A22–1534

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.

BRIEF OF RESPONDENT – FILLMORE COUNTY

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LEGAL ISSUES PRESENTED

I. Was it clearly erroneous for the District Court to conclude that the Government has a compelling interest in ensuring that gray water is properly treated so as not to transmit disease or introduce harmful chemicals, nutrients, and other contaminants into the environment?

The District Court ruled: The Government has a compelling interest of the highest order in protecting the well water of southern Fillmore County from contamination by the pathogen- and pollutant-carrying wastewater discharged from the Plaintiffs' and other Swartzentruber Amish Homes and the Government's "Amish Gray Water [septic] System" requirement is narrowly tailored to accomplish that compelling governmental interest;

Most apposite authorities: *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021); *Holt v. Hobbs*, 574 U.S. 352, 135 S. Ct. 853 (2015); *Ramirez v. Collier*, 142 S. Ct. 1264 (2022)

II. Was it clearly erroneous for the District Court to conclude that the gray water system is the least restrictive means to properly treat gray water and remove the harmful chemicals, nutrients and other contaminants that threaten public health and the environment?

The District Court ruled: The Government has proven that there is no less religiously burdensome or less restrictive alternative to the required septic system that serves the Government's compelling interests by properly treating Plaintiffs' wastewater, and the Government therefore has a compelling interest in denying these Plaintiffs an exemption from that requirement…."

Most apposite authorities: *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021); *Ramirez v. Collier*, 142 S. Ct. 1264 (2022); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020)

STATEMENT OF THE CASE

From 2014-2016, Respondents Fillmore County ("Fillmore") and Minnesota Pollution Control Agency ("MPCA") filed several enforcement actions to prevent Appellants from discharging raw sewage on to the ground and creating imminent public health threats. In 2017, Appellants filed a declaratory judgment action claiming that they had religious objections to installing gray water treatment systems that removed harmful gray water contaminants. Appellants claimed that the gray water system requirements violated the free exercise of their religion as protected by the Minnesota Constitution, and RLUIPA.

The Honorable Joseph F. Chase presided over a seven-day court trial at the Fillmore County Courthouse in 2018. The District Court determined that Appellants' religious beliefs were sincerely held and that the government's gray water treatment system imposed a substantial burden upon Appellants' free exercise of religion. Index #236, p. 1-2. However, the District Court found that the gray water treatment system is the least restrictive means of accomplishing the government's compelling interest in protecting public health, safety, and the environment. Index #236, p. 2-3. Judgment was entered against Appellants and in favor of Respondents on both claims. Index # 237.

The Minnesota Court of Appeals affirmed the District Court decision on June 8,

2020. Index #279. The Minnesota Supreme Court denied further review. Index # 282

Plaintiffs then petitioned the United States Supreme Court for a writ of certiorari, which was granted. On July 2, 2021, that court vacated the judgment and "remanded [the case] for further consideration in light of *Fulton v. Philadelphia*, 593 U.S. --, 141 S. Ct. 1868, -L.Ed.2d-- (2021)." See *Mast v. Fillmore County, Minnesota*, 141 S. Ct. 2430 (2021).

On September 7, 2022, the Honorable Joseph Chase, Judge of District Court, again ruled in favor of Fillmore County and MPCA. Judge Chase concluded that;

> "…the Government has proven that: (1) It has a compelling interest of the highest order in protecting the water of southern Fillmore County from contamination by pathogen- and pollutant-carrying wastewater discharged from Plaintiffs' and other Swartzentruber Amish homes; (2) the Government's "Amish Gray Water [septic] System" requirement is narrowly tailored to accomplish that compelling governmental interest; (3) there is no less religiously burdensome or less restrictive alternative to the required septic system that serves the Government's compelling interests by properly treating Plaintiffs' wastewater, and; (4) the Government therefore has a compelling interest in denying these Plaintiffs an exemption from that requirement…."

On October 28, 2022, Plaintiffs appealed the District Court decision. The matter is now before the Minnesota Court of Appeals for consideration.

STATEMENT OF FACTS

The District Court painstakingly detailed Findings of Fact in its order and memo of September 7, 2022. Those Findings of Fact are referenced in Appellants' Addendum as follows:

C. The Danger Gray Water Contaminants, the Credibility of Witnesses, and Other Important Facts have not Changed on Remand

1. The evidentiary record has not changed on remand. My review of *Fulton*, *Ramirez*… does not change my judgment as to the *credibility* of any witness or item of evidence that is before the court… What I found credible three years ago in the testimony and other evidence presented, I still find credible… I was convinced at trial by the testimony of Dr. Sara Heger describing the real danger to drinking water safety posed by untreated gray water released into the karst topography of Fillmore County…I did not find believable or persuasive the testimony of Ms. Laura Allen, asserting that California-style mulch basins were a plausible means of accomplishing the needed treatment of the gray water from Swartzentruber Amish homes…. (Appellant Add-18)

2. Nothing about the Supreme Court's remand in light of *Fulton* states or implies a judgment that this court erred in determining…that gray water sewage from Amish homes in Fillmore County carries chemical pollutants and pathogens capable of causing illness; and that due to the fractured and dissolving karst topography of southern Fillmore County, untreated

household wastewater flowing through the porous limestone bedrock can reach drinking water aquifers and wells within days of its release. (Appellant Add-18)

D. The District Court Corrected Multiple Mischaracterizations and Misrepresentations of Evidence

3. Some factual assertions without support in the trial record have crept into the arguments on remand. An example of this appears … where Plaintiffs assert that Minnesota's alleged "my way or the highway" approach to regulation "has led many [Amish] to choose the latter and leave Minnesota." This dramatic assertion has no evidentiary support in the trial record. (Add-18)

4. It is inaccurate to portray Fillmore County as never having made any attempt to work with its Amish community regarding the gray water SSTS requirement. (Add-21, Trial Transcript p.1712, 1722)

5. The Plaintiffs' assertion that the Government's position toward them has always been "my way or the highway" - and "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions."… inaccurately re-writes the history of this controversy. (Add-22)

6. Judge Gorsuch's description might suggest that this lawsuit and the Plaintiffs' mulch basin proposal arrived simultaneously. That would be a misunderstanding… Plaintiffs' did not "offer" the Government mulch

basins as an alternative; to the contrary, they presented them as a *fait accompli*…. (Add-6)

7. Plaintiffs' counsel suggests that each of his clients lives "on a remote farm located miles from its nearest neighbor." (Plaintiffs' brief, p. 24)… But as this case may again reach judges unfamiliar with the actual geography of Fillmore County, Minnesota; who might take literally the representation that rural residents here live "miles" from their nearest neighbors; and who might, therefore, mistakenly infer that that fact alone eliminates the danger to human health posed by untreated gray water; it is important that hyperbole not be mistaken for fact… no one in these townships, and certainly not the Plaintiffs, lives a mile or more from their nearest neighbor. In Fillmore County, rural neighbors live relatively close to one another's wells, and as Dr. Heger testified, in this place, one person's untreated gray water can be their neighbor's well water by the end of the week. (Add-26)

8. In announcing that "thousands" of campers, hunters, fisherman, and rustic cabin users are "exempt from the septic system mandate," Justice Gorsuch makes a factual assertion unsupported by the evidence presented at trial… On the evidence before this court, the claim that "thousands" of campers, hunters and fisherman are allowed to do what Swartzentruber Amish households may not, is **pure canard**. (Add-28)

9. The suggestion that Type V systems are a "minimal[ly] restricti[ve]" exemption by which "anyone" may circumvent the Government's

compelling interest in wastewater treatment, is at odds with reality. (Add-33)

E. Negotiations and Efforts at Elimination of Straight Pipes, Alternative Standards for the Amish, and Other Events Leading to This Litigation

10. I found credible the County's testimony that the Government's goal in these "many meetings with MPCA officials, Amish elders and bishops and families" was to negotiate "what those regulations would need to be for them to be agreeable to putting in a septic system ...." (Trial transcript p.1722.) (Add-21-Footnote 4)

11. The result of those talks was an accommodation by the County codified in the "alternative local standard" set out in Section 502 of the County's 2013 SSTS ordinance. This provision established the size of "Amish Gray Water Systems" based not on the number of bedrooms in the houses (as would have been required under state regulations; See Minn. Rules, parts 7080.1860 and 7080.2240), but rather on an estimate of "a flat usage of 100" gallons per day…. (Add-21; Footnote 5)

