Uniform Plumbing Code that some twenty other states permit. Add-52-54; 61; 67; 74.

The District Court applied the compelling state interest balancing test from *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990): “[O]nce a claimant has demonstrated a sincere religious belief intended to be protected by section 16, the state should be required to demonstrate that public safety cannot be achieved by proposed alternative means.” Add-11. RLUIPA also puts the burden of persuasion on respondents. 42 U.S.C. § 2000cc-2(b).

After trial, the District Court found that petitioners’ objections are based on sincerely held religious beliefs, Add-2, and that the government’s requirements substantially burden petitioners’ free exercise of religious beliefs. Add-3. The District Court found that the government has a

compelling interest in ensuring that gray water is properly treated to prevent disease transmission and protect the environment. Add-3. The District Court found that the wood chip mulch basin system is a less religiously burdensome disposal alternative but that it does not adequately serve the government's compelling interests in public health and environmental protection. Add-3, 4. Judgment was entered for respondents.

On appeal, the Court of Appeals concluded that the District Court's findings regarding the unfeasibility of the wood chip mulch basin system are supported by the record and not clearly erroneous, and that the District Court set forth the factual bases for determining not to rely on the practices of other states. The Court of Appeals affirmed the District Court's conclusion that respondents met their burden to demonstrate that the wood chip mulch basin system does not provide a means of accomplishing the government's compelling interests of protecting public health and the environment that is less restrictive of petitioners' beliefs.

ISSUE: Did Respondents carry their burden under article I, § 16, and under RLUIPA, to prove that there is no alternative means for adequately disposing of household gray water that is less restrictive on Petitioners' freedom to exercise their religious beliefs?

2. Criteria of the Rule Relied Upon to Support the Petition.

This Court should grant review because the Court of Appeals has ruled against the petitioners' claim that the septic system ordinance unconstitutionally burdens their rights to free exercise of religion as protected under the Minnesota Constitution by article I, § 16, and violates their rights under 42 U.S.C. § 2000cc(a)(1). The Court of Appeals' opinion affirmed the District Court's conclusion that the government can substantially burden petitioners' exercise of religious beliefs because there is no alternative to the state's chosen means of protecting public safety. The Court of Appeals' opinion is likely to have statewide impact on Amish religious communities in Minnesota and could potentially lead some Amish families to leave the state.

It is important for this Court to ensure that the Minnesota Constitution is properly applied. This Court has twice considered federal and state constitutional protections for the religious beliefs of the Old Order Amish community. *State v. Hershberger*, 444 N.W.2d 282 (Minn. 1989) [*Hershberger I*], *vacated and remanded*, 495 U.S. 901 (1990); and *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) [*Hershberger II*].

This case involves members of the same Amish community as in *Hershberger*. Petitioners seek an exception to a government regulation intended to protect public safety because of the substantial burden imposed

on their freedom of religious practice. This is an important question on which the Court should rule.

3. Statement of the Case and of the Facts.

Petitioners brought this declaratory judgment action against respondents, the County of Fillmore and the Minnesota Pollution Control Agency, claiming that the application to them of the requirements for a subsurface septic system infringed upon and substantially burdened their free exercise of religion as protected by the Minnesota Constitution, art. I, § 16, and by the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.*

The case was tried in Preston before Honorable Joseph F. Chase. The court found that petitioners' objections are based on sincerely held religious beliefs. Add-2. The court found that the government's regulations to install the septic system substantially burdens petitioners' free exercise of their sincerely held religious beliefs. Add-3. But the District Court found that the government's requirements are the least restrictive means to ensure that gray water is properly treated and found that the proposed wood chip mulch basin alternative is less religiously burdensome but does not adequately serve the compelling interest in public health and environmental protection. Add-3.

Facts: In June 2014,² forty-eight members of the Swartzentruber Amish faith, including the petitioners, signed a letter to the MPCA stating their religious objections to the septic system requirement and “asking in the name of our Lord to be exempt and forgiven from this oppression.” Add-108; T. 1150. On August 15, 2015, fifty-five members of the Swartzentruber Amish faith, including the petitioners, signed a second letter to the MPCA restating their religious objections to the ordinance requirements as a “way of the world,” noting that William Penn had invited the Amish to the United States from Europe as a “land of freedom of Religion.” Add-110-111. The letter again asked to be exempt and “forgiven this oppression that is being laid on us.” *Id.* In April 2016, MPCA filed administrative penalty order enforcement actions against twenty-three Amish families who had not installed a subsurface septic system.³

The members of the Old Order Amish Mennonite Swarzentrubler church community residing in rural Fillmore County incorporate their religious faith into every facet of daily living so that they live their lives essentially “always in church.” T. 433, 438. “The way of life characteristic of

² The handwritten letter shows a date of May 27, 2014, with that year crossed out and 2015 written. Add-108. The second letter describes the first as sent in June 2014. Add-111.

³ These enforcement cases are listed in Appellant’s Brief and Addendum to Court of Appeals at 13 n. 3.

the Amish results from their interpretation of scriptural passages that tell them that in order to live a Godly life, they must separate themselves from the world and adhere to the ways and practices of their forefathers and foremothers.” Add-27. The Ordnung is the Amish code of conduct which regulates all aspects of life and serves as “an unwritten map to being Amish that has evolved over time based on the traditions of generations before.” T. 438-39, 522-23; *see* Add-33. The petitioners object to installing septic systems because this would violate their church’s Ordnung and their sincerely held religious beliefs. Add-43.

During the pendency of the case, petitioners Menno Mast, Ammon Swartzentruber, and Samuel Miller experimented with wood chip mulch basins as a method to dispose of their gray water. T. 1105, 1172. Petitioners did not follow a plan, nor did they consult anyone with training and experience in these systems. T. 701, 1100, 2157. They intended to determine whether this new technique would be compatible with their religious faith,⁴ and to learn whether the mulch basins might freeze during the winter. T.

⁴ An Amish community regularly meets to review the conduct of members and to reaffirm what is acceptable or not. T. 437. At a semi-annual event called the Ordnung Gmay, it was determined that petitioners’ wood chip mulch basin effort would be acceptable within the church as a means of disposing of gray water. T. 115-116, 535-536, 1099, 1145-1146.

1105, 1172. These rudimentary test basins were substantially undersized.⁵ At trial, petitioners presented a professionally designed plan developed according to the Uniform Plumbing Code that depicts increased capacity and other improvements. Add-106-107.

The District Court found that gray water presents a serious risk to human health and the environment and that mulch basin systems do not provide the same protection as the required septic system. Add-54.

4. Argument in Support of the Petition.

Art. I, § 16, “precludes even an *infringement* or *interference* with religious freedom.” *Hershberger II*, 462 N.W.2d at 397 [italics in original]. Under RLUIPA, “the least-restrictive-alternative standard is exceptionally demanding....” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014). This Court should grant review in order to ensure that these standards are met before the government is authorized to substantially burden the petitioners’ rights to free exercise of religious beliefs.

The crucial issue under *Hershberger* is whether there is a feasible alternative: “[I]f freedom of conscience and public safety *can be achieved* through use of an alternative to a statutory requirement that burdens

⁵ During the fifteen months that these experimental basins were used, Menno Mast’s system overflowed once and Ammon Swartzentruber’s overflowed twice. T. 1018, 1021, 1171.

freedom of conscience, * * * section 16 requires an allowance for such an alternative.” 462 N.W.2d at 399 [italics supplied]. Petitioners’ expert explaining the wood chip mulch basin system has nineteen years experience on installation and operation of gray water basins as allowed under the Uniform Plumbing Code.⁶ MPCA’s expert witness agreed that the wood chip mulch basin system, if sited with at least three feet of soil depth above bedrock or a redoximorphic layer,⁷ could achieve the government’s goals of purifying the gray water and protecting the environment. “I think you then could have a system with a very high level of maintenance and oversight that would achieve that goal.” T. 1668 (Dr. Sara Heger); *and see* T. 1445 [“potentially” feasible, expert Brandon Montgomery]. Despite this testimony, and despite finding that it is “less religiously burdensome,” the District Court found that the wood chip mulch basin alternative cannot achieve the government’s compelling interest of ensuring public health and environmental safety. Add-54.

Whether there is a feasible alternative that adequately serves the government’s compelling interest is a mixed question of fact and law. When

⁶ The District Court noted that Laura Allen is not a soil scientist or hydrologist. Add-53, 54.

⁷ Redoximorphic means a rusty colored layer indicating periodic saturation with ground water. Add-45.

application of a constitutional provision turns on an issue of “constitutional fact,” the Supreme Court conducts an independent review of the record. “[S]ince a finding of negligence is also a matter of constitutional fact, we will conduct a de novo review of such finding on appeal.” *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 492 n. 21 (Minn. 1985). “Even though a Confrontation Clause analysis is one involving questions of both fact and law, our review must be conducted independently of the lower courts’ analyses to guarantee that the protections in the Confrontation Clause are satisfied.” *State v. King*, 622 N.W.2d 800, 806 (Minn. 2001). Petitioners’ claim for constitutional protection of religious exercise demands independent review.

Petitioners request this Court to review the lower courts’ analysis that their rights to religious freedom can be substantially burdened by the government.

Respectfully submitted,

LAW OFFICES OF SOUTHERN MINNESOTA
REGIONAL LEGAL SERVICES, INC.

/s/ Brian N. Lipford
Brian N. Lipford, ID # 388760
903 West Center Street, Suite 230
Rochester MN 55902
507.292.0060
brian.lipford@smrls.org

/s/ Charles H. Thomas
Charles H. Thomas, ID # 1090058
55 E. 5th Street, Suite 800
Saint Paul MN 55101
651.894.6933
charles.thomas@smrls.org

Attorneys for Petitioners

CERTIFICATE OF DOCUMENT LENGTH

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By: /s/ Brian N. Lipford
Brian N. Lipford, ID # 388760
5903 West Center Street, Suite 230
Rochester MN 55902
507.292.0060
brian.lipford@smrls.org

Appendix E

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF FILLMORE

THIRD JUDICIAL DISTRICT
Case Type: Civil Other/Miscellaneous

Amos Mast, Menno Mast, Sam Miller,
and Ammon Swartzentruber,

Plaintiffs,

vs.

Court File No. 23-CV-17-351

County of Fillmore and
Minnesota Pollution Control Agency,

Defendants.

**PLAINTIFFS' PROPOSED
AMENDED AND ADDITIONAL
FINDINGS AND CONCLUSIONS,
AND MEMORANDUM IN SUPPORT
OF MOTION FOR NEW TRIAL**

AND

County of Fillmore, a Political Subdivision
of the State of Minnesota,

Plaintiff,

vs.

Court File No. 23-CV-16-844

Ammon J. Swartzentruber and
Sarah J. Swartzentruber,

Defendants.

Plaintiffs have moved for the Court to make amended and additional findings of fact. These proposed amended and additional findings of fact are set out below and numbered in brackets. These additional findings of fact more fully reflect the evidence and testimony presented to the court. Proposed deleted language is shown by ~~striketrough~~ and proposed new language is shown by *italics*.

1. Proposed amended findings of fact.

Finding of Fact 6: The Government has a compelling interest in protecting

human health and the environment. Specifically, the Government has a compelling interest in ensuring that gray water is properly treated so as not to transmit disease and introduce into the environment harmful chemicals and nutrients. *The government's interest in ensuring proper gray water treatment and protecting the environment from the harmful chemicals and nutrients is not so compelling that the Government prohibits Fillmore County farmers from pumping black water and human fecal contents from septic tanks and spreading it directly onto the soil surface of their fields without any State or local regulations, permits or oversight.*

Memorandum at p. 37: I find that untreated or inadequately treated gray water discharged directly onto the soil of a field without use of either a septic system or an appropriately sized and sited mulch basin could present ~~presents~~ substantial and serious ~~danger~~ a risk to public health and risk to the environment. ~~and that the~~ The Government has a compelling interest in protecting against those potential dangers but this interest not more compelling than the Government's interest in protecting public health and the environment from the much higher risks of untreated or inadequately treated black water and human fecal contents that defendants allow to be pumped from septic tanks and spread directly onto the soil of a field in Fillmore County. Nor is the risk posed by gray water risk substantial and serious enough to warrant Minnesota from prohibiting discharge of gray water directly to the ground pursuant to the hand carried gray water exemption. Minnesota has hundreds of campsites across the state, including Fillmore County, that permit

untreated greywater to be dumped on the ground, often very close to nearby waterways.

