No. A22-1534

STATE OF MINNESOTA
COURT OF APPEALS

AMOS MAST, MENNO MAST, SAM MILLER, and AMMAN SWARTZENTRUBER,

Appellants,

vs.

COUNTY OF FILLMORE and MINNESOTA POLLUTION CONTROL AGENCY

Appellees.

BRIEF OF *AMICUS CURIAE* NATIONAL COMMITTEE FOR AMISH RELIGIOUS FREEDOM IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICUS CURIAE*

The National Committee for Amish Religious Freedom (NCARF)[1] was founded in 1967 by non-Amish individuals to defend the religious freedom of the Old Order Amish and related groups. NCARF has participated as an advocate in several disputes between the Amish and various governments, most notably in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). NCARF is made up of professors, lawyers, clergymen, and citizens from various faith backgrounds who believe in the preservation of the peaceful Amish communities in this country.

Amicus is concerned that the District Court has not afforded the Swartzentruber Amish community appropriate protections. While the District Court found that Fillmore County's gray-water regulations imposed a substantial burden on this community's religious exercise, the court failed to hold Fillmore County to the weighty burden strict scrutiny demands. Allowing the County to deny the Amish a religious exemption to the regulation would alter the status of religious freedom in and beyond Minnesota—a matter of primary interest for *Amicus*.

[1] No counsel for a party authored this brief in whole or in part, and no one other than *Amicus Curiae* or its counsel has made a monetary contribution to its preparation or submission.

INTRODUCTION

Nationwide, local government regulations have for decades come into conflict with the deeply faith-driven way of life of Amish communities. While these conflicts arise around the country, they tend to follow patterns based on how the local government reacts to Amish religious practices. Some governments respond amicably and work to reach an agreement that satisfies both parties' interests. Other governments are unwilling to consider alternatives that respect religious beliefs, often resulting in complex litigation.

Fillmore County chose not to work with Appellants. And it is in cases like this one that Amish religious communities rely on the courts to safeguard the critical, constitutional right to freedom of religion. Where disputes like this one have resulted in litigation, courts have frequently affirmed the religious rights of the Amish, finding that the government may not cram down regulation conflicting with the religious beliefs of these quiet, farm-oriented communities. Old Order Amish communities have been willing participants in efforts seeking collaborative solutions that meet the interests of regulators while respecting the Amish's unique way of life and their sincerely held religious beliefs.

Fillmore County's gray-water regulations impose a significant religious burden on the Swartzentruber community. As Justice Gorsuch noted, concurring in the United States Supreme Court's decision to vacate the initial

judgment in favor of Fillmore County and remand this case in light of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), "[i]nstead of … devising a solution that respected the Amish's faith, the Minnesota Pollution Control Agency filed an administrative enforcement action against 23 Amish families in Fillmore County demanding the installation of modern septic systems under pain of criminal penalties and civil fines." *Mast v. Fillmore Cnty.*, 141 S. Ct. 2430, 2431 (2021) (Gorsuch, J., concurring). As Justice Gorsuch stated, Fillmore County could and should have attempted to find a mutually beneficial solution, as many other governments have done before it, rather than resorting to coercion.

Instead, in the decision the Supreme Court vacated, the District Court "plainly misinterpreted and misapplied the Religious Land Use and Institutionalized Persons Act." *Id.* at 2430 (Alito, J., concurring). In particular, that court misapplied strict scrutiny by "treating the County's *general* interest in sanitation regulations as 'compelling' without reference to the *specific* application of those rules to *this* community." *Id.* at 2432 (Gorsuch, J., concurring) (emphasis in original). The Supreme Court emphasized the need for this "more precise analysis" in *Fulton*. 141 S. Ct. at 1881. Yet, on remand, the District Court again failed to conduct that analysis. Instead, it accepted the government's newfound, unsupported assertion of "risk" from longstanding

Amish practices as sufficient to justify a substantial burden on religious liberty.