12. The Plaintiffs' April 6, 2017 complaint, in its prayer for relief, asked that the court "allow Plaintiffs to… establish alternate safe systems for disposing of their household water."…The suit proposed no particular "alternate system." At the time of my September 18, 2017 order denying Plaintiffs a temporary injunction, it was the court's understanding that the Plaintiffs were…" still discharging gray water through 'straight pipes,"'

untreated, onto the ground surface outside their homes... The Plaintiffs actually built their mulch basins in the fall of 2017 (see the August 29, 2018 affidavit of Ammon Swartzentruber), but the Plaintiffs did not inform the Government of that fact at the time. The Government was unaware of the existence of the installed mulch basins until the next summer… in August, 2018. (Add-6)

F. Numerous Amish Households with Large Families

13. There are approximately 149 Swartzentruber Amish households in Fillmore County. (Exhibit 263)…The number of objecting households lies somewhere between 36 and 148. (Add-19-20)

14. These Swartzentruber Amish households … are large households. For example, 14 family members resided in Menno Mast's farmhouse at the time of trial; and a family of that size is not unusual in the Swartzentruber Amish community. (Trial transcript p. 1281.) (Add-20)

G. All Amish Households Have Running Water and Indoor Plumbing

15. Running water is pumped to and piped into these households from an outside source (which in these rural places is a well) in substantially the same way that running water comes into non-Amish residences. The Swartzentruber Amish, like non-Amish, have access to water in their homes by turning on a faucet. Inside these houses water is used for many of the same purposes for which water is used in non-Amish homes-bathing,

food preparation, laundering clothing, and doing dishes-with one key exception: Flushing toilets. The Amish use outhouses for toilets. (Add-20-21)

16. The Swartzentruber Amish themselves do not dispute that they have (and have long had) "running water" in their houses… The water used inside Swartzentruber Amish homes is pumped, sometimes hundreds of feet, to the house from an outside well, using a motorized pump-in the case of the Amish , a gasoline-fired engine. This pumped water arriving at the house by a "single line"… With the Amish, this pumped water goes into a large tank at the house-referred to in this record as a cistern-from which it is piped into the house to at least one sink... Emery Miller described that inside his home water is piped to the basement, the washroom and a sink near or in the kitchen. (Trial transcript p. 81.) At the time of trial, Plaintiff Amos Mast and his wife Mattie did not yet have running water in their residence… the Masts testified that they intended to connect to a running water supply in the future. (Footnote #4, Add-20-21)

H. <u>Amish Households Generate at Least 100 Gallons of Gray Water per Day</u>

17. How much gray water do these households produce? The only number that appears in the record is 100 gallons per day... The 100 gallons per day estimate is not based on measured monitoring of Amish household gray water flow rates. But the ballpark accuracy of that figure has not been

seriously disputed by the Plaintiffs; … There is no suggestion that the figure overstates gray water flow from these households that feed, clean and clothe a significant number of active children and hardworking adults engaged in agriculture and other manual labor. (Add 21-22)

18. An exemption granted to these religious claimants would permit the thousands of gallons of household wastewater released daily by these families to continue to be a substantial threat to the safety of the drinking water of the area in which they live, and to the natural environment of that area. (Add--3)

I. Appellants' Gray Water Contains Dangerous Contaminants

19. The Swartzentruber Amish use the same types of soaps, detergents, bleach and other common household chemicals used in non-Amish households. Amish and non-Amish gray water alike contains those pollutants. Because the Amish, like anyone else, wash themselves and their clothes, the gray water that comes out of Amish homes contains all of the detritus that comes off human bodies and clothing, including bacteria, viruses and other dirt and contaminants. Unlike most of today's non-Amish households, the Amish wash a lot of cloth diapers ... The gray water from Amish houses also includes kitchen sink water from food preparation, something that experts agree is a particularly dirty component of gray water. The gray water produced by Fillmore County's Swartzentruber households carries pathogens that are a threat

to public health, and chemical pollutants that damage the environment… the gray water from the Swartzentruber Amish households of Fillmore County is a danger to public health. Coliform bacteria can be present in gray water at 50,000 times the level considered unsafe for swimming. (Add-22)

20. Fillmore County staff who visited the Plaintiffs' farms credibly testified to and presented photographic evidence of their observations of milky, unpleasant smelling gray water they saw being emitted via "open pipe discharge" from the residences to the ground before the Plaintiffs' installation of mulch basins; and overflowing from the backed-up, sludge-lined basins once the mulch pits were installed. The on-the-ground observations from the farms-visual and olfactory evidence of the griminess of this wastewater-corroborated Dr. Heger's testimony concerning its content. (Add-24)

21. The pathogen- and pollutant-bearing gray water emitted by dozens of Swartzentruber Amish homes in the southern portion of Fillmore County- a volume of effluent totaling, at a minimum, three to four thousand gallons a day (36 residences x 100 gallons)-poses a present, substantial threat to the health and safety of Amish and non-Amish residents of the County alike. There is nothing speculative about the existence of that threat…. (Add-25)

J. Fillmore County's Fragile Karst Geology/Topography

22. The gray water discharged from the Swartzentruber Amish homes into the karst topography of Fillmore County, where disease-carrying pathogens and environmentally harmful chemicals and nutrients move quickly through dissolving limestone bedrock to the groundwater, aquifers and nearby wells, presents a substantial threat to the safety of the drinking water of Fillmore County and the area's environment. (Add-2)

23. The threat (created by untreated gray water pollutants) is contributed to by the "active karst" geology/ topography of Fillmore County…Not all "karst topography"… "Southeastern Minnesota is so challenging to protect because limestone is slowly dissolved by infiltrating rainwater, sometimes forming hidden, rapid pathways from pollution release points to drinking water wells or surface water." Exhibit 311, p.1. Dr. Sara Heger credibly testified that in this porous karst area, household wastewater can reach and contaminate a drinking water aquifer in just days. Dr. Heger testified that our "water is all connected;" and in karst topography, that connection can be swift. (Add 25-26)

24. Granting an exception from the septic system requirement to these Plaintiffs and their like-minded Swartzentruber church members would permit, every day, some three to four thousand gallons of gray water waste from at least 36 Swartzentruber Amish homes in southern Fillmore County- gray water that contains illness- causing viruses and bacteria as well as

soaps, detergents and other household chemical pollutants-to pour into the fissured limestone bedrock of southern Fillmore County and reach the County's aquifers and wells. This is a substantial threat to the safety of the drinking water supply of Fillmore County and gives the Government a compelling interest in denying an exemption from the septic system requirement for these religious claimants. (Add-27)

25. I find as I do-that the safety of the drinking water of Fillmore County is imperiled by granting an exemption to the Swartzentruber Amish- because the scientists and soil and septic experts who credibly testified to that danger at trial have convinced me that is the case. (Add-27)

K. <u>There are not Thousands of campers, hunters, fisherman, and rustic cabin users who are exempt from the septic system mandate.</u>

26. The suggestion implicit in Justice Gorsuch's commentary-that via the hand-carried water exception, the Government is allowing hunters and campers to create the very same threat to public health, safety and the environment that is the asserted basis to burden the religious practices of the Swartzentruber Amish-is at odds with the record. (Add-28)

27. The claim that "thousands" of campers, hunters and fisherman are allowed to do what Swartzentruber Amish households may not, is a **<u>pure canard</u>**. (Add-28, Footnote 12)

L. <u>Hand Carried Water Generates Small Amounts of Gray Water</u>

28. The record… contains no information supporting an inference that the

"hand-carried gray water" provision of Rule 7080.1500 leaves unprohibited any appreciable damage to the Government's interest in protecting drinking water from pathogens and pollutants. (Add-28, Footnote 12)

29. The hand-carry provision operates to authorize discharge of only "very small quantities of water." (Trial transcript p. 1381.) Why? Because water is *heavy*. One gallon weighs 8.3 pounds. Before any gray water can be lawfully discharged under this provision, it must first be hand-carried into that primitive campsite or rustic cabin. And because that is hard work, campers and hunters "bring [in] very small amounts of water" (Trial transcript p. 1376). According to Dr. Heger, the hand-carry situation is "very low risk" and is "allowed because... the volume of water would be so small." (Trial transcript p. 923.) Dr. Heger credibly testified that, in contrast, when water is piped into a residence "a lot more [waste] water" is generated and "the risk to public health and the environment" of discharging that waste water untreated "is too high." (Id.) (Add-28-29)

30. The nature of the gray water disposed of at a primitive campsite is different not only in amount but in kind than the gray water households produce. Few, if any, campers take a shower or a bath with water they hand-carried to their tent site. And no one in a hunting shack is using hand-carried water to wash a load of laundry. (Add-29)