Memorandum at p. 37: I also find that proper waste water treatment is of particular urgency in Fillmore County due to its karst topography. *That said, Karst is present throughout the United States and is located 49 of 50 states, many which permit the same alternative systems the Plaintiffs propose here. Additionally, this governmental interest is not more urgent in Fillmore County with respect to gray water than it is with respect to black water and human fecal contents that are spread directly onto the soil of a field without treatment. Furthermore, septic effluent, which contains pathogens, phosphorus and nitrogen, already is discharged throughout Fillmore County through its existing septic tanks and distribution lines.*

Memorandum at p. 49: The finding with which I begin my analysis is that *contact with untreated household gray water presents a serious risk to public health via disease-causing viruses and bacteria, and endangers the environment with nitrogen and phosphorus. This risk is very low given that the mulch based systems discharge the water subsurface. This risk is also substantially less serious than the risk to public health and the environment via disease-causing viruses and bacteria from untreated black water and human fecal contents.*

Memorandum at p. 51: Minnesota prohibits use of biodegradable substances such as woodchips as distribution media in waste water treatment systems because of the problems the decomposition of these materials creates. *While this prohibition makes sense for buried septic tank distribution lines, mulch has been used by*

Minnesota's commercial dairies in the treatment of industrial gray water; moreover, the Plaintiff's system contains valve cover boxes that would permit greater access than a buried line.

2. Proposed additional findings of fact.

[1] *The Government presented no evidence that any person in Minnesota, any other State in the United States or anywhere else in the world has been injured or made ill by gray water that is being reused by approximately 1.7 million people residing in twenty different states.*

[2] *The Government presented no evidence that ground water resources in Fillmore County have been contaminated or polluted by the gray water handling practices of these plaintiffs, or for that matter, by the practices of any of the people in the Amish communities residing in Fillmore County.*

[3] *While gray water may contain bacteria and viruses when there is a person with such bacteria or virus in the household, and may contain residual amounts of soap and detergent products from use of such products by the household, gray water is several orders of magnitude less dangerous to human health from incidental contact than is black water or human septage.*

[4] *For purposes of public health, transmission of illness arising from bacteria or viruses from an infected person is much more likely to result from people residing in close proximity in such a household than from a person having incidental contact with gray water.*

[5] *When gray water flows into an appropriately-sized mulch basin and spreads out and down to the subsurface soil, the soil provides the same treatment to the gray water as the subsurface soil provides when gray water, or black water with human fecal content, is pumped from a septic tank into buried rock drain lines in a leaching field.*

[6] *Defendants' rules and ordinances authorize farmers in Fillmore County to pump black water and human fecal matter from a septic tank and spread the material directly onto the surface of a field.*

[7] *Defendants' rules and ordinances authorize farmers in Fillmore County to spread black water and human fecal matter pumped from septic tanks directly onto the surface of their fields without obtaining any permit, any license, or submitting to any inspection by defendants.*

[8] *Defendants' rules and ordinances permit farmers in Fillmore County to spread black water and human fecal contents pumped from septic tanks directly onto the surface of a field without soil testing for redoximorphic features or for a perched water table, and regardless whether there is three feet of soil between the surface and any redoximorphic features or bedrock in the field where black water and human fecal contents are spread.*

[9] *Defendants' rules and ordinances permit farmers in Fillmore County to spread black water and human fecal contents pumped from septic tanks directly onto the surface of a field regardless of proximity to a wetland, stream, river, or lake, so long as the black water and human fecal contents pumped from septic tanks is not*

discharged directly into a well, a sinkhole, or a boring.

[10] *When black water and human fecal contents pumped from septic tanks is spread on a farmer's field in Fillmore County, treatment of the waste occurs at the soil surface and directly below the surface.*

[11] *When gray water flows into an appropriately sized and sited mulch basin system and through the mulch to the subsurface soil, treatment of the gray water occurs at that soil subsurface and directly below the subsurface soil.*

[12] *Gray water that originates from hand-carried water is exempted by defendants' rules and ordinances from the requirements of treatment so long as the gray water is not discharged directly to surface waters, drainageways, or poorly drained soils, is not discharged in a manner or volume harmful to the environment or public health, or in a manner that creates a public health nuisance.*

[13] *Plaintiffs' households utilize dry sinks and their residences do not have kitchen sinks or drains. As such all of their kitchen water, as well as their other water that is hand-carried, need not comply with the SSTS rules and ordinances so long as there is compliance with Minn. R., Part 7080.1500, subp. 2. Gray water originating from hand-carried water that is discharged into an appropriately sized and sited mulch basin system is handled in compliance with this rule.*

Finding of Fact 4: *Plaintiffs' objection to installing the gray water septic systems required by the Government, which would include a large capacity holding tank, pump, and subsurface drain lines of rock within a leaching field, is based on a sincerely held religious belief. Plaintiffs' Amish religious community has never*

permitted septic tanks.

Finding of Fact 5: The Government's regulation – that septic systems be installed on Plaintiffs' properties to dispose of gray water – substantially burdens Plaintiffs' exercise of their sincerely held religious beliefs *because plaintiffs are threatened by substantial civil fines, the threat of jail, and loss or destruction of their homes and property if they do not comply with the Government's rules and ordinances.*

[12] The Government's ~~regulation~~ *rules and ordinances for Fillmore County*– that septic systems *with a collecting or holding septic tank must be installed on Plaintiffs' properties to dispose of gray water – substantially burdens Plaintiffs' exercise of their sincerely held religious beliefs because plaintiffs believe that acceding to using new technologies can threaten broader acceptance of worldly ways within the Amish community that are not consistent with the Amish beliefs about scripture and is unacceptable.*

[13] *In order not to violate their sincerely held religious beliefs, plaintiffs are willing to construct mulch basins that are appropriately sized and sited to receive and dispose of their gray water even though the labor and regular maintenance that will be required could be regarded by non-Amish farmers as too burdensome, unfeasible, or impractical. Approximately 1.7 million individuals in the United States have already implemented these alternative systems, despite the potential for more labor or maintenance, for reasons such resource conservation and/or cost savings. There is no reason to believe that the Amish, who already engage in daily tasks made more*

burdensome due to their religious faith, would not accept any additional labor or maintenance for the reason that this system is not repugnant to their religious faith.

[14] *The septic tank component of an SSTS system does not by itself remove from the waste water any phosphorus, nitrogen, or any pathogens such as bacteria or viruses. Treatment of these potentially harmful elements in waste water occurs when the effluent passes through the rock filled drain lines and leaches into the soil. Gray water that is discharged into an appropriately sized mulch basin would undergo the same treatment process when the effluent reaches the soil surface at the bottom of the mulch basin.*

[15] *Twenty states permit use of mulch basin systems for disposal of gray water. Approximately 1.7 million people are using such systems to capture and reuse their waste gray water.*

[16] *The 2018 Uniform Plumbing Code at Chapter 15 provides for use of mulch basins in disposal or reuse of gray water. Minnesota has not adopted this chapter.*

[17] *Under defendants' rules and ordinances, plaintiffs could install an SSTS with a septic tank, instead of a mulch basin system, and then could pump their gray water out of the tank and spread it directly onto the soil without soil testing and regardless of the amount of separation between the soil surface and any redoximorphic features in the soil.*

[18] *Under defendants' rules and ordinances, plaintiffs could install an SSTS with a septic tank instead of flowing gray water into a mulch basin, and could then discharge the gray water directly onto the surface of a field regardless of proximity to*

a wetland, stream, river, or lake, so long as this gray water was not discharged into a well, a sinkhole, or a boring.

[19] *Karst topography is present in Minnesota as well as in forty-eight other states, including states that permit mulch basin systems for disposal of gray water, as proposed by plaintiffs.*

[20] *Plaintiffs did not object to soil testing to determine siting of the mulch basin systems in order to satisfy the requirement of three-feet of soil above bedrock or redoximorphic features.*

[21] *Defendants' requirement of three-feet of soil above bedrock or redoximorphic features applies to an SSTS system as well as to the proposed mulch basin system. If there are no locations with sufficient depth of soil, placement of an SSTS system would not be permitted under defendants' rules and ordinances.*

[22] *Three plaintiffs testified that the mulch basin systems they constructed in 2017 did not freeze during the winter of 2017-18.*

[23] *The court takes judicial notice that states permitting gray water reuse and mulch basin systems include states with cold weather climates such as Wyoming and Montana.*

Upon adopting these proposed amended and additional findings of fact, the court must then adopt conforming conclusions of law that defendants have not demonstrated that there is no less intrusive or less burdensome means for the government to further its interests. The court must modify the order and modify the judgment to conclude that plaintiffs have prevailed on their claim under

RLUIPA and under article 1, § 16, of the Minnesota Constitution.

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR A NEW TRIAL**

Plaintiffs have moved this Court for a new trial. Under M.R.Civ.Pro., Rule 59.01, a new trial may be granted to all or any of the parties, on all or part of the issues. Plaintiffs' motion is for a new trial limited to the issue of defendants' burden to prove that there is no alternative to the SSTS system required under defendants' rules and ordinances that is less intrusive on plaintiffs' sincerely held religious beliefs that they cannot utilize such a system with a septic tank for their gray water.

Plaintiffs' primary claims arise under RLUIPA, 42 U.S.C. § 2000cc, and under the Minnesota Constitution, art. 1, § 16. Both claims are generally similar in the required elements, and for both the federal and state claims, the ultimate burden is placed on defendants to demonstrate that there is no means of furthering the governmental interest that is less intrusive on plaintiffs' religious beliefs.

A. Elements of the RLUIPA claim.

The RLUIPA claim has three elements: (1) whether plaintiffs have a sincerely held religious belief as a basis for refusing to comply with the defendants' rules and ordinances for a SSTS system; (2) whether the defendants' rules and ordinances substantially burden the exercise of plaintiffs' sincerely held religious beliefs; and

(3) whether the defendants' compelling governmental interests can be furthered by any means that is less restrictive or burdensome on plaintiffs' sincerely held religious beliefs.

In the decision of 22 April 2019, the court concluded that "...the Plaintiffs sincerely hold religious beliefs that are the basis for their objections to the Government's mandate at issue here." Decision at 33. This satisfied the first element for the plaintiffs' RLUIPA claim.

In the decision of 22 April 2019, the court concluded that "...Government-required installation of gray water septic systems on Plaintiffs' farms will significantly burden their religious beliefs." Decision at 36. This satisfied the second element of the plaintiffs' RLUIPA claim.

Once plaintiffs established that their sincerely held religious beliefs are substantially burdened by the defendants' requirements, the burden-shifting framework of RLUIPA applies. *First Lutheran Church v. City of St. Paul*, 326 F.Supp.3d 745, 760 (D. Minn. 2018). 42 U.S.C. § 2000cc-2(b) provides that "the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice substantially burdens the plaintiff's exercise of religion." Because the court's conclusions found that plaintiffs have met their burden that the law substantially burdens their exercise of religion, it is the defendants whom the court must hold to the burden to "...demonstrate that the imposition of the burden on that person, assembly, or institution – (A) is in

furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.” § 2000cc(a)(1).

B. Elements of the § 16 claim.

Plaintiffs’ claim under the Minnesota Constitution, article 1, § 16, includes elements very similar to the RLUIPA claim. The Minnesota Supreme Court applies the compelling state interest balancing test to provide more protection than the First Amendment. “Under section 16, we consider whether: (1) the objector's belief is sincerely held; (2) the state action burdens the exercise of religious beliefs; (3) the state's interest is overriding or compelling; and (4) the state action uses the least restrictive means.” *Odenthal v. Minn. Conf. of Seventh-Day Adventists*, 649 N.W.2d 426, 442 (Minn. 2002), citing *Hill-Murray Fed. of Teachers v. Hill-Murray High School*, 487 N.W.2d 857, 865 (Minn. 1992). As applies under RLUIPA, the Minnesota Supreme Court has also explicitly allocated the burden of persuasion to the state through the compelling state interest test. “[O]nce a claimant has demonstrated a sincere religious belief intended to be protected by section 16, the state should be required to demonstrate that public safety cannot be achieved by proposed alternative means.” *Hershberger II*, 462 N.W.2d at 398.

