No. _____

In The

Supreme Court of the United States

BRIAN A. TRUSKEY,

Petitioner,

v.

THOMAS J. VILSACK,
Secretary, United States Department of Agriculture,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Constitution guarantees that all citizens may enjoy the "free exercise" of the religion of their choice. Am. 1. The Court has recognized that the government as an employer may impose some limitations on the First Amendment rights of public employees, *see*, *e.g.*, *Garcetti v. Ceballas*, 547 U.S. 410 (2006), but the Court has never recognized a right to deprive an otherwise qualified individual of the ability to obtain federal employment solely because of the applicant's religious beliefs where the applicant can demonstrate his eligibility to work and to fulfill his tax-reporting obligations.

The questions presented are:

1. Whether the Sixth Circuit erred in refusing to consider Petitioner's Religious Freedom Restoration Act claim on the ground that it was not fully briefed where the government changed its litigation position in its Response Brief to state that Title VII does not displace RFRA to provide the sole remedy for religious discrimination in employment and Petitioner fully argued the basis for the RFRA claim in his Reply Brief?

2. Whether the government's requirement that an individual possess a valid Social Security Number imposes a substantial burden on Petitioner's religious liberty in violation of the Religious Freedom Restoration Act where it does not uniformly require the number for all employment purposes and Petitioner has alternative identification that permit wage reporting and tax filing?

QUESTIONS PRESENTED – Continued

3. Whether the trial court erred in concluding that Mr. Truskey cannot state a religious discrimination claim under Title VII where Mr. Truskey had a valid substitute identification in lieu of a Social Security Number that would not cause Appellee to violate the law by employing him and Mr. Truskey otherwise stated a *prima facie* case of religious discrimination.

PARTIES TO THE PROCEEDING

Petitioner Brian A. Truskey was the Plaintiff in the district court proceeding and the Appellant in the court of appeals proceedings. Respondent Thomas J. Vilsack, the Secretary of the United States Department of Agriculture, was substituted as the Defendant in the district court proceeding and was the Appellee in the court of appeals proceedings after assuming the position of Secretary of the United States Department of Agriculture from Sonny Perdue, who was the original Defendant in the district court proceedings.

RELATED CASES

- *Brian A. Truskey v. Sonny Perdue, Secretary, United States Department of Agriculture*, No. 5:19-cv-51-BJB, U.S. District Court for the Western District of Kentucky. Judgment entered July 30, 2021.
- *Brian A. Truskey v. Thomas J. Vilsack, Secretary, United States Department of Agriculture*, No. 21-5821, U.S. Court of Appeals for the Sixth Circuit. Judgment entered Aug. 19, 2022.

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PETITION FOR WRIT OF CERTIORARI

Brian A. Truskey respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is unpublished but appears at 2022 U.S. App. LEXIS 23220 (6th Cir. Aug. 19, 2022), and is included in Petitioner's Appendix ("App.") at 1-12. The opinion of the district court granting the motion to dismiss is unpublished but appears at 2021 U.S. Dist. LEXIS 260709 (W.D. Ky. July 30, 2021), and is included in App. at 13-24.

JURISDICTION

On July 30, 2021, the district court granted Defendant's motion to dismiss. Plaintiff Brian A. Truskey filed a timely appeal to the Sixth Circuit Court of Appeals, which affirmed the dismissal on August 19, 2022 in an opinion issued by Judges Clay, Batchelder, and Larsen. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

The Religious Freedom Restoration Act provides that: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a)-(b).

INTRODUCTION AND STATEMENT OF THE CASE

Petitioner Brian A. Truskey belongs to a small family church with views similar to Messianic Judaism but differing in their view that Scripture prohibits the use of a Social Security Number ("SSN") as the "mark of the beast" described in Revelation 13:17 and I Chronicles 21:1-8. Thus, Mr. Truskey's parents did not apply for a SSN when he was born and, after studying the Scriptures as he reached adulthood, Mr. Truskey accepted and maintained that belief. As such, he

has never had a SSN due to his sincerely held religious beliefs.

Mr. Truskey's religious opposition to the use of a SSN has imposed hardships on his efforts to obtain employment, with employers often initially telling him that he had to have a SSN for payroll purposes. Because the Internal Revenue Code at 26 U.S.C. § 6724(a) excuses the provision of a SSN based on reasonable cause, however, Mr. Truskey had been able to resolve those issues by working with the employer and the Internal Revenue Service. He has obtained a substitute identifier known as an Internal Revenue Service Number, which allowed his employers to report his wages such that Mr. Truskey could pay taxes. He had no such cooperation from Respondent, however.

