No. 06-3090, 06-3091, 06-3092, 06-3093, 06-3094 & 06-3095

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DARRELL COMBS et al.
Plaintiffs-Appellants,

v.

HOMER CENTER SCHOOL DISTRICT et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Pennsylvania

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA IN SUPPORT OF APPELLANTS AND URGING REVERSAL

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INTEREST OF THE AMICUS CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 400,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Pennsylvania is one of its statewide affiliates. The ACLU has appeared numerous times before this Court and others, as counsel or as *amicus curiae*, to champion individual religious liberty, both under the federal and state Constitutions, and through urging the proper interpretation and enforcement of legislative protections for religious observance, such as the federal Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*

Pennsylvania's Religious Freedom Protection Act ("RFPA"), 71 PA. CONS. STAT. § 2401 *et seq.*, like its federal counterparts, is designed to protect both the freedom of expression and freedom of conscience of people of faith. The decision below is the first published decision to interpret this important statute.

Unfortunately, the district court improperly narrowed the scope and protections of RFPA. For the reasons detailed below, *amicus* asks this Court to correct that error so that this seminal case will not constrict RFPA, but give full effect to its text and purpose.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case of first impression regarding the meaning of Pennsylvania's Religious Freedom Protection Act ("RFPA"). Under RFPA, a state governmental entity that "substantially burdens" the exercise of religion must demonstrate that the burden is the least restrictive means of achieving a compelling government interest.

This case presents a paradigmatic conflict between a religious adherent and the government, as the plaintiffs here must choose between "abandoning [their] religious principle or facing criminal prosecution." *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). The plaintiffs contend that Pennsylvania's licensing scheme for parents who wish to home school their children "substantially burdens" their religious belief that the education of their children is their sacred *and exclusive* duty, and is not subject to secular supervision. Pennsylvania requires parents to do a number of administrative and bureaucratic tasks in order to be granted permission to home school their children – among other things, parents must outline their children's proposed educational objectives, submit a portfolio of records and materials to the state, and have a written evaluation of their child conducted by a licensed psychologist or qualified school teacher. *See, e.g.*, 24 PA. CONS. STAT. § 13-1327.1 *et seq.* (Home Schooling Act). More fundamentally, Pennsylvania imposes a system of state supervision of home schooling that is

inconsistent with the plaintiffs' sincerely held religious belief that they, and they alone, are to supervise their children's education. As the district court below put it, "there [] is no dispute that the very existence of Act 169, which requires school districts to ascertain that all of its compulsory age children are receiving 'appropriate education,' is completely antithetical to Plaintiffs' sincerely held religious beliefs that reject any secular authority over the education of their children." *Combs v. Homer Center Sch. Dist.*, No. 04-1599 et al., 2006 WL 1453532, at *28 (W.D. Pa. May 25, 2006).

The district court, despite acknowledging this inherent conflict between the plaintiffs' beliefs and the requirements of the Home Schooling Act, held that the plaintiffs had not offered any evidence that they suffered a "substantial burden" within the meaning of RFPA, because the defendants did not attempt to dictate the manner of the plaintiffs' religious observance or to alter the religious content of the instruction they provide their children. The district court therefore granted summary judgment without considering whether the Home Schooling Act is the least restrictive means of achieving a compelling government interest.[1]

The district court's ruling is erroneous, and dangerously so, because it disregards the provision of RFPA that protects not only religious practice, but also religious conscience. RFPA provides that a plaintiff demonstrates a "substantial

[1] Indeed, the district court granted summary judgment before the parties had completed discovery on the issue of the government's burden.

burden" that requires the government to come forward with a compelling interest when he or she establishes, by clear and convincing evidence, that a government rule or practice "[c]ompels conduct or expression which violates a specific tenet of [plaintiff's] religious faith." 71 PA. CONST. STAT. § 2403(4) (2002).

