J. A12038/03

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JONAS MILLER, ANDY J. MILLER, BEN MILLER, JOHN MILLER, JOHN MILLER, JONAS S.MILLER, EMERY MILLER, JONAS A. SWARTZENTRUBER, ELI A. MILLER, LEVI SWARTZENTRUBER, JOSEPH MILLER, JOSEPH MILLER, ANDY MILLER, DANNIE A. SWARTZENTRUBER, DANIEL A. MILLER, KATIE MILLER, JONAS MILLER, LEVI J. ZOOK, ELI C. ZOOK, JACOB A. MILLER, LEVI MILLER, NOAH YODER, ANDY A.MILLER, LAVINA ZOOK, SAM YODER, JONAS MILLER Appellants	:	IN THE SUPERIOR COURT OF PENNSYLVANIA 1124 WDA 2002

Appeal from the Judgment of Sentence entered June 6, 2002, Court of Common Pleas, Cambria County, Criminal Division at No(s). 2833-2000, 0174-2001, 0175-2001, 0402-2002, 0403-2002, 0624-2002, 0703-2002, 0754-2001, 0755-2001, 0756-2001, 0757-2001, 0758-2001, 1308 & 1312-2002, 1309-2002, 1310-2002, 1313-2002, 1389-2001, 1390-2001, 1391-2001,1392-2001, 1393-2001, 1394-2001, 1836-2001, 2832-2000, 2834-2000, and 2835-2000.

BEFORE: JOHNSON, KLEIN, and POPOVICH, JJ.

MEMORANDUM: Filed: October 20, 2003

Jonas Miller, Andy J. Miller, Ben Miller, John Miller, Emery Miller, Jonas A. Swartzentruber, Eli A. Miller, Levi Swartzentruber, Joseph Miller, Dannie A. Swartzentruber, Daniel A. Miller, Katie Miller, Levi J. Zook, Eli C. Zook, Jacob A. Miller, Levi Miller, Noah Yoder, Andy A. Miller, Lavina Zook and Sam Yoder (collectively "Swartzentruber Amish" or "Swartzentrubers"), appeal multiple judgments of sentence imposed following their respective convictions for failure to affix a traffic warning symbol designated by the Pennsylvania Department of Transportation to the rear of their horse-drawn buggies. The Swartzentruber Amish contend that the display of the symbol violates their religious beliefs and argue that state law compelling its use violates their rights of freedom of religion under the Constitutions of the United States and the Commonwealth of Pennsylvania. They argue, in addition, that the law violates their Constitutional rights of freedom of expression and freedom of association under the Constitution of the United States. We conclude that the law is indeed unconstitutional as applied to the Swartzentruber Amish. Accordingly, we reverse their respective judgments of sentence.

The Amish are members of the Christian faith who adhere to Anabaptist religious teachings. ***See Wisconsin v. Yoder***, 406 U.S. 205, 210 (1972). These teachings pervade and regulate every aspect of Amish life, compelling adherents to live separate from those outside their

communities to witness to the world their commitment to God. ***See id.*** at 216. Accordingly, the Amish as a group lead an insular existence, modest, devout, and unencumbered by material acquisition or display. They shun modern conveniences and do not use automobiles, traveling instead in horse-drawn "buggies." Today, Pennsylvania is home to approximately 300 of the 1300 Amish congregations existing in the United States.

Among the Amish congregations resident in Pennsylvania is one congregation of the Swartzentruber Amish, an Old Order Amish group composed of 65 congregations nationwide, of which the defendants in this case are members. This congregation makes its home in Cambria County, and like other congregations of Old Order Amish, espouses rigorously conservative values "characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence." ***See Yoder***, 406 U.S. at 210. These values, recorded in the "*ordnung*" of each congregation, prohibit the use of bright colors, which the Swartzentruber Amish equate with the sin of vanity, and forbid display of any symbol of the secular world.

Accordingly, the Swartzentruber Amish, unlike members of some other Amish congregations, decline to display on their buggies the traffic warning device prescribed by Pennsylvania law to denote animal-drawn vehicles. They assert that the device, a fluorescent orange triangle outlined in red

reflective tape, displays unwanted color forbidden by their *ordnung*, and constitutes a symbol of the secular world inconsistent with their deeply-held faith in God. In lieu of the symbol, the Swartzentruber Amish hang a red lantern from the left rear corner of their buggies and outline the tailgate with strips of gray reflective tape one inch wide. The tape approximates the shape of the buggy and demonstrates its size to oncoming motorists.

Upon encountering the buggies of the Swartzentruber Amish, police in Cambria County determined that the gray reflective tape did not comport with a controlling provision of Pennsylvania's Motor Vehicle Code, and a Department of Transportation regulation that requires the use of the SMV emblem on the back of all animal-drawn vehicles and certain other vehicles that travel at less than 25 miles per hour. ***See*** 75 Pa.C.S. § 4529 (Slow moving vehicle emblem) ("Section 4529"); 67 Pa. Code § 165.4. The applicable provision of the Motor Vehicle Code provides in pertinent part as follows:

> **§ 4529. Slow moving vehicle emblem**
>
> **(a) General rule.**—All implements of husbandry, commercial implements of husbandry and special mobile equipment designed to operate at 25 miles per hour or less and all animal-drawn vehicles shall, when traveling on a highway, display on the rear of the vehicle a reflective slow moving vehicle emblem as specified in regulations of the department. The use of the slow moving vehicle emblem shall be in addition to any other lighting devices or equipment required by this title.

75 Pa.C.S. § 4529. The "slow moving vehicle emblem" (SMV emblem) the statute requires is described in a Department of Transportation regulation as follows:

> **CHAPTER 165. SLOW-MOVING VEHICLE IDENTIFICATION EMBLEM**
>
> **§ 165.4. Description.**
>
> The identification emblem, Figure 1, shall consist of a fluorescent yellow-orange triangle with a dark, red reflective border. The yellow-orange fluorescent triangle is for daylight identification. The reflective border defines the shape of the fluorescent color in daylight and becomes a hollow red triangle in the path of motor vehicle headlights at night. The emblem may be permanently mounted or portable.

67 Pa.Code 165.4. Ostensibly in accordance with these two sections, the police, on the twenty-seven occasions now before us, cited the Swartzentrubers. Each citation carried a fine and the potential for incarceration of any defendant who failed to pay. At the district justice level, the Swartzentrubers contested the citations; however, the district justice convicted them of the stated violations and imposed fines of $95 each.

On appeal, the Court of Common Pleas of Cambria County convened a *de novo* hearing at which the Swartzentrubers argued that enforcement of the display requirement in Section 4529 violates their rights to religious freedom guaranteed both by the First Amendment of the United States Constitution and Article I, Section 3 of the Constitution of Pennsylvania.

They argued, further, that the right they assert under the U.S. Constitution, is a "hybrid right" implicating First Amendment freedom of expression, as well as freedom of association. ***See Employment Division, Department of Human Resources of Oregon v. Smith***, 494 U.S. 872 (1990) (concluding that Free Exercise claims are subject to heightened scrutiny of compelling state interest test only when they assert violation of a "hybrid right" involving other Constitutional claims).

In support of their claims, the Swartzentrubers presented fact testimony concerning the sincerity of their religious beliefs, as well as expert testimony comparing the physical characteristics of the SMV emblem with those of "less restrictive" alternatives also used to mark buggies. The Commonwealth did not contest the sincerity of the Swartzentrubers' religious beliefs, but did present expert testimony on the relative effectiveness of the SMV emblem and other marking devices. The Commonwealth's expert concluded that the SMV emblem was the most visible form of identification for daytime viewing, but conceded that it was not as effective during nighttime hours as the reflective tape and lantern used by the Swartzentrubers.