A. Mr. Truskey Obtained an Apprenticeship That Did Not Provide Him the Full Orientation Given to Employees

In or about August 2014, Mr. Truskey obtained a position as a Communications Apprentice at the Land Between the Lakes National Recreation Area. Mr. Truskey participated in some training in that role, including firefighter training through which he obtained certification as a Type 2 Wildland Firefighter in 2015. He was an Apprentice and not a federal employee, however, so he did not undergo the new employee orientation that includes detailed information on Defendant's EEO policies or procedures.

In fact, Mr. Truskey never obtained that orientation because he never became a federal employee. Respondent stated, after he obtained his Wildland Firefighter certification, that he could not be converted to employee status because of his lack of a SSN. Mr. Truskey had faced similar roadblocks before, however, so he attempted to resolve the situation by communicating with Respondent. Mr. Truskey continued these efforts for several months by communicating with all sources known or identified to him as potentially having the power to remedy his situation.

Finally, in November 2015, Respondent told Mr. Truskey to contact the Office of Personnel Management to resolve the situation. Mr. Truskey stated that he was told on November 24, 2015 that he would not be permitted to participate in training classes to become a firefighter because he was not on the Administratively Determined Pay Plan.[1] Forty-five days after that was January 8, 2016, but no one told him about his right – much less his obligation – to file an EEO complaint.

As communications with OPM again generated responses that nothing could or would be done, Mr. Truskey began researching other avenues for addressing

[1] The exact date Mr. Truskey learned he was a victim of discrimination is unclear because, based on his experience in other workplaces and the agency's repeated refusal to respond to his query regarding the authority for demanding a SSN, Mr. Truskey believed agency officials were merely ignorant of the law and the matter would be resolved through internal communications as had been his experience with other employers.

the situation, leading him to discover the EEO process in January 2016. He contacted Defendant's EEO agency on January 25, 2016, within two weeks of initially discovering that option.

Mr. Truskey noted in his interview with the EEO counselor that he did not know of the EEO office or of his right to make a claim with it until "the last couple of weeks" before his contact with the office and that he only learned of the forty-five-day time limit during his talk with the EEO counselor. Prior to that time, he had only been told to contact the Office of Personnel Management regarding the SSN issue, which he had done.

Upon initially learning of his option to do so, Mr. Truskey filed an EEO complaint requesting accommodation for his religious belief and thereafter participated in the EEO process. His claim ultimately was denied, however, based primarily on a conclusion that he supposedly failed to contact the EEO counselor within the forty-five-day time limit.

Out of options, Mr. Truskey sued to vindicate his religious liberty.

B. Proceedings in the District Court and Court of Appeals

Mr. Truskey filed his lawsuit *pro se* on April 12, 2019. After counsel entered an appearance, Respondent filed a Motion to Dismiss to which Mr. Truskey timely responded. The Motion was denied with leave to file an amended complaint. On October 13, 2020, Mr.

Truskey filed his First Amended Complaint alleging claims under the Religious Freedom Restoration Act and Title VII of the Civil Rights Act of 1964 based on his ineligibility for federal employment solely because of his lack of a SSN.

Respondent again filed a Motion to Dismiss. It asserted that Mr. Truskey had failed to timely exhaust his administrative remedies pursuant to Title VII, had failed to state a Title VII claim even if he had exhausted his administrative remedies because accommodating his lack of a SSN would require Respondent to "violate a federal statute," and had failed to state a Religious Freedom Restoration Act claim because that law did not excuse the facially-neutral SSN requirement.

After full briefing, on July 30, 2021, the district court granted Respondent's Motion to Dismiss. The district court dismissed Mr. Truskey's Religious Freedom Restoration Act claim because it targeted the same conduct as his Title VII claim. The district court concluded that, since Title VII is a comprehensive statute addressed to employment discrimination, it provided the sole remedy for such misconduct.

The district court then also dismissed Mr. Truskey's Title VII claim. It first held that this Sixth Circuit precedent foreclosed the claim that Mr. Truskey's religious objection constituted reasonable cause for not providing a SSN pursuant to the IRS rule because *Yeager v. FirstEnergy Generation Corp.*, 777 F.3d 362, 363-64 (6th Cir. 2015) had cited *EEOC v. Allendale*

Nursing Centre, 996 F.Supp. 712 (W.D. Mich. 1998), for the proposition that an employee who caused the penalty could not demand its violation as an accommodation.

