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NOT RECOMMENDED FOR PUBLICATION
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No. 21-5821

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

BRIAN A. TRUSKEY, Plaintiff-Appellee, v. THOMAS J. VILSACK, Secretary, United States Department of Agriculture, Defendant-Appellant.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY OPINION (Filed Aug. 19, 2022)

Before: BATCHELDER, CLAY, and LARSEN, Circuit Judges.

CLAY, Circuit Judge. Plaintiff Brian A. Truskey appeals from the district court's order granting the motion to dismiss of Defendant Thomas J. Vilsack, Secretary of the United States Department of Agriculture ("USDA;" "Agency"), in this case alleging religious discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-2(1). For the reasons set forth below, this Court **AFFIRMS**.

I. BACKGROUND

A. Factual Background

Plaintiff Truskey, a resident of Kentucky, is a member of a small family church with beliefs similar to messianic Judaism but differing in the view that Scripture prohibits the use of a social security number ("SSN"). Plaintiff believes that identification by number, including a SSN, causes him to be besmeared with the "mark of the beast," per *Revelation* 13:17 ("[T]hat no man should be able to buy or to sell, save he that hath the mark, even the name of the beast or the number of his name.") and 1 *Chronicles* 21:1-8 ("Satan . . . incited David to number Israel."). Plaintiff's parents, adherents to the same belief, never applied for a SSN for Truskey when their son was born. Plaintiff has retained credence in this faith into adulthood and has never had a SSN.

In the latter part of 2014, Truskey began volunteering as a communications apprentice at a USDA-administered recreation area in Kentucky. Plaintiff soon earned certification to become employed as a wildland firefighter with the Forest Service, an agency of the USDA. Unfortunately for Truskey, he learned that switching from a volunteer position to federal employment required supplying a social security number. To that point, a representative of the USDA emailed Plaintiff on June 15, 2015: "[T]here is no exception to the requirement to have a[ ] SSN in order to be hired under the [administratively determined pay plan]." (ALJ Order, R. 19-1, PageID # 148). The reason for this

requirement is simple: the Agency's payroll system, called the administratively determined pay plan ("ADPP"), is compatible only with SSNs; without that numerical identifier, the USDA cannot issue an employee's salary. Alternative forms of identification (such as an individual tax number or employer identification number) are not accepted on the ADPP; these alternatives are also not accepted on the electronic filing form that the USDA submits to the Internal Revenue Service ("IRS"). Ultimately, on November 24, 2015, the USDA confirmed the thrust of its June missive: it could not enroll Truskey in its pay plan without a SSN, thereby ending Plaintiff's hopes for federal employment as a wildland firefighter.

B. Procedural History

After contacting an Equal Employment Opportunity Commission ("EEOC") counselor in January 2016, Truskey filed an administrative complaint with the USDA alleging religious discrimination in employment. After numerous administrative appeals and remands, on December 17, 2018, an EEOC administrative law judge issued an order of dismissal in favor of the USDA for untimeliness[1] and failure to state a claim.

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[1] The ALJ first noted that for a claim to be timely, an aggrieved party must initiate contact with an EEOC counselor within forty-five days of the alleged discriminatory action, 29 C.F.R. § 1614.105(a)(1); it then held: "Complainant's initial EEO counselor contact on January 25, 2016, was untimely because he delayed contacting an EEO counselor for nearly *six* months after

Plaintiff then brought his claim to federal court and filed a pro se complaint on April 12, 2019. After a period of inactivity, and after Plaintiff's counsel entered an appearance, the district court ordered Truskey to file an amended complaint, now with the benefit of counsel. The two-count amended complaint was filed on October 13, 2020, and alleged violations of Title VII and the RFRA. Defendant moved to dismiss. For purposes of that motion only, Defendant did not contest the sincerity or validity of Plaintiff's religious perspective concerning social security numbers and Scripture. The district court granted the motion to dismiss for failure to state a claim, making three holdings: (1) Truskey had constructive notice of the forty-five day filing requirement for making an administrative complaint of employment discrimination, sufficient to trigger the statute of limitations; (2) the Title VII claim failed on the merits pursuant to *Yeager v. FirstEnergy Generation Corp.*, 777 F.3d 362, 363-64 (6th Cir. 2015); and (3) relief under the RFRA was unavailable because Title VII provides the exclusive remedy for claims of discrimination in federal employment. Plaintiff's timely appeal to this Court followed.

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he first received the Agency's June 15, 2015 email informing him of the Agency's SSN collection obligation." (ALJ Order, R. 19-1, PageID # 150).

II. DISCUSSION

A. Standard of Review

This Court reviews the district court's dismissal of a complaint *de novo*. *Zaluski v. United Am. Healthcare Corp.*, 527 F.3d 564, 570 (6th Cir. 2008). A motion to dismiss is properly granted if the plaintiff has "fail[ed] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Accordingly, to survive a motion to dismiss, a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This Court "must accept all well-pleaded factual allegations of the complaint as true and construe the complaint in the light most favorable to the plaintiff." *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 619 (6th Cir. 2002) (citing *Turker v. Ohio Dep't of Rehab. & Corr.*, 157 F.3d 453, 456 (6th Cir. 1998)).