31. The hand-carry provision addresses a very different situation than that in which running water, pumped into a home and available by turning on a

faucet, is discharged as gray water in much larger quantity, after use for all of the day-to-day activities required to clean and feed a family. The evidence convinced me that hand- carry provision does not permit "conduct that undermines the government's asserted interests in a similar way." (Add-29)

32. The hand-carried gray water provision addresses a situation incomparable in both quantity and quality to the daily gray water discharge of a large Swartzentruber Amish household… hand-carried gray water neither causes nor threatens any substantial harm to public health. This is in contrast to dozens of households sending a total of three to four thousand gallons of gray water every day into the karst topography of Fillmore County, a practice that a University of Minnesota professor with a doctorate in wastewater science testified poses a substantial threat to the safety of the local drinking water supply. (Add-29)

M. <u>There is no Exception to the Septic Requirement for Tents, Cabins or Other Structures which have Running Water</u>

33. There is *no* exception, discretionary or otherwise, to Minnesota's requirement that residences with running water-all residences with running water-must discharge gray wastewater into a treatment system… No Government official here has the discretion to "consider the particular reasons for a person's conduct" and decide who must comply and who need not. Further, the hand-carry provision is as available to the Swartzentruber

Amish as it is to anyone else. The suggestion that the regulation here subjects-or gives any official the authority to subject-the households of the Swartzentruber Amish of Fillmore County to more exacting, less lenient treatment than other households receive is unsupported by the record…. (*Add-30*)

N. <u>Privies and Outhouses are not an Individualized Exception to the Septic Requirement</u>

34. It is true that the pathogens carried in gray water are found at much higher levels in toilet waste. But it is a fallacy to reason that a Government-required septic system for gray water cannot really be so important if that same Government says a mere hole in the ground beneath a privy is sufficient for toilet waste.

There is a key difference between outhouse waste and gray water, and that difference, one infers, is *water…* Dr. Heger noted in her testimony that there are various means of dealing with toilet waste, but that "all the wastewater needs to be treated." (Trial transcript p. 924 (italics added).) By definition, the only "*water"* going into a privy is *urine.* And it is the water, be it gray or black, that carries the disease-causing pathogens to other surface or groundwaters. I am not convinced that there is any regulatory inconsistency in allowing the Plaintiffs to have privies for non-water toilet waste, and at the same time requiring septic systems for the gray waste water their households generate. (Add 30-31)

M. Farm Applied Septage under 40 CFR Part 503 is not an Individualized Exception to the Septic Requirement

35. There is no evidence in the record that any farmer-application of septage is actually happening anywhere in Fillmore County…(Add-31)

36. Plaintiffs assert that farmer application of septage is permitted "with minimal restrictions." (Plaintiffs' brief p. 19.) This is not the case.… (Add-31)

37. There is nothing "simple" about compliance with the 503' s. In particular the calculations necessary to ensure that the land can handle the septage to be applied are daunting: "Prior to [septage application] you're going to be looking at the farm field... where you can land apply it and you're going to look at what crop is growing there this year, what crop has been growing there last year, and actually figure out how much sewage can actually go onto that property.... So you're not overloading it." (Trial transcript p. 1494.)(Add-31 to 33)

38. I detect nothing about farmer application of septage to farm fields, robustly regulated under 40 CFR part 503, that is either inherently or practically inconsistent with the policies furthered by the Government's gray water septic system requirement. (Add-31-33)

N. Type V Septic Systems are not an Individualized Exemption

39. Type V systems are "engineered systems" (Trial transcript p. 1347.), designed by a certified SSTS design engineer with "advanced

training."… There are few Type V systems in Minnesota… The suggestion that Type V systems are a "minimal[ly] restricti[ve]" exemption by which "anyone" may circumvent the Government's compelling interest in wastewater treatment, is at odds with reality. (Add-33)

40. Section 7080.1500, subp. 1 requires that wastewater from all dwellings not connected to centralized sewer systems "must be treated." As Dr. Heger testified: "The [Minnesota] septic code says all wastewater has to be dealt with." (Trial transcript p. 924.) There is no exception or exemption from the requirement that all wastewater resulting from running water piped into dwellings go through a treatment system. (Add-33)

41. Plaintiffs argue that "no regulations govern the creation of a Type V system." (Plaintiffs' brief. p. 26.) This is a mischaracterization. The creation and operation of Type V systems are much more rigorously regulated than Type I systems. Type V systems "must be designed, installed, inspected, operated, and maintained by appropriately licensed businesses and certified individuals."…. (Add-34)

42. Nothing in the Type V rules evidences a relaxation or compromise in the regulatory scheme that is inconsistent with the urgency of the Government's interest in protecting surface and groundwater from contamination by untreated wastewater. Indeed, the opposite is true.

Type V systems represent no "exemption" from SSTS requirements or objectives. One might accurately characterize Type V systems as the Cadillac of residential wastewater treatment systems…. (Add-33 to 35)

43. Unlike the *Fulton* situation,… the Type V approval decision is not "entirely discretionary" nor anything like it… in order to gain approval, a Type V system must meet all the same performance requirements as any other treatment system. If a proposed Type V system fails to meet those requirements by not adequately treating wastewater, the Government has no discretion to approve the system and allow it to operate out of compliance with Chapter 7080. In…. There is no room for "forbidden value judgements" here: The system either works, or it does not. (Add-36)

44. The "explanation for the different treatment" of Plaintiffs is that they have never taken any step toward having their mulch basins evaluated as Type V systems. The Type V option is as available to Plaintiffs as it is to anyone else. Plaintiffs have not pursued it. (Trial transcript p. 237.) (Add-36)

45. It is no mystery-nor is it evidence of "bureaucratic inflexibility"-that Plaintiffs' mulch basins never received Type V consideration. They never asked for it nor did they present anything to support it. (Trial transcript p. 1396.)

46. The Government has proven a compelling interest of the highest order

in protecting the well water of southern Fillmore County from contamination by the viruses, bacteria and pollutants in thousands of gallons of wastewater discharged daily from at least three dozen Swartzentruber Amish homes in four townships in that part of the County. The gray water discharged from the Swartzentruber Amish homes into the karst topography of Fillmore County, where contaminants move quickly through dissolving limestone bedrock to aquifers and wells, presents a substantial threat to the safety of Fillmore County drinking water. (Add-45 to 46)

O. <u>The Gray Water System is the Least Restrictive Alternative for Treating the Wide Variety of Toxins Found in Appellant's Gray Water</u>

47. Mulch basins are inadequate to accomplish the Government's compelling interest, because of the inherent shortcomings of mulch basins as a mode of wastewater treatment, and because of the continuous, substantial labor that would be required to keep them from becoming saturated and entirely ineffective. (Add-3)

48. The "alternative local standard" provided for in Section 502 of Fillmore County's SSTS ordinance, requiring an "Amish Gray Water [septic] System" sized for the reduced wastewater flow from Amish homes, is narrowly tailored to accomplish the Government's objective of eliminating the threat of contaminated surface-, ground-, and well water in the townships where the Swartzentruber Amish live. (Add-3)

P. No Other State Would Allow A Mulch filled Cesspool to Treat Appellants' Contaminated Gray Water

49. No other state would permit the Plaintiffs to use mulch basins for the kind of gray water that comes from the Plaintiffs' homes-wastewater that includes both the particularly dirty kitchen sink water and water used to wash soiled diapers--under the circumstances Plaintiffs' situation presents. Plaintiffs' contention that their proposed use of mulch basins for their gray water would be allowed by other states' regulations amounts to an attempt to fit the Plaintiffs' square peg into twenty states' round holes. (Add-38)

50. [T]he kitchen sink is some of the dirtiest water in our home after -- right after the toilet." (Trial transcript p. 880; testimony of Dr. Sara Heger.) (Add-38, Footnote 16)

51. The "rules of other jurisdictions" that allow mulch basins to receive certain types of wastewater would not permit mulch-basin handling of the gray water discharged from Plaintiffs' residences. Were Minnesota to authorize mulch basins as a "treatment system" for the kind of gray water discharged by the Swartzentruber Amish homes of Fillmore County, it would be the first and only state to do so. (Add-38-39)

Q. Mulch Pits do not have 3 Feet of Separation from the Saturated Soils

52. The three-feet requirement presents a serious problem in places where bedrock is high and/ or the perched water table is shallow-such as

Fillmore County… a mulch system, with its requisite basin excavations, makes three feet of separation much more difficult-if not impossible-to accomplish at locations with a shallow water table or high bedrock. (Add-40)

53. At trial the court asked Dr. Sara Heger… to hypothetically assume that Plaintiffs could locate on their Fillmore County farms the requisite five to seven feet of unsaturated soil for basin installation. Dr. Heger responded that such an assumption was not plausible: "I actually think you're expecting a lot, because a lot of the soil conditions around here do not allow for a system in-ground with three foot of separation around them. So I think you're dreaming a dream that we - that doesn't exist…. (Add-40) (Trial transcript p. 1668).