Finally, the district court concluded that, even if Mr. Truskey had stated a Title VII claim, he had failed to exhaust his administrative remedies by reporting the discrimination within forty-five days. The court held that Mr. Truskey had received constructive notice of the filing requirement because it concluded that the required EEO poster was displayed in a facility at which Mr. Truskey worked and that he was not entitled to equitable tolling because nothing beyond his control prevented him from timely contacting an EEO counselor.

Mr. Truskey filed a Notice of Appeal to the Sixth Circuit Court of Appeals on August 27, 2021. The Sixth Circuit affirmed in an unpublished opinion entered on August 19, 2022.

The Sixth Circuit agreed with the district court that Mr. Truskey's Title VII claim was foreclosed by the conclusion in *Yeager* that an employer did not violate Title VII, which does not require an employer to violate other federal laws in order to accommodate an employee. Thus, the Sixth Circuit held that Mr. Truskey's Title VII claim was barred because permitting him to work without a SSN would violate the Internal Revenue Code. *See* App. at 9-10.

The Sixth Circuit went on to state that Mr. Truskey had waived his arguments regarding the Religious

Freedom Restoration Act by not raising it in his principal brief. Yet, the court also noted that Respondent addressed the issue. The court recognized that "both parties maintain that the district court erred in finding that Title VII is the exclusive remedy for job-related claims of federal religious discrimination." Still, the court concluded that the issue had not been fully developed by adversarial briefing, despite Mr. Truskey's response in his Reply Brief to Respondent's arguments as to the applicability of RFRA to his claims. *See* App. at 10-12.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS ERRONEOUSLY DENIED MR. TRUSKEY THE ABILITY TO EXERCISE HIS RELIGION BY REFUSING TO CONSIDER THE RELIGIOUS FREEDOM RESTORATION ACT CLAIM THAT WAS PROPERLY PLACED BEFORE IT

The Sixth Circuit incorrectly refused to consider Mr. Truskey's Religious Freedom Restoration Act claim because Mr. Truskey did not raise the issue in his principal brief, but Respondent independently raised the issue to brief the change in law that makes Mr. Truskey's claim viable. Thus, Respondent would suffer no prejudice from consideration of the issue it raised. With the issue properly before the court and briefed below, Mr. Truskey demonstrated that he was denied the ability to exercise his religion when less

restrictive alternatives existed to permit him to maintain federal employment.

A. The Religious Freedom Restoration Act Was Properly Raised Below

The Sixth Circuit stated that "both parties maintain that the district court erred in finding that Title VII is the exclusive remedy for job-related claims of federal religious discrimination," but nevertheless concluded that the issue was not ripe because Mr. Truskey had not raised the issue in his principal brief and it had, therefore, not been fully briefed. The conclusion does not follow, however, because it was Respondent who raised the issue to highlight the availability of a RFRA claim as a remedy for discrimination in federal employment in addition to any available Title VII claim. Mr. Truskey replied to Respondent's briefing of the issue that Respondent had raised. This both identified the issue and placed adversarial legal analysis before the Court of Appeals. Appellate courts may consider an issue that has not been adequately raised on appeal if such a failure will not prejudice the opposing party. *United States v. Cotterman*, 709 F.3d 952, 960 (9th Cir. 2013).

In determining whether to consider an issue as barred on appeal, appellate courts consider "whether (i) Appellees had notice of the issue on appeal and (ii) whether Appellees have had the opportunity to fully brief the issue." *Chandler v. NDeX W., LLC*, 571 F. App'x 606, 607 (9th Cir. 2014) citing *Ahlmeyer v. Nev.*

Sys. of Higher Educ., 555 F.3d 1051, 1055 (9th Cir. 2009). When the appellee was aware of the contested issue and briefed it in its response brief, the appellee suffers no prejudice from consideration of the issue on appeal. *Chandler*, 571 F. App'x at 607.

Of course, when an argument is not fully briefed, or presented at all, to the circuit court, any consideration of the merits of the issue would be improper "both because the appellants may control the issues they raise on appeal, and because the appellee would have no opportunity to respond to it." This is because "an appellee is entitled to rely on the content of an appellant's brief for the scope of the issues appealed." *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004) quoting *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983).