B. Analysis

1. Title VII

Title VII prohibits employers from discriminating against "any individual with respect to his compensation, terms, conditions, or privileges of employment" because of his membership in a protected class, which includes religious groups. 42 U.S.C. § 2000e-2(a)(1). Section 2000e(j) of Title 42 defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance

or practice without undue hardship on the conduct of the employer's business." The EEOC guidelines add more: "The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee." 29 C.F.R. § 1605.1.

In reviewing a Title VII religious accommodation claim, this Court employs a two-step, burden-shifting framework. *Tepper v. Potter*, 505 F.3d 508, 514 (6th Cir. 2007). First, an aggrieved party must establish a prima facie case of religious discrimination by showing he (1) holds a sincere religious belief that conflicts with an employment requirement; (2) has informed the employer about said conflict; and (3) suffered an adverse employment outcome for failing to comply with the conflicting employment requirement. *Id.* Second, once a prima facie case is made out, the employer must demonstrate that it could not "reasonably accommodate" the employee's religious beliefs without incurring an undue hardship or burden on its business. *Id.*; 42 U.S.C. § 2000e(j). Otherwise said, an employer escapes liability upon a showing that accommodating a religious belief would result in an undue hardship.

Job applicants whose religious beliefs reject the use of social security numbers as marks of the beast routinely bring Title VII claims. The leading "mark of the beast" case in our Circuit is *Yeager v. FirstEnergy Generation Corp.*, 777 F.3d 362 (6th Cir. 2015), where the plaintiff, a Fundamentalist Christian, renounced

his SSN as contrary to Scripture; as such, he failed to supply the numerical identifier in connection with his internship application. *Yeager v. FirstEnergy Generation Corp.*, No. 5:14-CV-567, 2014 WL 2919288, at *1 (N.D. Ohio, June 27, 2014). Without a social security number, the *Yeager* plaintiff was unable to assume the internship, prompting him to sue his would-be employer for religious discrimination. The district court granted the defendant's motion to dismiss, and this Court affirmed. We noted that the Internal Revenue Code obligates employers to collect and report employees' SSNs. As a result, the employer could not be held liable under Title VII when accommodating religious beliefs would require violating federal law. *Yeager*, 777 F.3d at 363 ("This conclusion is consistent with Title VII's text, which says nothing that might license an employer to disregard other federal statutes in the name of reasonably accommodating an employee's religious practices.").

Yeager joined the Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits in finding that an employee's aversion to social security numbers as marks of the beast does not require an employer to violate federal law merely to accommodate the employee's beliefs. *Baltgalvis v. Newport News Shipbuilding, Inc.*, 15 F. App'x 172, 173 (4th Cir. 2001) (per curiam) (affirming on the reasoning of the district court's order); *Seaworth v. Pearson*, 203 F.3d 1056, 1057 (8th Cir. 2000); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 829-31 (9th Cir. 1999); *Weber v. Leaseway Dedicated Logistics, Inc.*, 166 F.3d 1223 (10th Cir. 1999); *Hover v.*

Florida Power & Light Co., 101 F.3d 708 (11th Cir. 1996) (affirming on the reasoning of the district court's order). The only significant difference between this Court's decision in *Yeager* and those of our sister Circuits is that we declined to specify on what step of the two-part Title VII burden-shifting framework our rationale rested.[2] *Yeager*, 777 F.3d at 364 (refraining from deciding whether plaintiff failed to make out a step one prima facie case, or, under step two, the employer showed that violating a federal statute would impose undue hardship).

Reviewing the case *sub judice*, the district court found that *Yeager* squarely foreclosed Truskey's Title VII claim. Plaintiff asks this Court to reverse. The question is whether the district court erred in holding that Defendant did not violate one law (Title VII) by complying with another (the Internal Revenue Code).

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[2] Some courts have rejected a Title VII, mark of the beast lawsuit under the first step of the two-part test; these courts find that the employee or applicant is unable to make out a prima facie case because an employer's statutory obligation to supply the IRS with employees' SSNs is not an "employment requirement." *Baltgalvis v. Newport News Shipbuilding, Inc.*, 132 F. Supp. 2d 414, 418 (E.D. Va. 2001); *see id.* ("Ms. Baltgalvis was discharged not because of a NNS employment requirement, but because of a requirement of federal law."); *Seaworth*, 203 F.3d at 1057 ("[T]he IRS, not defendants, imposed the requirement that Seaworth provide an SSN.") (citing 27 U.S.C. § 6109). Other courts assess the viability of a Title VII mark of the beast lawsuit under step two, holding that violating a federal statute would impose an "undue hardship" on the employer. *Sutton*, 192 F.3d at 830-31; *Weber*, 166 F.3d at 1223. The Sixth Circuit in *Yeager* resolved the question in favor of the employer without deciding whether it was properly a step one or step two question.