54. Michael Frauenkron testified that soil testing conducted at Plaintiff Ammon Swartzentruber's property-performed because Mr. Swartzentruber wanted to install a new privy-revealed that the restricted layer was only 24 to 30 inches below the surface. (Trial transcript, p. 2038-39). Mr. Swartzentruber's mulch basin, however, was dug four feet into the ground. According to Mr. Frauenkron, the bottom of Mr. Swartzentruber's mulch basin was inside the restricted layer; and any water flowing down and out of that basin was receiving "no treatment." (*Id.*). (Add-40)

55. The shallow perched water table and bedrock of Fillmore County make

it difficult or impossible to find locations where mulch basins could be dug three feet above the restricted layer. (Add-40)

R. Mulch Pits are High Maintenance

56. A significant problem with mulch as a distribution medium is that it is organic, quickly becomes saturated, and naturally breaks down. This creates a system dependent on a high level of maintenance, as the woodchips will need to be frequently and continuously replaced… I remain of the view that Dr. Heger's testimony on level of maintenance is more credible and persuasive than Ms. Allen's. I again find that the organic nature of wood chips creates a system that is extremely and impractically labor intensive. (Add-41)

S. Mulch Consumes Oxygen and Hinders Treatment of the Contaminants

57. In the process of breaking down, the woodchips use oxygen. This removes oxygen from the surrounding area. This is important… because oxygen removal from chip break-down "will hamper the treatment of sewage and create an anaerobic environment." (Trial transcript, pp. 907- 08; 1644… No amount of maintenance will change the fact that wooden mulch is an organic material that breaks down, creates an oxygen demand, and hinders sewage treatment. (Add-41)

T. Since Mulch Pits do not have a Tank, the Solids and Grease Clog up the Pit and Prevent Treatment of the Gray Water Contaminants

58. Mulch wastewater systems do not have a septic tank or tank-equivalent providing an important first step in gray water treatment. The tank settles solids to the bottom and floats light liquids such as grease to the top. (Trial transcript, pp. 911-912). The effluent then travels to the drain field having been already partially cleaned. This step enhances the system's longevity and is also the important first step in wastewater treatment… Mulch does not allow for the floating-and-settling part of treatment process… solids tend to cling to the wood chips, "gum up" the system, and prevent the effluent from reaching the soil interface for proper treatment. (Trial Transcript, p. 943). (Add- 41 to 42)

U. <u>Mulch Pits do not Allow the Contaminated Gray Water to "Spread Out"</u>

59. Another problem with mulch is that is that it does not allow effluent to effectively "spread out" to unsaturated soil and receive adequate soil treatment. …this problem would not be solved by increasing volume or square footage of mulch…(Trial Transcript, pp. 1653-55) (Add-42 to 43)

V. <u>Mulch Pits Quickly Seal Up and have to be Re-located</u>

60. The Court also found credible Dr. Heger's testimony that when a mulch system sealed up in the manner she foresaw, the needed remedy would not simply be to dig out the old wood chips and add new. The entire system will have to be relocated. (Trial Transcript, pp. 1668-1670) (Add-43 to 44)

W. Summary of Mulch Pit Defects

61. The impractical level of maintenance that would be required to keep a mulch basin performing any level of wastewater treatment continues to be a part of this court's reasoning in finding mulch unworkable. Mulch's labor-intensiveness is not the only stumbling block for mulch basins to be a viable treatment alternative… mulch basin excavations would be difficult or impossible to site on the Swartzentruber Amish farms in Fillmore County, given the area's shallow perched water table and high bedrock… mulch is a flawed distribution medium because it breaks down and hinders treatment by poaching the oxygen required for wastewater treatment… mulch lacks the septic tank's important floating-and-settling treatment function… mulch is a barrier to effluent reaching the wide distribution on the soil surface necessary for effective treatment; and that the mulch basins would eventually seal up requiring relocation. (Add-44)

62. The required maintenance alone would be an insurmountable obstacle. (Add-45)

63. Even after assuming unlimited mulch-bed size and volume, Dr. Heger expressed her belief "that the water will accumulate and pond;" and that such a system would "seal up relatively quickly across the bottom." "And when it seals up," Dr. Heger testified, "it backs up. And it fails- and it stops performing its job." (Trial transcript, pp. 1669-70). After

reviewing the totality of Dr. Heger's testimony and her multiple criticisms of mulch basins as a septic system substitute, I think I incorrectly described her testimony when I said she thought mulch even "theoretically possible" as a gray water treatment system in Fillmore County. (Add-45)

64. The Government has proven that a gray water system with a septic tank is the only plausible, realistic means of ensuring that Swartzentruber Amish gray water is adequately treated to eliminate that contamination threat… mulch basins are inadequate to the task, not only because of the enormous labor that would be required to keep them from becoming saturated and ineffective, but because of the inherent shortcomings of this mode of wastewater treatment, particularly in the karst topography / geology. The "alternative local standard" set out in Section 502 of Fillmore County's SSTS ordinance, requiring an "Amish Gray Water System" of reduced size based on a smaller wastewater flow, is narrowly tailored to accomplish the Government's objective of eliminating the threat to the safety of drinking water in southern Fillmore County. (Add-46)

STANDARD OF REVIEW

When reviewing a declaratory judgment action, the Appellate Court applies the clearly erroneous standard to factual findings and reviews the District Court's determinations of law de novo. *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 615

(Minn. 2007); *Skyline Village Park Ass'n v. Skyline Village L.P.*, 786 N.W.2d 304, 306 (Minn. App. 2010).

Appellate courts "must consider the evidence in a light most favorable to the prevailing party" and district court findings "will not be reversed on appeal unless they are manifestly contrary to the evidence." *G. C. Kohlmier, Inc. v. Albin*, 101 N.W.2d 909, 914 (1960); *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). The Appellate Court must not engage in new fact-finding. *Rasmussen v. Two Harbors Fish Co.*, 817 N.W.2d 189 (Minn. 2012). Appellate courts may not sit as factfinders, and are not empowered to make or modify findings of fact. *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008). In order to conclude that the findings of fact are clearly erroneous the Court must be left with the definite and firm conviction that a mistake has been made. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999); *Fletcher v. St. Paul Pioneer Press*, 589 N.W. 2d 96, 101(Minn. 1999). The Appellate Court can only set aside findings that are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Northern States Power Co. v. Lyon Food Products, Inc.*, 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

There is no deference to the District Court's determination on questions of law and the Appellate Court will review a district court's application of the law de novo." *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013); *Harlow v. State, Dep't of Human Servs.*, 883 N.W.2d 561, 568 (Minn. 2016). However, when there are mixed questions of law and fact, the District Court decision can only be set aside if there has been an abuse of discretion. *In Re the Estate of Sullivan*, 868 N.W. 2d 750, 754

(Minn. Ct. App. 2015)

ARGUMENT

The journey of this case from the river valleys of Fillmore County to the ivory towers of Washington D.C. is similar to the winding and twisting trek that thousands of gallons of Appellants' contaminated gray water take each day as they seep into the ground and spread throughout the entire Tri-State area. Appellants' polluted gray water has gushed, gurgled, ebbed, flowed, and trickled into the surrounding groundwater, trout streams, and wells of Fillmore County for many years despite the best efforts of the County and State to negotiate a compromise. The compelling nature of this case and corresponding threat to public health and safety continues to grow exponentially with each and every gallon of untreated and contaminant laden gray water that is discharged by Appellants' large households.

Good legal analysis should operate much like the government's gray water system. The Court must filter out and separate misleading arguments, inaccurate information, and other "gunk". If the "gunk" is not filtered out, the legal analysis gets clogged up, breaks down, and ultimately results in a contaminated opinion. If the Court is able to filter the contaminated arguments and polluted information, the Court will once again conclude that there are overwhelming and compelling public safety interests which require these particular Appellants to install a gray water system which will effectively treat the wide variety of harmful toxins generated by their households.