Plaintiffs have demonstrated “a sincere religious belief intended to be protected by section 16,” *State v. Hershberger*, 462 N.W.2d 393, 399 (Minn. 1990) [*Hershberger II*]. This court has concluded that this is true. Decision at 33. The second prong is whether “application of the statute burdens the exercise of the

appellants' religious beliefs." *State v. Hershberger*, 444 N.W.2d 282, 287 (Minn. 1989) [*Hershberger I*] [referring to requirement for Amish to display slow-moving vehicle emblems on buggies]. There is no question here that it does. This court has determined that defendants' rules and ordinances substantially burden plaintiffs' free exercise of religion. Decision at 36. This second prong of the plaintiffs' § 16 claim is established.

The third element of the § 16 claim is somewhat different than the third element in RLUIPA because Minnesota protects religious liberty at a higher level than RLUIPA. "[S]ection 16 precludes even an *infringement* or an *interference* with religious beliefs. * * *. Section 16 also expressly limits the governmental interests that may outweigh religious liberty. Only the government's interest in peace or safety or against acts of licentiousness will excuse an imposition on religious freedom under the Minnesota Constitution." *Hershberger II*, 462 N.W.2d at 397 [italics in original].

The fourth prong of the test under § 16 is congruent with the final elements of the RLUIPA claim: Defendants must demonstrate that the governmental interest of safety cannot be achieved by proposed alternative means. Plaintiffs' motion seeks a new trial on the burden shifting elements of the RLUIPA and the § 16 claim because the court did not require defendants to demonstrate that the asserted compelling government interests "are the least restrictive means" of further that interest, nor did the court require defendants to demonstrate that the public safety goals are furthered in the least restrictive way.

C. Defendants' did not carry their burden of demonstrating that there is no less intrusive means of furthering the government's interest.

The court's decision did not hold defendants to their burden under the applicable law for either of plaintiffs' claims. Rather than require defendants to demonstrate that there is no alternative means of furthering the governmental objectives, the court's decision found only that plaintiffs' self-built mulch basin system "...did not work." Decision at 57. "This record contains no evidence of a single, properly working mulch basin system in Minnesota; or in any other northern tier state with polar vortex temperatures." Decision at 57. In this way, the court imposed on plaintiffs the burden of demonstrating not only an alternative to the SSTS septic system that is less intrusive on plaintiffs' religious beliefs, but also an alternative that had already been constructed, that needed no changes, alterations, or adjustments as to sizing, capacity, size of mulch, division of the gray water flow, or cold weather operation. The court focuses its decision, not on whether defendants proved there is no possible alternative less intrusive on plaintiffs' religious beliefs, but instead on highlighting inadequacies in the operation of the mulch basin systems that the plaintiffs had built on their own and were done without any expert instruction or guidance: "They were too small. ... [Ms. Allen] observed saturated soil and pooling of waste water in Plaintiffs' systems." Decision at 46. One mulch basin was filled with woodchips that were too fine, resulting in clogging and premature decomposition. Decision at 47 n. 28. Notably, the government sought to have these improvised systems forcibly removed with costs

assessed to the indigent Plaintiffs during the pendency of this action; the court now penalizes the Plaintiffs because said systems, installed under these circumstances, were not extensive enough. The court erred in concluding that this evidence satisfied defendants' burden on this element of the claims. The burden on defendants is not to show that a mulch basin system can fail, but to prove that a mulch basin system cannot be made to work adequately and that such system permitted in other states could not be made to work in Minnesota. The evidence is insufficient to support this conclusion. This error justifies a new trial on this issue.

The court's decision poses the proper question, whether an appropriately sized mulch basin system in a location with three feet of soil above the redoximorphic features "...could * * * provide ground water treatment that protects human health and the environment." Decision at 51. The court decision cites to the opinion by the state defendant's expert, Dr. Sara Heger¹, that "Dr. Heger testified that this might be theoretically possible." This opinion is not remarkable in light of the evidence that twenty states permit such systems, and that the Uniform Plumbing Code contains provisions approving these systems. Appropriately sized and sited mulch basin systems are far more than a theoretical possibility. They are an operational reality in the United States today.

Because it is possible, in the opinion of the defendants' expert, for the mulch basin system to provide gray water treatment that protects human health and the environment, the court must also conclude that the defendants' mandating only the

¹ Dr. Heger admitted that she had no training, knowledge or expertise in the area of the alternative non-septic based systems being used in other parts of the United States.

intrusive SSTS system is not the only alternative and that it is not the least restrictive on plaintiffs' beliefs. By itself, this admission by Dr. Heger shows that defendants cannot have carried the burden of proving there is no alternative less burdensome on plaintiffs' religious beliefs, because 'it is theoretically possible.' Decision at 51. Given this admission, the defendants' must demonstrate that the practicalities of an appropriately sized and sited mulch basin system cannot be reasonably achieved. This the defendants' evidence has not done.

The court's decision relies on what are the defendants' "practical" objections to a mulch basin system which plaintiffs have accepted as a treatment technique for gray water that is not as intrusive or overly burdensome on their free exercise of religion. Despite noting Dr. Heger's concession that the mulch basin system possibly could be an adequate treatment approach for the plaintiffs' gray water, the court's decision then finds that "...the maintenance required to keep such a system properly operating would be so burdensome as to render it unfeasible." Decision at 51. But the court ignores that it is the plaintiffs who would willingly perform this maintenance.

The plaintiffs have affirmed that they are willing to do what is necessary to keep the mulch basin systems operating effectively so that they can comply with reasonable gray water treatment requirements while engaging in free exercise of their religious beliefs. The plaintiffs already conduct their daily lives and farming activities in accordance with the dictates of their religious beliefs, in a manner and with methods that most residents of Minnesota would find so burdensome as to be

‘unfeasible.’ But the legal element of the defendants’ burden under the RLUIPA and § 16 claims is whether the mulch basin system could work for gray water disposal, not whether non-Amish residents of Fillmore County would believe it to be reasonable for themselves to spend the time and labor required to build, operate, and maintain the mulch basin system instead of a septic system. This finding by the court is not a proper basis for concluding that the plaintiffs’ claims under RLUIPA and § 16 have been defeated by defendants’ evidence. There must be a new trial on this element of the claims before the court.

Respectfully submitted,

LAW OFFICES OF SOUTHERN MINNESOTA
REGIONAL LEGAL SERVICES, INC.

Dated: May 21, 2019

By: /s/ Brian N. Lipford
Brian N. Lipford, ID # 388760
903 West Center Street, Suite 230
Rochester MN 55902
507.292.0060
brian.lipford@smrls.org

Attorney for Plaintiffs

Appendix F

A19-1375

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Amos Mast, Menno Mast, Sam Miller, and
Ammon Swartzentruber,

Appellants,

vs.

County of Fillmore, and
Minnesota Pollution Control Agency,

Respondents.

APPELLANTS' BRIEF AND ADDENDUM

Brett Corson, ID # 205990
Fillmore County Attorney
PO Box 307
Preston MN 55965
507.765.2530
bcorson@co.fillmore.mn.us

Attorney for Fillmore County

KEITH ELLISON, Attorney
General, State of Minnesota
Christina Brown, ID # 391019
Janine Kimble, ID # 392032
445 Minnesota Street, Suite 900
Saint Paul MN 55101-2127
651.757.1471
christina.brown@ag.state.mn.us

*Attorneys for Minnesota
Pollution Control Agency*

LAW OFFICES OF SOUTHERN
MINNESOTA REGIONAL LEGAL
SERVICES, INC.

By: Brian N. Lipford, ID #388760
903 West Center Street, Suite 230
Rochester MN 55902
507.292.0080
brian.lipford@smrls.org

Charles H. Thomas, ID # 109058
55 E. 5th Street, Suite 800
Saint Paul MN 55101
651.894.6933
charles.thomas@smrls.org

Attorneys for Appellants

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LEGAL ISSUES PRESENTED

Appellants' declaratory judgment action alleged that the application to them of the Fillmore County sewage treatment ordinance, as authorized and required by rules issued by the Minnesota Pollution Control Agency, infringed upon and burdened appellants' right to free exercise of their sincerely-held religious beliefs under the Minnesota Constitution, art. I, § 16, and under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc *et seq.* As members of the Swartzentruber Old Order Amish community, appellants object to installing a full subsurface septic system to dispose of the gray water from their homes. The District Court found that appellants' objections are based on sincerely-held religious beliefs and found that the government's regulations substantially burdened appellants' free exercise of their religion. But the District Court found that there is no alternative method for disposing of appellants' gray water that is less restrictive on appellants' free exercise of religion.

I. Did the District Court properly balance the competing interests of appellants' freedom of religious exercise with the government's interest in public safety?

The District Court ruled: The government's compelling interest cannot be achieved by less religiously burdensome means. The mulch-basin

gray water system does not provide the same protection as the gray water septic system required by the government. Add-54.

Issue preserved for appeal: Appellants moved the trial court for amended findings of fact, for amended conclusions of law, and for an amended judgment, or for a new trial. Index # 243. The District Court denied the motion. Index # 249; Add-65.

Most apposite authorities: *State v. Hershberger*, 444 N.W.2d 282 (Minn. 1989) [*Hershberger II*]; *Holt v. Hobbs*, 574 U.S. 352 (2015).

II. Is the District Court's conclusion that there is no alternative gray water disposal method that can adequately protect the government's compelling interest supported by the findings of fact and the evidence in the record?

The District Court ruled: The government's requirement is the least restrictive means of ensuring that gray water is properly treated such that public health and the environment is protected. Appellants' proposed alternative, a mulch-basin gray water system, is less religiously burdensome but does not adequately serve the government's compelling interest in public health and environmental protection. Add-3.

Issue preserved for appeal: Appellants moved the trial court for amended findings of fact, for amended conclusions of law, and for an

amended judgment, or for a new trial. Index # 243. The District Court denied the motion. Index # 249; Add-65.

Most apposite authorities: *Odenthal v. Minn. Conf. of Seventh-Day Adventists*, 649 N.W.2d 426 (Minn. 2002); *State v. Hershberger*, 444 N.W.2d 282 (Minn. 1989) [*Hershberger II*]; *Holt v. Hobbs*, 574 U.S. 352 (2015).

STATEMENT OF THE CASE

Appellants brought a declaratory judgment action against respondents, the Minnesota Pollution Control Agency and the County of Fillmore, challenging the requirements under state statutes, rules, and local ordinances that appellants install and use a septic system for disposal of the gray water from appellants' homes. Index # 8. Appellants claimed that the application to them of the requirements for a subsurface septic system violated appellants' right to free exercise of their religion as protected by the Minnesota Constitution, article I, section 16, and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc, *et seq.*¹

The case was tried before Honorable Joseph F. Chase, Judge of District Court, Third Judicial District, in Preston. Add-1. After seven days of trial, *id.*, the District Court found that appellants' religious beliefs were sincerely-

¹ Appellants' Count I and Count III [Index # 8] went to trial. Count II, which asserted a First Amendment claim, was dismissed. Add-3.

held; found that the government's requirements imposed a substantial burden upon appellants' free exercise of religion; but found that the respondents' requirements are the least restrictive means of accomplishing the government's compelling interest in protecting public health and the environment. Add-2-3. Judgment was entered against appellants and in favor of respondents on both claims. Index # 237.

Appellants moved for amended findings of fact, for amended conclusions of law, for an amended judgment, and for a new trial. Index # 243. The District Court denied appellants' post-trial motions. Index # 249. Appellants timely appealed to the Minnesota Court of Appeals. Index # 256.

STATEMENT OF FACTS

Introduction: Appellants are four Amish farmers residing with their families in rural Fillmore County, Minnesota. Add-2. Appellants are all members of the Swartzentruber Old Order Amish community. Add-28. The Swartzentruber Amish are the most conservative of all the Amish groups and have remained the most separate from modern technology. *Id.*; T. 429.