This Court affirms the dismissal of Plaintiff's Title VII claim.

"Every circuit to consider the issue has applied one of the above two steps to hold that Title VII does not require an employer to reasonably accommodate an employee's religious beliefs if such accommodation would violate a federal statute." *Yeager*, 777 F.3d at 363; *see also Baltgalvis*, 132 F. Supp. 2d at 419 ("Courts have consistently agreed that an employer is not liable under Title VII when accommodating an employee's religious beliefs would require the employer to violate federal or state law."). As in *Yeager*, the relevant law in this case is the Internal Revenue Code, which instructs employers to collect and provide the SSNs of their employees. Specifically, the regulation instructs employers to "include in any such return, statement, or other document, such identifying number as may be prescribed for securing proper identification of such [employee]." 26 U.S.C. § 6109(a)(3). For purposes of that reporting obligation, the regulation continues: "The identifying number of an individual . . . shall be such individual's social security account number." *Id.* § 6109(a); *see also id.* § 6109(d).

An "employer is not liable under Title VII when accommodating an employee's religious beliefs would require the employer to violate federal . . . law." *Yeager*, 777 F.3d at 363 (quoting *Sutton*, 192 F.3d at 830). In the instant case, Plaintiff's disavowal of social security numbers would cause the Agency to violate the Internal Revenue Code. Circuit precedent forecloses the merits of this argument; an employer cannot be

required to intentionally violate a federal regulation – and subject itself to potential penalties – in order to accommodate an employee's religious belief. Because Defendant cannot be found liable for a Title VII violation for complying with federal law, we find that the district court did not err in dismissing the amended complaint. Thus, "we affirm the district court's conclusion without deciding whether it is properly a step-one or step-two question."[3] *Id.* at 364. Consequently, we need not reach the equitable tolling question of whether Plaintiff has presented a sufficient reason to excuse his failure to timely file an administrative complaint. *McFarland v. Henderson*, 307 F.3d 402, 406 (6th Cir. 2002) (noting that regulatory exhaustion is not a jurisdictional prerequisite); *Hill v. Nicholson*, 383 F. App'x 503, 508 (6th Cir. 2010) ("We [may] decline to address the question of exhaustion [where] we are able to dispose of these claims on the merits.").

2. RFRA

To make out a prima facie case under the RFRA, an individual must show that the government policy

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[3] This Court declines Plaintiff's invitation to find that *Yeager* was incorrectly decided. *Sykes v. Anderson*, 625 F.3d 294, 319 (6th Cir. 2010) (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) ("This panel is without authority to overrule binding precedent[ ] because a published prior panel decision 'remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.' ")).

imposed a substantial burden on his religious exercise. 42 U.S.C. § 2000bb(b)(2); 42 U.S.C. § 2000bb-1(c). Upon such a showing, the burden then shifts to the government to show that applying that burden on the individual furthers a compelling state interest and is the least restrictive means of furthering that interest. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014).

In this case, the district court did not reach the merits of the RFRA claim; instead, it dismissed Truskey's RFRA claim, finding that Title VII provides the exclusive remedy for allegations of discrimination in federal employment. This finding was in accordance with caselaw from the Third and Eighth Circuits. *See Francis v. Mineta*, 505 F.3d 266, 272 (3d Cir. 2007) ("It is equally clear that Title VII provides the exclusive remedy for job-related claims of federal religious discrimination, despite Francis'[] attempt to rely upon the provisions of RFRA."); *Harrell v. Donahue*, 638 F.3d 975, 983 (8th Cir. 2011) ("Harrell's claims under RFRA are barred because Title VII provides the exclusive remedy for his claims of religious discrimination.").

In his opening brief on appeal, Truskey challenged only the district court's discussion of entitlement to relief under Title VII; he did not address the basis of the district court's dismissal of his claim under the RFRA – i.e., the finding that Title VII is a comprehensive remedial scheme such that it precludes the attempt to obtain parallel relief under the RFRA. Because Truskey did not raise this issue until his reply brief, he has abandoned that claim on appeal. *Hills v. Kentucky*, 457

F.3d 583, 588 (6th Cir. 2006) (finding forfeited any issues not contained in the opening brief); *Stewart v. IHT Ins. Agency Grp., LLC*, 990 F.3d 455, 456 (6th Cir. 2021) (citing *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018)) ("[E]ven well-developed arguments raised for the first time in a reply brief come too late.").

The issue of forfeiture aside, 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. Truskey and the USDA urge this Court to find instead that Title VII does not preempt a RFRA claim for employment discrimination arising in the federal sector. Even if this claim were preserved, it would be ill-advised for this Court to decide this question of unsettled statutory and constitutional law on the basis of an argument not subjected to developed adversarial briefing. We dispose of this matter on the single preserved and dispositive issue under Title VII.