Contrary to Appellants' arguments, harmful impurities found in Amish gray water pose a compelling public health and safety risk. Mulch filled cesspools provide

absolutely no treatment for hazardous pathogens, bacteria, and other contaminants. The County has implemented narrowly tailored guidelines with objective categories. Those guidelines do not treat secular activities or entities more favorably. The gray water guidelines properly distinguish between hazards associated with the large amounts of contaminated gray water produced by Appellants' permanently occupied households and the minute amount of impurities produced by sporadically occupied camp sites or cabins with no running water. All campgrounds must obtain a conditional use permit, must have shower and wash facilities, must have an updated and compliant septic system, and must comply with all state and federal regulations.

A close review of the evidence proves that mulch filled cesspools similar to those proposed by Appellants are not allowed in any other state. Appellants' mulch pits pierce the saturated soils so as to create a direct pipeline of contaminants to the groundwater, provide absolutely no treatment of the pathogens and other harmful impurities, quickly fail and backup, require constant maintenance, and must be regularly re-located. There is no legitimate comparison to the minimal risk associated with the handful of farmers who incorporate treated and limed/PH compliant sewage on their own fields once every couple of years in accordance with 40 CFR Chapter 503 guidelines.

Appellants' mulch filled leeching pits are an imminent threat to public health and safety, threaten the environment and groundwater, and endanger the economic well-being of Southeast Minnesota. The only effective alternative which provides satisfactory treatment of the harmful pollutants in Appellants' waste water is the

County's gray water system.

A. LEGAL AUTHORITY

1. RLUIPA and the Compelling State Interest Test

RLUIPA provides in pertinent part 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).

RLUIPA requires that "the government bear the burden of proving that its regulations serve a "compelling" governmental interest and that its regulations are "narrowly tailored" to achieve a compelling government interest. *Mast v. Fillmore Cty.*, 141 S. Ct. 2430, 2432 (2021); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) Once a challenging party has established that their sincerely held religious belief is substantially burdened, "the burden shifts to the government to show that substantially burdening the religious exercise of a particular claimant is the least restrictive means of furthering a compelling governmental interest." *Holt v. Hobbs*, 574 U.S. 352, 370, 135 S. Ct. 853, 867 (2015); quoting *Burwell v. Hobby Lobby Stores, Inc.*; 573 U.S. 682, 717, 134 S. Ct. 2751(2014)

2. Compelling Governmental Interest

Courts "cannot rely on broadly formulated governmental interests," but rather must scrutinize "the asserted harm of granting specific exemptions to particular religious

claimants." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1881, (2021); *Hobby Lobby*, 573 U.S. at 726. A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1881 (2021); *Church of Lukumi Babalu Ave. Inc. v Hialeah*, 508 US 520, 546; 113 S. Ct. 2217 (1993).

A government regulation triggers strict scrutiny "if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions" or "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1881; *Lukumi*, 508 U.S. at 546-547.

The Court's review consists of a "'focused inquiry' that requires the government to demonstrate that its policy 'actually furthers' a compelling interest when applied to 'the particular claimant whose sincere exercise of religion is being substantially burdened."' *Holt v. Hobbs*, 574 US at 363-64; *Hobby Lobby*, 573 U.S. at 726. The relevant question is whether the government has a compelling interest in denying a religious exemption to a particular group while making exceptions available to others. *Mast*, 141 S. Ct. at 2433, *Fulton*, 141 S. Ct. at 1881-1882.

A recent RLUIPA case identified numerous compelling public interests when an inmate on death row requested that his pastor "lay hands" on him and pray over him in the execution chamber. *Ramirez v. Collier*, 142 S. Ct. 1264 (2022) The Court stated several times that "Texas has a compelling interest in <u>preventing disruptions</u> of any sort and <u>maintaining solemnity and decorum</u> in the execution chamber." *Ramirez* at 1271,

1280, 1281. The Court reached "the commonsense conclusion that the State has a compelling interest in ensuring safety, security, and solemnity in the execution room." *Ramirez* at 1287. "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Ramirez* at 1271, 1282. "Prisons have compelling interests in protecting those attending an execution, preventing them from interfering with it, and "Preventing accidental interference with the prison's IV lines." *Id.* at 1280-1281. Also, "prison officials have a compelling interest in monitoring an execution and responding effectively during any potential emergency." *Id*. at 1270 and 1279.

The Supreme Court also concluded that stemming the spread of COVID-19 qualified as a compelling interest. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Preventing animal cruelty and protecting public health and safety during animal sacrifices are compelling interests. *Church of Lukumi Babalu Ave. Inc. v Hialeah*, 508 US 520, 546; 113 S. Ct. 2217 (1993). Regulating adoptions and protecting the rights of gay couples are also compelling interests. *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021) Prison security, preventing prisoners from concealing their identity, and preventing contraband from being hidden are also considered compelling governmental interests. *Holt v. Hobbs*, 574 U.S. 352, 135 S. Ct. 853 (2015)

3. Least Restrictive Alternative

Strict scrutiny requires that the law or regulation be "narrowly tailored' to serve a 'compelling state interest." *Roman Cath. Diocese*, 141 S. Ct. at 77; *Lukumi*, 508

U.S. at 546. "Narrow tailoring" requires that the government utilize the "least restrictive means" of achieving its objective. *Thomas v. Rev. Bd. Of Indiana Emp. Sec. Div.*, 450 U.S. 707, 718, 101 S. Ct. 1425 (1981)

"Least restrictive means" requires that the government 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." *Holt v. Hobbs, 574 U.S. at 369*, *Burwell v. Hobby Lobby*, 573 US 682, 728; 134 S. Ct. 2751(2014). If a less restrictive means is available for the government to achieve its goals, the government must use it. *Holt v. Hobbs*, 574 U.S. at 365; *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815, 120 S.Ct. 1878 (2000). "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 141 S Ct at 1881. However, the government need not "do the impossible-refute each and every conceivable alternative regulation scheme" but need only "refute the alternative schemes offered by the challenger". *Holt v. Hobbs*, 574 U.S. 352, 371-72, 135 S. Ct. 853, 868 (2015)

Accommodating an individual's religious belief, should not detrimentally affect others who do not share that person's belief. *Burwell* v. *Hobby Lobby Stores, Inc.,* at 740, 745-746, 764, 134 S. Ct. 2751; *Holt v. Hobbs*, 574 U.S. 352, 370, 135 S. Ct. 853, 867 (2015) The right to religious liberty does not protect conduct that would endanger public peace or safety. *Fulton*, 141 S. Ct. at 1901.

The terminology used in *Ramirez* makes it clear that the least restrictive option must actually exist and must actually work to address the government's compelling

interest. The Court used phrases like; "least restrictive **means of furthering** the government's compelling interests" (*Ramirez.* at 1270, 1277 1278, 1279, 1280), "least restrictive **means that would accomplish**" the State's compelling objectives (*Id.* at 1271, 1280), and "**handle any concerns**." (*Id.* at 1280) The Court also used the phrase "**reasonably addressed"** (*Id.* at 1281) and "**means could satisfy"** that compelling interest." (*Id.* at 1286).

4. <u>Deference to Scientists and Other Experts when Assessing a Compelling Governmental Interest and Least Restrictive Alternative</u>

Courts should give deference to government officials expertise when they "offer a plausible explanation for their chosen policy…." *Roman Cath. Diocese*, 141 S. Ct. 63, 74; *Holt v. Hobbs* at 867; *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005). Furthermore, "Our Constitution principally entrusts "the safety and the health of the people" to the politically accountable officials of the States "to guard and protect. *Roman Cath. Diocese*, 141 S. Ct. 63, 74; *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). When those officials "undertake to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Id.*; *Marshall v. United States*, 414 U.S. 417, 427, 94 S. Ct. 700 (1974). Where those broad limits are not exceeded, they should not be subject to second guessing by an "unelected federal judiciary" which lacks the background, competence, and expertise to assess public health and is not accountable to the people. *Id.*; *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545, 105 S. Ct. 1005 (1985)

5. <u>Objective Standards are not Individualized Exceptions</u>

"An exemption is not individualized simply because it contains express exceptions for objectively defined categories of persons." *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 288-89 (2d Cir. 2021) (quoting 303 *Creative LLC v. Elenis*, 6 F. 4th 1160, 1187 (10th Cir. 2021) If the challenged rules are tied to particularized objective criteria, they do not afford the unfettered discretion that could lead to religious discrimination. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1081-82 (9th Cir. 2015) *cert. denied*, 136 S. Ct. 2433, 195 L. Ed. 2d 870 (2016) The "mere existence of an exemption procedure," absent any showing that secularly motivated conduct could be impermissibly favored over religiously motivated conduct, is not enough to render a law not generally applicable and subject to strict scrutiny. *We the Patriots,* at 288-289; *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 276 (3d Cir. 2007).