The trial court, the Honorable Timothy P. Creany, recognized that the Swartzentrubers' religious beliefs are sincerely held, but determined as well that the Commonwealth had demonstrated that enforcement of the display

provision of section 4529 was necessary to achieve a "compelling state interest." Consequently, the court found the Commonwealth's case sufficient to overcome the Swartzentrubers' religious objections and determined further that the display requirement of the statute is not unconstitutional. The Swartzentrubers then filed this appeal raising the following questions for our review:

> 1. Whether 75 Pa.C.S. § 4529(a) and the attendant regulation, 67 Pa. Code § 165.4, which require horse-drawn buggies to display orange/red truncated triangles, are unconstitutional as applied to people who object on religious grounds to displaying such triangles, where the Commonwealth did not prove either that it has a compelling interest in requiring such people to display such triangles or that this particular device and only this particular device furthers the Commonwealth's interest in saving lives by reducing accidents between horse-drawn buggies and motorized vehicles[?]
>
> 2. Whether an individual who has only minimal specialized knowledge, expertise, and training in the fields of visibility issues as they relate to transportation may nonetheless testify as an expert witness on those subjects, and whether it was proper to admit into evidence, over objection and for the truth of matters contained therein, an out-of-court report prepared by the putative expert that is itself hearsay and that contains multiple levels of hearsay[?]

Brief for Appellants at 3.

Before addressing the merits of the Swartzentrubers' claims, we note that their first question presents the limited issue of the constitutionality of Section 4529 and the attendant section of the Pennsylvania Code as applied

to the Swartzentruber Amish. Although this issue appears central to the disposition of this case, we remain cognizant of the time-honored jurisprudential tenet that all courts must avoid questions of constitutionality if the case may be decided on any other ground. ***See In re Fiori***, 673 A.2d 905, 909 (Pa. 1996) (citing ***Rescue Army v. Municipal Court***, 331 U.S. 549, 568-69 (1947)). Accordingly, we consider the Swartzentrubers' second question first to discern whether the evidentiary issues it raises may resolve this appeal.

The Swartzentrubers' second question raises two issues: the first, whether the trial court erred in qualifying the Commonwealth's expert to testify on the issue of the visibility of reflective traffic-control devices and, the second, whether the trial court erred in admitting the expert's report into evidence. The first issue, concerning qualification of expert witnesses, implicates the discretionary powers of the trial court. Whether a witness is qualified to testify as an expert is a decision committed to the discretion of the trial judge; we will not reverse that decision absent an abuse of discretion. ***See Rittenhouse v. Hanks***, 777 A.2d 1113, 1116 (Pa. Super. 2001).

In this case, the trial court determined that the Commonwealth's expert, Richard W. Varner, was qualified to testify as an expert "[a]nd, particularly, [would be] permitted to express opinions on retroreflectivity

and visual perception." N.T. Summary Appeal Hearing, 5/23/02, at 35. The court reached its conclusion based on Varner's *curriculum vitae* and preliminary testimony that he had attended some coursework that included discussion of retroreflectivity of materials and had co-authored a book on traffic safety that included a chapter on visibility in the context of commercial vehicles. The Swartzentrubers objected, contending that Varner possessed only general knowledge of accident reconstruction. N.T. Summary Appeal Hearing, 5/23/02, at 3. They argue on appeal that Varner "has never been qualified as an expert in visibility, retroreflectivity of materials, or photometrics," and that his experience relating to visibility "is quite limited . . . consisting of very few hours of discussion within larger seminars." Brief for Appellants at 45. Upon review of the record, in conjunction with applicable caselaw, we conclude that the trial court did not err in allowing Varner to testify as an expert witness.

In Pennsylvania, the threshold of expertise necessary to qualify a witness to give expert testimony is relatively modest. ***See Miller v. Brass Rail Tavern***, 664 A.2d 525, 528 (Pa. 1995). The witness must have sufficient skill, knowledge, or expertise in the field at issue "as to make it appear that his opinion or inference will probably aid the trier [of fact] in his search for truth." ***West Philadelphia Therapy Center v. Erie Ins. Group***, 751 A.2d 1166, 1168 (Pa. Super. 2000). Accordingly, the witness

need not possess all of the knowledge in his field of expertise, but need only possess "more knowledge than is otherwise within the ordinary range of training, knowledge, intelligence or experience" of the average juror. ***Miller***, 664 A.2d at 528. ***See also West Philadelphia Therapy Center***, 751 A.2d at 1158. Thus, regardless of the source or character of his expertise, a witness may testify as an expert if he has "**any** reasonable pretension to specialized knowledge on the subject under investigation." ***Id.*** (original emphasis). Provided this standard is met, the weight accorded the witness's testimony is left to the factfinder, which will accept or reject it on grounds of credibility. ***See id.***

In view of these liberal guidelines, we find no error in the trial court's conclusion that Varner was qualified to testify as an expert witness. The record reflects that Varner is program director at the Pennsylvania Traffic Institute for Police Services, where he provides instruction on traffic safety issues to law enforcement officers from across the Commonwealth. N.T. Summary Appeal Hearing, 5/23/02, at 17, 19-20. Varner has conducted several nighttime visibility studies, has co-authored a book, one of the chapters of which concerned visibility of commercial vehicles, and has both taken and taught classes on nighttime and other visibility issues. N.T. Summary Appeal Hearing, 5/23/02, at 23-24. Moreover, he is experienced in the use of the reflectometer, a device used in field testing to measure the

transmission of light from reflective surfaces. N.T. Summary Appeal Hearing, 5/23/02, at 32. Although cross-examination revealed that Varner's primary area of expertise is in accident reconstruction, this concentration of knowledge does not diminish his training and experience in the realm of visual perception of traffic control devices, which both parties agree is at issue here. This case is therefore readily distinguishable from the cases on which the Swartzentrubers rely. ***See e.g. Erschen v. Pennsylvania Independent Oil Co.***, 393 A.2d 924 (Pa. Super. 1978) (finding fire marshal not qualified to testify on origin of gas explosion because he had *no formal instruction or on-the-job training* concerning that issue); ***McDaniel v. Merck, Sharp & Dohme***, 533 A.2d 436, 441-42 (Pa. Super 1987) (finding specialist in pharmacology not qualified to testify concerning drug he had *never studied or researched and with which he had no clinical experience*); ***Dambacher v. Mallis***, 485 A.2d 408 (Pa. Super. 1984) (finding two auto mechanics not qualified to testify concerning effect of mixing radial and non-radial tires because "*nothing in their experience, or in such education as they had had*, enabled them to reason about what that effect would be"). Because Varner's credentials demonstrate knowledge of the visibility of traffic control devices beyond the "ordinary range of training, knowledge, intelligence or experience," he was amply qualified to testify as an expert

witness. ***See Miller***, 664 A.2d at 528. The trial court did not err in admitting his testimony.

The Swartzentrubers contend further that the trial court erred in admitting Varner's expert report into evidence. Brief for Appellants at 46. They assert that the report contains multiple levels of hearsay and may be admitted only if each such level meets an exception to the hearsay rule. Brief for Appellants at 49 (citing ***Pompa v. Hojuncki***, 281 A.2d 886, 888 (Pa. 1971)). We find no merit in the Swartzentrubers' contention, as their argument fails to establish that the court admitted the report for the truth of its contents, or if it did, that the report violated the hearsay rule.