Appellants and the other Swartzentruber Amish use privies² – outhouses – and do not install or utilize indoor flush toilets at their homes. Add-2, Add-32; T. 500-503. This case centers on the disposal of “gray water,” which is the water used by appellants’ households for the kitchen, bathing and laundry. T. 604. Gray water does not contain toilet waste. Minn. R. 7080.1100, subp. 38. Waste water from toilets and sewage containing toilet waste is called “black water.” T. 616-17.

Appellants objected to the government’s regulations requiring them to install a septic system for the disposal of their gray water because installing such a system violates their sincerely-held religious beliefs. Index # 8 at p. 7. Appellants proposed an alternative system that would direct their kitchen, bathing and laundry water into mulch-basins. Add-99-100. According to appellants’ expert, some 20 states have regulations allowing mulch-basin disposal of gray water. T. 645. Appellants have determined that using a mulch-basin gray water system does not infringe on appellants’ religious faith. T. 270-71.

As discussed below, a subsurface septic system and the mulch-basin gray water system both rely on the soil to purify the wastewater. Add-43. “The gray water trickles down to the dirt floor at the bottom of the basin –

² See Minn. R. 7080.1100, subp. 62, defining “privy”, and 7080.2280 describing requirements for a privy.

the soil interface of this system – and soaks into (“infiltrates”) the soil where treatment happens in the same natural, aerobic manner that it does with a septic system.” Add-48. At root, these appellants believe that, just as toilet waste – black water – can safely be disposed of through use of a privy without a septic tank or a subsurface septic system, so, too, can their gray water be safely disposed of through a mulch-basin without using a septic tank or a subsurface septic system. Appellants seek permission from this court to use this method in order to preserve their religious way of life while disposing of their gray water.

History of this dispute: In December 2013, Fillmore County adopted its Sub-Surface Sewage Treatment System Ordinance as required by Minn. Stat. § 115.55 (2019), Minn. Stat. §§ 145A.05 (2019), and Minn. R., chapters 7080-7082. Ex. 101; Add-96.

On May 27, 2015, 48 members of the Swartzentruber Amish faith, including the four appellants, signed a letter to the Minnesota Pollution Control Agency informing the state agency of their religious objections to the septic system requirement and “asking in the name of our Lord to be exempt and forgiven from this oppression.” Ex. 3; Add-102; T. 1150.

On August 15, 2015, 55 members of the Swartzentruber Amish faith, including the four appellants, signed a second letter to the Minnesota Pollution Control Agency asking for a response to their May letter, restating

their religious objections, reminding them that “when William Penn had purchased the province of Pennsylvania in 1682 he went back to the European Countries and invited us to the land of freedom of Religion” and stating “we are again asking in the name of our Lord to be exempt and forgiven from this oppression that is being laid on us.” Ex. 4; Add-104; T. 1152.

On April 14, 2016, the Minnesota Pollution Control Agency filed Administrative Penalty Order enforcement actions against 23 Amish families in Fillmore County who had not installed the required subsurface septic system.³

³ See, 23-CV-16-220 (Edward Hershberger); 23-CV-16-221 (Eli D Hershberger, Ida Hershberger); 23-CV-16-222 (Eli D Hershberger, Susanna Hershberger); 23-CV-16-223 (Eli J Hershberger, Lydia D Hershberger); 23-CV-16-224 (Harvey J Hershberger, Mary Hershberger); 23-CV-16-225 (Levi E Hershberger, Rebecca L Hershberger); 23-CV-16-226 (Menno D Mast, Lizzie Mast); 23-CV-16-227 (Menno R Mast, Susie G Mast); 23-CV-16-228 (Ammon M Miller, Rachel Y Miller); 23-CV-16-229 (Amos M Miller, Rhonda Y Miller); 23-CV-16-230 (Emery J Miller, Sarah J Miller); 23-CV-16-231 (Levi M Miller, Susan E Miller); 23-CV-16-232 (Mattie P Miller); 23-CV-16-233 (Sam P Miller, Verna E Miller); 23-CV-16-234 (Andy A Slabaugh, Verna C Slabaugh); 23-CV-16-235 (Abe PM Swartzentruber, Lydia Swartzentruber); 23-CV-16-236 (Dan D Swartzentruber, Sarah Swartzentruber); 23-CV-16-237 (Eli J Swartzentruber, Amanda Swartzentruber); 23-CV-16-238 (Jacob W Swartzentruber, Rebecca Swartzentruber); 23-CV-16-239 (Ammon J Troyer, Anna E Troyer); 23-CV-16-240 (Daniel M Yoder, Amanda A Yoder); 23-CV-16-241 (Levi A Yoder, Frances Yoder); 23-CV-16-242 (Jonas D Zook, Barbara J Zook)

Declaratory judgment action filed: On April 7, 2017, appellants brought this proceeding as a declaratory judgment action⁴ against the County of Fillmore and the Minnesota Pollution Control Agency challenging on religious freedom grounds the county's ordinance and the state's rules that require appellants to install a septic system for disposal of the kitchen, bathroom, and laundry waste water from appellants' homes. Index # 8.

On April 27, 2017, respondent Fillmore County filed its Answer and Counterclaim seeking an order removing appellants from their homes, removing their possessions and rendering their homes uninhabitable if they did not install a septic system in 6 months. Index # 27 at 10.

In September 2017, appellant Menno Mast experimented by routing his gray water into two mulch-basins. T. 1018, 1105. Shortly after Menno Mast did this, appellant Sam Miller routed his gray water into two mulch-basins and appellant Ammon Swartzentruber routed his gray water into one mulch-basin.

On November 13, 2017, the District Court granted respondents the right to inspect the exterior of the appellants' properties concerning gray water disposal but denied their request to inspect the interiors of appellants'

⁴ This case was initially filed in Ramsey County and assigned case number 62-CV-17-2033. After respondents' change of venue motion was granted, Index # 1, the case was transferred to Fillmore County and assigned number 23-CV-17-351.

homes to investigate the types of modern technologies and materials that appellants might be using. Index # 101 at 16-17.

On June 8, 2018, Fillmore County filed a motion seeking a court order allowing the government to search the interiors of appellants' homes, barns and outbuildings. Index # 125.

On June 27, 2018, the District Court denied respondents' second request to inspect the interior of appellants' homes. Index # 150. The District Court limited the government inspections to its previous order allowing searches only of the land and exterior of buildings. *Id.*

On August 17, 2018, the respondents inspected appellants' mulch-basin installations.⁵ Index # 191 at 4. On September 28, 2018, the court indicated that it "would not, at this time, order removal" of appellants' experimental mulch basins and denied the government's request that they be immediately removed at the government's expense with an award of attorney's fees. *Id.*

Evidence and testimony at the trial: This case was tried to the court on November 26 to 30, December 14, and December 27, 2018. Add-1. The District Court received extensive evidence about appellants' religious

⁵ When the government inspected the mulch-basin installations, they also searched for evidence to attack the sincerity of appellants' religious beliefs and photographed a trailer at appellants' property [Ex. 216], the rubber tires on one of their children's wagons [Ex. 198], a gas-powered cement mixer [Ex. 217], their children's play set [Ex. 221], and a propane torch [Ex. 237].

beliefs as members of the Swartzentruber Old Order Amish community.

Add-27-38. Both respondents vigorously disputed that appellants' objections were based on religion. Index # 223 at 9-12, Index # 228 at 9-12.

Appellants' religious beliefs: Expert witness testimony was provided about how the Amish's religious faith is incorporated into every facet of daily living so that they live their lives essentially "always in church." T. 433, 438. Baptism into the Amish faith is an oath to God that one is going to "follow Christ's example, to live a scriptural life, and how you live that life is mapped out for you by the Ordnung." T. 433. The Ordnung is the Amish code of conduct which regulates all aspects of life and serves as "an unwritten map to being Amish that has evolved over time based on the traditions of generations before." T. 438-39, 522-23. The Amish are baptized as adults because Christ was baptized as an adult and they believe children are too young to understand the meaning of this commitment. T. 434.

Failing to abide by the Ordnung can lead to excommunication which means there will be virtually no social interaction with that individual until the person makes things right with the church by making confession and stopping the behavior. T. 445-46. At that point, the church members could grant a pardon and members would "forgive and forget" and the person would be allowed back into the community. T. 286.

When civil authority comes into conflict with the Ordnung, the Amish will traditionally seek a resolution that will address the government's concerns without violating their religious beliefs, thereby rendering “to Caesar the things that are Caesar’s.” T. 458-9. If the government’s objectives cannot be achieved in a manner consistent with the Ordnung, individual Amish, or sometimes entire communities,⁶ will move from the jurisdiction. T. 290, 458, 463, 556-7. In other circumstances a conflict about government’s rules can lead to a “split” in the church where the church divides. T. 442-4, 575. This division is tantamount to a “divorce” which is a sorrowful event that results in the division of families and restricting with whom people can marry within their religious community. T. 442-44, 576.

Requirements of the Fillmore County Ordinance: Section 502 of the county’s ordinance provides what are termed “alternative local standards” and described as “intended to serve the Amish community” within several specific townships in the county, including where each of the appellants reside. Add-79. The ordinance provides that dwellings “that do not have a toilet located in the home may be considered a Type IV Gray Water System

⁶ A Swartzentruber Amish settlement in Nicktown, Pennsylvania, no longer exists as a result of ordinances requiring them to install septic systems. In that case, when the courts ruled against them, the settlement disbanded and relocated to a new community in Summerville, New York. T. 457-58 [testimony of Professor Johnson-Weiner].

and labeled, for the County’s purposes, as Amish Gray Water Systems.” *Id.* The ordinance provides that such gray water systems are to be calculated with “a flat usage of 100” gallons per day, that the subsurface septic system must use a septic tank with minimum size of 1,000 gallons and requires installing a minimum 100 feet of drainfield. *Id.* The system requires three feet of separation for the drain field above any periodically saturated soil – identified by redoximorphic features in the natural soil. These systems, which the county designated “gray water systems,” are essentially a full septic system with a slightly smaller required drainfield.⁷ T. 1409.

Appellants propose an alternative to the septic system: In the fall of 2017, appellants decided to experiment with creating mulch basins. T. 1018, 1105. Appellant Menno Mast testified that he learned about the mulch-basin concept that has been allowed in other states: “I’ve heard of these other systems and I kind of decided I’m going to try some. And I really didn’t have no actual plan, I just kind of step by step.” T. 2157; Add-98 [Menno Mast’s diagram of what he installed]. Five other members of the Swartzentruber Amish community, including appellants Sam Miller and Ammon

⁷ The state rules for a “gray water system” reduces the minimum septic tank size from 1,000 gallons to 750 gallons. Minn. R. 7080.2240, subp. 3. However, Fillmore County’s ordinance requires a minimum 1,000-gallon tank for the “Amish Gray Water System.” Add-79, Ordinance at section 502.1.a.3.

Swartzentruber, installed their own experimental mulch basins. T. 236, 1024, 1167, 1573.

Expert witness testimony and evidence showed that mulch-basin gray water systems are permitted in 20 other states, and such systems are incorporated into the Uniform Plumbing Code⁸ (“UPC”). T. 645, 682-686, Ex. 39. The court took judicial notice of the sections of the UPC dealing with mulch basins, which provides the following standards: “1502.2 System Requirements. Gray water shall be permitted to be diverted away from a sewer or private sewage disposal system, and discharged to a subsurface irrigation or subsoil irrigation system. The gray water shall be permitted to discharge to a mulch basin for single family and multi-family dwellings. Gray water shall not be used to irrigate root crops or food crops intended for human consumption that come in contact with soil.” Ex. 39; T. 685.

Treatment of gray water waste by septic and mulch-basin systems: Three categories of materials are removed for proper wastewater treatment: nutrients, pathogens and solid organic material. T. 1627-28. Gray water contains substantially smaller amounts of harmful nutrients

⁸ The UPC is promulgated by the International Association of Plumbing and Mechanical Officials (IAPMO). Minnesota has adopted most sections of the Uniform Plumbing Code, but it has not adopted the chapter that provides rules for using mulch basins to treat gray water. T. 682-3; see Minn. R. 4714.0050, incorporating chapters 2-11, 14, and 17, into Minnesota’s plumbing code.