That logic fails in this case, however, because Mr. Truskey did not frame Respondent's briefing. Here, Respondent chose to raise its view on the Religious Freedom Restoration Act as an issue and laid out its reasoning. Mr. Truskey replied, explaining how application of RFRA necessarily results in a finding that he was denied his right to exercise his religion. This placed the issue in controversy and before the Sixth Circuit. The failure to address the issue placed squarely before it was error. *See*, *e.g.*, *Hill v. TD Bank*, 586 F. App'x 874, 878 n.2 (3d Cir. 2014) (where appellant did not specifically appeal a particular adverse order, the appellate court could still consider it where appellee would not be prejudiced by consideration of

the issue because it had fully briefed the issue raised by the other order).

This Court should grant Mr. Truskey's Petition because Respondent itself placed the important issue of Mr. Truskey's religion before the Court. Mr. Truskey provided the Court of Appeals with full briefing in response to Respondent's decision to raise the RFRA issue. The important issue of a workers' religion should not be ignored when the government itself put the matter at issue.

B. This Court's Precedents Demonstrate That Employment Cannot Be Used to Deprive Individuals of Their Religious Beliefs

With the issue properly raised on appeal, the district's court's rejection of Mr. Truskey's RFRA claim should be reversed because Mr. Truskey adequately stated a claim for deprivation of his religious rights. Respondent agrees the RFRA is not displaced by Title VII as the sole remedy for an individual who has suffered religious-based employment discrimination, *see* App at C-27, providing Mr. Truskey with protection against the United States government placing a substantial burden on his religious liberty, *even if the burden results from a rule of general applicability*. *See* 42 U.S.C. § 2000bb-1(a) (emphasis added); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694 (2014) *quoting* 42 U.S.C. §§ 2000bb(a)(2) & (a)(4) (because "laws 'neutral' toward religion may burden religious exercise

as surely as laws intended to interfere with religious exercise," Congress enacted RFRA to overturn *Employment Div. v. Smith*, 494 U.S. 872 (1990), and to prohibit the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability."). The limitation applies broadly to all branches, departments, agencies, and instrumentalities of the federal government. *See* 42 U.S.C. § 2000bb-2(1).

Under RFRA, the federal government's substantial burden on a person's religious exercise is impermissible unless it can show the burden (1) furthers a compelling governmental interest, and (2) is the least restrictive means of furthering that interest. 42 U.S.C. §§ 2000bb-1(a)-(b). Applying RFRA, thus, imposes three questions: First, would the mandate substantially burden an exercise of religion? Second, if the mandate would impose such a burden, would it nevertheless serve a "compelling interest"? And third, if it serves such an interest, would it represent "the least restrictive means of furthering" that interest? *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, ___ U.S. ___, 140 S.Ct. 2367, 2389 (2020) (Alito, J., concurring); *see also Priests for Life v. United States HHS*, 808 F.3d 1, 15 (D.C. Cir. 2015) (same).

1. Respondent Cannot Show a Compelling Interest in Its SSN Policy As Applied to Mr. Truskey or That Its Blanket Requirement Is the Least Restrictive Means

Respondent did not dispute that its policy imposed a substantial burden on Mr. Truskey's religious exercise,[2] but it cannot meet the high burden of strict scrutiny to justify that burden. Once the objecting party has shown a substantial burden, the government must show that application of the burden to the individual (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling interest. 42 U.S.C. § 2000bb-1(b).

As the Eastern District of Kentucky explained:

> The test is one of "strict scrutiny" and invokes, in substantial part, the pre-[*Employment Div. v.] Smith* constitutional rubric. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 1220-21, 163 L.Ed. 2d 1017 (2006). Critically, the Government's showing must focus on justification as to the particular person burdened. Thus, "RFRA requires the Government to demonstrate that the compelling interest test is

[2] Nor could Respondent have successfully disputed the notion in light of Mr. Truskey's lifelong belief against the use of SSNs. *Cf.*, *e.g.*, *B.W.C. v. Williams*, 990 F.3d 614, 620 (8th Cir. 2021) ("Religious exercise is not burdened unless 'compliance cause[s] the objecting party to violate its religious beliefs, as it sincerely understands them[.]'") (brackets in original) quoting *Little Sisters of the Poor*, 140 S.Ct. at 2389 (Alito, J., concurring).

> satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* The second requirement, that the means of regulation be the least restrictive available to further the governmental interest, is an independent, rigorous hurdle. "The least-restrictive-means standard is exceptionally demanding." *Burwell*, 134 S.Ct. at 2780. The Supreme Court has categorized the dual justificatory burdens imposed on the Government by RFRA, "the most demanding test known to constitutional law." *City of Boerne [v. Flores]*, 117 S.Ct. [2157,] at 2171 [1997].