The trial court explained its admission of Varner's report as follows:

> I will admit the report. I believe that [Varner's] testimony was on the basis of his experience, his training, as well as the review of studies and literature normally relied upon by experts of his discipline in formulating opinions. He has outlined[,] in my estimation[,] those opinions and the basis for them, and he is permitted, as he did on his direct and cross, to expand and expound on the reason for his opinions. So I will admit his report as I admitted his testimony.

N.T. Summary Appeal Hearing, 5/23/02, at 100-01. The court's explanation tends to establish that it admitted Varner's report not as substantive evidence bearing on the matter then on trial, but rather to establish the factual basis for Varner's testimony. This practice is not inconsistent with Pennsylvania law. ***See Primavera v. Celotex Corp.***, 608 A.2d 515, 518

(Pa. Super. 1992) (indicating that factfinder must be made aware of the bases for expert's ultimate conclusions, including his partial reliance on indirect sources).

Admission of an expert report under these circumstances differs markedly from the scenario condemned by our Supreme Court in ***Pompa***, the case on which the Swartzentrubers rely. ***See*** 281 A.2d 886. In ***Pompa***, the Supreme Court determined that the report of the plaintiff's expert witness constituted inadmissible hearsay when the plaintiff introduced it for the truth of its contents in lieu of the expert's testimony after the expert had died. ***See*** 281 A.2d at 888. Thus, cross-examination of the author of the report was not possible. ***See id.*** In this case, by contrast, the Swartzentrubers cross-examined Varner extensively concerning the contents of his report and the opinions he derived from the sources he cited.

The Swartzentrubers contend, nevertheless, that such cross-examination could not reach the report's levels of embedded hearsay expressed as opinions of other experts from which Varner drew his conclusions. Brief for Appellant at 50. Our Courts have recognized, of course, that embedded hearsay is not subject to cross-examination. Thus, out of practical necessity, our Supreme Court adopted as the law of Pennsylvania, a rule "which permits an expert witness to rely on, *and disclose* data which is not in evidence in order to form his expert opinions,

assuming the materials relied on are of the type reasonably relied on by experts in their respective fields." ***Primavera***, 608 A.2d at 518 (emphasis added). ***See also*** Pa.R.E. 703 (Bases of opinion testimony by experts). This rule allows a qualified expert to rely on material that might be otherwise classified as inadmissible hearsay subject to no exception. ***See id.*** at 519. "In a sense, the expert synthesizes the primary source material—be it hearsay or not—into properly admissible evidence in opinion form" upon which the expert may then be cross-examined. ***See id.*** at 521 (quoting ***United States v. Sims***, 514 F.2d 147, 149 (9th Cir. 1975)). Provided the factfinder is apprised of the indirect or hearsay sources upon which the expert relied, it is then capable of determining his credibility. ***See id.*** ("[T]he crucial point is that the factfinder be made aware of the bases for the expert's ultimate conclusions, including his partial reliance on indirect sources."). Because such indirect, hearsay sources are therefore properly disclosed to the factfinder to assist in its evaluation of an expert's credibility, the inclusion of such sources in an expert's report cannot render the report inadmissible. Accordingly, we find no merit in the Swartzentrubers' contention that the trial court erred in admitting Varner's report due to its inclusion of multiple hearsay. Because we discern no grounds in the Swartzentrubers' evidentiary claims for a finding of reversible error, we conclude that they are not entitled to relief on the basis of the issues raised

in their second question. Accordingly, we proceed to the assertion of their first question that Section 4529 and its attendant regulation are unconstitutional.

In their extensive discussion of the first question, the Swartzentrubers argue that Section 4529 is infirm under both the Free Exercise Clause of the First Amendment of the United States Constitution and under Article I, Section 3 of the Constitution of Pennsylvania. Brief for Appellant at 30-34, 35-39 (respectively). In addition, several interested third parties have filed *amicus curiae* briefs addressing this question. ***See*** Brief of Amicus Curiae The Becket Fund for Religious Liberty; Brief of Amicus Curiae National Committee for Amish Religious Freedom; Brief of Amicus Curiae Mennonite Central Committee US. We recognize, as these proponents advocate, that the issue presented here may be resolved by reference to our state constitution. ***See Commonwealth v. Edmunds***, 586 A.2d 887, 894 (Pa. 1991) (citing ***PruneYard Shopping Center v. Robins***, 447 U.S. 74,80-82 (1980)). Although the federal constitution establishes a minimum level of protection that must be applied to analogous state provisions, each state is encouraged to interpret and apply its own constitution. ***See Edmunds***, 586 A.2d at 894-95 (citing ***Pruneyard***, 447 U.S. at 80-82). Our own Supreme Court has admonished that "it is both important and necessary that we undertake an independent analysis of the Pennsylvania Constitution, each

time a provision of that fundamental document is implicated." ***See Edmunds***, 586 A.2d at 894-95.

As a general rule, litigants seeking relief under a provision of Pennsylvania's constitution must provide analysis of four factors:

1) text of the Pennsylvania constitutional provision;
2) history of the provision, including Pennsylvania case-law;
3) related case-law from other states;
4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence

Id. "Depending upon the particular issue presented, an examination of related federal precedent may be useful as part of the state constitutional analysis, not as binding authority, but as one form of guidance." ***Id.*** In this case, the parties have fulfilled these requirements. Accordingly, we focus on the issue of whether, pursuant to Article I, Section 3 of the Constitution of Pennsylvania, Section 4529 and its attendant regulation are unconstitutional as applied to the Swartzentruber Amish. We will discuss the history and application of the First Amendment's Free Exercise clause as necessary to demonstrate the foundation of our own jurisprudence.

The Free Exercise Clause of the First Amendment provides a floor of constitutional protection for religious liberty below which state constitutions may not deviate. That Clause, which appears below following the Establishment Clause, provides as follows:

Amendment I. Freedom of Religion

> Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*; . . . .

U.S. CONST. Amend. I (emphasis added). The United States Supreme Court has recognized that this provision enunciates a "fundamental right" to unencumbered religious practice, ***see Yoder***, 406 U.S. at 220, which may not be burdened absent a state interest "of the highest order," ***id.*** at 214. Consistent with this standard, the Court expressly rejected application of a rational basis test to issues arising under the Free Exercise Clause:

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '(o)nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation'.

Sherbert v. Verner, 374 U.S. 398, 403 (1963) (quoting ***Thomas v. Collins***, 323 U.S. 516, 530 (1945)). The Court held accordingly that even facially neutral laws, if they unduly burden Free Exercise, must be justified by a "'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'". ***Sherbert***, 374 U.S. at 403 (quoting ***NAACP v. Button***, 371 U.S. 415, 438 (1963)); ***see also Yoder***, 406 U.S. at 219-220. The Court insisted further that government entities seeking enforcement of such laws to the detriment of the religious objector must demonstrate that such enforcement "represents the least restrictive

means" of achieving the compelling state interest at issue. ***Bowen v. Roy***, 106 U.S. 693, 728 (1986). Following this test, the Court rejected even state interests of admittedly high social importance, fettering free exercise only where the objectors' conduct "posed some substantial threat to public safety, peace or order." ***Sherbert***, 374 U.S. at 403 (additional citations omitted).