The American Civil Liberties Union of Pennsylvania writes as *amicus* in this case to explain how the district court erred in its interpretation of what constitutes a "substantial burden" under RFPA. For the reasons that follow, *amicus* believes that the plaintiffs below offered sufficient evidence of a substantial burden to survive summary judgment on that issue. *Amicus* therefore respectfully requests that this Court reverse the district court's grant of summary judgment and remand the case for further proceedings.

ARGUMENT

I. Pennsylvania's RFPA Must Be Read in The Context of More Than 25 Years of Legislative Efforts to Protect Individual Religious Expression and Conscience.

Before 1990, the Supreme Court had interpreted the federal Free Exercise Clause to bar the enforcement of any law in a manner that substantially burdened the exercise of religion, unless it was justified by a compelling government interest. *See, e.g., Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In 1990, however, the Supreme Court narrowed the scope of the Free Exercise Clause, and held that laws that were neutral and generally

applicable could be enforced without regard to their effect on religious exercise. *See Employment Div. v. Smith*, 494 U.S. 872 (1990). The *Smith* court explained that while accommodations for religious observers were certainly appropriate in many circumstances, it was not the province of the federal judiciary to mandate exceptions to neutral and generally applicable laws. *Id.* at 890 (explaining that it was "leaving [religious] accommodation to the political process").

In response to the *Smith* decision, in 1993 Congress passed the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.* As enacted, RFRA restored the *Sherbert/Yoder* compelling-interest standard generally to both matters of state and federal law. Insofar as RFRA applied to state law, however, it was declared beyond Congress's power to enact under Section 5 of the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). RFRA still applies to issues of federal law. *See Gonzales v. O Centro Espírita Beneficente União Do Vegetal,* 546 U.S. 418 (2006).

As a result of both *Smith* and *Boerne*, it has now principally fallen to states to be the protectors of religious liberty with regard to matters of state law.[2] Both

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[2] It should also be noted that the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*, still acts to restore the compelling-interest standard to both state and federal law in the particular areas of land use and prison regulation. RLUIPA was passed in 2000, and its language is often materially identical to the language used in RFRA. *See Cutter v. Wilkinson*, 544 U.S. 709 (2005) (explaining the Act, and upholding it against an Establishment Clause challenge).

state legislatures and state courts have taken steps to ensure that their own laws do not unnecessarily burden religious observance. *See* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty*, 118 HARV. L. REV. 155, 211 (2004) (noting that "[t]welve state legislatures passed state RFRAs" and "at least ten state courts have considered *Smith* and adopted a more protective standard under their own constitutions").

The instant litigation concerns the breadth of Pennsylvania's state RFRA, known as the Religious Freedom Protection Act ("RFPA"), 71 PA. CONS. STAT. § 2401 *et seq*. RFPA was passed by the Pennsylvania legislature in 2002, and its language generally mirrors the language of the federal RFRA. By its text, RFPA requires that state governmental entities "not substantially burden a person's free exercise of religion" unless the government can prove "by a preponderance of the evidence, that the burden is . . . [i]n furtherance of a compelling interest" and that the government's action is "[t]he least restrictive means of furthering the compelling interest." 71 PA. CONS. STAT. § 2404(a) & (b).[3]

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[3] For purposes of comparison, RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion" unless "it demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a) & (b).

II. The Court Below Misread RFPA's "Substantial Burden" Requirement in a Manner That Is Without Precedent and That Would Eviscerate RFPA.

Unlike the federal RFRA, Pennsylvania's RFPA itself provides a definition for the term "substantial burden." It defines the term as follows:

> An agency action which does any of the following:
>
> (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs.
>
> (2) Significantly curtails a person's ability to express adherence to the person's religious faith.
>
> (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion.
>
> (4) Compels conduct or expression which violates a specific tenet of a person's religious faith.