6. <u>Comparable Activities</u>

Two cases challenged the occupancy limits which were placed on religious services, in an effort to curb COVID-19 transmission indoors, but which were not applied to secular businesses with similarly high capacities. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67, 208 L. Ed. 2d 206 (2020); *Tandon*, 141 S. Ct. at 1297. In those cases, the Court did not engage in a one-to-one comparison of the transmission risk posed by an individual worshipper as compared to an individual grocery shopper. Instead, the Supreme Court compared aggregate data about the transmission risks posed by groups of various sizes in various settings. *See, e.g., Roman Catholic Diocese*, 141 S. Ct. at 66-67 (comparing "a large store in Brooklyn that could literally have hundreds of people shopping there on any given day" with "a nearby church

or synagogue [that] would be prohibited from allowing more than 10 or 25 people for a worship service").

B. IT WAS NOT CLEARLY ERRONEOUS FOR THE DISTRICT COURT TO DETERMINE THAT APPELLANT'S GRAY WATER CONTAINS A PLETHORA OF DANGEROUS POLLUTANTS WHICH INJURE OR KILL PEOPLE, POISON THE ENVIRONMENT, AND HARM GROUNDWATER.

1. It was not Clearly Erroneous for the District Court to Conclude that Gray Water from Appellants' Households Contains a Wide Variety of Harmful Contaminants which Pollute Groundwater, Cause Illnesses, Damage the Environment, or Cause other Irreversible Harm

The District Court made a detailed factual determination that the gray water generated by Appellants' large households contained a wide variety of bacteria, viruses, chemicals, feces, urine and other pollutants. This determination is not clearly erroneous. Appellants continue to make the astonishing claim that their gray water does not contain a multitude of dangerous toxins and contaminants. It is also astounding that Appellants continue to claim that those pollutants and contaminants do not cause people to get sick and die, pollute the groundwater, poison wells, or cause other harm. Appellants' also ignore the fact that their large families generate vast amounts of contaminated gray water which quickly flows through the fractured and fragile Karst topography of Fillmore County. There is overwhelming evidence that Appellants' gray water contains vast amounts of impurities that cause people to get sick, contaminates ground water and wells, and threatens public health and safety.

Dr. Heger stated that a cup full (100 milliliters) of Appellants' gray water

contains ten million bacteria and viruses. Those bacteria and viruses include e-coli, fecal coliform, cryptosporidium, whooping cough, influenza and many other pathogens which cause illness, disease, and death. Public beaches are shut down with a count of only 200 parts per 100 milliliters.

Gray water contains feces, urine, blood, vomit, skin, hair, spit/sputum, lint, bodily fluids, and other organic materials which spread illness, consume oxygen in rivers, or contaminate groundwater. As Dr. Heger and others explained that feces, bodily fluids, and other organic materials are washed off the human body when people bathe, wash their hands, or wash clothes. Feces from cloth diapers, underwear, and clothing goes down the drain. There is blood from wounds, scrapes, or female menstrual cycles. Every illness in an Amish household gets washed down the drain where it is transmitted to others unless properly treated. If the feces, urine, skin, hair, blood, bodily fluids, and other organic materials are not properly removed or treated, they will end up in the groundwater and nearby streams.

There are also chemicals, plastics and other materials in gray water which must be properly treated and removed in order to protect public safety and the environment. Soaps, household cleaners, waxes, oils, pharmaceuticals, vitamins, and other chemicals are found in Appellants' gray water. Vitamins, body lotions, skin creams, calamine lotion, antiseptic creams, and other topical lotions contain many harmful chemicals. Medications for heart conditions, depression, cancer, anxiety, etc. all contain hazardous chemicals. There are waxes and chemicals in furniture and

floor cleaners. Oil, gas, WD-40, lubricants, and chemicals are on clothes and hands and get washed down the drain. There are plastics fibers in clothes, bags, utensils, furniture, toys, and other items which get washed down the drain. Round Up, bug sprays, fertilizers and other agricultural chemicals are found on clothes or skin and eventually go down the drain.

Appellants' households generate 3 to 5 times the amount of these harmful contaminants since their households are significantly larger than the average household. Menno Mast has approximately 15 people living his house. Sam Miller has a large household and Ammon Swartzentruber has 5 young children.

2. <u>It was not Clearly Erroneous for the District Court to Conclude that the County has a Compelling Interest in Treating the Plethora of Poisonous Pollutants in Appellants' Gray Water</u>

The District Court provided detailed information in support of its factual determination that gray water contaminants must be treated in order to prevent illnesses, groundwater contamination and other devastation. It was not clearly erroneous for the District Court to conclude that Appellants' should not be exempted from treating the wide spectrum of chemicals, organic material, pathogens, and toxins found in their gray water. Appellants' gray water is overflowing with these harmful impurities which must be properly treated so that people's lives and livelihood, the environment, and groundwater are not irreparably damaged. The pathogens, chemicals, and other contaminants in gray water are not hypothetical. The illness, environmental damage, contamination of water, and other damage caused by those harmful toxins in plaintiffs'

gray water are not speculative. Consequently, the County has a compelling interest in denying Appellants' use of mulch filled cesspools which fail to provide any type of treatment.

The widespread contamination of wells and drinking water, the vast potential for illness and death, the likelihood of damage to trout streams and fragile eco-systems, and other harm is certainly more, if not as equally, compelling as regulating adoptions in *Fulton* or insuring the solemnity or security during an execution in *Ramirez*. Here, thousands of gallons of contaminants are flowing every day from Appellants' straight pipes and mulch filled cesspools into hundreds of wells, threatening thousands of lives, and causing irreparable damage to rivers and fresh water in the Tri-State area. There is certainly a compelling public interest in properly treating the wide variety of dangerous impurities in Appellants' gray water.

Contrary to Appellants' claim, Fillmore County does not need to show actual harm or specific illnesses caused by Appellants' gray water toxins as a prerequisite to a determination that there is a compelling governmental interest. *Lukumi* did not require proof of animal torture or piles of rotting animal carcasses related to particular Santeria worshipers before it was determined that Public health and prevention of animal cruelty were compelling interests. *Tandon and Roman Cath. Diocese*, did not require that each specific church member be traced to a death or COVID outbreak before it was determined that stopping the spread of COVID was a compelling interest. Texas was not required to show that *Ramirez* tried to stab a guard, make public proclamations, or pull out his IV lines before it was determined that security and solemnity were compelling

interests. All of these cases established a compelling governmental interest based on expert knowledge, scientific data, observation, and other reliable information. It is not required that the government establish that Appellants' gray water polluted a a specific neighbor's well, caused a specific fish kill, poisoned a particular stream, or got a certain person sick.

3. It was not Clearly Erroneous for the District Court to Conclude that There are no Exceptions to the Septic System/Gray Water Requirement for Campsites, Cabins, and Other Dwellings Which Have Running Water or Indoor Plumbing

The District Court made a factual determination that there are no exceptions to the requirement that all cabins, campsites, or other buildings with running water or indoor plumbing must have a septic system or gray water system. (Add-30) This determination was not clearly erroneous.

Cabins, campsites, or buildings with running water or indoor plumbing are not treated more favorably than the Appellants and are not part of a system of individualized exceptions since they all must have a Septic System or Gray Water/Privy System to treat their wastewater. "This is not a *Fulton* situation, in which a government official is empowered, in his/her sole discretion, to exempt parties from the regulations requirements…." (Add-30) No government official is empowered to make arbitrary decisions or "consider the particular reasons for a person's conduct." (Add-30) There is no evidence of a tent, cabin, or other structure that has indoor plumbing or running water which does not have a full septic system or gray water/outhouse combination system. Appellants' accusations of individualized exceptions or harm caused by "phantom"

campsites and cabins are not accurate.

4. <u>It was not Clearly Erroneous for the District Court to Conclude that no Other States Allow a Mulch Cesspool like that proposed by Appellants</u>

The District Court made a factual determination that no other state would permit the Appellants to use mulch basins to dispose of their wastewater from soiled diapers, kitchen sinks, and similar activities common to Appellants' households. (Add-38) This determination is not clearly erroneous.