In 1990, the United States Supreme Court abandoned the compelling state interest standard where the objector's Free Exercise claim arises out of the state's enforcement of a facially neutral law. ***See Employment Division v. Smith***, 494 U.S. at 879 ("[T]he right to free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'."). Deriding the "compelling state interest" test as "a constitutional anomaly," the High Court concluded that "the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable . . ." ***Id.*** at 885. The Court continued, sharply criticizing the test, if not the values it would uphold:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"--permitting him, by virtue of his beliefs, "to become

> a law unto himself," contradicts both constitutional tradition and common sense.

Id. (citations omitted). Accordingly, the Court repudiated the very language it had earlier espoused in ***Yoder***:

> Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid,* as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

Compare Smith, 494 U.S. at 888, ***with Yoder***, 406 U.S. at 214 ("The essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion"). The Court sanctioned the continued application of a "compelling state interest" analysis to claims arising from facially neutral laws only where the objector's Free Exercise claim also implicates other constitutional rights. ***See Smith***, 494 U.S. at 881 ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved . . . the Free Exercise Clause in conjunction with other constitutional protections such as freedom of speech and of the press[.]"). In the remainder of cases, the Court would require that the challenged law "must simply be related to a legitimate government end." ***United States v. Hardman***, 297 F.3d 1116, 1126 (10th Cir. 2002).

In direct response to ***Smith***, Congress, in 1993, adopted the Religious Freedom Restoration Act (RFRA). ***See*** 42 U.S.C. § 2000bb. RFRA reinstated the "compelling state interest" test expressly as set forth in ***Sherbert*** and ***Yoder***, to "all cases where free exercise of religion is substantially burdened." ***See*** 42 U.S.C. § 2000bb(b)(1). Subsequently, however, the Supreme Court deemed RFRA unconstitutional, holding that its enactment violated the separation of powers doctrine first enunciated in ***Marbury v. Madison***, 1 Cranch 137 (1803). ***See City of Boerne v. Flores***, 521 U.S. 507, 536 (1997).

This marked departure from the High Court's prior Free Exercise jurisprudence has prompted the appellate courts of 11 states to diverge from federal precedent, giving effect to greater protections afforded by their own constitutions. ***See Humphrey v. Lane***, 728 N.E.2d 1039 (Ohio 2000); ***State v. Bontranger***, 683 N.E.2d 126 (Ohio App. Ct. 1996); ***In re Browning***, 476 S.E.2d 465 (N.C. Ct. App. 1996); ***State v. Miller***, 549 N.W.2d 235 (Wis. 1996); ***Swanner v. Anchorage Equal Rights Comm'n***, 874 P.2d 274 (Alaska 1994); ***Rourke v. N.Y. State Dep't of Corr. Servs.***, 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), *aff'd by* 615 N.Y.S.2d 470 (N.Y. App. Div. 1994); ***Davis v. Church of Jesus Christ of Latter Day Saints***, 852 P.2d 640 (Mont. 1993); ***St. John's Lutheran Church v. State Comp. Ins. Fund***, 830 P.2d 1271 (Mont. 1992); ***First Covenant Church of Seattle v.***

City of Seattle, 840 P.2d 174 (Wash. 1992); ***Rupert v. City of Portland***, 605 A.2d 63 (Me. 1992); ***Society of Jesus of New England v. Boston Landmarks Comm'n***, 564 N.E. 2d 571 (Mass. 1990); ***Attorney Gen. v. Desilets***, 636 N.E.2d 233 (Mass. 1994); ***State v. Evans***, 796 P.2d 178 (Kan. Ct. App. 1990); ***State v. Hershberger***, 462 N.W.2d 393 (Minn. 1990). Eight other states have adopted the "compelling state interest" test by statute and another has amended its constitution to include this protection. ***See*** Gary S. Gildin, *Coda to William Penn's Overture: Safeguarding Non-Mainstream Religious Liberty Under the Pennsylvania Constitution*, 4 U. Penn J. Const. L. 81, 125-26 nn. 212-19. In only two states have appellate courts interpreted their state constitutions to provide the limited protection specified in ***Smith***. ***See Wolf v. Sundquist***, 955 S.W.2d 626 (Tenn. Ct. App. 1997); ***Meltebeke v. Bureau of Labor & Indus.***, 903 P.2d 351 (Or. 1995).

In 1979, the Pennsylvania Supreme Court recognized that the liberties established by Article I, Section 3, were co-extensive with those of the Free Exercise Clause. ***See Springfield School District v. Department of Education***, 397 A.2d 1154, 1170 (Pa. 1979) (opining that religious liberty afforded by Article I, Section 3 of Pennsylvania's Constitution "does not transcend" the protection of the Free Exercise Clause); ***Wiest v. Mt. Lebanon School Dist.***, 320 A.2d 362, 366 (Pa. 1979) (same).

Consequently, the Court declined, in both ***Springfield*** and ***Weist***, to extend protection to religious liberty in Pennsylvania beyond that afforded by the First Amendment. ***See Springfield School Dist.***, 397 A.2d at 1170. However, on the dates of those decisions, First Amendment scrutiny of religious claims challenging application of facially neutral laws was then solidly established by ***Sherbert*** and ***Yoder***, and the floor of First Amendment protection required demonstration of a "compelling state interest."

Our appellate courts have not considered, since ***Smith***, whether the protection afforded religious practice by our state constitution remains co-extensive with that afforded to Free Exercise claims or whether our Constitution requires a higher level of scrutiny. The Swartzentrubers and *amici curiae* contend that both the applicable text of the Pennsylvania Constitution and Pennsylvania's history of religious tolerance require heightened scrutiny of all such claims. Therefore, consistent with our Supreme Court's direction in ***Edmunds***, 586 A.2d at 894-95, we will consider whether the text, history and policy surrounding Article I, Section 3 of the Constitution of Pennsylvania are sufficiently served by the United States Supreme Court's analysis in ***Smith***.

Article I, Section 3 provides an unequivocal foundation for religious liberty in Pennsylvania. Unlike the spare language of the First Amendment,

Pennsylvania's Declaration of Rights offers expansive language respecting both freedom of conscience and religious practice:

> **ARTICLE I.** DECLARATION OF RIGHTS
>
> * * * *
>
> **§ 3. Religious freedom**
>
> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

PA. CONST. art. I, § 3. Significantly, the language of this Article recognizes both the inviolate nature of rights of conscience *and* the right of our citizens to practice or refrain from practice as their consciences dictate. ***See Eubanks***, 512 A.2d at 622 ("[O]ur Commonwealth is neutral regarding religion. It neither encourages nor discourages religious belief. It neither favors nor disfavors religious activity."). Indeed, over one-half century ago, this Court determined that Article I, Section 3 safeguards the religious adherent's freedom both "to adopt any creed or hold any opinion whatever on the subject of religion; *and to do or forbear to do, any act, for conscience sake, the doing or forbearing of which is not prejudicial to the public weal.*"

Commonwealth v. Beiler, 79 A.2d 134, 137 (Pa. Super. 1951) (emphasis added).