Amicus urges this Court to recognize these clear errors and correct them. Fillmore County has imposed a substantial burden on the Amish's free exercise of their religion—"a precious right" that both Minnesota and the United States highly prize. *State v. Hershberger* 462 N.W.2d 393, 398 (Minn. 1990) (holding that state law requiring fluorescent orange tape on slow-moving vehicles violated Minnesota Constitution as applied to Amish buggies); *see* U.S. CONST. amend. I; Minn. Const. art. I, § 16. The Supreme Court requires a "more precise analysis" than the District Court undertook on remand. *Mast v. Fillmore County*, 141 S. Ct. 2430. This Court should therefore reverse the decision below.

ARGUMENT

I. Tensions Between Government Policies And The Amish Way Of Life Need Not Result In Litigated Disputes.

Tensions between the Amish way of life—followed as a matter of religious conviction—and government regulation have existed since the first Amish communities were formed. Consistent with the primacy of peacemaking in Amish teaching, the Amish have sought to resolve these tensions amicably. And throughout the long history of their persecution on account of their

religious beliefs and practice, the Amish have demonstrated that many such disputes can be resolved without resort to litigation.

A. The Amish Pursuit of Religious Liberty in Historical Context.

Amish believers are a subset of the broader Anabaptist grouping of Protestant Christians that arose at the time of the Reformation in the 16th century. The first Amish religious community formed in Switzerland in 1693 when "a schism between members of the Anabaptist movement resulted in the followers of Jakob Amman breaking away from other Mennonite groups." Perry Sekus, *Dispute Resolution Among the Old Order Amish*, 4 OHIO ST. J. DISP. RESOL. 315, 316 (1989). Over time, the Old Order Amish became the most conservative group, maintaining that "a good Christian leads a simple life, free from ostentation and pride." *Id.* at 317.

The separation of Amish communities from the rest of the world resulted mostly "from long years of suppression," as their firm adherence to their faith "brought down harsh persecution from the state." Wayne F. Miller, *Negotiating with Modernity: Amish Dispute Resolution*, 22 OHIO ST. J. DISP. RESOL. 477, 481–82 (2007). "They are admonished to suffer injustice [...] For some two hundred years in Europe they suffered the most grievous persecution. They have become used to being punished by the state and they regard such treatment as the price they must pay." Sekus, *supra*, at 319. Those of Amish

faith were targeted for holding religious beliefs that were inconsistent with European norms; this persecution contributed to the Amish isolation from the rest of the world as "[t]hey were persecuted, imprisoned, whipped, tortured, beheaded, drowned, and burned at the stake." John Umble, *The Old Order Amish, Their Hymns and Hymn Tunes*, 52 J. AM. FOLKLORE 82, 82 (1939).

In the 18th and 19th centuries, several waves of Amish made the arduous cross-Atlantic journey in hopes of finding a peaceful home in the New World. But governmental interference with Amish religious practices continued. During the American Civil War, Amish and Mennonite men were coerced into violating their faith by serving compulsory military duty or paying others to take their place. *See* James O. Lehman & Steven M. Nolt, *Mennonites, Amish, and the American Civil War* at 91 (Johns Hopkins Univ. Press 2007). The compulsory public education of Amish children was a recurring subject of dispute for decades before the Supreme Court finally held such compulsion unconstitutional in 1972 in the landmark case of *Wisconsin v. Yoder*. *See Yoder*, 406 U.S. 205; *see also* John A. Hostetler, *The Amish and the Law: A Religious Minority and Its Legal Encounters*, 41 WASH. & LEE L. REV. 33, 40–44 (1984) (detailing Amish communities' decades of opposition to compulsory education). Yet despite their long history of suffering affront and persecution, Amish communities have remained pacifists who at "most … can hope for … tolerance" from outsiders in their pursuit of religious redemption. *Id.* at 47.