The Appellants' misguided claim that 20 other states allow a mulch filled leeching pit similar to that which they have proposed "amounts to an attempt to fit the Plaintiffs' square peg into twenty states' round holes". (Add-38) It was established that these states actually define gray water very differently, require that the mulch pits be hooked up to a standard septic system, require at least 3 feet of separation, limit operation during the winter months, and place other restrictions on mulch pits. (Add-38 to 39)

Since these other states define gray water very differently than Minnesota, homeowners can't put wastewater from the kitchen sink or dishwasher into a mulch system because of the dangerous contaminants. In those states, the homeowner would still need a full septic system. In those states, "water used to wash diapers or similarly soiled or infectious garments" cannot be put into a graywater system. (See Footnote 18-Add-38 to 39) The District Court determined that the mulch pits would not work for the Amish community because they would still need to dispose of their kitchen sink and laundry water in a gray water or septic system. (Add-38) If Minnesota was to "authorize mulch basins as a treatment system for the kind of gray water discharged by the

Swartzentruber Amish homes of Fillmore County, it would be the first and only state to do so." (Add-38 to 39)

5. It was not Clearly Erroneous for the District Court to Conclude that Individual Primitive Campsites and Rustic Cabins that rely upon Hand Carried Water and do not have Running Water or Indoor Plumbing are not Treated more Favorably and are not part of a System of Individualized Exceptions

The District Court determined that the hand carry water provision only authorizes the discharge of "very small quantities of water" which does not leave unprohibited any appreciable damage to the Government's interest in protecting drinking water from pathogens and pollutants. (Add-28) These findings of fact are not clearly erroneous.

There is a separate and objective category which allows tent sites, rustic cabins, and other occupied structures to use only a privy/outhouse if all of the water originates from a hand carried source. There cannot be indoor plumbing or running water. The privy/outhouse must still have 3 feet of separation and comply with all of the other requirements of *Rule 7080.2280*. Furthermore, any resulting gray water must still be disposed of without creating a public health nuisance or in a manner which is harmful to the environment. (*Rule 7080.1500 Subp. 2*)

The provision for hand carried water is based on objective science and common sense. Minimal amounts of hand carried water are brought into a dwelling because a gallon of water is heavy (8.3 pounds per gallon) and it involves hard work. (Add-28 to 29). Situations involving hand carried water are low risk because minimal gray water or harmful contaminants are produced. (Add-28 to 29)

The amount of harmful contaminants created by plaintiffs' permanently occupied

households is significantly greater than sporadically occupied tent sites or rustic cabins which produce small amounts of gray water. As the Court stated, "The hand carried gray water provision addresses a situation incomparable in both quantity and quality to the daily gray water discharge of a large Swartzentruber household." (Add-29) The Appellants pump large amounts of water into their house each day and discharge hundreds of gallons of gray water. "When water is pumped into a residence, a lot more waste water is generated and the risk to public health and the environment of discharging that wastewater untreated is too high." (Add-28 to 29)

The harm caused by Appellants' large households is very different than carrying 5 gallons of water to a campsite or cabin a few days per year. Campers and hunters are not washing clothes or taking showers at their campsite or primitive cabin. (Add-29) Campsites and cabins are sporadically occupied for brief periods. Appellants and their families occupy their houses every day, cook meals, take baths, wash dishes, wash clothes, and discharge large amounts of gray water 365 days a year. (Add-29) Appellants have large households and they often work at home on the farm, in their workshop, or sawmill. There is no merit to the claim that the "carry in-carry out" exception for sporadically occupied primitive camp sites and cabins is comparable to the large amounts of contaminated gray water generated by Appellants' households.

It should be emphasized that Appellants can take advantage of the hand carried water category. However, Appellants have refused the option of limiting their water consumption to hand carried water. Plaintiffs must be required to install a gray water system if they continue to pump water into their houses, utilize indoor plumbing, and

generate large volumes of gray water contaminants.

The hand carried water provision is an objective category and not an individualized exception because it is based on science and available to everyone. The hand carried water provision does not do any "substantial harm" or "appreciable damage" to the Government's public health and safety interests that are the basis for the household gray water septic system requirement. (Add-29) The minimal harm related to the hand carried water provision is in sharp contrast "to dozens of households sending a total of three to four thousand gallons of gray water every day into the karst topography of Fillmore County, a practice that a University of Minnesota professor with a doctorate in wastewater science testified poses a substantial threat to the safety of the local drinking supply." (Add-29)

6. The District Court Properly Concluded that Appellants' Large Households Generate Vast Amounts of Polluted Gray Water

The Court made a factual determination that there are between 36 and 148 Amish households that are discharging at least 100 gallons of contaminant laden gray water each day into the fragile Karst topography of Fillmore County. (Add-19 to 20 and 21 to 22) This determination is not clearly erroneous.

The government believes the figure of 100 gallons per day grossly underestimates the amount of pollutants because Amish families are generally 3 to 5 times larger than the average American household. (Add-20) Moreover, the figure of 100 gallons per day was based on representation by the Amish community that they were hand carrying water

to their homes. Despite underestimating the amount of gray water contaminants spewing from Appellants homes, the Court properly concluded that:

> "Granting an exemption to these Plaintiffs and their like-minded Swartzentruber church members would permit, every day, some three to four thousand gallons of gray water waste from at least 36 Amish homes in southern Fillmore County – gray water that contains illness causing virus and bacteria as well as soaps, detergents and other household chemical pollutants – to pour into the fissured limestone bedrock …and reach the County's aquifers and wells. This is a substantial threat…." (Add-3, 27)

7. The District Court Properly Concluded that Privies/Outhouses are not part of a System of Individualized Exceptions Since Privies Must have 3 feet of Separation, must Comply with Strict Design Standards, and Must Comply with all Local, State, and Federal Regulations

The District Court determined that "there is a key difference between outhouse waste and gray water and that difference … is water…. " (Add-30 to 31) Furthermore, " there is no "regulatory inconsistency in allowing the Plaintiffs to have privies for non-water toilet waste, and at the same time requiring septic systems for the gray waste water their households generate. (Add-30-31) These conclusions are not clearly erroneous.

Contrary to Appellants' claims, Fillmore County has design criteria and regulations for outhouses and enforces those. It is ironic that Appellants make this argument since Fillmore County was forced to bring legal action against Appellants Ammon Swartzentruber Amos Mast for not having properly constructed outhouses, using 5 gallon pails to catch outhouse sewage, and dumping raw sewage from those pails on to the ground. There are no individualized exceptions which give discretion to County administrators and which invite unequal treatment of plaintiffs or other citizens based on their religious beliefs. Privy standards and enforcement are consistent with Fillmore

County's compelling interest in treating harmful and toxic sewage.

MPCA regulations confirm that a privy AKA "outhouse" is not an unregulated sewage disposal system or "individualized exemption". To qualify as a privy under *MPCA Rule 7080.2280* the system must:

(1) "Meet or exceed the requirements of part *7080.2150, subpart 2*;

(2) have soil beneath the bottom of the pit that meets or exceeds the requirements of part *7080.2150, subpart 3, Item C*…

(3) meet the requirements of items *B to E*."

Furthermore, the privy pit "must consist of at least 25 cubic feet of capacity" and "must be easily maintained and insect proof." *Rule 7080.2280 B and C*. The privy must be designed and conform to all federal, state, and local rules as well as prevent sewage contact with humans or animals. *Rule 7080.2150 Subpart 2 A and B*. The privy must also treat and disperse the sewage in a safe manner as well as have 3 feet of separation from the saturated soils. *Rule 7080.2150 Subpart 2 C and D*.

It should be emphasized that a privy is separate and distinct category from a gray water system even though one is not allowed without the other. A gray water system treats large volumes of water while the privy primarily treats/contains solids. The systems have different purposes which explains the different design requirements.

8. Farmers who Spread Sewage from their own Septic Tanks on Their Own Land After it has been Properly Treated and Limed/PH Compliant and After Complying with Strict "503" Requirements are not Treated more Favorably and are not part of a System of Individualized Exemptions

The District Court concluded that there is no evidence of a farmer in Fillmore

County who has land applied sewage from their own septic tanks. (Add-31) Similarly, there is nothing simple about the "503" requirements and nothing in the "503" requirements that is "inconsistent with the policies furthered by the Government's gray water septic system requirement." (Add-31-33) These findings are not clearly erroneous.