This level of religious tolerance stands as a founding principle upon which much of the history of this Commonwealth is built. ***See Eubanks***, 512 A.2d at 622 (citing *The Papers of William Penn*, Vol. I (Dunn & Dunn, University of Pennsylvania Press), pp. 51-52, 90-93, 268, 280, 452, 511) ("Pennsylvania, more than any other sovereignty in history, traces its origins directly to the principle that the fundamental right of conscience is inviolate."). Indeed, tolerance for the beliefs and practices of all religious creeds has undergirded civil government in Pennsylvania since the inception of Penn's "holy experiment" over three hundred years ago. ***See Freethought Society v. Chester County***, 194 F. Supp. 2d 437, 441 (2002) (*rev'd on other grounds*, 2003 WL 21468470 (3rd Cir. June 26, 2003)) (noting that Penn's ideal "included tolerance of religious views that was unique in the colonies long before the First Amendment was a gleam in James Madison's eyes"). Consistent with this ideal, the text of Article I, Section 3 first appeared in the Constitution of 1790, to be followed in the Constitution of 1838, and later in the Constitution of 1874. ***See Weist v. Mt. Lebanon School Dist.***, 320 A.2d 362, 366 (Pa. 1974). An antecedent version, substantially similar in character, appeared in the Constitution of 1776. ***See id.***

Following study of the bases for analysis established in ***Edmunds***, we find the protection currently afforded by the Free Exercise Clause of the First Amendment markedly insufficient to sustain freedom of conscience and religious liberty as those terms are intended in Article I, Section 3 of the Constitution of Pennsylvania. The express language of that Article requires that no person shall be compelled to engage in practice or expression antithetical to his rights of conscience and religious scruples. ***See*** PA. CONST., Art. I, § 3 ("[N]o man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience . . ."). This language, coupled with Pennsylvania's extended history of religious tolerance and our Supreme Court's express stance of neutrality on religious issues, signals a continued need for the protection afforded by the "compelling state interest" analysis. Justice Sandra Day O'Connor, dissenting in ***Smith***, explained the value of that standard as a bulwark of religious liberty:

> The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests "of the highest order," ***Yoder, supra***, 406 U.S. at 215. "Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the

> rights, benefits, and privileges enjoyed by other citizens." [***Bowen v.***] ***Roy***, ***supra***, 476 U.S. at 728 (opinion concurring in part and dissenting in part).

Smith, 494 U.S. at 895 (O'Connor, J. Dissenting, joined in Parts I and II by Blackmun, Brennan and Marshall, JJ.) (internal citations reformatted). The Dissent's rationale, although directed to the First Amendment, is equally applicable to Article I, Section 3 of our Pennsylvania Constitution.

We hold accordingly, that once a religious objector has demonstrated that a government regulation or criminal prohibition burdens the free exercise of religion as recognized in Article I, Section 3, the Commonwealth must demonstrate:

> that unbending application of its regulation to the religious objector 'is essential to accomplish an overriding governmental interest,' [***U.S. v.***] ***Lee***, ***supra***, 455 U.S. 252, 257-258, or represents 'the least restrictive means of achieving some compelling state interest,' ***Thomas*** [***v. Collins***], 450 U.S. at 718. ***See***, ***e.g.***, ***Sherbert***, 374 U.S. at 406; ***Yoder***, 406 U.S. at 214-215; ***Roy***, 476 U.S. at 728-732 (opinion concurring in part and dissenting in part) (internal citations reformatted).

Smith, 494 U.S. at 899 (O'Connor, J. Dissenting, joined in Parts I and II by Blackmun, Brennan and Marshall, JJ.). ***See also Bear v. Reformed Mennonite Church***, 341 A.2d 105, 107-08 (Pa. 1975) (quoting ***Sherbert***, 374 U.S. at 406); ***Wikoski v. Wikoski***, 513 A.2d 986, 987, 989 (Pa. Super. 1986) (quoting ***Sherbert***, 374 U.S. at 406).

Our holding applies equally regardless of whether the state law at issue is facially neutral. "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." ***Yoder***, 406 U.S. at 220. Such exercise is burdened "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs . . . ." ***Id.*** at 897 ((O'Connor, J. Dissenting, joined in Parts I and II by Blackmun, Brennan and Marshall, JJ.) (quoting ***Thomas***, 450 U.S. at 717-718). "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.'" ***Id.*** (quoting ***Braunfeld v. Brown***, 366 U.S. 599, 605 (1961)).

Following these precepts, a facially neutral law or regulation is subject to challenge under Article I, Section 3 in accordance with the following procedure. In the first instance, a citizen who objects on religious grounds to compliance with a facially neutral law bears the burden to show that the law to which he objects burdens his exercise of sincerely held religious

beliefs. ***See Yoder***, 406 U.S. 205, 215-26; ***Antrim Faith Baptist Church v. Commonwealth, Dep't of Labor and Indus.***, 460 A.2d 1228, 1230-31 (Pa. Cmwlth.). If he fails to make that showing, the challenged law will be deemed constitutional and the Commonwealth may compel his compliance. ***See id.*** If, however, he makes that showing, the burden then shifts to the Commonwealth to demonstrate that enforcement of the challenged law against that citizen is necessary to achieve a compelling interest that the challenged law advances. ***See Sherbert***, 374 U.S. at 406-07; ***Wikoski***, 513 A.2d at 987 (quoting ***Sherbert***, 374 U.S. at 403). Finally, provided the Commonwealth has shown a compelling state interest in enforcement of the challenged law, it must demonstrate, as well, that the form of regulation the law imposes is the least restrictive means of achieving the state's interest. ***Thomas***, 450 U.S. at 718; ***Cf. Commonwealth ex rel. Specter v. Moak***, 307 A.2d 884, 889 (Pa. 1973).

In this case, the Swartzentrubers challenged Section 4529 and its attendant regulation after the Commonwealth cited them for non-compliance. In accordance with the ***Yoder*** line of cases, the Swartzentrubers argued that the mandate of section 4529 and its attendant regulation, that they display the SMV emblem on their buggies, burdened their exercise of religious liberty because it would require them to display a garishly-colored secular symbol in violation of sincerely held religious beliefs.

Based on the evidence, the trial court recognized that the Swartzentrubers had carried their burden. ***See*** Trial Court Opinion, 6/6/02, at 8 (not numbered). We concur in the court's conclusion. Following that determination, the burden of proof shifted to the Commonwealth to demonstrate that "unbending application" of Section 4529 and its attendant regulation to the Swartzentrubers represents "the least restrictive means of achieving some compelling state interest." ***Thomas***, 450 U.S. at 718; ***see also Specter***, 307 A.2d at 889.

Determination of what constitutes a "compelling state interest" is a matter of law. ***See Hardman***, 297 F. 3d at 1127. At trial, the Commonwealth asserted a compelling interest in saving lives by reducing accidents between Amish buggies and motorized vehicles. ***See*** Trial Court Opinion, 6/6/02, at 8. The trial court recognized that to establish the primacy of this interest over claims of religious infringement, the Commonwealth must demonstrate an evidentiary nexus; i.e., that the religious objectors' conduct poses a demonstrable threat of harm to the state's asserted interest. ***See*** Trial Court Opinion, 6/6/02, at 8 (citing ***City of Richmond v. J.A. Croson Co.***, 488 U.S. 469, 473 (1989)). The court recognized, as well, that provided the Commonwealth establishes such a threat, "[t]he issue then comes down to whether the SMV emblem is the least restrictive means to affect [sic] this legitimate interest, or to state it

differently, whether the state demonstrated that public safety cannot be achieved by proposed alternative means." Trial Court Opinion, 6/6/02, at 9 (citing ***State v. Hershberger***, 444 N.W. 282, 288-89 (Minn. 1990)).

The court properly recognized these rules of law. In order to demonstrate that the asserted interest in traffic safety was "compelling," so as to overcome the Swartzentrubers religious objections, the Commonwealth was required to show that the Swartzentrubers' refusal to comply necessarily compromised traffic safety, i.e., posed a safety hazard. Provided the Commonwealth could show such a hazard, it was then required to show that imposition of the SMV emblem was the least restrictive means of ameliorating or curing that hazard. Unfortunately, the trial court erred in applying these rules to the evidence.