The Swartzentruber Amish community developed as a branch of the Old Order Amish, "reputedly the most conservative of the Amish," that maintains traditional values, continues to speak a dialect of German known as Pennsylvania Dutch, and prizes religious guidance for daily life through the community's church rules, also known as "*Ordnung*." *State v. Swartzentruber*, 556 N.E.2d 531, 531–32 (Ohio Mun. Ct. 1989). It is this religious *Ordnung* that requires the Amish to follow the practices they are most well-known for: keeping plain dress, eschewing the use of automobiles and electricity, and living apart from others in rural communities. Despite the challenges posed by this way of life, the Amish population in the United States—including the Swartzentruber community in Minnesota and elsewhere—has continued to grow. In the last ten years, the number of Amish church districts in Minnesota has increased from 33 to 43. *See* "Growth of Amish Settlements and Districts, 2013–2022," Young Center for Anabaptist and Pietist Studies, Elizabethtown College, *available at* https://tinyurl.com/mpdmxyf2.

B. Solutions in Other Jurisdictions Demonstrate the Practicability of Accommodating Amish Religious Practices.

As described below, there are many examples of local governments that have been able to work out accommodations with the Old Order Amish that allow local governments to meet their needs while allowing the Amish to follow their unique religious precepts. That is of great importance to the legal

questions before this Court, because the successful accommodation of Amish religious practices elsewhere puts the burden on Fillmore County to explain why it cannot accommodate the plaintiff Amish in this case.

Two recent Supreme Court cases explain why. In *Ramirez v. Collier*, 142 S. Ct. 1264, 1279 (2022), and *Holt v. Hobbs*, 574 U.S. 352 (2015), the Supreme Court looked to examples from around the country in weighing government claims that religious exemptions were not feasible. In both cases, the existence of successful religious accommodations in other jurisdictions radically undermined the government defendant's argument that it had a compelling interest in denying a religious exemption.

For instance, in *Holt*, Arkansas rejected a Muslim prisoner's request to have a beard in accordance with his faith. The Supreme Court held that because "many" prisons successfully permitted facial hair, and Arkansas could not show that its prison system differed from those prisons, its argument that it had a compelling interest in denying a Muslim inmate a religious accommodation to its grooming policy rang hollow. *Holt*, 574 U.S. at 367.

Similarly, in *Ramirez*, the Court surveyed recent instances of audible clergy prayer and clergy touch in execution chambers, noting that Texas, which claimed a compelling interest in denying that practice, had failed to explain either how its chamber or process differed from those other jurisdictions' or why it had changed its own policy in recent years. *Ramirez*, 142 S. Ct. at 1279–

80. Texas could not meet its burden of explaining why other governments could accommodate religious practices, but it could not.

Fillmore County is no different. Although the County claims that its purported interest in public health must trump the Swartzentrubers' religious liberty, state legislatures and administrative agencies all over the country have made specific exceptions to local public health and safety regulations to accommodate the religious practices of Amish communities without impairing regulatory goals. These examples demonstrate that regulators can successfully accommodate Amish religious practices on a wide range of issues without threatening their communities with fines, imprisonment, or removal from their homes. Rather, the most practicable and readily successful public policy solutions are tailored exemptions that permit the Amish to preserve their way of life.

Notably, the State of Maryland decades ago faced a situation very similar to this one. State health officials attempted to prevent an Old Order Mennonite community from completing a one-room schoolhouse involving privies in place of flush toilets, consistent with Mennonite religious requirements (which are similar to those of Old Order Amish in that they forbid the use of electric-powered septic systems). The schoolhouse accordingly ran afoul of new regulations, and state officials contended that it risked groundwater contamination. The Old Order Mennonites, together with local Amish

communities, argued that the new regulations would force them to leave their long-established communities and seek refuge elsewhere. *See* Eugene Meyer, *Amish to Stay as MD. Relents on Privy Rule*, Washington Post (Apr. 1987), *available at* https://tinyurl.com/2p8an6t6. Health officials ultimately altered their policy to accommodate the religious practices of the Amish and Mennonite communities by allowing exemptions from the septic system requirements on a case-by-case basis. The Maryland General Assembly subsequently cemented the policy change in law, and a state official acknowledged that the change reflected a desire to respect the centuries-old religious practices of Amish and Mennonite communities. *See id.*; Md. Code Ann., Env't § 9-223(d)(3).