III. CONCLUSION

For these reasons, this Court **AFFIRMS** the district court's grant of Defendant's motion to dismiss Plaintiff's first amended complaint.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Brian A. Truskey, **Plaintiff**

v. **No.: 5:19-cv-51-BJB**

Sonny Perdue, Secretary, United States Department of Agriculture, **Defendant**

* * * * *

MEMORANDUM OPINION AND ORDER

(Filed Jul. 30, 2021)

Brian Truskey obtained an apprenticeship with the Land Between the Lakes National Recreation Area, part of the United States Department of Agriculture, in August 2014. First Amended Complaint (DN 24) ¶ 13. Soon after, the USDA certified him as a Type 2 Wildland Firefighter, a credential Truskey believed would help him become a full-time USDA employee. FAC ¶¶ 16-17. But USDA did not make him an employee because its policy required all full-time employees to provide valid social security numbers. FAC ¶ 17. Truskey does not have a social security number because he belongs to a small church that believes the numbers are the "mark of the beast" described in the Bible. MTD Opp. (DN 26) at 2 (citing Revelation 13:17 and 1 Chronicles 21:1-8). He alleges that he could not get one without seriously violating his religious convictions, FAC ¶¶ 8-10, and that USDA discriminated

against him on the basis of his religion by not accommodating this aspect of his beliefs, *id.* at ¶¶ 36-40.

Truskey first contacted the USDA about his religious beliefs and their effect on his employment status on May 12, 2015. Complainant's Affidavit (DN 13-1) ¶ 10. USDA declined to provide an exemption from its requirement on June 15. *See* Administrative Order (DN 19-1) at 4. Nevertheless, Truskey engaged in mediation with the agency and alleges that he continued to expect the USDA to offer him an exemption, as private sector employers had done in the past. FAC ¶¶ 11-12. But on November 24, 2015 the USDA informed him that it could not enroll him in its Pay Plan without a social security number, effectively barring him from employment. *See* EEO Counselor Report (DN 16-1).

The USDA instructed Truskey that he could file objections to its decision with the EEOC. *See* Administrative Order at 4-5. He contacted an EEO counselor, but not until after the 45-day time limit to report employment discrimination claims against the federal government had expired. *Id.* at 6. After further correspondence with the counselor, he filed a formal EEOC complaint. But an Administrative Judge dismissed it – both because Truskey failed to initiate contact with an EEO counselor within 45 days of the incident and because he failed to state a cognizable Title VII claim. *Id.* at 3-6, 6-7.

He filed this lawsuit against USDSA shortly after that dismissal, maintaining that the Secretary violated Title VII and the Religious Freedom Restoration

Act by denying him employment without accommodating his religious beliefs.[1] FAC ¶¶ 27-34, 36-40. He filed his complaint *pro se* on April 12, 2019, DN 1, and the Court granted his motion to proceed in forma pauperis two weeks later, DN 7. On June 25, the Court ordered the US Marshal to serve process on the Secretary and the United States. DN 9. The Marshal initially failed to properly serve the United States, but Truskey corrected the defect on October 7. DN 13-6. An attorney entered an appearance for Truskey – but not until after the Court forwarded the *pro se* complaint to the U.S. Marshal to effect service.

The Secretary filed this motion to dismiss Truskey's complaint on multiple grounds: exhaustion, service of process, and the failure to plead all elements of his RFRA and Title VII claims Motion to Dismiss (DN 25). To survive a motion to dismiss, a claim must be "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), because it contains "'either direct or inferential allegations respecting all material elements' necessary for recovery under a viable legal

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[1] Truskey's initial complaint (DN 1) alleged that the Secretary violated the First Amendment, 8 U.S.C. § 1324(a), 5 U.S.C. § 552a, 42 USC § 408(a)(8), 26 USC § 6724(a), "Executive Orders 13583 9397 as amended by Executive Order 13478," and "20 CFR 411.103," in addition to RFRA and Title VII. DN 1 at 4. The only allegations remaining in his First Amended Complaint (DN 24), however, are RFRA and Title VII violations. DN 24 ¶¶ 26-40. All references to other authorities in his briefing appear intended only to support these claims rather than to espouse separate theories of recovery. Because Truskey removed all other allegations from his First Amended Complaint, the Court only addresses his RFRA and Title VII claims.

theory." *Phila. Indem. Ins. Co. v. Youth Alive, Inc.*, 732 F.3d 645, 649 (6th Cir. 2010) (quoting *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 274 (6th Cir. 2010)). Courts must accept these factual allegations as true, but needn't accept a plaintiff's mere legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Service of Process. Truskey had to serve both the Secretary and the United States because he is suing the Secretary in his official capacity as United States officer. Fed. R. Civ. P. 4(i)(2). The government doesn't challenge Truskey's timely service of the Secretary. But it contends Truskey failed to properly serve the United States within 90 days after filing his complaint. *See* Motion to Dismiss at 22. If proper service does not occur "within 90 days after the complaint is filed, the court . . . must dismiss the action without prejudice against that defendant or order that service be made within a specified time." Fed. R. Civ. P. 4(m).