In this case, the trial court concluded that the Commonwealth had demonstrated, first, that the state's interest in public safety is paramount. ***See*** Trial Court Opinion, 6/6/02, at 8. The court reached its conclusion on the basis that "[t]here was no argument by the [Swartzentrubers] that fostering safety by some means is inappropriate. . . . Thus, the [Swartzentrubers] have effectively conceded that a compelling governmental interest is at issue here. If they have not, then this court nonetheless finds that it is so." This conclusion reflects a misapplication of the burden of proof, which as the court itself had earlier recognized, rests on the State.

See Thomas, 450 U.S. at 718. The Commonwealth must establish its interest not merely as an abstract assertion of public policy but rather as an imperative that will suffer specific injury if the objectors' challenge is granted. ***See Yoder***, 406 U.S. at 221. Thus, the Swartzentrubers had no obligation to prove that fostering safety is not appropriate or, for that matter, that the SMV emblem is not an appropriate way to foster safety. ***See id.*** Rather, the Commonwealth was obliged to show that the Swartzentrubers' use of their buggies as marked poses a demonstrable safety hazard and that the imposition of the SMV emblem is the "least restrictive means" by which to ameliorate that hazard. ***See Yoder***, 406 U.S. at 228-29.

Upon consideration of the evidentiary record, we conclude that the Commonwealth has failed to carry its burden. Initially, it produced no evidence to demonstrate the frequency or cause of rear-end collisions between other vehicles and buggies. Thus, it failed to demonstrate that the buggies pose any hazard at all, regardless of the manner in which they are marked. Because the Commonwealth failed, even at this initial stage, to show a threat to the asserted interest of traffic safety, it cannot show that its interest is sufficiently compelling, vis-à-vis the Swartzentrubers, to require them to display the SMV emblem in violation of their sincerely held religious beliefs. ***See People v. Swartzentruber***, 429 N.W.2d 225, 228-29

(Mich. Ct. App. 1988) (finding no compelling state interest under ***Yoder*** where state seeking to require Old Order Amish to display SMV emblem failed to produce evidence showing that fewer accidents resulted among vehicles using emblem than those not using emblem).

Similarly, the Commonwealth failed to produce evidence comparing the number of collisions suffered by buggies marked with the gray reflective tape and red lantern the Swartzentrubers currently use, with those marked with the SMV emblem. Without such comparative evidence the court could not conclude, without speculation, that buggies marked with gray tape and lanterns compromise that interest in traffic safety in any way that those marked with the SMV emblem do not. ***See State v. Hershberger***, 462 N.W. 2d 393, 399 (Minn. 1990) (finding that state failed to demonstrate "compelling state interest" in statute that required display of SMV emblem on buggies of Old Order Amish where state failed to produce evidence that reflective tape and lantern already used by Amish was insufficient means to achieve state's interest). Although we recognize that highway safety, as a general matter, is a significant state interest, because the evidence fails to substantiate a threat posed by the Swartzentrubers' failure to display the SMV emblem we cannot find that interest sufficiently compelling to justify intrusion on the Swartzentrubers' sincerely held religious beliefs. ***Cf. Yoder***, 406 U.S. at 2228-29 (recognizing that even where asserted state interest in

mandatory high school education is valid in generality of cases, it could not be deemed compelling vis-à-vis Old Order Amish where evidence failed to show injury to state in allowing Amish children to leave high school in favor of vocational education aimed at sustaining traditional way of life). The trial court erred in finding to the contrary.

Nevertheless, assuming that the Commonwealth sufficiently demonstrated a compelling state interest, it failed also to demonstrate that its interest could not be met by some less restrictive measure than the SMV emblem. This point too is demonstrated by the Commonwealth's failure to produce comparative studies of the rate of collisions involving buggies marked with gray reflective tape and those marked with the SMV emblem. Without comparative information, a court possesses scant basis on which to conclude that the SMV emblem achieves a decrease in the rate of collisions that the reflective tape cannot achieve. Without this information to establish that the reflective tape and lantern used by the Swartzentrubers is not as effective as the SMV emblem at safeguarding highway safety, the SMV emblem cannot be deemed the least restrictive means to that end. ***See State v. Miller***, 549 N.W.2d 235, 242 (Wisc. 1996) (finding unconstitutional under Wisconsin Constitution state statute that required Old Order Amish to display an SMV emblem where state failed to produce studies comparing frequency of collisions amongst Amish buggies marked with reflective tape

to those marked by SMV emblem. State could not demonstrate that SMV emblem was least restrictive means to achieve "compelling state interest" of highway safety).

Significantly, in the absence of this information, both parties' expert witnesses agreed that the reflective tape the Swartzentrubers now use provides *substantially better* nighttime visibility than the SMV emblem. The trial court concluded, however, that the SMV emblem, due to its color, was more visible during daylight hours and therefore the "least restrictive means" to achieve visibility "over the spectrum of situations." Trial Court Opinion, 6/6/02, at 10. The trial court relied on testimony that revealed that "60.9% of all horse and buggy accidents occurred in daylight, approximately .8% occurred at dawn and 4% occurred at dusk." Trial Court Opinion, 6/6/02, at 10. From these statistics, the court surmised that because "approximately 2/3rds of all horse and buggy accidents occurred during either low light or full daylight conditions," the SMV emblem was necessarily the least restrictive means to achieve traffic safety. Trial Court Opinion, 6/6/02, at 10. We cannot conclude that this data, in itself, supports the court's conclusion. The Commonwealth produced no evidence to disclose the causes of the recorded accidents. Thus, whether any given accident was caused by a deficiency in the visibility of the Amish buggy that could be remedied by an SMV emblem, or any other marking, is a subject of

speculation. In addition, the Commonwealth produced no evidence of whether the buggies involved in the accidents tallied were in fact marked. To the extent that these buggies already carried an SMV emblem, the statistics cannot be read to support the efficacy of such symbols or to demonstrate that they are the least restrictive means to achieve the Commonwealth's asserted interest in traffic safety.

We determine, accordingly, that the record compiled in the trial court fails to establish that the Commonwealth had a compelling state interest in enforcing Section 4529 against the Swartzentrubers. We determine also that, to the extent a compelling state interest appears, the record fails to substantiate that the SMV emblem is the least restrictive means by which to vindicate that interest. Consequently, we are compelled to conclude that, under an independent analysis of Article I, Section 3 of the Pennsylvania Constitution, Section 4529 is unconstitutional as applied to the Swartzentruber Amish. ***See Yoder***, 406 U.S. at 228-29 (recognizing imperative to adjudge constitutionality in relation to specific group effected by challenged law). Therefore, we order their judgments of sentence reversed.

Judgments of sentence **REVERSED**. Case **REMANDED** to the Court of Common Pleas of Cambria County for further proceedings consistent with this Memorandum. Jurisdiction **RELINQUISHED**.

Judge Klein files a Concurring Statement.

Judge Popovich Files a Dissenting Memorandum.