(nitrogen and phosphorus), pathogens (bacteria and viruses) and organic material than does black water. T. 614-617, 882-883, 1399, 1621, 1627-28. A subsurface septic system and a mulch-basin system operate with the same basic process: solid organic material are first removed from the wastewater and then the gray water flows to the soil where aerobic decomposition is used to eliminate potentially dangerous components from entering the ground water. Add-44-49.

The treatment process of the septic system and the mulch-basin system is the same, with the soil providing the treatment for the wastewater. Add-43. The main difference between the septic system and the mulch-basin system is appellants propose not to use a 1000-gallon tank. Add-99-101. In a septic system, the tank allows the solid organic material to settle. T. 911-12, 1629, 1673. The tank itself provides virtually no treatment of the harmful components within wastewater. T. 911-12. The settling in the tank removes less than 10 percent of the nutrients and provides no treatment of the pathogens. T. 911-912. Appellants' expert, Laura Allen, testified that the mulch does remove nutrients, specifically nitrogen. T. 2146. Respondents' expert Dr. Sara Heger agreed with this, testifying that mulch is currently being researched for its nitrogen removal properties, stating she believed we would "see more woodchips used in systems down the road, particularly for nitrogen." T. 926. The net result of wastewater being held in the septic tank

is that, while the wastewater will have less solids, it will have retained over 90% of the unwanted nutrients and the same number of pathogens as when the wastewater first entered the septic tank. T. 911-12, 1673, 2148. In both systems, this gray water then flows to the soil where the actual treatment occurs. Add-43.

Performance of appellants' experimental mulch basins: The appellants did not follow a plan to construct their experimental mulch basin or consult with anyone experienced with installing mulch-basin gray water systems. Add-98, Add-99; T. 701,1100, 2157. These rudimentary experiments did not work as well as appellants intended; the mulch basins showed signs of back-up and had standing water when the government inspected them. Add-62.

Although appellants' mulch basins did not work well from an engineering perspective, the intended purpose was two-fold: first, to determine if a mulch basin system would operate without freezing during a Minnesota winter, and second, to determine if such a system was compatible with the Amish community beliefs or if it violated the Ordnung. T. 1105, 1172. If the mulch basins froze during the winter, or if the system was determined to violate the community's Ordnungs, then mulch-basins would not be a viable alternative to the county's required septic system with a tank. In these two critical areas appellants' systems succeeded: none of appellants'

experimental mulch basins froze, and the community determined it was an acceptable technology. T. 1020-21, 1169, 1574.

Expert’s recommended improvements and upgrades to the mulch-basin gray water system: After visiting the appellants’ homes and reviewing their first attempt at mulch basins, gray water expert Laura Allen recommended several improvements that could turn appellants’ experiments into workable systems. T. 2093-2103. These recommendations were incorporated into a plan drafted by a licensed architect. Add-100-101. The improved design for a mulch-basin gray water system calls for significantly larger volume basins and divides the wastewater so it flows equally into four separate mulch basins. Add-99. Allen recommends improving the fittings to more equally divide the gray water and recommends drilling holes in the 55-gallon half-barrel emitters located above the basins for better dispersal of the gray water throughout the basin. Add-99; T.2099, 2102. Laura Allen also recommends the appellants use larger “chunkier” wood chips. T. 2100.

The professionally designed mulch basin system provides more soil surface area for aerobic treatment. Add-99-100. Under the ordinance, the county’s required septic system would distribute the gray water for treatment through at least 100 *linear* feet of distribution lines to drip into the soil. Add. 79. Appellants’ proposed alternative mulch basin system handles the gray water with the capacity of one square foot of soil surface area for each gallon

per day of flow. Add-79, section 502.1.a.2. The gray water is distributed for treatment into 100 *square* feet of soil beneath the mulch basins.⁹ Add-99-100.

Minnesota requires there to be “three feet of separation” from where wastewater enters the ground to one of two layers: bedrock or redoximorphic features¹⁰. T. 888, 899. The soil depth requirements for both the mulch-basin system and the septic tank are the same; the bottom of both systems have a minimum depth of 12 inches and a maximum depth of 4-feet. Add. 99-101. T. 906, 1366-69.

Performance standards for a mulch basin system: Expert witness testimony and regulations from other states indicate that there are other standards that can be implemented for a mulch-basin gray water system that will further protect public health and the environment. T. 665. These are divided between performance-based standards and prescriptive standards. T. 665. One common performance standard is that the system has no pooling or runoff.¹¹ Another performance standard in the Wyoming

⁹ The ordinance specifies that gray water flow “should be calculated on a flat usage of 100” gallons per day. Add-79, section 502.1.a.2.

¹⁰ Redoximorphic features are a rust colored mottling in the soil, indicative of periodic saturation. T. 899; Add-45.

¹¹ T. 663, 665; Ex. 30, Ariz. Admin. Code R18-9-D701 (A) 1; California Plumbing Code 1502.1.1 (4); Wyo. Admin. Rules, §17(a)(i)(A); UPC 1501.5.

regulation provides that if the gray water system is going to be used during the winter that the system be designed to prevent freezing. Ex. 30, Wyo. Admin. Rules, §17(a)(iii).¹²

Expert witness Laura Allen provided an extensive list of prescriptive standards the government could implement in the appellants' proposed alternative: setbacks from wells, waterways, adjoining property and karst features [T. 673, 721, 24]; basin size requirements based upon the soil type and amount of water usage [T. 674]; prohibitions of disposing of hazardous materials into the systems [T. 670]; and restrictions on irrigating the edible portions of vegetables with gray water. T. 671. Appellants object to none of these.

Handling of solids in the gray water: The mulch basin system and septic system handle solids differently. In a mulch basin system, the solids are collected out of the wastewater by the mulch, primarily in the location directly under the half-barrel emitter. T. 2081, 2084, 2135; Add-100. These solids will eventually decompose some of the mulch at the top of the basin and the mulch will need to be manually removed twice a year. Add-57. A septic tank allows solids to settle and the sludge – called septage – must be

¹² The same caution is found in Minnesota's rules that septic system distribution lines must "...be designed, installed, and protected to minimize the danger of freezing in the pipe." Minn. R. 7080.2050, subp. 2.B.(7).

pumped from the tank every three years or so. T. 887, 1494. After being pumped from the septic system, a farmer may apply this septage directly to the ground surface. T. 2210-11. Farmers are not required to have a license to do this. T.1834, 2210-11, 2215-16; *see* Minn. R. 7083.0700, D. [“A license is not required for: * * * a farmer who pumps septage from an ISTS that serves dwellings or other establishments that are owned or leased by the farmer and applies septage on land that is owned or leased by the farmer.”]

Farmers can apply the contents of their own septic tanks or animal manure, to their own land using the following methods: 1) apply it after adding hydrated lime and waiting 30 minutes, 2) spread it, without treating it with lime, and incorporate it into the soil within 6 hours, or 3) inject the untreated sewage directly into the soil. T. 1494, 1522, 1519. A farmer can land-apply the contents of a septic tank without a permit, without governmental supervision of the process, without soil testing, without inspection, and following only recommended, but not required, guidelines. T. 1825, 2210-13.

The District Court’s decision: The trial court reviewed case law regarding the Amish Community from the Minnesota Supreme Court, the United States Supreme Court, and other jurisdictions in order to assess whether the appellants’ objections were based on sincerely-held religious beliefs. Add-6-26. The District Court held that the appellants’ objections to

installing a septic system were based on their sincerely-held religious beliefs, and that this government requirement substantially burdened appellants' free exercise of religion but found that the government's septic system is the least restrictive method of accomplishing its compelling interest of protecting public health and the environment. Add-2-3.

STANDARD OF REVIEW

“When reviewing a declaratory judgment action, we apply the clearly erroneous standard to factual findings, and review the district court’s determinations of law de novo” *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 615 (Minn. 2007) (citations omitted); *see also Skyline Village Park Ass’n v. Skyline Village L.P.*, 786 N.W.2d 304, 306 (Minn. App. 2010). “[W]e review the district court’s factual findings for clear error. That is, we examine the record to see if there is reasonable evidence in the record to support the court’s findings. And when determining whether a finding of fact is clearly erroneous, we view the evidence in the light most favorable to the verdict. To conclude that findings of fact are clearly erroneous we must be left with the definite and firm conviction that a mistake has been made.” *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013) (quotations and citations omitted).

When reviewing a mixed question of fact and law, the district court is given some discretion. “When reviewing mixed questions of law and fact, we correct erroneous applications of law, but accord the district court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard.” *In re Estate of Sullivan*, 868 N.W.2d 750, 754 (Minn. App. 2015) (quotation omitted). As to questions of law, there is no deference to the district court’s determination. “We review a district court’s application of the law de novo.” *Harlow v. State, Dep’t of Human Servs.*, 883 N.W.2d 561, 568 (Minn. 2016). “No deference is given to a lower court on questions of law.” *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003). As for constitutional issues, no deference is granted. “[T]he interpretation of the constitution is a purely legal issue that we review de novo.” *Cruz-Guzman v. State*, 916 N.W.2d 1, 7 (Minn. 2018).

ARGUMENT

I. The government’s statutes and ordinances mandating the installation of a septic system, as applied to the Amish appellants, violated appellants’ freedom of conscience rights protected by the Minnesota Constitution.

A. The District Court correctly found that appellants’ religious beliefs are sincerely held.

After trial, the District Court clearly found as a fact that appellants’ objections to installing a septic system were based on their sincerely-held religious beliefs. Add-2, Add-36-38. The District Court rejected the respondents’ arguments disputing that the Amish religion prohibits septic systems, or that the objectors were disingenuously trying to avoid the expense. “The status quo for the Amish of the original Canton church is that this technology has *always* been, and *remains*, prohibited.” Add-33 [italics in original]. The “Swartzentruber Amish live a life that is much more labor-intensive and less comfortable than do most non-Amish Americans. One cannot reasonably doubt the genuineness and sincerity of the Amish religious beliefs that cause them to choose a life that is so much more physically demanding and wearisome – in a word, harder – than that lived by most other Americans.” Add-32-33. “...I find credible the testimony of the Amish plaintiffs that their objection to the state-mandated septic system stems from their religious belief that these systems must be avoided as a way of the world, antithetical to a faith that tells them to be separate in order to live as

God intends. I find that the Plaintiffs sincerely hold religious beliefs that are the basis for their objections to the Government’s mandate at issue herein.”

Add-38.

B. Article I, § 16, of the Minnesota Constitution broadly protects religious freedom and conscience.

Article 1, § 16, of the Minnesota Constitution broadly protects religious freedom. “The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. *The right of every man to worship God according to the dictates of his own conscience shall never be infringed*; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; *nor shall any control of or interference with the rights of conscience be permitted*, or any preference be given by law to any religious establishment or mode of worship; but *the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state*; nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.” [Italics supplied.]

The Supreme Court in *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990) [*Hershberger II*] noted that while the First Amendment “establishes a limit on government action at the point of *prohibiting* the

exercise of religion, section 16 precludes even an *infringement* or *interference* with religious freedom.” [Italics in original].

Under § 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.” *Id.* The court recognized that these standards differentiated Minnesota’s protections from those under the First Amendment as interpreted by the United States Supreme Court at that time: “Because section 16 precludes an *infringement* on or an *interference* with religious freedom and limits the permissible countervailing interests of the government, Minnesotans are afforded greater protection for religious liberties against governmental action under the state constitution than under the first amendment of the federal constitution.” *Id.* [Italics in original].

Minnesota has retained “the compelling state interest balancing test” for the Constitution’s freedom of conscience clause. *Hill-Murray Fed’n of Teachers v. Hill-Murray High School*, 487 N.W.2d 857, 865 (Minn. 1992). “Under section 16, we consider whether: (1) the objector’s belief is sincerely held; (2) the state action burdens the exercise of religious beliefs; (3) the state’s interest is overriding or compelling; and (4) the state action uses the least restrictive means.” *Odenthal v. Minn. Conf. of Seventh-Day Adventists*, 649 N.W.2d 426, 442 (Minn. 2002).

C. The District Court correctly found that appellants' objections to complying with the septic system ordinance are grounded in sincerely-held religious beliefs.