71 PA. CONS. STAT. § 2403 (2002).

The district court in this case concluded that the plaintiffs could not possibly establish a "substantial burden" within the meaning of § 2403. The district court's logic was that a "substantial burden" can only exist when the government prevents a plaintiff from engaging in a religious practice or observance. Thus, to the district judge, if a plaintiff is "unable to identify any specific, concrete, direct (or indirect) effects on the *practice* or *exercise* of their religion" specifically, they cannot show a "substantial burden" within the meaning of the statute. *Combs*, 2006 WL 1453532, at *31 (emphasis in original). Again, under this conception of

"substantial burden," the mere fact that the government might be forcing plaintiffs to "violate[] their sincerely held religious beliefs" is of no consequence – such plaintiffs still must show a "particular impact on the *exercise*, *practice*, *conduct*, or *expression* of religion." *Id.* at *25 (emphasis in original); *see also id.* at *33 (arguing that the Home Schooling Act creates no "substantial burden" because the Act does not interfere with the "*practice* or *exercise* of [the plaintiffs'] religion, but only [interferes] with their sincerely held religious *beliefs*") (emphasis in original).

The district court's analysis is incorrect. The district court is certainly right that RFPA applies when the government forbids a plaintiff from doing something he or she is religiously motivated to do. But that is not RFPA's only concern. RFPA applies with equal force when the government legally compels a plaintiff to do something that he or she is religiously forbidden to do. This is, in fact, precisely what the fourth prong of § 2403 aims to address – that is, a situation where a law "[c]ompels conduct or expression which violates a specific tenet of a person's religious faith." 71 PA. CONS. STAT. § 2403(4) (2002).[4] Indeed, that sort of situation involves the most substantial sort of burden that the government can impose. *See, e.g.*, *Employment Div. v. Smith*, 494 U.S. 872, 898 (1990)

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[4] The district court does not address the obvious thrust of this language, and its proposed substitute has no basis in the statutory text. *See, e.g.*, *Combs v. Homer Center Sch. Dist.*, No. 04-1599 et al., 2006 WL 1453532, at *31 (W.D. Pa. May 25, 2006) (holding that a plaintiff must show a "denial or *substantial* infringement of *conduct* or *expression* which violates a specific tenet of his or her religious faith" to show a substantial burden) (emphasis in original).

(O'Connor, J., concurring in part and in the judgment) ("A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible, for it 'results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.'") (citing *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)).

It should also be noted that the district court's conclusion – that a "substantial burden" is not necessarily made out when government legally compels a plaintiff to do something that he or she is religiously forbidden to do – is also inconsistent with the traditional meaning of the term "substantial burden." For instance, under the pre-*Smith* Free Exercise Clause (which RFPA, again, was designed to restore), it was well established that a "substantial burden" existed whenever the government compelled a plaintiff to do something to which he or she had a religious objection. *See, e.g., Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987) (finding a substantial burden under the Free Exercise Clause when government put "substantial pressure on an adherent to modify his behavior and to violate his beliefs"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (explaining that there is a substantial burden when an individual must "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion on the other").

That sort of situation is also now sufficient to create a "substantial burden" under the federal RFRA, as this Court has itself explained that the "substantial burden" standard under RFRA and the "substantial burden" standard under the Free Exercise Clause are actually the same. *See, e.g., Adams v. Comm'r*, 170 F.3d 173, 177 (3d Cir. 1999) (noting the legislative history indicating that "'[t]he committee expects that the courts will look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened [under RFRA]") (quoting S. Rep. 103-111 at 8-9, 1993 U.S.C.C.A.N. at 1897-98). Thus, the district court's conclusion not only contradicts the plain text of RFPA, but it is also fundamentally inconsistent with the long-standing definitions attached to the term "substantial burden." All this to say that the district court's interpretation of the term "substantial burden" is completely without support of any kind.