Judgment Entered:

Eleanor R. Valecko

Deputy Prothonotary

Date: October 20, 2003

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JONAS MILLER, ANDY MILLER, BEN MILLER, JOHN MILLER, JOHN MILLER, JONAS S. MILLER, EMERY MILLER, JONAS A. SWARTZENTRUBER, ELI A. MILLER, LEVI SWARTZENTRUBER, JOSEPH MILLER, JOSEPH MILLER, ANDY MILLER, DANNIE A. SWARTZENTRUBER, DANIEL A. MILLER, KATIE MILLER, JONAS MILLER, LEVI J. ZOOK, ELI C. ZOOK, JACOB A. MILLER, LEVI MILLER, NOAH YODER, ANDY MILLER, LAVINA ZOOK, SAM YODER, JONAS MILLER, Appellants	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1124 WDA 2002

Appeal from the Judgment of Sentence entered June 6, 2002, Court of Common Pleas, Cambria County, Criminal Division at No(s). 2833-2000, 0174-2001, 0175-2001, 0402-2002, 0403-2002, 0624-2002, 0703-2002, 0754-2001, 0755-2001, 0756-2001, 0757-2001, 0758-2001, 1308 & 1312-2002, 1309-2002, 1310-2002, 1313-2002, 1389-2001, 1390-2001, 1391-2001,1392-2001, 1393-2001, 1394-2001, 1836-2001, 2832-2000, 2834-2000, and 2835-2000.

BEFORE: JOHNSON, KLEIN, and POPOVICH, JJ.

CONCURRING STATEMENT BY KLEIN, J.:

I fully agree with the majority that the Commonwealth failed to demonstrate that the form of regulation is the least restrictive means of achieving the Commonwealth's interest. The defendants have demonstrated that the use of grey reflective tape would not violate their religious beliefs and would provide an adequate safeguard for motorists.

However, I would rely on the First Amendment of the United States Constitution to reach this result rather than on Article I, Section 3 of the Constitution of Pennsylvania. It is clear from the cases cited by the majority that failing to use the least restrictive means to achieve the Commonwealth's interests while accommodating defendants' religious beliefs violates the First Amendment of the United States Constitution.

I refer to the concurring opinion by Judge James R. Cavanaugh in ***Commonwealth v. Carroll***, 628 A.2d 398 405-6 (Pa. Super 1993), ***rev'd on other grounds sub. nom. Commonwealth v. Matos***, 672 A.2d 769 (Pa. 1996), where he said:

> Our Supreme Court has declared that while we can interpret our own constitution [sic] to afford defendants greater protections than the federal constitution [sic] does ... there should be a *compelling* reason to do so. Thus, while certainly our Constitution may afford greater protections than the U.S. Constitution, I would submit that a party bears a heavy burden of persuasion in convincing a court that our Commonwealth's Constitution differs from the Federal Constitution.
>
> We are not interpreting Constitutions from two alien societies: the intellectual climate when the Pennsylvania Constitution was written is substantially similar to that when the United States Constitution was written. The provisions in our Commonwealth's Constitution are often either identical or very similar to that which appears in our national Constitution. To rule without compelling reason that the two Constitutions differ erodes public confidence in the Rule of Law.

Carroll, 628 A.2d 405-6 (internal quotation marks and citations omitted).

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JONAS MILLER, ANDY MILLER, BEN MILLER, JOHN MILLER, JOHN MILLER, JONAS S. MILLER, EMERY MILLER, JONAS A. SWARTZENTRUBER, ELI A. MILLER, LEVI SWARTZENTRUBER, JOSEPH MILLER, JOSEPH MILLER, ANDY MILLER, DANNIE A. SWARTZENTRUBER, DANIEL A. MILLER, KATIE MILLER, JONAS MILLER, LEVI J. ZOOK, ELI C. ZOOK, JACOB A. MILLER, LEVI MILLER, NOAH YODER, ANDY MILLER, LAVINA ZOOK, SAM YODER, JONAS MILLER, Appellants	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1124 WDA 2002

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BEFORE: JOHNSON, KLEIN and POPOVICH, JJ.

DISSENTING MEMORANDUM BY POPOVICH, J.:

I agree with the plurality's conclusion that the trial court properly qualified Mr. Varner as an expert to testify on the issue of the visibility of retroreflective traffic-control devices and properly admitted into evidence Mr. Varner's report. I also agree with the plurality's well-reasoned holding

that our State Constitution affords greater protection of the Free Exercise of religion than our Federal Constitution, and, therefore, the Commonwealth must demonstrate a compelling state interest in enforcement of the challenged law. However, I disagree with the plurality's conclusion that the Commonwealth failed to meet its burden. Therefore, I respectfully dissent.

The Swartzentrubers argued that conforming to 75 Pa.C.S.A. § 4529 burdened their Freedom of Exercise of religion because it would require them to display an orange and red secular symbol in violation of their religious beliefs. The Commonwealth did not dispute the sincerity of their beliefs. I agree with the plurality that the Swartzentrubers carried their burden. The plurality then found that the Commonwealth failed to establish a compelling state interest and to demonstrate that the imposition of the SMV emblem was the least restrictive means. I dissent from these findings.

As the plurality held:

> [O]nce a religious objector has demonstrated that a governmental regulation or criminal prohibition burdens that free exercise of religion as recognized in Article I, Section 3, the Commonwealth must demonstrate that unbending application of its regulation to the religious objector is essential to accomplish an overriding governmental interest *or represents the least restrictive means of achieving some compelling state interest.*

Plurality memorandum opinion, at 26 (quotation marks and citations omitted).

The plurality noted that the trial court concluded that the Commonwealth had demonstrated that the state's interest in public safety is

paramount. However, the plurality stated that the trial court reached its conclusion in error. I disagree.

The trial court noted that the Swartzentrubers did not present argument that the Commonwealth had a compelling state interest in requiring SMV emblems on buggies and, thus, effectively conceded this issue. The plurality correctly noted that the Commonwealth, and not the Swartzentrubers, must demonstrate that the state's interest is compelling. The plurality then considered the evidentiary record and found that the Commonwealth failed to carry its burden. However, the trial court further found that the Commonwealth has a compelling state interest. I agree.

I believe that the Commonwealth has paramount concerns regarding the safety of vehicles traveling on the roads within the Commonwealth and the regulation thereof. I disagree with the plurality's conclusion that the Commonwealth failed to carry this burden because it failed to produce evidence demonstrating the frequency or cause of rear-end collisions between other vehicles and buggies and because it failed to demonstrate that the buggies pose any hazard at all. Plurality memorandum opinion, at 31. It is axiomatic that a slow-moving vehicle, buggy or otherwise, poses a traffic hazard. The Commonwealth argued that it has a compelling governmental interest in protecting the safety of the Amish who utilize the roads of the Commonwealth and those who travel on the roads that the Amish utilize. I feel that the Commonwealth carried its burden in showing

that it has a compelling state interest in regulating slow-moving vehicle on Commonwealth roads to ensure the safety of those traveling on the roads.

I also disagree with the plurality's conclusion that the Commonwealth failed to demonstrate that its interest could not be met by some less restrictive measure than the SMV emblem.

Each party presented expert testimony regarding the use of gray retroreflective tape and a red lantern as the Swartzentruber Amish propose. The Swartzentrubers' presented the testimony of Mr. Garvey who, after conducting a field study involving the use of SMV emblem and gray tape on buggies, opined that the use of gray retroreflective tape and a red lantern provided an adequate replacement of the SMV emblem with regard to twilight and nighttime applications and would be more effective than the SMV emblem in providing a sense of shape of the buggy to an on-coming motorist. ***See*** N.T. Suppression Hearing vol. 2, 4/10/2002, at 40-41. However, Mr. Garvey conceded that when an on-coming motorist is in a position to observe color, the SMV emblem is superior. ***See id.***, at 69. Regarding visibility during the daytime, Mr. Garvey testified that the SMV emblem is more visible than gray retroreflective tape and a red lantern. ***See id.***, at 57-58, 69.