The record includes substantial evidence and testimony about the appellants' Amish religious beliefs and how these led the appellants to decide that they cannot go along with the requirements mandated by the state and county government. "The way of life characteristic of the Amish results from their interpretation of scriptural passages that tell them that in order to live a Godly life, they must separate themselves from the world and adhere to the ways and practices of their forefathers and foremothers." Add-27. "The Amish are the most conservative of the Anabaptist groups, meaning that they are the least willing to adopt new, worldly technologies, and are "most separate" from the outside world." Add-28.

Appellants "are all members of the Swartzentruber Amish. Swartzentruber Amish make up seven percent of all Amish and are among the most conservative of Amish people." *Id.* The District Court noted that Swartzentruber Amish were the defendants in the *Hershberger I* and *II* cases "objecting to the display of slow moving vehicle signs." Add-29. The District Court quoted testimony from expert witness Professor Johnson-Weiner about the separateness of Swartzentruber Amish from modern technology: "They have considered very, very carefully what new innovations they will permit in their communities and have drawn the line at most." Add-29; T. 429.

The appellants and other Amish community members testified uniformly that installing the government required septic system is against their religious beliefs. Add-36-38. One example is appellant Ammon Swartzentruber who was asked why he would not install the septic system after all the problems he has had with Fillmore County, including criminal charges filed against him and his wife: “Never had it before, so we're not allowed to have it.” T. 1181. Appellant Amos Mast testified that even though he was forced to install a septic system,¹³ he would discontinue use of the septic system and install a mulch-basin gray water system; would even continue to make all the payments on the loan he had to take out to install the government’s septic system. T. 389, 415.

Respondents did not appeal from these findings and conclusions by the District Court.

D. The District Court correctly found that the government’s regulations substantially burden appellants’ free exercise of religion.

¹³ Appellant Amos Mast installed a septic system in November 2017, so he could obtain the necessary permit from Fillmore County to finish renovations and move into his new home. Prior to doing this, appellant, his wife and children, ages 5, 4, 2, and 1, resided in an uninsulated 16’ x 20’ produce shed for 13 months. They decided to install a septic system because winter was approaching, and they had a newly born 2-month-old child. T. 131, 340-41.

Respondents' claimed that the septic system ordinance does not burden appellants' religious exercise significantly, or at all. Add-38. The District Court rejected these claims. "The [appellants] can be criminally prosecuted for not installing gray water septic systems. The government is requiring [appellants], on pain of criminal penalties, to install on their premises a permanent apparatus that is antithetical to their religious beliefs. Second, refraining from ownership of worldly technology is central to Amish religious faith and practice." Add-39. The District Court noted expert witness Professor Johnson-Weiner's testimony that for appellants, being Amish is a "lived, not intellectual, faith." Add-37, 40. "Their religious principles guide their daily life. Everything they do." T. 471.

Respondents did not appeal from these findings and conclusions by the District Court.

E. The District Court erred in analyzing "untreated" gray water for the government's interest in protecting public health and the environment.

The third element under the *Hershberger II* test is whether the state's interest is overriding or compelling. Appellants stipulated that, in general, the government does have a compelling interest in protecting public health and the environment; however, appellants did not stipulate that the government has an overriding or compelling interest in requiring that appellants' gray water be disposed into a septic tank or that imposing such a

requirement on appellants furthers the government's goal of protecting public health or the environment. T. 2232-3.

The District Court analyzed the government's interest in public safety by examining the risk of *untreated* gray water, finding that "untreated household gray water presents a serious risk to public health via disease-causing viruses and bacteria and endangers the environment with nitrogen and phosphorous." Add-54. The District Court stated that it was "persuaded by the Government's evidence that untreated gray water poses a significant public health risk." Add-60. This was improper because appellants are not proposing to discharge gray water untreated, they are proposing to *treat* household gray water by discharging it subsurface into a mulch-basin system. Once in the basin it will be treated by the soil just like a septic system. The proper inquiry is whether the government has a compelling or overriding interest in requiring appellants to dispose of their gray water into a septic system and tank instead of into a mulch basin system for treatment by the soil. To that question, the answer is no.

F. The government's interest in requiring the appellants to install the subsurface septic system and tank for disposal of gray water is neither compelling nor overriding.

Although there was some disagreement as to the level of risk posed by gray water, there was agreement by all expert witnesses that gray water poses a much lower risk to public health and the environment than black

water. T. 1621-25. Specifically, gray water contains less contaminants than black water waste by two to three orders of magnitude. T. 1625. Assuming *arguendo* that appellants' gray water *was* untreated, the risk posed by gray water is very low. Minnesota allows gray water to be disposed of by throwing it out directly onto the ground surface pursuant to its hand-carried exception. Minn. R. 7080.1500, subp. 2. This exception applies at campsites throughout the state, including those in Fillmore County, and when an individual washes things outside the home such as cars or pets.¹⁴ T. 720-21.

Appellants are proposing that their gray water be disposed of subsurface into mulch basins instead of septic systems with tanks. In both systems, the gray water is subsurface, substantially reducing the chance of human contact. In both systems, the soil provides the treatment for the wastewater. Given the fact that Minnesota allows all its citizens to throw hand carried gray water directly on the ground for disposal, the government does not at the same time have a compelling or overriding interest in requiring appellants to discharge their gray water through a septic system tank instead of a mulch basin.

(i.) Potential Health Risk

¹⁴ Most of the appellants' gray water is probably covered through this exemption because appellants use dry sinks and manually carry their water where needed after hand pumping it. T. 87-8, 136, 248.

The District Court found that “untreated gray water poses a significant public health risk.” Add-60. While gray water does not typically contain pathogens, the concern is if a person is sick in a household, then this person’s pathogens will be shed into gray water through that person’s bathing, laundry and culinary activities. T. 615, 1343. The idea is that it is possible another person could come into contact with this gray water and then catch the illness. *Id.* Household members living with the sick person would already be at risk of catching this illness because they are living in close contact with this person and likely touching the same objects such as doorknobs. T. 640, 698. The risk that a person would catch an illness, not through their contact with that person inside the home, but through contact with gray water associated with person that is being discharged to a subsurface mulch basin, is exceedingly low.

Both appellants’ and respondents’ expert witnesses testified that there has never been a single documented case of disease transmission through gray water contact. T. 734, 1416-17. The court dismissed the fact by noting that “there has been little scientific research on that public health question.” Add-41. The fact remains that the government cannot on this record point to evidence showing a single instance that gray water has ever negatively impacted public health, including appellants’ gray water.

Finally, even if there are limited academic studies looking into the potential for disease transmission through gray water contact, there is very suggestive evidence that, even if hypothetically possible, the risk is extremely low. An estimated 7 percent of the United States' population are using mulch-basins and other methods of reusing their gray water in the different states. T. 645, 651. An estimated 54 percent of Australians are reusing gray water in some manner. T. 643. This accounts for millions of individuals reusing their gray water without a single documented case of anyone ever getting sick. T. 734, 1416-17. That there has never been a single illness attributed to gray water contact, despite widespread use of mulch-basin gray water systems, is highly relevant to assessing gray water's risk to public health and whether the appellants' proposed mulch-basin gray water systems can adequately achieve the government's public safety interest.

(ii.) Potential Environmental Risk

The District Court held that “untreated household gray water... endangers the environment with nitrogen and phosphorous.” Add-54. Gray water has low levels of these nutrients and substantially lower levels when compared to black water. T. 641, 1621-26. While there was testimony that these nutrients, if “put into a stream or waterway” could cause algae to grow, there was no evidence presented as to what levels of nitrogen and phosphorus would cause environmental concern. T. 641. There was also no evidence on

how gray water compares with other sources of these nutrients being released into the environment. For example, the court commented on the prevalence of cattle manure noting that it was “dropping by the ton every day all over Fillmore County.” T. 860. The court lacked basic fundamental evidence required to make the finding that gray water nutrients endanger the environment: how many nutrients are found in gray water? how do these levels compare to other sources of these nutrients? and at what levels do these nutrients cause environmental concern? It was error for the court to conclude that the nitrogen and phosphorus in gray water endanger the environment without the basic information required to draw such a conclusion. Moreover, in either a mulch basin system or a septic system with tank, the soil would treat these nutrients.

The government’s interest in forcing appellants to discharge their gray water into a septic system with tank instead of a mulch basin for environmental reasons is not compelling nor overriding as a basis for infringing on appellants’ rights to religious freedom.

G. The government is required to prove that protecting public health and the environment from the discharge of gray water can be achieved only through their septic system with tank requirements.

The Minnesota Constitution requires that the court appropriately weigh and balance both the competing values – avoiding infringement on

appellants' religious freedom and achieving the government's interest in public safety by the means least restrictive to appellants' religious freedom. Under the legal analysis applied to a § 16 claim, "once a claimant has demonstrated a sincere religious belief intended to be protected by section 16, the state should be required to demonstrate that public safety cannot be achieved by proposed alternative means." *Hershberger II*, 462 N.W.2d at 398. In that case, the Supreme Court noted that the state's fundamental interest in public safety coexists with broad protection for religious freedom. "Competing values of such significance require this Court to look for an alternative that achieves both values articulated in section 16. Specifically, if freedom of conscience and public safety can be achieved through use of an alternative to a statutory requirement that burdens freedom of conscience, in this case the SMV symbol, section 16 requires an allowance for such an alternative." *Hershberger II*, 462 N.W.2d at 399.

The *Hershberger II* standard is whether an alternative method "can" achieve the government's public safety interest. The court's use of the word "can" means that this prong is focused on feasibility, on what is "do-able." "The plain meaning of 'practicable' is 'capable of being put into practice or being done or accomplished: feasible. [C]apable of being used: usable.'" *In re OCC, LLC*, 917 N.W.2d 86, 94 (Minn. 2018) [dictionary citation omitted].

The District Court stated that it agreed with this legal framework: “On this issue, the Government bears the burden of proof.” Add-41.

The court’s conclusion that there is no alternative to the government’s septic system is not adequately supported by the evidence in the record.

H. The government did not meet their burden of proving that a septic system with tank is the least-restrictive-means of protecting public health and the environment from the discharge of gray water. Appellants’ mulch basin system is a feasible alternative.

The least-restrictive-means test focuses on feasibility. The evidence in this case clearly establishes that a less restrictive means can adequately treat appellants’ gray water. Respondents’ expert, Dr. Sara Heger, acknowledged that a mulch-based system could adequately treat appellants’ gray water. T. 1668. Because even respondents’ own expert acknowledged that the mulch-basin gray water system could work adequately to treat gray water, respondents have failed to prove that there is no alternative.

The District Court framed its hypothetical question to Dr. Heger, asking that she assume she had access to the sorts of pipes and Y-connectors and half-barrel valve boxes shown in Exhibit 7, that she had sufficient pasture land with three feet of separation and sufficient mulch. T. 1666-1667. Given that, the court asked if “... you were given the assignment of achieving the same performance, water purification, protection of the environment ... could you do it?” T. 1667. Dr. Heger answered that if

suitable soil separation existed, “...I think *you then could have a system* with a very high level of maintenance and oversight *that would achieve the goal.*”

T. 1668 [emphasis supplied].

The court asked Dr. Heger again: “So would it be fair to say that you could envision your team of PhDs coming up with a system that might have the same performance as the Exhibit 270 system, but it would have to be monitored carefully and it would be labor intensive; is that correct? A. Yes.”

T. 1672.

This admission by respondents’ expert makes clear as a matter of fact that the goal of adequate treatment of gray water *can be achieved* through a properly operated and maintained mulch basin. Therefore, there is an alternative means of achieving the government’s public safety interests. This alternative is less restrictive of appellants’ rights of free exercise of their religious faith. Even with Dr. Heger’s qualifiers, to be discussed later – that mulch basins are ‘too much work’ – this system would achieve adequate treatment.

Respondents’ other expert witness, Brandon Montgomery, provided similar testimony to Dr. Heger. Brandon Montgomery testified that he had seen the diagrams and pictures of appellants’ experimental mulch basins and expressed the opinion that these did not adequately protect public health and

the environment. T. 1445. But, when questioned by the District Court, he conceded that it *was possible* to achieve the government’s goals through mulch basins but pointed out that the Minnesota Pollution Control Agency has “never had to look at a mulch system” for approval. T. 1446.