Similar legislative and regulatory accommodations for Amish religious practices are numerous. In each instance, such exemptions helped settle litigation or avoid it altogether, and prevented the need for enforcement. For example, in 2012, the Kentucky General Assembly passed a bill providing Amish buggies on roadways an exemption from displaying bright orange warning signs. *See* S.B. 75, 2012 Regular Sess. (Ky. 2012), *codified at* Ky. Rev. Stat. § 189.820. The bill was a response to the jailing of Amish men who maintained that displaying the signs on their buggies violated their religious beliefs. The local Amish communities agreed to place reflective tape on the buggies, an alternative safety precaution approved in the new bill. The

governor noted that the Transportation Cabinet had assured him it could maintain safe highways with this statutory accommodation in place. Kenny Colston, *Beshear Signs Amish Buggy Bill*, WKMS (Apr. 11, 2012), https://tinyurl.com/bdd2cpdk; Roger Alford, Amish Buggy Safety Bill Wins Final Passage in Kentucky, Insurance Journal (Mar. 29, 2012), https://tinyurl.com/3mxb3vfp.

Enforcement agencies have similarly worked to accommodate Amish religious exercise. To take one example, in 2015, the Wisconsin Department of Safety and Professional Services crafted a religious exemption to the State's housing code for members of the Amish community. This accommodation allowed them to build homes without carbon monoxide detectors, smoke detectors, or indoor plumbing. Tim Stuhldreher, *Wisconsin Joins Pa. in Granting Building Code Waivers to Amish*, Lancaster Online (Oct. 7, 2015), https://tinyurl.com/bddrm4x9. The amendment to the code arose after county officials pursued actions against several Amish citizens. Following the implementation of this amendment, the Amish were able to submit waivers to receive the exemption. *State Waivers Allow Amish to Ignore Building Code*, The Daily Reporter (Aug. 28, 2015), https://tinyurl.com/yc4kc9je.

Governments have also crafted exemptions to photo-identification requirements to accommodate the Amish objection to being photographed based on their religious beliefs regarding vanity and self-promotion. In 2015,

the Indiana General Assembly passed a bill, now codified in law, allowing the Amish to request a religious exemption from photographs for state-issued IDs. *See* Ind. Code § 9-24-16.5 (2016); *see also* Greensburg Daily News, *House Panel Passes Bill for Amish Exemption on Photo IDs* (Jan. 30, 2015), https://tinyurl.com/36hb473a. Photo-exempt ID cards are now available to anyone in the State who requests one for religious reasons, as reflected in the Indiana Bureau of Motor Vehicles' policy. *See* Indiana BMV, Photo Exempt Identification Card, https://tinyurl.com/479e33xz.

In 2019, an Amish couple settled a lawsuit with the federal government over a similar photo ID requirement pertaining to the process for obtaining U.S. citizenship. The federal agencies involved eventually permitted the non-citizen to obtain a waiver to the photograph requirement. *See* Dkt. 37, No. 4:18-cv-00162 (S.D. Ind. July 17, 2019) (stipulated dismissal in light of settlement agreement); *see also* Casey Smith, *Indiana Amish Couple Could Set New Religious Freedom Precedent with Lawsuit Settlement*, IndyStar (May 29, 2019), https://tinyurl.com/bddk792x.

Other examples of accommodations for Amish religious practices abound across the country. All point to the same conclusion: it is not only possible to accommodate Amish religious practices without undermining regulatory interests, taking seriously the Amish faith and treating their communities amicably, but also preferable to litigation. These examples all demonstrate the

viability of providing such accommodations at the local, state, and federal levels.

II. The District Court Misapplied Strict Scrutiny.

Absent amicable resolutions of the kinds discussed above, the Amish have been forced to seek protection of their religious freedom from the courts, which apply strict scrutiny to regulations that burden religious exercise. As a constitutional matter, "[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*, 141 S. Ct. at 1881; *Ramirez*, 142 S. Ct. at 1274. Critically, "broadly formulated interests" are insufficient to satisfy the government's burden under strict scrutiny. *Ramirez*, 142 S. Ct. at 1278. Instead, the government must "demonstrate" that applying the challenged policy to the "particular claimant whose sincere exercise of religion is being substantially burdened" satisfies the compelling interest test. *Id*. The District Court failed to apply the strict scrutiny test properly in this case.