Finally, the district court's interpretation of RFPA's "substantial burden" requirement is so narrow that it largely threatens to eviscerate RFPA's protections. As but one example, many religious groups – including Navajo Indians, Orthodox Jews, and the Hmong people from Laos – have deep religious objections to having their bodies autopsied after death. To these religious groups, an autopsy can threaten the very existence of the soul after death. *See, e.g.*, Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 226 (1993) ("The

Hmong believe that if an autopsy is performed, the spirit of the deceased will never be free."). Under the district court's logic, however, a state-mandated autopsy of a deceased Orthodox Jew, for example, would not create an issue under RFPA. For a state-mandated autopsy in itself does not impact anyone's "*exercise*, *practice*, *conduct*, or *expression* of religion." *Combs*, 2006 WL 1453532, at *25. To be sure, Orthodox Jews have the most serious sort of objections to autopsies. But avoiding an autopsy is not a religious observance. And so if RFPA only protects religious observances (as the district court held), then RFPA would not even be implicated in the situation of a state-mandated autopsy.

Thus, if adopted, the district court's interpretation of the substantial-burden requirement would radically narrow RFPA – and in a way fundamentally inconsistent with RFPA's plain text and with the traditional definitions of the term "substantial burden." RFPA not only guards against governmental intrusions on a plaintiff's religious activities and practices, but also guards against governmental actions that a require a plaintiff to violate his or her religious beliefs. This is the only conclusion consistent with RFPA's explicit text, as well as the only conclusion sensible in light of the history of legislative and judicial accommodations of religious freedom.

III. Under a Proper Interpretation of RFPA, The Plaintiffs Have Offered Sufficient Proof of a Substantial Burden to Survive Summary Judgment.

In order to win at trial, RFPA will ultimately require the plaintiffs to demonstrate a "substantial burden" by clear and convincing evidence. *See* 71 PA. CONS. STAT. § 2405(f) (2002) (explaining that a plaintiff must "prove[], by clear and convincing evidence, that the person's free exercise of religion has been burdened or likely will be burdened in violation of [RFPA]"). Given that the plaintiffs bear the ultimate burden of proof on the issue and given that the defendants have asserted a lack of evidence on this point, the plaintiffs now must offer more than a scintilla of evidence on the "substantial burden" issue to survive summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). But the plaintiffs do not, at this stage, have to *prove* anything – they merely must put forward sufficient evidence that a finder of fact could reasonably find, by clear and convincing evidence, a "substantial burden" at trial. *Id.* at 255-56. And in resolving this question, this Court must "take the facts in the light most favorable to the [plaintiffs]" and must "draw all reasonable inferences in [their] favor." *Morton Intern., Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 680 (3d Cir. 2003) (citations and quotations omitted).

The plaintiffs here have offered evidence sufficient to survive summary judgment that their religious exercise is "substantially burdened" within the

meaning of RFPA. Through the Home Schooling Act, the state of Pennsylvania pervasively regulates the entire home schooling process. Among other requirements, the Act mandates that parents submit to the state a number of things – an outline of their children's proposed educational objectives, a portfolio of records and materials, and a written evaluation of their child conducted by a licensed psychologist or qualified school teacher. *See, e.g.*, 24 PA. CONS. STAT. § 13-1327.1 *et seq.* (Home Schooling Act). And, more generally, the Act requires parents to work with the state to conduct the home schooling of their children, and it makes the state the ultimate arbiter of the education that parents give to their home-schooled children.

The plaintiffs here object, on religious grounds, to this entire regulatory scheme. They believe that God commands them to educate their children at home, and that God forbids them from following the requirements of the Home Schooling Act. They make these arguments in their briefs, as well as in their concise statement of material facts – and their claims are supported by numerous citations to the record. *See, e.g.*, Pls.' Br. in Opp. to Defs.' Mot. for Summ. J. at 9-12; Pls.' Br. for Summ. J. at 5-7; Pls.' Concise Statement of Material Facts, at 2-3.

The plaintiffs' argument is simple. They believe that God does not want them submitting any part of the education of their children to the state for its approval. *See* Pls.' Br. for Summ. J. at 6 (arguing that "subjecting [the plaintiffs']

home education program to the authority, oversight and discretionary review of the State violates Biblically-ordained jurisdictional lines between the family the State"). Indeed, in their briefs, they explained their view that complying with the law would make them guilty of idolatry. *See* Pls.' Br. for Summ. J. at 10 ("[T]o submit their home-education program to the government [] for approval is tantamount to bowing down before Nebuchadnezzar's golden statute.").