The evidence is clear: there is an alternative that can achieve the goal of providing adequate treatment of appellants’ gray water. Under the § 16 standard, respondents have failed to show that there is no less restrictive alternative. Appellants are entitled to a reversal of the District Court’s conclusion that there is no less restrictive alternative.

II. The government’s statutes and ordinances mandating the installation of a septic system, violate appellants religious liberty rights protected by the Religious Land Use and Institutionalized Persons Act of 2000.

A. The District Court’s findings apply with full force to appellants’ claim under RLUIPA.

Separate from their claim under the Minnesota Constitution, appellants raised a claim under 42 U.S.C. §§ 2000cc *et seq.*, The Religious Land Use and Institutionalized Persons Act of 2000 [RLUIPA]. Index # 8. This statute provides that “No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that

person, assembly, or institution – (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling government interest.” 42 U.S.C. § 2000cc(a)(1)(A), (B).

There is no dispute in this case that the Fillmore County sewage treatment ordinance is a “land use regulation.” The District Court made strong findings that these appellants’ objections to the septic system requirement are based on their sincerely-held religious beliefs, and that the ordinance substantially burdens appellants’ religious beliefs. These findings apply with equal force to this RLUIPA claim. As such, under RLUIPA, the government must bear the burden of proof on clause (A) – that the burden is in furtherance of a compelling government interest – and on clause (B) – that the burden is the least restrictive means of furthering that compelling government interest. 42 U.S.C. § 2000cc-2(b). On this record, respondents failed to carry that burden.

The language of this statute creates a standard that is very similar to the *Hershberger II* test for the § 16 claim. RLUIPA protects the “religious exercise of a person” from a “substantial burden,” mirroring the first two prongs of the *Hershberger II* standard. Since the District Court clearly found that appellants’ objections are based on sincerely-held religious beliefs and the regulation is a substantial burden on the religious exercise, the

respondents are prohibited from imposing that substantial burden “unless the government demonstrates” that imposing the burden is “in furtherance of a compelling governmental interest” and that the burden is “the least restrictive means” of furthering that governmental interest. Just as in claims under § 16, this statute requires the government to bear the burden to demonstrate these last two elements. 42 U.S.C. § 2000cc-2(b).

B. The government did not prove the burden they imposed on appellants is in furtherance of a compelling governmental interest and that the government utilized the least restrictive means to accomplish their goals.

The compelling governmental interest test required under RLUIPA mirrors the “compelling or overriding interest” test required for analysis under the Minnesota Constitution. For the reasons previously stated, appellants assert that while the government has a compelling interest in protecting public health and the environment, the government did not meet their burden in establishing that it has a compelling interest in requiring appellants to dispose of their gray water into a septic tank instead of a mulch basin.

“The least-restrictive-means standard is exceptionally demanding...,” requiring the government to show “that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682,

728 (2014). “[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it.” *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815 (2000) [speech restriction, strict scrutiny test]. Courts must not “assume a plausible, less restrictive alternative would be ineffective.” *Id.*

In *Holt v. Hobbs*, 574 U.S. 352, 135 S. Ct. 853 (2015), a Muslim prisoner in Arkansas wanted to grow a beard, which was prohibited except for those with diagnosed dermatological problems. Under RLUIPA, the inmate demonstrated his sincere religious belief and the burden on his religious practice, but the prison refused to make an exception, asserting compelling interests in stemming the flow of contraband, and to prevent prisoners from shaving their beards to conceal their identities. *Id.*, 135 S.Ct. at 863, 864. The court concluded that “the Department cannot show that forbidding very short beards is the least restrictive means of preventing the concealment of contraband.” *Id.*, at 864. Similarly, the court was not persuaded that simply taking a photograph of the prisoner with and without a beard would not suffice. *Id.*

The Supreme Court in *Holt v. Hobbs* specifically noted that the state failed to show “why the vast majority of States and the Federal Government permit inmates to grow 1/2-inch beards, either for any reason or for religious

reasons, but it cannot.” *Id.* at 866. This observation applies with significant force in this case, given the testimony that several states – perhaps 20 – authorize disposal of gray water in mulch-basin systems. Additionally, the use of mulch basins for disposal of household gray water has been adopted as an acceptable method by the Uniform Plumbing Code.

If those other states and the Uniform Plumbing Code permit a mulch basin disposal option without leading to harm, why can’t Minnesota?

RLUIPA requires the court to “scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants”—in other words, to look to the marginal interest in enforcing” the challenged government mandate. *Hobby Lobby*, 573 U.S. at 771-72, quoting *Gonzalez v. O Centro Espirita Beneficente Uniō do Vegetal*, 546 U.S. 418, 431 (2006). Under that analysis, the government’s case fails.

The fact that several other states and authorities allow disposal of gray water through mulch basin systems indicates that respondents could make an exception for the religious exercise of these appellants without unduly threatening public safety. By failing to make this exception due to the burden imposed upon appellants religious beliefs, they have violated appellants’ religious liberty rights under RLUIPA.

III. The District Court applied an improper burden to appellants in considering the mulch basin system as a less restrictive alternative to a septic system.

A. The court erred in analyzing the performance of appellants' experimental mulch basins instead of considering the feasibility of the designed mulch basin system recommended by the expert.

The District Court centered its decision on the finding that appellants' self-built mulch basin system "...did not work." Add-62. This point was critical for the District Court, which stated that "had Plaintiffs' own experimental mulch basin systems proved successful, they might have been strong evidence of a practical, less religiously intrusive alternative." Add-62. However, the proper legal standard is not whether appellants' first attempt at implementing a system worked flawlessly and needed no improvements; the standard to apply is whether the respondents proved that there was no possible way that a mulch basin system could accomplish the government's goals. The District Court did not apply this burden.

Appellants are not suggesting their experimental mulch basins, made without significant planning or expert input, are the only available alternatives; instead, they are proposing the professionally rendered plan as an alternative, based on input from expert witness Laura Allen, who has 19 years of experience in gray water and mulch-basin systems. T. 604; Add-97-8, Add-100-01. Both of respondents' expert witnesses conceded that it is

possible to achieve the government's goals with a mulch-basin based system. The court failed to hold respondents to their burden of proof and instead focused on inadequacies in the operation of the mulch-basin systems that the appellants had built on their own for the sole purpose of testing and experimenting with their design ideas. Add-62.

B. Appellants only created very small mulch basins due to the government's history of aggressive actions against them.

It is true that the appellants' experimental mulch basins were poorly designed from an engineering perspective and did not perform as appellants wanted. T. 2168. The purpose for creating these experimental mulch basins was not to create a permanent gray water disposal system that would last for years; the experimental mulch basins were merely experiments with the concept. T. 1105. There are justifiable reasons why appellants did not create an entire system. The government had already taken extremely punitive actions against appellants and other members of the Amish community concerning their gray water disposal, resulting in fines, orders for community service, and threats of jail. T. 224, 227, 578, 1027, 1177, 1142, 1576. Additionally, a few months before these experimental mulch basins were being installed, the government had counterclaimed seeking to have appellants and their families removed from their homes and to have their

homes rendered uninhabitable in response to appellants raising their religious objections through a declaratory judgment case. Index # 27 at 10. Given the government's prior actions, it is understandable why appellants would not attempt to create something permanent or large scale merely to try out the concept, because they may have had to remove anything they installed, and then this might prompt the government to once again take punitive actions against them. As anticipated, the mere act of digging a hole beneath their straight pipes resulted in the government seeking an order to have these basins destroyed and to award the government attorney's fees. Index # 191 at 4.

C. The appellants experimented with mulch basins to see if they would freeze and if they would be acceptable technology for their community.

Appellants experimented with the concept of mulch basins to explore whether these mulch basins would freeze and be acceptable within the Ordnung. T. 1105, 1172. Appellant Ammon Swartzentruber said he "wanted to see if it would work in Minnesota winter, see whether or not it would freeze." T. 1172. All three appellants that installed these experimental mulch basins testified that their basins did not freeze. T. 1020-1, 1169, 1574. In order to prevent the lines from freezing appellants insulated the lines by placing sawdust, shavings and chips over the pipes. T. 1021. The basins were

installed in September 2017 and lasted through a winter where temperatures dropped to an estimated 20 below zero. T. 1018, 1020. The court did not consider this evidence when it cited in its decision concern for the ability of mulch basins to work in “polar vortex” temperatures. Add. 62.

The second reason for experimenting with mulch basins was to see if this disposal method was acceptable from a *religious* perspective. T. 1105. The mulch-basin gray water system is new technology that appellants’ forefathers never had. T. 268. The acceptance of any new technology or change is considered during a religious service called Ordnung gmay; this biannual event is where the entire church reviews and reaffirms the acceptable conduct within the community. T. 437. The gray water mulch basin system was determined to not violate the Ordnung because the church unanimously consented to this technology at an Ordnung gmay. T. 437-441, 1096-97, 115-116, 123, 223, 444, 473, 535-536, 1145-46.

While the court placed heavy emphasis on the poor technical performance of the appellants’ experimental mulch basins, these were never intended to be permanent systems. These test mulch basins succeeded at their intended purposes; they proved that they can work in the winter without freezing and determined that they were an acceptable technology for their religious faith.

D. The court did not properly evaluate the improvements made to the professionally designed mulch basin system.

The court found that appellants' "proposed mulch systems, even with the capacity expansion and siting improvements to which the appellants are agreeable, would not accomplish the Government's compelling public health and environmental safety purposes." Add-62. The court appears to not have reviewed the improvements made to the experimental mulch basins. The court summarized these improvements as fixing the "one principal problem with all of the Plaintiffs' systems as built: They were too small." Add-51.

While the District Court claimed to have considered the "capacity expansion" in rendering its decision, the decision fails to address this. Add-62. The professionally designed system substantially increases the capacity of the mulch basins. Appellants Menno Mast and Sam Miller's experimental mulch basins were only 32 square feet. T. 1574, 2157. Appellant Ammon Swartzentruber's basin was only 16 square feet. T. 1167-8. The professionally designed system's soil service will be 100 square feet and is based on the county's estimate of 100 gallons per day and on the conservative assumption that the basins are placed in heavy clay, which is the slowest draining soil. T. 674, 702, 2099. The 100 square feet is comprised of four 25 square foot mulch basins. T. 2098-99; Add-99-100. This would be a 312.5% increase in capacity for appellants Menno Mast and Sam Miller and a 625% increase in capacity

for appellant Ammon Swartzentruber. Appellant Menno Mast also expressed a willingness to make the basins even larger than 100 square feet if needed. T. 2160.

Laura Allen also recommended a change in mulch. T. 792, 2100. Very fine mulch, like the kind initially used by appellants, can quickly break down and cause the bottom of the bed to clog and not drain properly. *Id.* Improved, chunkier wood chips would help the system by providing better water infiltration into the soil and providing surge capacity. T. 2081 These improved chips would also prevent pooling and runoff, the major problem with appellants' experimental mulch basins. T. 689, 786. This chunkier type of mulch will also provide more air gaps and additional space for microorganisms to break down the gray water. T. 2081. Finally, the improved wood chips will also last longer. T. 792.

Laura Allen also recommended improved pipe fittings. Add-99; T. 2099-2100. The appellants experiments used a capped "Y" junction to divide the gray water. T. 2019. These "Y" junctions did not divide the gray water evenly and caused one basin to receive more water. T. 2099-2100. The professionally designed system uses fittings which will more equally divide the gray water flow into the four basins which will reduce the possibility of oversaturation. *Id.*

While the decision demonstrates the court questioned whether these improvements would work, the court improperly assessed the testimony about identified benefits of these improvements, and thereby failed to hold the government to its proper burden on this factor.

IV. The District Court's conclusion that mulch basins cannot achieve the government's interest in public safety rests on erroneous findings.

The District Court rejected appellants' proposed use of mulch basins as a less restrictive alternative to the septic system requirement. The District Court made erroneous findings in four major areas.

A. The District Court relied upon the government's witnesses who have no experience or expertise in the mulch basin systems being proposed.