Whether the government has a compelling interest "of the highest order" in a particular instance depends on the weight of evidence supporting the government's assertion that accommodating religious beliefs will necessarily undermine the government's ability to achieve its stated interest. This is what *Fulton* meant in saying that strict scrutiny "demands a more precise analysis": "Rather than rely on broadly formulated interests, courts must scrutinize the

asserted harm of granting specific exemptions to particular religious claimants." *Fulton*, 141 S. Ct. at 1881 (internal quotation marks omitted).

The District Court here misapplied the strict scrutiny test by failing to place the burden of proof on Fillmore County in at least three ways. First, the District Court wrongly accepted the mere risk of harm—and a *hypothetical* risk, at that—as a compelling government interest. Second, the District Court ignored the relative newness of the asserted government interest, particularly as compared to the Amish interest in continuing their centuries-old religious practice. Third, the District Court failed to require Fillmore County to show why it cannot accommodate the Amish religious practices at issue here, as other jurisdictions have done. The weakness of these asserted interests underscores that this case—like the many other disputes the Amish have successfully resolved with the government—could and ought to have been resolved through a religious accommodation.

A. The Mere Risk of Harm Does Not Create A Compelling Government Interest.

To demonstrate that it has a compelling interest in denying a religious accommodation in a particular instance, the government cannot merely speculate that the accommodation *risks* harming its interests; it must provide *actual evidence* that the harm will occur. The Supreme Court found in *Fulton* that Philadelphia was discriminating against a Catholic foster care agency

with whom it had partnered for fifty years, suddenly barring it from receiving any foster care referrals because of its long-held beliefs. The City attempted to justify its intrusion on the Catholic foster care agency's religious practices merely by pointing to risks to the City's purportedly compelling interests. The Court acknowledged that the City's asserted goals were important, but concluded that "the City fail[ed] to show that granting … an exception" to the City's policy "will put those goals at risk." 141 S. Ct. at 1881–82. There was no actual evidence that continuing to partner with the Catholic charity would harm the City's asserted interest in maximizing the number of foster families. *Id.* And while the City also claimed an interest in avoiding liability, it "offer[ed] only speculation that it might be sued" if it allowed the Catholic agency to continue following its Catholic religious beliefs. *Id.* But, the Court held, "[s]uch speculation is insufficient to satisfy strict scrutiny." *Id.*

Ramirez was similar. There, prison officials claimed that permitting the condemned prisoner's clergyman to pray over and touch the prisoner at the time of execution would be disruptive. The Court rejected this speculation, holding that in the absence of any "indication in the record that [the prisoner's pastor] would cause the sorts of disruptions that respondents fear," the argument reduced "to conjecture regarding what a hypothetical spiritual advisor might do in some future case." *Ramirez*, 142 S. Ct. at 1280 (internal quotation marks omitted). That was "insufficient to satisfy respondents'

burden." *Id.* at 1288 (Kavanaugh, J., concurring) (noting that a history of allowing the religious practice at issue cuts against the salience of the risk it assertedly poses).

B. Newfound Interests in Regulating Longstanding Practices Are Unlikely Compelling.

The Supreme Court has also instructed that when a government policy infringing religious exercise is relatively new, as compared to the religious practices it curtails, the government's interest in that policy is less likely to be compelling. And the government's case is even harder where—as here—the government first articulates the supposedly-compelling interest in the middle of litigation.