If the Court is inclined to compare incorporation of treated septage under 40 CFR 503 with Appellants' mulch pits, it is evident that they are entirely different categories of activity. The "503" sewage from the septic tank has already been treated since it has gone through the tank where solids and other materials are separated and the remaining liquids have been treated in the drainfield. The treated septage must come from that specific farmer's septic tank and can only be applied to that specific farmer's land. *(T. 1823, 1847-48, 2215-2216)* In sharp contrast, the mulch pit provides no separation of solids and provides no treatment for the pathogens and other contaminants in the liquid gray water. Mulch pit effluent simply seeps directly into the saturated layer or backs up to the surface.

The farmer who applies to his own field must follow the same rules as a licensed maintainer. *(T. 2210)* In contrast, there are no rules for design, installation, and operation of a mulch pit. Moreover, before the farmer applies the septage to the land, it must be treated with lime to a PH of at least 12, held for at least 30 minutes, and then incorporated into a wide area. (*T. 1823, 2210-2217)* The sewage must be incorporated, injected/plowed into the soil. *(T. 2217)* Appellants' contaminated gray water is not treated with lime and does not meet certain PH protective standards. Moreover,

Appellants' contaminated gray water is not incorporated over several acres so that it can be treated a second time by the oxygenated topsoil. Instead. Appellants' mulch pits inject the contaminants into a tiny oxygen deprived area where there is no treatment. The injection area for mulch pits is below the oxygenated soils which means that there is no treatment. Mulch pits funnel the poisonous pollutants directly into the groundwater while "503" septage is injected into the bacteria and oxygen-rich topsoil for a second round of treatment. *(T. 2211)*

It is also important to understand that the few farmers who take advantage of the "503" guidelines, inject the treated sewage into the unsaturated topsoil only once every year or two. By comparison, the Appellants are spewing untreated sewage and gray water on to the ground or directly into the groundwater every day. The damage and danger associated with Appellant's large households which discharge untreated gray water contaminants on a daily basis is significantly different the minimal impact of "503" septage.

9. Type V Septic Systems are not an Example of a System of Individualized Exceptions

The District Court determined that Type V systems are engineered systems that are rigorously regulated and could be described as the "Cadillac of residential treatment systems." (Add-33-35) Furthermore, the Type V approval process does not involve "forbidden value judgements" since the system either works or it does not. (Add-36) Finally, the explanation for Appellants' alleged "different treatment" is not "bureaucratic

inflexibility." Instead. Appellants have never taken any steps towards having their mulch system evaluated as a Type V system. (Add-36) These findings of fact are not clearly erroneous.

Appellants inaccurately claim that the standards for Type V are "minimal" and disregard the complex design and approval standards. As the District Court detailed, these standards are very complex and consistent with the requirements for vertical soil separation, loading rates, flow values, sewage dispersal and treatment, and a plethora of other standards. (Add- 33-36) Since Appellants failed to make any effort to have their mulch cesspools approved as a Type V system, they cannot now claim that they have been the victims of "individualized exemptions" or that they have been subjected to disparate treatment because of their religious activities.

C. IT WAS NOT CLEARLY ERRONEOUS FOR THE DISTRICT COURT TO CONCLUDE THAT THE GRAY WATER TREATMENT SYSTEM IS THE LEAST RESTRICTIVE ALTERNATIVE WHICH PROTECTS PUBLIC SAFETY, WELFARE, THE ENVIRONMENT, AND GROUNDWATER

The District Court concluded that mulch pits are a fundamentally flawed concept which actually fail to "accomplish" or "achieve" proper treatment of the harmful contaminants in gray water. Appellants' proposed mulch pits fail to achieve the compelling governmental interest of properly treating the dangerous chemicals, pathogens, and other contaminants found in graywater. In fact, the proposed mulch pits provide a direct conduit for untreated gray water contaminants to nearby wells, fractured karst, and rivers. The mulch pits are an imminent public health threat.

The evidence irrefutably establishes that the Government's gray water systems are

an effective, inexpensive, low maintenance, and long-lasting method of removing solids, oils, chemicals, organic materials and other harmful contaminants. The septic tank provides the first important step in the treatment process by removing lint, feces, skin, and other solids. Oils, fats, and other contaminants float to the top. The partially cleaned graywater leaves the tank and flows to the drainfield which has distribution pipes laid in trenches filled with gravel. The drainfield facilitates effective distribution of the wastewater. Gravel (unlike mulch) is a durable, long lasting distribution media.

Underneath the gravel in the drainfield is 3 feet of unsaturated soil which contains oxygen. The naturally oxygenated soil contains bacteria which treats and filters out the harmful gray water contaminants. The gray water system effectively achieves the compelling public interest of properly treating gray water contaminants that threaten public health, safety and the environment.

Gray water systems are also long lasting, durable, and low maintenance. The typical gray water system lasts 25-30 years. The graywater system is low maintenance and only requires pumping every couple of years. Low maintenance makes the gray water system more affordable and convenient.

In stark contrast, the Appellants' mulch pits contaminate ground water, quickly back up and fail, require intensive maintenance, and are an imminent public health threat. Pictures and other evidence showed that the mulch pits actually failed miserably once they were installed by Appellants. There was absolutely no credible evidence to show that the improvised mulch pits could function long term and effectively treat the

multitude of harmful contaminants found in Appellants' gray water.

The evidence established that there are multiple design and operational defects with the mulch pits:

1. Mulch filled pits lack three feet of separation from the saturated soils. (Add-40, 44-46)
2. There are no sites in Fillmore County suitable for mulch pits since there is not 3 feet of separation from the saturated soils. (Add-40, 44-46)
3. Mulch is an organic material which decomposes or breaks down over time. As it decomposes, it uses oxygen which creates an anaerobic environment which hinders the treatment of gray water. (Add-41, 44-46)
4. Mulch absorbs the water and becomes saturated. Saturation of the mulch (just like saturation of the soil) removes the oxygen which then creates a barrier to treatment. (Add-41, 44-46)
5. There is no tank to filter out the solids, oils and other substances that create a biomat which clogs the mulch. This causes back up and failure. (Add-41-42, 44-46)
6. The mulch pits are extremely high maintenance because mulch must be regularly and repeatedly changed. (Add-41, 44-46)
7. It is necessary to change or move the entire pit because all of the mulch is saturated, the soils become compacted and eventually seal up. (Add-43, 44-46)

8. It does not work to simply create more mulch pits or expand the area. The mulch continues to decompose in all pits, all of the pits clog. (App-42-43,44-46)

9. The mulch pit has a small distribution area directly under the utility cover/entrance pipe which does not allow the effluent to spread out to the unsaturated soil to receive adequate treatment. (Add-42-43)

10. As Mr. Frauenkron explained, mulch pits are dug 48 inches or more into the ground. This depth penetrates the restricted layer and any gray water contaminants flowing down and out of the pit receive "no treatment." (Add-40)

11. The mulch pits back up and eventually the contaminated gray water comes to the surface where it will come in contact with humans, animals and groundwater.

12. An operator permit would be required since the mulch pits are high maintenance, likely to fail, likely to cause surface discharge, and are high risk.

13. Mulch leeching pits would be expensive to maintain since they are high maintenance, have a short life span, and would require an operator's license.

The pictures and testimony confirmed that the mulch pits were an actual failure and were not a means to achieve the government's interest in properly treating gray

water contaminants. Appellants confirmed that the mulch pits backed up and gray water came to the surface several times. Black colored gray water bubbled out of Sam Miller's mulch pit when the cover was removed. All of the mulch pits had sludge, slime, oils, and solids caked to the cover and pipes because backup and system failure.

There is no basis to exempt Appellants from properly treating their graywater to remove harmful chemicals, feces, bodily fluids, viruses, and other contaminants which threaten public safety and the environment. The mulch filled leeching pits fail to achieve the government's compelling interest in protecting public safety and the environment because the mulch decays, there is not 3 feet of soil separation, the system clogs up and quickly fails, extensive maintenance is required, and there is no treatment of the gray water contaminants.

CONCLUSION

The trial court properly concluded that gray water contains viruses, bacteria, feces, urine, bodily fluids, soaps, organic materials, chemicals, and other harmful contaminants which threaten public health, safety, groundwater, and the environment. The trial court was also correct in determining that the government has a compelling interest in protecting the public and the environment from disease, illness, pollution, and contamination associated with these harmful pollutants. Finally, the District Court correctly decided that the Government's gray water system is the least restrictive alternative which achieves that compelling interest. None of the District Court's determinations have been shown to be clearly erroneous. Therefore, the District Court's opinion must be affirmed in its entirety.

Respectfully submitted,

FILLMORE COUNTY

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CERTIFICATION OF LENGTH OF DOCUMENT

I hereby certify that this Respondent's 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 13,780 words. This brief was prepared using Microsoft Word.

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