The government's witnesses, Brandon Montgomery, Steve Oscarson, Cristal Adkins, and Dr. Sara Heger, have knowledge concerning black water septic systems, but none had expertise in the mulch basin systems being suggested as an alternative. Brandon Montgomery admitted he only reviewed some documents about mulch-basin gray water systems; his experience was with Minnesota rules for septic systems and gray water septic systems. T. 1413. Steve Oscarson admitted he had no experience with mulch-basin gray water systems. T. 1544-1545. Cristal Adkins admitted she did not have a good working knowledge of mulch-basin gray water systems or how they are

supposed to operate, and prior to trial she was not aware that mulch-basin gray water systems were allowed in other states. T. 1796, 1798. Dr. Sara Heger admitted her only experience with anything like a mulch-basin gray water system was in the context of the use of a bark bed for insulating cattle milkhouse wastewater in conjunction with septic tanks. T. 908, 1641.

Appellants' expert witness Laura Allen is the only witness who has actual experience in the design, installation and maintenance of mulch-basin gray water systems that have been successfully implemented in 20 other states. The court erred in relying upon the government's witnesses who speculated on possible problems about mulch-basin gray water system without having any training, educational background, or experience working with these systems implemented across the United States.

B. The District Court's findings rejecting appellants' proposed use of mulch basins are flawed.

The court relied on Dr. Heger's testimony where she opined that "a lot of the soil conditions around here do not allow for a system in-ground with three foot of separation around them." T. 1668. Dr. Heger stated that finding a location that has three feet of separation was the "biggest problem" for a mulch basin. T. 1668-69. Finding such a location, she opined, was "dreaming a dream that we - that doesn't exist." *Id.* The court relied on this generalized comment to find that "sites that would satisfy that requirement

may simply not be available to the [appellants], regardless of their willingness to otherwise comply with the Government's requirements." Add-55.

There is no evidence in this record to support a conclusion that appellants' farms completely lack the soil conditions suitable for installing a mulch basin with three-feet of separation above any bedrock or redoximorphic features. This same three feet of separation is required for the installation of the government's septic system. Add-45, 79, 101. Therefore, if finding this soil condition was impossible, as Dr. Heger suggests, there would be no septic systems in Fillmore County. During the course of the trial, seven individuals referred to their own septic tank systems in Fillmore County.¹⁵ Appellants are not objecting to the three-foot separation requirement. The court's speculation that appropriate sites 'may not be available' falls far short of an affirmative finding that these sites cannot be found. Moreover, if there was evidence that three feet of separation could not be found on any of appellants' farms, then appellants could not install the government's required system either, because it requires the same three feet of separation. *See*, Minn. R. 7080.2150, subp. 3.C.(1): "A minimum three-foot vertical soil

¹⁵ Amos Mast, T. 369, Ephraim Byler, T. 580, Cristal Adkins, T. 1783, Abe Swartzentruber, T. 1939, David Miller, T. 1962, Dan Gingerich, T. 1972, Brett Corson, T. 2216.

treatment and dispersal zone must be designed below the distribution media * * *: (a) the zone must be above the periodically saturated soil and bedrock.” The court’s speculation that three feet of separation “may not be available” is contrary to the evidence presented during the course of the trial.

Second, the District Court found that “woodchip mulch is not suitable” for the purpose of spreading the gray water over the soil at the bottom of the mulch basin. Add-56. The court based this on Dr. Heger’s testimony that she believed the mulch would “gum up” with solids and then the solids would go to the soil surface and plug it. T. 943. The court’s reliance on Dr. Heger’s opinion fails to recognize her own testimony that she has never operated a mulch-basin system; likewise, the court ignores the expert opinion from Ms. Allen whose nineteen years of experience with mulch basin systems informs her opinion that periodic maintenance will keep the mulch basin performance adequate to treat gray water. T. 624, 2120, 2142.

The court noted that Minnesota prohibits using biodegradable substances like woodchips for distribution media because decomposition would create such problems. Add-56. The court correctly notes that using wood chips as the media in a drain field – which must be covered with at least six inches of soil [Minn. R. 7080.2150, subp. 3.I.] – would not make sense. Wood chips clearly would not function for 20 to 30 years as distribution

media. But this finding ignores that the proper operation of the proposed mulch-basin system requires periodic removal and replacement of the degraded mulch – before the mulch stops functioning as intended – to catch the solids from the gray water. T. 2078-79. Mulch is suitable for this purpose only if the degraded portion in the top of the basin is periodically replaced – a frequency which appellants’ expert Allen recommended to be about every six months. Add-57 n. 29. The UPC text indicates that homeowners should inspect and maintain mulch basins “as needed to maintain mulch depth and prevent ponding and runoff” and states “the mulch basin shall be maintained periodically to retain the required depth and area, and to replenish the mulch cover.” UPC 1502.11.2.4, UPC 1501.5; Ex. 39.

It makes no sense to use mulch in a buried system of septic tank drain lines – but appellants do not propose to do that. Appellants propose to use the mulch basin system that requires them to perform regular maintenance to remove and replace the degraded portion of the mulch that catches the solids from the gray water. T. 861.

The District Court next found that “...the maintenance required to keep such a system properly operating would be so burdensome as to render it unfeasible.” Add-56. This finding relied upon Dr. Heger’s opinion that

“this maintenance requirement makes the mulch basin concept unworkably labor intensive.” *Id.* The court acknowledged Laura Allen’s view that twice yearly shoveling out and replacing the decomposed portion of the mulch is not that big job, but instead relied on Dr. Heger’s opinion that “farmers are unlikely to have available time to devote to the extraordinary monitoring and upkeep requirements” of the mulch basin system. Add-57 n. 29. But this finding is again a speculation that these appellants would not perform this maintenance. These Amish appellants are already doing things in their daily lives that most non-Amish would regard as “unworkably labor intensive,” such as using horse and buggy for transportation, horses for field work, and living without indoor toilets or electricity. There is no evidence that the Amish would be any less willing or able to perform the necessary maintenance than the estimated 7 percent of the United States population that is reusing their gray water across 20 different states. T. 645, 651. The court’s finding that mulch basins are not practical disregards the intent of the appellants in this case – to utilize an accessible system for disposing of their gray water that is compatible both with their religious beliefs and acceptable to the government.

Dr. Heger’s testimony on the maintenance requirement is weakened by the fact that her training, experience, and knowledge base is limited to black

water septic tanks. Black water has substantially more solids than gray water, therefore would require substantial effort if one had to manually remove the solids; but this system is used to treat only gray water which has minimal solids.¹⁶ Dr. Heger’s only experience with gray water and mulch is concerning the use of bark beds to treat high strength wastewater coming from commercial milk processing. T. 876. The amount of work required in this commercial application to treat extremely high volumes of “quite different” wastewater is not a sound foundation to base speculations on the labor requirements for a single residential home using a mulch-basin system for their household gray water. *Id.*

Neither is Dr. Heger an expert witness on the industriousness of Amish farmers. The District Court found Dr. Heger’s personal opinion about dairy farmers in comparison to the Amish persuasive, finding “there is not evidence the Amish farmers have any more *time* on their hands than do non-Amish farmers.” [italics in original]. Add-57 n. 29. Dr. Heger opined that dairy farmers are the “hardest working people she knows” and they did not want to

¹⁶ Black water has substantially more organic solids (feces and toilet paper) when compared to the minimal solids found in gray water (food particles, dead skin, lint and dirt). T. at 805, 806, 837, 1778, 1794, 2083, 2123. Laura Allen testified that “in gray water there are very few solids...and what you do have can easily pass through and then decompose in the mulch.” T. 805. Dr. Heger agreed, stating that there is “no debate” that there are fewer solids in gray water. T. 912.

perform the maintenance on these commercial bark beds. T. 947, 1668.

Specifically, Dr. Heger testified that the dairy farmers told her that the bark beds “were great” but they didn’t want to “deal with” them and “putting more mulch on their system was not super exciting.” *Id.* Dr. Heger’s opinions about commercial dairy farmers and the industrial application of bark beds should not have supplanted appellants’ evidence that they are willing perform this maintenance or that millions of Americans are currently performing this maintenance on their own mulch basin systems. T. 1172.

These three factual findings are not sufficiently supported by the evidence in this record. These speculative findings are inadequate to justify the court’s conclusion that mulch basins cannot operate effectively.

C. The court overlooked that additional standards for the mulch basin system could further the objectives of protecting public health and the environment.

Minnesota has existing prescriptive requirements for septic systems which require setback requirements from wells, buildings and property lines. Minn. R. 7080.2150. There was testimony that the Amish would be willing to adhere to prescriptive requirements such as disposal of the prewash from diapers into their outhouses and not utilizing the mulch-basin gray water system for this task. T. 140.

The court failed to consider any of the previously detailed list of possible prescriptive standards that the government could implement in conjunction with the appellants' proposed alternative that would further promote the government's interest in protecting public health and the environment. Thus, the government was not held to the proper standard of proving that it is not possible to achieve their public safety and environmental protection goals through permitting a mulch-basin gray water system option in conjunction with reasonable performance and/or prescriptive standards.

D. The court failed to address the existing level of risk associated with septic tanks concerning the government's goals.

There is tolerance for the existing risk in the Minnesota's currently approved household waste disposal methods. Minnesota allows outhouses. Minn. R. 7080.2280. Outhouses, just like mulch basins systems and septic systems, use the power of the earth to protect public health and the environment. They are an acceptable and safe method for disposing of toilet waste as long as they are placed in areas with the proper soil conditions and maintain setbacks. Minnesota has determined that outhouses adequately protect public health and the environment. Appellants propose discharging their gray water into four mulch basins. Each of these four mulch basins

would meet the capacity requirements for a privy vault¹⁷ which Minnesota has determined is a safe and effective method of disposing of toilet waste that, as discussed previously, is several orders of magnitude more dangerous than gray water. If a 25 cubic foot hole located under proper soil can effectively treat toilet waste, why could four 25 cubic foot basins located within suitable soil *not* effectively treat the substantially less dangerous gray water?

Septic systems also have risks. As noted previously, farmers can apply the contents of their own septic tanks or animal manure, to their own land without any treatment, so long as they incorporate this sewage into the land within 6 hours. T. 1494, 1519, 1522. Neither the State of Minnesota nor Fillmore County supervise this process or require soil testing. T. 1821, 1825, 2211. If appellants were to install septic tanks, they would be allowed to hand pump out the contents of their septic tanks and discharge the contents directly on the surface of their land using a horse and wagon. T. 1496. There is no indication that the District Court considered the risk to public health and the environment if the Amish were to adopt the government's septic system, which would allow them to spread the contents of their septic tanks on their fields without setbacks, permits, or checking for proper soil

¹⁷ Privy vaults have a minimum capacity size of 25 cubic feet and the sides of the pit must be curbed to prevent cave-in. Minn. R. 7080.2280 (B) and (C).

conditions. The court did not weigh that risk against the proposed alternative mulch basin system.

CONCLUSION

The trial court did not adequately weigh the competing values under § 16, nor under RLUIPA. Because the alternative mulch-basin gray water system is compatible with appellants' religious beliefs and is feasible as a means of satisfying the government's interest in public health and environment, it is error to allow respondents to deny appellants the opportunity to comply with both their religious beliefs and the requirements of the civil authorities. The District Court opinion must be reversed.

Respectfully submitted,

LAW OFFICES OF SOUTHERN MINNESOTA
REGIONAL LEGAL SERVICES, INC.

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/s/ Brian N. Lipford

By: Brian N. Lipford, ID #388760
903 West Center Street, Suite 230
Rochester MN 55902
507.292.0060
brian.lipford@smrls.org

Charles H. Thomas, ID # 109058
55 E. 5th Street, Suite 800
Saint Paul MN 55101
651.894.6933
charles.thomas@smrls.org

Attorneys for Appellants

CERTIFICATION OF LENGTH OF DOCUMENT

I hereby certify that this Appellants' Brief conforms to the requirements of the applicable rules, is produced with a proportional 13-point font, and that the length of this document is 12,680 words. This brief was prepared using Word for Office 365.

LAW OFFICES OF SOUTHERN MINNESOTA
REGIONAL LEGAL SERVICES, INC.

/s/ Brian N. Lipford

Brian N. Lipford, ID #388760

903 West Center Street, Suite 230

Rochester MN 55902

507.292.0060

brian.lipford@smrls.org