In *Wisconsin v. Yoder*, the Supreme Court upheld the right of Amish Americans to live according to the tenets of their faith without being subject to compulsory education laws, which carried "precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." 406 U.S. at 218. The Court noted that the government regulation requiring compulsory education through the tenth grade was a "relatively recent" development that increased education requirements beyond what had been required historically. *Id.* at 226. Fewer than sixty years before *Yoder*, a basic elementary education was all that most States required. The argument that Wisconsin had a compelling interest in forcing the Amish to abandon their

demonstrably successful three-hundred-year-old practices, imposing a severe burden on their religious exercise for only "speculative gain," crumbled under strict scrutiny. *Id.* at 227.

Today, the Supreme Court, in applying strict scrutiny, continues to contrast the recency of government regulations and corresponding government interests against longstanding religious practices. For example, in *Ramirez*, the Court examined the historical context of the religious practice that Texas was attempting to restrict, a spiritual advisor's audible prayer in an execution chamber. It looked as far back as the early 1700s to note that the practice of audible clerical prayer at the time of a prisoner's execution had a long history that predated the founding of the United States and carried through to the present day. *Ramirez*, 142 S. Ct. at 1278–79. The Court also noted that various jurisdictions, including Texas itself, had recently allowed this religious practice without causing any interference with the government's interests. But now, "in the last several years," Texas insisted that it had a compelling interest requiring the total elimination of the practice. *Id.* at 1279. As Texas could not explain the discrepancy, the Court concluded that its asserted interest was "not enough." *Id.*

C. The District Court Wrongly Held the County's Newfound and Speculative Interest in Reducing Risk from Amish Practices to be a Compelling Interest.

The District Court acknowledged that strict scrutiny applies, yet erred by accepting the County's newfound, speculative risk as compelling. The District Court correctly acknowledged that "under *Fulton* strict scrutiny, mere speculation regarding future harm is insufficient to establish a compelling state interest." Add-24. Despite this, it incorrectly determined that Amish gray-water contains "pathogen[s]" and "pollutant[s]" and thus "poses a present, substantial threat to the health and safety of Amish and non-Amish residents of the County alike." Add-25. As the District Court recognized, the County failed to produce evidence that gray water from the farms at issue has made anyone ill, notwithstanding the significant amount of gray water those farms produce and their longstanding water-disposal practices. Add-24–25. Indeed, the County failed to produce evidence that gray water has ever made *anyone*, *anywhere*, ill. *See id.* There is nothing "precise," much less compelling, about the analysis employed below.

The many examples of amicably-resolved tensions between government regulations and Amish religious practices underscore the weakness in the government's compelling-interest argument here—and in the District Court's strict scrutiny analysis. As the Supreme Court has recently noted in both *Ramirez* and *Holt*, examples of accommodation from around the country can

undermine government explanations for why religious exemptions are not feasible. *See Ramirez*, 142 S. Ct. at 1279; *Holt*, 574 U.S. at 367. The many instances in which Amish communities and regulators have ultimately settled on accommodations for religious exercise only illustrate why the government's generalized and hypothetical asserted interest in this case does not satisfy strict scrutiny. *See supra* I.B.

This Court should follow the logic of *Fulton* and *Ramirez*. The County has provided no evidence of actual harm the Amish religious practices at issue have caused. Whatever its concerns, the government has not met its burden to demonstrate a compelling interest in nullifying these centuries-old practices. The many examples of Amish communities around the country amicably resolving disputes with local governments demonstrate that Amish religious practice need not be impaired to ensure the effectiveness of government regulations like the one here. This conflict could and should have been resolved with a little common sense and good will.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below and find that the County has failed to satisfy strict scrutiny standard as it must under RLUIPA, the United States Constitution, and the Minnesota Constitution.

Dated: January 10, 2023

Respectfully submitted,

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FORM 132. CERTIFICATION OF LENGTH OF DOCUMENT

STATE OF MINNESOTA
IN COURT OF APPEALS

CASE TITLE: MAST V. FILLMORE COUNTY, MINNESOTA

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Sam Miller, and Amman
Swartzentruber,
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CERTIFICATION OF LENGTH DOCUMENT

vs.

APPELLATE COURT CASE NUMBER: A22-1534

County of Fillmore and
Minnesota Pollution Control Agency,
Respondents.

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DATED: January 10, 2023

Respectfully submitted,

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