District courts may, in their discretion, extend the deadline for service, but only if plaintiffs show "good cause" for the delay. *See Stapleton v. Vicente*, No. 5:18-cv-504, 2021 WL 1234636, at *2 (E.D. Ky. Mar. 31, 2021) (citing *Habib v. General Motors Corp.*, 15 F.3d 72, 73 (6th Cir. 1994)). To demonstrate "good cause," plaintiffs must show that the delay was "the result of excusable neglect." *Turner v. City of Taylor*, 412 F.3d 629, 650 (6th Cir. 2005). Neglect means "a simple, faultless omission to act, or because of [his] carelessness." *Id.* Whether the neglect is excusable rests on a court's evaluation of factors including "(1) the danger of prejudice to the non-moving party, (2) the length of delay

and its impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant and (4) whether the movant acted in good faith." *Stapleton*, 2021 WL 1234636, at *2 (alterations adopted). This standard "must be construed leniently with regard to *pro se* litigants." *Habib*, 15 F.3d at 74.

Truskey showed good cause for his failure to timely serve the United States. Consistent with this Court's order (DN 9) and 28 U.S.C. § 1915(d), Truskey reasonably relied on the U.S. Marshal to serve the United States. But for reasons that aren't clear from the record, the Marshal did not serve the United States. Truskey didn't discover this until "Truskey got counsel," who "noticed that the Marshal had only served the individual Defendants." MTD Opp. at 3. And when counsel did discover the omission, he promptly "set out to serve the US Attorney and the Attorney General." *Id.*

This delayed discovery and service – "a simple, faultless omission to act" – was excusable neglect. *See Turner*, 412 F.3d at 650. This is especially true in light of his *pro se* status at the outset of the litigation. The Sixth Circuit has expressly recognized that a "failure of the clerk and the Marshals Service to accomplish their respective duties to issue and serve process for plaintiff proceeding in forma pauperis constitutes a showing of good cause." *Byrd v. Stone*, 94 F.3d 217, 220 (6th Cir. 1996). Truskey's delayed service while proceeding *pro se* was likewise excusable. It did not prejudice the Secretary, who had actual notice of the

litigation within 90 days after Truskey's filing of the complaint. Nor did it significantly delay these proceedings, because the defect in service was discovered reasonably soon after the 90-deadline. Finally, Truskey's swift action to correct the defect upon its discovery demonstrates his good faith. Because Truskey's excusable neglect supplies good cause for the delay, the Court exercises its discretion to extend the service deadline to October 7, when Truskey perfected service.

RFRA. Truskey's RFRA claim fails because Title VII of the Civil Rights Act of 1964 "provides the exclusive remedy for claims of discrimination in federal employment." *Harrell v. Donahue*, 638 F.3d 975, 983 (8th Cir. 2011) (quoting *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 835 (1976)). The Supreme Court reached this conclusion because the "balance, completeness, and structural integrity of § 717," *Brown*, 425 U.S. at 832, call for the application of the "established principle," *id.* at 835, that "a precisely drawn, detailed statute preempts more general remedies," *id.* at 834. RFRA did not "broaden the remedies for federal employment discrimination beyond those that already existed under Title VII," *see Harrell*, 638 F.3d at 984, so "Title VII provides the exclusive remedy for job-related claims of federal religious discrimination," *Francis v. Mineta*, 505 F.3d 266, 272 (3rd Cir. 2007).

Truskey's RFRA claim is job-related and asserts religious discrimination by the federal government. He alleges that the Secretary violated RFRA only by declining to make him a full-time employee because his religious beliefs do not permit him to have a social

security number. ¶ 34. Like other federal employees who alleged violations of RFRA when they were terminated for reasons related to their religious beliefs, Truskey's RFRA claim is unavailable because Title VII provides their exclusive remedy. *See Harrell*, 638 F.3d at 984 (federal employee terminated by the Postal Service because his religious beliefs prevented him from working on Saturdays had no RFRA claim); *Mineta*, 505 F.3d at 272 (federal employee terminated by the Transportation Security Agency because his religious beliefs prevented him from cutting his hair had no RFRA claim).

Some RFRA claims have proceeded alongside Title VII claims, to be sure. But those cases appear to have involved separate legal theories addressing separate harms – not parallel claims targeting the same conduct. In *Lister v. Def. Logistics Agency*, the court confronted RFRA, First Amendment, Fifth Amendment, *and* Title VII claims. No. 2:05-cv-495, 2006 WL 162534 (S.D. Ohio Jan. 20, 2006). There, the plaintiff pursued an employment-discrimination claim for disparate treatment and failure to accommodate, and constitutional and RFRA claims based on limitations barring his religious speech on a bulletin board. These were "distinct from [his] claim for employment discrimination and therefore [] not precluded by Title VII." *Id.* at *3; *accord Gunning v. Runyon*, 3 F.Supp.2d 1423, 1431 (S.D. Fla. 1998) (allowing free speech claim to proceed because it was distinct from employment discrimination). Truskey's RFRA claim, by contrast, rests solely

on allegations of employment discrimination. Title VII provides his only possible path to relief.