This is, again, the paradigmatic example of a "substantial burden." For the plaintiffs to adhere to their religious beliefs, they must violate the Home Schooling Act – which would expose them to criminal fines and imprisonment. *See* 24 PA. CONS. STAT. § 13-1333 (specifying penalties for violations of the compulsory attendance laws). And the only way the plaintiffs can comply with the Home Schooling Act is by violating their religious beliefs. *Cf. Employment Div. v. Smith*, 494 U.S. 872, 898 (1990) (O'Connor, J., concurring in part and in the judgment) ("A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible, for it 'results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.'") (citing *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)).

The district court below, despite its holding on the burden issue, did not question that the plaintiffs' beliefs are sincere. *See, e.g., Combs*, 2006 WL

1453532, at *1 (explaining that the current case was brought by "[p]arents who home school their children based on their sincerely held religious beliefs"); *id.* at *24 (acknowledging that the "placing of authority in any state agency violates [the Plaintiffs'] sincerely held religious beliefs"). And, as the Supreme Court has explained, once it is clear that a plaintiff has a sincere religious objection to the law at issue, the court's inquiry into the religious basis for that objection ends. *See, e.g., Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 715 (1981) ("Courts should not undertake to dissect religious beliefs because . . . [the claimant's] beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."); *see also DeHart v. Horn*, 227 F.3d 47, 55 (3d Cir. 2000) (calling it "simply unacceptable" for a district court "to determine whether an inmate's sincerely held religious belief is sufficiently 'orthodox' to deserve recognition," and pointing out that "[i]t would be inconsistent with a long line of Supreme Court precedent to accord less respect to a sincerely held religious belief solely because it is not held by others").[5]

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[5] Relatedly, the defendants in the court below suggested the plaintiffs' religious beliefs should be considered insincere because their objections were not necessarily shared by others in their religious community. *See Combs v. Homer Center Sch. Dist.*, No. 04-1599 et al., 2006 WL 1453532, at *18 (W.D. Pa. May 25, 2006) (noting the defendants' argument that the plaintiffs' objections were insincere because they were not based on any "tenet of the 'Church's Magisterium'"). But this sort of argument too has been flatly rejected. *See DeHart v. Horn*, 227 F.3d 47, 56 (3d Cir. 2000) ("'[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect . . . [I]t

It is therefore clear that these plaintiffs have offered more than a "scintilla" of evidence that the Home Schooling Act "compels conduct or expression which violates a specific tenet of [the plaintiffs'] religious faith." 71 PA. CONS. STAT. § 2403(4) (2002). That evidence will be subject to closer scrutiny at trial, and the plaintiffs' ultimate proof must be "clear and convincing," but there can be no question that they have submitted sufficient evidence to survive summary judgment on the "substantial burden" issue.

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is not within the judicial function and judicial competence to inquire [who has] more correctly perceived the commands of their common faith.'") (quoting *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 715-16 (1981)).

CONCLUSION

Amicus respectfully submits that the district court's conclusion that the plaintiffs' religious exercise was not "substantially burdened" within the meaning of RFPA was error. The judgment of the district court should be reversed, its error corrected, and this case remanded for further proceedings.

Respectfully submitted,

/s/ Christopher C. Lund

Dated: January 29, 2007

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CERTIFICATE OF ADMISSION TO BAR

I, Christopher C. Lund, counsel for *Amicus Curiae* American Civil Liberties Union of Pennsylvania, do hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,898 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2007, the foregoing Brief of Amicus Curiae American Civil Liberties Union of Pennsylvania and Motion of the Americans Civil Liberties Union for Leave to File an Amicus Curiae Brief was filed and served on the following in the numbers and manner indicated:

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