United States v. Girod, 159 F.Supp.3d 773, 778-79 (E.D. Ky. 2015) (brackets added).

a. Respondent Lacks a Compelling Interest in Using a SSN for Mr. Truskey As an Individual

Respondent cannot demonstrate a compelling interest in the use of a SSN for employing Mr. Truskey because it does not uniformly require the number to access government programs or to make government reports, even those relating to employment. In order to establish a compelling interest within the meaning of RFRA, the government must satisfy the test of *Sherbert v. Verner*, 374 U.S. 398 (1963), codified in the statute. In *Sherbert*, the Supreme Court held that "'[o]nly the gravest abuses, endangering paramount interest'" could "'give occasion for [a] permissible limitation'" on

the free exercise of religion. *Little Sisters of the Poor*, 140 S.Ct. at 2392 (Alito, J., concurring) quoting *Sherbert*, 374 U.S. at 406. Accordingly, a compelling interest in a particular requirement exists only when the government can "show that it would commit one of 'the gravest abuses' of its responsibilities if it did not" impose the requirement. *Little Sisters of the Poor*, 140 S.Ct. at 2392 (Alito, J., concurring).

i. The Numerous Exceptions to a SSN Requirement Show It Is Not Necessary for Respondent to Function

The compelling interest question may be resolved by asking whether Congress has applied the provision to all persons. *Little Sisters of the Poor*, 140 S.Ct. at 2392 (Alito, J., concurring). ("We can answer the compelling interest question simply by asking whether *Congress* has treated the provision of free contraceptives to all women as a compelling interest.") (emphasis in original). Because "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited," *Id.* quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547, 113 S.Ct. 2217, 124 L.Ed. 2d 472 (1993), courts must consider the "exceptions" to an asserted "rule of general applicability" in considering whether Congress has manifested the view that it has a compelling interest in a particular requirement. *Little Sisters of the Poor*, 140 S.Ct. at 2392 (Alito, J., concurring) quoting *Gonzales*, 546 U.S.

at 436. Where a rule provides significant exceptions to its general provision, it does not indicate a compelling interest. *Little Sisters of the Poor*, 140 S.Ct. at 2392 (Alito, J., concurring). This is as true in the employment setting as in other settings. *Id.* at 2392-93 (Affordable Care Act did not show compelling interest in employers providing birth control where many employers were excluded for various reasons).

The Internal Revenue Code provides an exception for failure to report information by SSN when the "failure is due to reasonable cause and not to willful neglect." 26 U.S.C. § 6724(a). This exception has permitted Mr. Truskey to work without a SSN in employment outside of the federal government, reflecting the lack of necessity for a SSN. Similarly, the government has acknowledged that it need not use a personal identifier that would impede on individual rights. The Privacy Act permits agencies only to maintain information that is "relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. § 552a. The Internal Revenue Code, as stated, however, does not require Respondent to use a SSN where Mr. Truskey has good cause not to have one. Similarly, Executive Order 13478 states that Federal agencies shall conduct their activities involving personal identifiers in a manner protecting against unlawful use, while Executive Order 13583 provides a commitment to employing individuals of all

backgrounds by removing barriers to recruiting, hiring, and retaining individuals of diverse backgrounds.[3]

Respondent expresses concern about complying with Social Security Administration requirements, but that agency expressly tells employers not to take adverse action against employees who lack a valid SSN:

> If the employee is unable to provide a valid SSN, you are encouraged to document your efforts to obtain the correct information. (Documentation should be retained with payroll records for a period of three (3) years.) . . . A mismatch is not a basis, in and of itself, for you to take any adverse action against an employee, such as laying off, suspending, firing or discriminating. . . . Any employer that uses the failure of the information to match SSA records to take inappropriate adverse action against a worker may violate State or Federal law.

See https://www.ssa.gov/employer/ssnvshandbk/failedSSN.htm (last visited Nov. 6, 2022). Mr. Truskey's information would not even create a mismatch, however. Instead, submission of either his IRSN or statement that he lacked a SSN would match SSA's records.

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[3] The Government once required SSNs. Executive Order 9397 as issued by President Franklin Delano Roosevelt in 1943 required agencies to "utilize exclusively the Social Security Act account numbers . . . ," *see* E.O. 9397 § 1, but Executive Order 13478 amended Executive Order 9397 by striking the word "shall," substituting the word "may," and striking the word "exclusively." *See* E.O. 13478 § 2(a). Thus, use of SSNs in government employment is permissive rather than mandatory.