Title VII. Truskey's employment-discrimination claim against the Secretary also fails, because Congress, not the USDA, is responsible for Truskey's obligation to provide a social security number. "Title VII does not require an employer to reasonably accommodate an employee's religious beliefs if such accommodation would violate a federal statute." *Yeager v. FirstEnergy Generation Corp.*, 777 F.3d 362, 363 (6th Cir. 2015) (explaining that "[e]very circuit to consider the issue" has taken this position). The Secretary did not break one law by complying with another: 26 U.S.C. § 6109 requires employers to collect and provide the social security numbers of their employees. The Sixth Circuit has expressly held that Title VII does not require employers to provide exemptions to § 6109.[2] *See Yeager*, 777 F.3d at 364. "Title VII's text," the Court explained, "says nothing that might license an employer to disregard other federal statutes in the name of reasonably accommodating an employee's religious practices." *Id.* at 363. Truskey's Title VII claim that the

[2] Title VII requires a two-step analysis: First, the aggrieved employee must demonstrate that he was discharged or disciplined for failing to comply with an employment requirement from which he requested exemption. Second, and if so, the burden shifts to the employer to demonstrate that it could not accommodate the employee's request without undue hardship. *See Yeager*, 777 F.3d at 363. The Sixth Circuit's decision in *Yeager* did not specify whether its conclusion rested on step one or step two. *Id.* at 364 ("[W]e affirm the district court's conclusion without deciding whether it is properly a step-one or step-two question.") (collecting cases).

Secretary should've ignored § 6109 in his case therefore fails.

To support his claim of entitlement to an accommodation, Truskey points to a provision in the Internal Revenue Code stating that an employer's failure to comply with the Code's requirements "for reasonable cause" shall not result in any penalty. MTD Opp. at 18 (citing 26 U.S.C. § 6724(a)). The statute does not define reasonable cause, but does contrast it with willful neglect: "No 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." § 6724(a). What amounts to "reasonable cause" (and IRS forebearance) remains unclear in the context of this litigation, however, as does the question whether and how Truskey's conscientious objection would amount to willful neglect.

The law of the Sixth Circuit forecloses Truskey's argument in any case. The court's opinion in *Yeager*, 777 F.3d at 363-64, cited with approval a district court decision that expressly rejected this argument: *EEOC v. Allendale Nursing Centre*, 996 F. Supp. 712 (W.D. Mich. 1998). That court's reasoning applies equally here. "There is nothing that indicates that the waiver provision was put in place to benefit the employee who caused the penalties pursuant to section 6723 to be imposed. The Plaintiff has attempted to transform a section which allows an employer to likely avoid certain penalties if it takes certain steps into a requirement that the employer must take these steps in order to accommodate the employee who caused the penalty in

the first place." *Id.* at 718. *See also Seaworth v. Pearson*, 203 F.3d 1056, 1057-58 (8th Cir. 2000) (rejecting the argument that § 6724 required employer to accommodate workers who object to social security number requirements to avoid Title VII violations); *Weber v. Leaseway Dedicated Logistics, Inc.*, 166 F.3d 1223 (10th Cir. 1999) (same). The Sixth Circuit's holding in *Yeager*, therefore, continues to both persuade and bind this Court.

* * *

Even if Truskey had stated a cognizable Title VII claim, the EEOC Administrative Judge correctly ruled that his failure to timely exhaust his administrative remedies bars this claim. *See* Administrative Order at 3-6. "The right to bring an action under Title VII regarding equal employment opportunity in the federal government is predicated upon the timely exhaustion of administrative remedies, as set forth in the EEOC regulations." *Hunter v. U.S. Army*, 565 F.3d. 986, 993 (6th Cir. 2009) (alterations adopted). And Truskey failed to timely exhaust his administrative remedies because he failed to report the alleged discriminatory event within 45 days, as required by 29 C.F.R. § 1614.105(a)(1).

Truskey does not argue that he complied with this requirement. Instead, he argues that he is entitled to an extension under subsection (a)(2) because he "was not notified . . . and was not otherwise aware" of the time limit. 29 CFR § 1614.105(a)(2); MTD Opp. 6-9. But "subjective ignorance alone does not automatically

entitle the plaintiff to" this extension. *Hickey v. Brennan*, 969 F.3d 1113, 1124 (10th Cir. 2020) (alteration adopted) (quoting *Harris v. Gonzales*, 488 F.3d 442, 445 (D.C. Cir. 2007)). "[A]n employee claiming to have been unaware of the 45-day time limit" is not "automatically entitled to an extension even though the agency . . . made conscientious efforts to advise its employees of the time limit." *Harris*, 488 F.3d at 445. Rather, "constructive notice is sufficient to bar relief under [subsection] (a)(2)." *Hickey*, 969 F.3d at 1124. Moreover, "[a] plaintiff who is employed at a facility where the requisite EEO poster is appropriately posted is considered to be on constructive notice of the time limitation to file suit." *Ransdell v. U.S. Postal Serv.*, No. 3:15-cv-00084, 2017 WL 1190912, at *5 (E.D. Ky. Mar. 30, 2017). Posters at the site of Truskey's apprenticeship clearly displayed the 45-day time limit. *See* Administrative Order at 5 (citing administrative record). Therefore Truskey had constructive notice and is not entitled to an extension.[3]