The Commonwealth presented the testimony of Mr. Varner who indicated that any reaction to a stimulus in a traffic setting is a four-step process for the on-coming driver, specifically, visibility, identification,

decision and reaction. ***See*** N.T. Suppression Hearing, 5/23/2002, at 42-43. Applying his process, he conceded that the retroreflectivity of the gray reflective tape for nighttime use has equal or superior visibility than that of the SMV emblem. However, he limited his concession to nighttime without adverse weather conditions, *e.g.*, rain or fog. Additionally, he opined that the gray tape and red lantern did not affect the other three steps in the process for the on-coming driver. ***See id.***, at 57. Specifically, Mr. Varner indicated that the gray tape would not aid the driver in identification of the buggy, thus enabling him to make a decision and an appropriate reaction. ***See id.***, at 57. Regarding visibility in daytime and adverse weather conditions, Mr. Varner testified that the SMV emblem provided greater visibility than the gray reflective tape. ***See id.***, at 57. Mr. Varner also provided statistical data regarding the frequency of buggy accidents. ***See id.***, at 56. Nearly two-thirds of all buggy accidents in Pennsylvania and Ohio occurred in low daylight (twilight) or full daylight conditions, and both experts agree that, in twilight and daylight conditions, the SMV emblem provides greater visibility than the gray retroreflective tape, better warns on-coming motorists of the potential hazard a slow-moving buggy presents and enables the motorists to identify the buggy, make a decision and react to the potential hazard. ***See id.***, at 58; ***see also*** N.T. Suppression Hearing vol. 2, at 57-58, 69. After reviewing the testimony of both expert witnesses, the trial court found that the application of gray retroreflective tape and a

red lantern are not as effective as the SMV emblem during the majority of the time that buggies are traveling on the Commonwealth's roads. ***See*** Trial Court Opinion, 6/6/2002, at 10 (unnumbered). I agree with the trial court's conclusion.

On implements of husbandry, which includes a buggy, 75 Pa.C.S.A. § 4529 and 67 Pa. Code § 203.104 requires the use of a SMV emblem as specified by the Department of Transportation. In Chapter 165 of Title 67 of the Pennsylvania Code, the requirements of the SMV emblem are indicated as follows:

> § 165.5. Performance requirements
>
> (a) *Visibility.* The emblem shall be entirely visible in daylight and at night from all distances between 600 feet and 100 feet (182.88 meters to 30.48 meters) from the rear when directly in front of lawful upper beam of headlamps.
>
> (b) *Dimensional requirements.* The size shall be as shown in Figure 1.
>
> <see the book>
>
> Identification Emblem Figure 1 -- IDENTIFICATION EMBLEM
>
> (c) *Color and reflectivity.* Requirements for color and reflectivity are as follows:
>
> (1) The spectrophotometric color values of the yellow-orange fluorescent material shall have a dominant wave length of 590,610 millimicrons and a purity of 98% before test. After durability test, § 165.6(b) (relating to test procedures), the dominant wave length of the fluorescent material shall not change more than 10%.
>
> (2) The reflective material shall have minimum intensity values at each of the angles listed in Table 1. After durability test, § 165.6(b), the minimum reflective

intensity values for the reflective material shall not change more than 20% from the values specified in Table 1.

TABLE 1 -- MINIMUM REFLECTIVE INTENSITY VALUES, R*

Divergence Angle, deg	Incidence Angle, deg	Reflective Intensity, R
0.2	0	10
0.2	15	7
0.2	30	5
0.5	0	5
0.5	15	4
0.5	30	2

*Measurements shall be conducted in accordance with photometric testing procedures for reflex-reflectors as specified in Society of Automotive Engineers Standard, SAE J594, Reflex Reflectors, and using 50, +-- 5 sq. in. (322.6, +-- 32.3 sq. centimeters) of reflective material. The maximum dimension of the test surface shall not be greater than 1.5 times the minimum dimension. The reflective intensity (R) is computed from the equation.

$$R = \frac{(Lr\ (d^2)}{(Ls\ (A)}$$

where

R = reflective intensity, candlepower per incident foot-candle per square foot
Lr = illumination incident upon receiver at observation point, foot-candles
Ls = illumination incident upon a plane perpendicular to the incident ray at the test specimen position, foot-candles
d = distance from test specimen to source of illumination (100 ft. as specified in SAE J594), feet
A = area of test surface, square feet

(d) *Durability.* Requirements for durability shall be as follows:
(1) The reflective and fluorescent materials shall be tough, flexible, and of sufficient thickness and strength to meet the requirements of this section and § 165.6. After the durability test, § 165.6(b), the fluorescent and reflective

> material shall show no appreciable discoloration, cracking, blistering, loss of durable bond or dimensional change.
> (2) Backing material for portable identification emblems shall be equivalent to 0.040 inch (1.02 millimeter) minimum thickness aluminum, 22-gage (0.030 inch or 0.76 millimeter minimum thickness mill -- galvanized or coated sheet steel with the surface clean and receptive to a durable bond. The backing material shall be free of burrs.
> (3) These requirements shall be minimal and shall not preclude the use of materials having superior performance.

67 Pa. Code § 165.5. The Code provides specific dimension and performance requirements of the SMV emblem. ***See*** 67 Pa. Code § 165.5. It is clear that the gray retroreflective tape is not substantially similar to the dimensions and the color performance of the SMV emblem as defined in § 165.5. Accordingly, I would find, as the trial court found, that the Commonwealth's interest in safety in not met by permitting the Swartzentrubers to apply the gray retroreflective tape and red lantern to the buggies because, as the experts agreed and the trial court found, the application of gray retroreflective tape and a red lantern are not as effective as the SMV emblem during the majority of time that buggies are traveling on the Commonwealth's roads.

Additionally, I believe that the appropriate body to permit the substitution of gray reflective tape and a red lantern for the SMV emblem on Amish buggies is the Legislature. The function of the courts is merely to interpret and apply the laws as enacted by the Legislature. ***See Allebach v. Dept. of Fin. & Rev.***, 546 Pa. 146, 683 A.2d 625 (1996). By holding that

gray reflective tape and a red lantern is a functional equivalent of a SMV emblem, I feel that this Court is promulgating legislation, which is authority held solely by the Legislature. In ***Fiore v. White***, 562 Pa. 634, 757 A.2d 842 (2002), our Supreme Court noted that there can be no change to statutory law without an amendment from the Legislature or a prior decision from the Supreme Court and that the Court's role is to interpret the statute as enacted. The SMV emblem statutes and regulations, *i.e.*, 67 Pa. Code §§ 165.1-.7, § 203.104 and 75 Pa.C.S.A. § 4529, as enacted by the Legislature, require that all slow-moving vehicles, which include the Amish buggies, must display a SMV emblem on the rear of the buggy. Because the use of gray retroreflective tape and a red lantern is not the functional equivalent of the use of a SMV emblem, as per visibility and performance, I believe that the plurality memorandum opinion oversteps its bounds and "enacts" legislation that is within the purview of the legislative arm of the government.

Additionally, I feel that the requirement of a SMV emblem on a buggy does not impede the Swartzentrubers from practicing their religious beliefs because they may choose not to be subject to the emblem requirements of the Vehicle Code and the Department of Transportation by simply foregoing the privilege to drive on the Commonwealth roads. ***Compare Kocher v. Bickley***, 722 A.2d 756, 762 (Pa. Cmwlth. 1999) (requirement of providing social security number or obtaining waiver thereof before obtaining driver's

license does not impede practice of religious belief because appellant may forgo privilege to drive).

Accordingly, I would affirm the judgment of sentence of the Court of Common Pleas, Cambria County.