Respondent's claim that it must provide a SSN to comply with E-Verify requirements also fails. The I-9 form required for newly hired employees contemplates employees who lack SSNs: "Providing your 9-digit Social Security number is voluntary on Form I-9 unless your employer participates in E-Verify. If your employer participates in E-Verify and: (1) You have been issued a Social Security number, you must provide it in this field; or (2) You have applied for, but have not yet received a Social Security number, leave this field blank until you receive a Social Security number." *See* https://www.uscis.gov/sites/default/files/document/forms/i-9instr.pdf (last visited Nov. 6, 2022).

Mr. Truskey, of course, will never have a SSN, but that is no bar to employment because the implementing statute merely requires employers to verify employment eligibility by reviewing a Social Security card *or* any other document authorized by regulation from the Attorney General. *See* 8 U.S.C. 1324a(a)(1)(A)-(B), (b)(1)(C). The regulation provides that employment status may be verified by documentation including a Social Security card *or* United States passport *or* birth certificate. 8 C.F.R. § 274a.2(a)(2), (b)(1)(ii), and (b)(1)(v)(A)(1) and (C)(1)-(3). Mr. Truskey has a United States passport that, by itself, is sufficient to establish both his identity and his employment eligibility, 8 C.F.R. § 274a.2(b)(1)(v)(A)(1), as well as both a driver's license[4] and a birth certificate, which are sufficient

[4] Mr. Truskey had no trouble obtaining a driver's license without a SSN. The Kentucky Transportation Cabinet has a Religious Exemption Affidavit for that exact purpose. *See* https://

proof of employment eligibility. 8 C.F.R. § 274a.2(C)(1)-(3).

Respondent's concerns regarding unemployment are similarly misplaced. Mr. Truskey corresponded with the unemployment agency regarding that issue and learned that he is covered so long as his employer pays into the system.[5]

ii. Respondent Has No Specific Interest in Mr. Truskey, Individually, Having a SSN

Regardless, this generalized inquiry ignores the individualized analysis required by RFRA. Rather than a general interest, the analysis must focus on whether the government has a compelling interest in requiring Mr. Truskey specifically to have a SSN. *See Girod*, 159 F.Supp.3d at 781 ("rather, the Court must judge whether, as to Samuel Girod, the United States has proven a compelling interest servable only by the manner of USMS photography sought. RFRA's focus on 'the person' at issue requires an assessment 'beyond broadly formulated interests' and searching scrutiny of 'the asserted harm of granting specific exemptions to particular religious claimants.' *Gonzales*, 126 S.Ct. at 1220."); *see also U.S. Navy Seals 1-26 v. Biden*, No. 22-10077, 2022 U.S. App. LEXIS 5262, at * 30-31 (5th Cir.

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transportation.ky.gov/Organizational-Resources/Forms/TC%2094-161.pdf (last visited Nov. 6, 2022).

[5] The subject email exchange was not part of the record below but can be provided should the Court want to see it.

Feb. 28, 2022) ("The question, then, is not whether [the Navy has] a compelling interest in enforcing its [vaccination] policies generally, but whether it has such an interest in denying an exception to [each Plaintiff]."") (brackets in original) quoting *Fulton v. City of Philadelphia*, 593 U.S. ___, 141 S.Ct. 1868, 1881 (2021).

In *Girod*, the Eastern District of Kentucky found that the government lacked a compelling interest in requiring an Amish person subject to post-conviction supervision to violate his sincerely held belief in not intentionally submitting to photography in violation of the commandment against graven images. The court noted that Girod had done everything required of him and had shown no individual traits making him likely to abscond. *Girod*, 159 F.Supp.3d at 781-83.

Similarly here, Respondent lacks a compelling interest in requiring Mr. Truskey to obtain a SSN in direct violation of his sincerely held religious beliefs. Respondent never claimed it had a compelling interest in applying the SSN to Mr. Truskey as an individual. It relied upon various statutes and cases asserting interests in preventing fraud and complying with obligations relating to immigration, child support, and taxes, but it failed to address how any of those concerns relate to Mr. Truskey. He has submitted new-hire paperwork for every employer he ever had, he has a US Passport, he has no children, and he pays taxes every year using his IRSN. Respondent did not assert an individual interest in requiring a SSN from Mr. Truskey because it had none.