Nor is Truskey entitled to equitable tolling of the time limit. "[T]ypically, equitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Steiner v. Henderson*, 354

[3] The Court may consider the administrative record on a Rule 12(b)(6) motion. *See Allen v. Shawney*, No. 11-cv-10942, 2013 WL 2480658, at *13 (E.D. Mich. June 10, 2013) ("The court may take judicial notice of the administrative record reflecting plaintiff's exhaustion of administrative remedies without converting the motions into ones for summary judgment.") (alterations adopted) (citations omitted).

F.3d 432, 438 (6th Cir. 2003) (quoting *Graham-Humphreys v. Memphis Brooks Museum of Art*, 209 F.3d 552 (6th Cir. 2000)). Truskey does not allege that anything out of his control prevented him from timely contacting an EEO counselor. He simply argues that he was not aware that he needed to contact an EEO counselor, and that he took other, reasonable measures to pursue his claim. But in light of his constructive knowledge of the time limit and the high bar for justifying equitable tolling, this cannot overcome the time limits set forth through EEOC regulations. *Cf. id.* (declining equitable tolling of the subsection (1) time limit even though the plaintiff "was proactive in seeking conciliation and did not passively let the time slip away").

CONCLUSION

The Court grants the Secretary's motion to dismiss the First Amended Complaint.

[SEAL]

/s/ Benjamin J. Beaton

Benjamin Beaton, District Judge

United States District Court

July 30, 2021

No. 21-5821

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIAN A. TRUSKEY

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF FOR APPELLEE

(Filed Feb. 19, 2022)

Brian M. Boynton
Principal Deputy Assistant Attorney General
Michael Bennett
United States Attorney
Marleigh D. Dover
(202) 514-3511
Lowell V. Sturgill Jr.
(202) 514-3427
Attorneys, Civil Division
Appellate Staff, Room 7241
U.S. Department of Justice
950 Pennsylvania Avenue, N. W.
Washington, D.C. 20530

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STATEMENT REGARDING ORAL ARGUMENT

The government does not believe oral argument is necessary here, principally because *Yeager v. FirstEnergy Generation Corp.*, 777 F.3d 362 (6th Cir. 2015), in our view requires affirming the dismissal of plaintiff's complaint. The government stands ready to present oral argument, however, if the Court would find it useful.

[1] Statement of Jurisdiction

This case involves claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq*. The district court had subject-matter

jurisdiction pursuant to 28 U.S.C. § 1331. On July 30, 2019, the court dismissed the complaint for failure to state a claim. *See* R. 32, Mem. Op. and Order (Mem. Op.), Page ID # 249. That order resolved all the claims of all the parties and is a final order for purposes of appeal. Plaintiff filed a timely notice of appeal on August 27, 2021. *See* R. 34, Notice of Appeal, Page ID # 256. This Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of the Issues

1. Whether the district court correctly dismissed plaintiff's Title VII claim because plaintiff failed to report the alleged discriminatory event to an Equal Employment Opportunity (EEO) counselor within 45 days, as required by 29 C.F.R. § 1614.105(a)(1).

2. Whether plaintiff's Title VII claim fails because requiring the U.S. Department of Agriculture (USDA) to hire him as an emergency firefighter without a social security number would impose undue burdens on USDA, including by requiring USDA to violate statutory duties to collect and report its employees' social security numbers.

3. Whether plaintiff cannot state a valid RFRA claim because requiring plaintiff to provide a social security number as a condition of employment as a USDA [2] emergency firefighter is the least restrictive means necessary to achieve multiple compelling government interests.

Statement of Facts

1. Statutory and Regulatory Background

The Social Security Administration (SSA) is required by statute to issue social security numbers (SSNs) to United States citizens, lawful permanent resident aliens, and aliens who are legally authorized to work in the United States on a temporary basis. *See* 42 U.S.C. § 405(c)(2)(B)(i)(I)-(V). The SSA uses social security numbers to track employees' wages and self-employment income for purposes of calculating any old-age, survivors, disability, or other benefits to which an individual may be entitled. *See id.* § 405(c)(2)(A), (F).