Respondent will not violate any other law because SSNs are permissive and excused for good cause. Nor will Respondent face any great difficulty in tracking Mr. Truskey's work performance, wages, or benefits. He has agreed to comply with any reasonable work around for the SSN requirement, meaning his individual circumstances do not comport with the government's generalized interest in a tracking system by SSN.

b. The SSN Requirement Is Not the Least Restrictive Means to Carry Out the Government's Interest

Even if Respondent could satisfy the compelling interest requirement, it cannot demonstrate that requiring Mr. Truskey to obtain a SSN is the least restrictive means of furthering that interest. The least restrictive means test is an "exceptionally demanding" standard that requires Respondent to "sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion." *Little Sisters of the Poor*, 140 S.Ct. at 2394 (Alito, J., concurring) quoting *Burwell*, 573 U.S. at 728 & citing *Holt v. Hobbs*, 574 U.S. 352, 365 (2015) ("[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it."). The government must take whatever action is necessary to avoid substantially burdening a religious belief in violation of the RFRA. *Little Sisters of the Poor*, 140 S.Ct. at 2395 (Alito, J., concurring) ("RFRA does not specify the precise manner in which a violation must be remedied; it simply instructs the Government to avoid

'substantially burden[ing]' the 'exercise of religion' – *i.e.*, to eliminate the violation."); *see also id.* ("Thus, in *[Burwell v.] Hobby Lobby*, once we held that application of the mandate to the objecting parties violated RFRA, we left it to the Departments to decide how best to rectify this problem. *See* 573 U.S. at 736.").

To the extent Respondent made any reference to the means of enforcement, it argued simply that exempting Mr. Truskey from the SSN requirement is "impossible" because Respondent's wage processing system requires a SSN. That is not a satisfactory response to the RFRA burden, however. *See Girod*, 159 F.Supp.3d at 783; *see also U.S. Navy Seals 1-26*, 2022 U.S. App. LEXIS 5262, at * 31 ("RFRA 'demands much more[]' than deferring to 'officials' mere say-so that they could not accommodate [a plaintiff's religious accommodation] request.'") (brackets in original) quoting *Holt*, 574 U.S. at 369.

The least restrictive means test requires the government "to show a degree of situational flexibility, creativity, and accommodation when putative interests clash with religious exercise." *Girod*, 159 F.Supp.3d at 783. This may include changes or improvements to an agency's technological capabilities. *Id.* (where individual had sincere religious objection to sitting for a photograph, Marshals Service should rely on images from courthouse cameras and "[i]f the cameras' or systems' technical limits present obstacles to making, keeping, or preserving an adequate image, the Marshal may need to augment or improve its technical capabilities when faced with this rare objection."). It is irrelevant

that such changes may impose costs on the agency to accomplish the accommodation. *Id.* citing *Burwell*, 573 U.S. at 730 ("both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs").

Mr. Truskey has stated that he was able to work as an apprentice for Respondent and has been able to work for other employers without problem. A quick Google search reveals numerous other payroll processing applications available and Mr. Truskey has offered to engage in any process needed other than obtaining a SSN to help Respondent accommodate him. It strains credulity to assert that the federal government could not employ some other payroll system or some process in conjunction with its existing payroll system to accommodate the rare situation presented by Mr. Truskey. The accommodation may require effort and resources, but it is not impossible. Thus, because Respondent has not shown the absence of other alternatives, its arguments fail and this Court should grant Certiorari to review the decision of the District Court dismissing the RFRA claim should be reversed. *See Girod*, 159 F.Supp.3d at 783 (where objector had no problem with unwitting photographs, existence of iPhones and courthouse camera footage provided less restrictive means to requirement of sitting for photographs).

II. THE LOWER COURTS ERRED IN HOLDING THAT MR. TRUSKEY COULD NOT STATE A TITLE VII CLAIM WHERE HE HAD A VALID IDENTIFICATION NUMBER THAT WOULD NOT CAUSE RESPONDENT TO VIOLATE FEDERAL LAW

This Court also should review the lower courts' conclusion that Mr. Truskey failed to state a Title VII claim since employing him with a valid substitute for a SSN would not violate federal law. Thus, Respondent's objection to Mr. Truskey's lack of a SSN was purely based on its objections to his religious beliefs, which easily could be accommodated since his substitute number followed the same format as a SSN. The Court of Appeals dismissed Mr. Truskey's claim without any Title VII analysis relying on its decision in *Yeager v. FirstEnergy Generation Corp.*, 777 F.3d 362 (6th Cir. 2015) (per curiam), which affirmed dismissal of a lawsuit arising from an employee's termination by a private employer for lacking a SSN because of his sincerely held religious beliefs.

In *Yeager*, as in this case, the Sixth Circuit noted that "[t]he Internal Revenue Code requires employers such as FirstEnergy to collect and provide the social security numbers of their employees." *Id.* citing 26 U.S.C. § 6109(a)(3), (d). Based on that, the Court adopted the reasoning of *EEOC v. Allendale Nursing Centre*, 996 F.Supp. 712 (W.D. Mich. 1998), in holding that "collection of Yeager's social security number is a 'requirement imposed by law.'" *Yeager*, 777 F.3d at 363-64; *see also Allendale*, 996 F.Supp. at 717 (holding employee

was wrong in believing she did not need a SSN because she was ineligible for other types of identifying numbers and she received an Internal Revenue Service Number on only a temporary basis until she obtained a SSN).

The Internal Revenue Code provides that: "The social security account number issued to an individual for purposes of section 205(c)(2)(A) of the Social Security Act shall, except as shall otherwise be specified under regulations of the Secretary, be used as the identifying number for such individual for purposes of this title." 26 U.S.C. § 6109(d). The IRS provides various other identifying numbers in its regulations, however. In this instance, Mr. Truskey has been issued an Internal Revenue Service Number that, while nominally temporary, he has used for employment and tax filing since he learned it was an option in 2014 or 2015. The IRSN is in the same nine-digit format as a SSN, such that Respondent would not even need to alter its payroll system to add Mr. Truskey.

Still, the *Allendale* court dispensed with the argument that the Social Security Number requirement could be waived. The Internal Revenue Code provides that "[n]o penalty shall be imposed under this part with respect to any failure if it is shown that such failure is due to reasonable cause and not to willful neglect." 26 U.S.C. § 6724(a). The court held that nothing indicated "that the waiver provision was put in place to benefit the employee who caused the penalties pursuant to section 6723 to be imposed." The Sixth Circuit in *Yeager* adopted that conclusion from *Allendale*,

which the district court relied on in this litigation. *See* App. 21 (stating *Yeager's* adoption of *Allendale* opinion foreclosed Mr. Truskey's argument). The underlying holding and its application to this matter are incorrect, however.

The district court stated that the Internal Revenue Code does not define either reasonable cause or willful neglect, *see* App. at 21, but those terms are defined. Reasonable cause exists to waive the penalty when either (1) significant mitigating factors exist and the filer acted in a responsible manner, or (2) the failure arose from events beyond the filer's control and the filer acted in a responsible manner. *See* 26 C.F.R. §§ 301.6724-1(a)(2)(i), (ii).

Respondent qualifies for a reasonable cause penalty waiver under both exceptions. First, it meets the mitigating factors requirement because, presumably, it has a history of complying with the information reporting requirement regarding identifying employees by SSN. *See* 26 C.F.R. § 301.6724-1(b). Second, this situation arose from events beyond Respondent's control either because it relied on written instructions from the IRS in that Mr. Truskey presented the letters regarding his lack of a SSN but possession of the Internal Revenue Service Number under which he had worked for other employees and filed taxes, *see* 26 C.F.R. § 301.6724-1(c)(4), or because it relied on the actions of the payee (here, Mr. Truskey) in that he failed to provide it with the required information (a SSN) to meet the reporting requirement. *See* 26 C.F.R.

§ 301.6724-1(c)(6)(i). Respondent met the acting-in-a-responsible-manner element under both tests because it exercised reasonable care to determine its filing obligations and communicated with Mr. Truskey in an attempt to remove the impediment. *See* 26 C.F.R. §§ 301.6724-1(d)(1)(i), (ii)(C).

Respondent would not violate any federal law by employing Mr. Truskey. The Internal Revenue Code mandates a SSN except when an exception applies and, here, such an exception is applicable. Thus, no violation occurs – just as one who shoots someone in self-defense does not violate the murder statute. Nor is Mr. Truskey seeking to benefit from a penalty he created. He lacked a SSN well before he encountered Respondent and no employer suffered a penalty as a result. He did not create a penalty because his employers were, at all times, exempted from the penalty requirement.

Respondent could submit its payroll and file its tax reports for Mr. Truskey just as it did for any other employee on its payroll. He was no different than any other employee except in the formalistic sense that his identifying number was titled an "Internal Revenue Service Number" instead of a SSN. In the absence of any statutory violation, the *Yeager/Allendale* analyses are inapplicable. As such, this Court should grant the Petition and instruct the Circuit Court to perform a substantive Title VII analysis.

CONCLUSION

The Petition for Writ of Certiorari should be *granted*.

Respectfully submitted,

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