Congress also has authorized federal agencies to collect and use social security numbers to establish the identity of individuals in numerous other contexts. For example, 26 U.S.C. § 6109(a) requires any person who is required to file a federal income tax return or other document to identify himself or herself by providing a social security number. *See* 26 U.S.C. § 6109(a)(1), (d). Section 6109 and its implementing Treasury regulations also require employers to collect and report to the Internal Revenue Service (IRS) the social security numbers of all their employees. *See id.* § 6109(a)(3), (d); *Yeager v. FirstEnergy Generation Corp.*, 777 F.3d 362, 363 (6th Cir. 2015) (per curiam). The IRS [3] uses that information to identify erroneous or fraudulent federal

income tax claims. *See*, *e.g.*, *Davis v. Commissioner*, No. 12859-98, 2000 WL 924630, *2 (T.C. Jul. 10, 2000).[1]

In addition, the U.S. Department of Homeland Security (DHS) uses employees' social security numbers to enforce the nation's immigration laws. *See* R. 19-1, Administrative Judge (AJ) Order, Page ID # 151. The Immigration Reform and Control Act of 1986 requires employers (including federal agencies) to hire only persons who are eligible to work in the United States, *see* 8 U.S.C. § 1324A, and to file an I-9 form for all new employees.[2] Employers who participate in the E-Verify system[3] (including the Department of Agriculture) must include the employee's social security number on the I-9. *See* U.S. Citizenship & Immigration Servs.,

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[1] Federal law also requires individuals who claim various federal income-tax credits and rebates to provide a social security number. *See* 26 U.S.C. § 24 (taxpayer must provide SSN for child to claim child-tax credit); *id.* § 32(m) (filer must provide SSN to claim earned-income tax credit); *id.* § 6428 (SSN required to claim recovery rebate); *id.* § 3402 (SSN required to request that an annuity or sick pay be subjected to withholding).

[2] A copy of the I-9 form is available at https://go.usa.gov/xte8g.

[3] E-Verify is a federal government web-based system, operated by United States Citizenship and Immigration Services (USCIS), that allows enrolled employers to confirm the eligibility of their employees to work in the United States. *See* USCIS, DHS, *Handbook for Employers M-274*, https://go.usa.gov/xte8b (last updated Nov. 24, 2020). E-Verify employers are able to verify the identity and employment eligibility of newly hired employees by electronically matching information provided by employees on Form I-9 against records available to the SSA and the DHS. *See* USCIS, DHS, *What Is E-Verify*, https://go.usa.gov/xte8W (last updated Dec. 3, 2020).

DHS, *Instructions for Form I-9, Employment Eligibility Verification* (Oct. 21, 2019), https://go.usa.gov/xte8K; *see also* R. 19-1, AJ Order, Page ID # 151 (noting that the FBI uses social security numbers to conduct background investigations on federal employees); 8 U.S.C. § 1360 (requiring [4] SSA to provide the Attorney General with information regarding any alien not authorized to work in the United States for whom earnings are reported on a social security account).

Employers—including federal government employers, *see* 42 U.S.C. § 653a(b)(1)(C)—also are required by law to furnish state governments with the name, address, and social security number of each new employee hired, *see id.* § 653a(b)(1)(A), information the states use to enforce child-support orders, *see id.* § 653a(f)(1). Federal law also requires the states to ensure that the social security number of an applicant for a professional license, driver's license, occupational license, recreational license, or marriage license is recorded on the application for that license. *See id.* § 666(a)(13). In addition, to assist in administering its unemployment compensation system, Kentucky requires employers operating in the state to establish and maintain records for all their employees that include their employees' social security numbers. *See* Ky. Rev. Stat. Ann. § 1:180 §§ 1, 2.

2. Procedural History

a. Plaintiff's Pursuit of USDA Employment

From August 2014 through August 2016, plaintiff Brian Truskey was an unpaid volunteer-communications apprentice at the Land Between the Lakes National Recreational Area (Land Between the Lakes). *See* R. 24, First Am. Compl. (FAC) ¶ 13, Page ID # 168; R. 13-1, Complainant's Aff., Page ID # 79. Located in southwestern Kentucky and northwestern Tennessee, Land Between the Lakes is administered by the [5] USDA. *See* R. 32, Mem. Op., Page ID # 249. Mr. Truskey, who resides in Kentucky, *see* R. 24, FAC, Page ID # 166, 167, worked at USDA's Golden Pond, Kentucky facilities at Land Between the Lakes. *See* R. 19-2, Baker Aff., Page ID # 158.

After he obtained certification as a Type 2 Wildland Firefighter, Mr. Truskey sought to be hired as a USDA emergency firefighter. *See* R 13-5, EEO Counselor Letter, Page ID # 95. That position is an "Administratively Determined" (AD) position, *see id.*, which means that USDA has statutory authority to administratively determine the rates of pay for that category of employees. *See* R. 13-4, Swenka Aff., Page ID # 92 (citing 5 U.S.C. § 5102(c)(19); 7 U.S.C. §§ 2225, 2226; 16 U.S.C. § 554e; and 43 U.S.C. § 1469)). For employees hired in AD positions, USDA uses an electronic payroll system administered by the Department of Interior. *See id.*

In connection with his pursuit of an emergency firefighter position, Mr. Truskey informed USDA that

his religious beliefs preclude him from providing USDA with a social security number. *See* R. 13-1, Complainant's Aff., Page ID # 80. On June 15, 2015, USDA employee Bonita Johnson informed Mr. Truskey that "there is no exception . . . to have an SSN in order to be hired under the AD Pay Plan." R. 13-2, June 15, 2015 e-mail, Page ID # 85. Mr. Truskey acknowledged receipt of that e-mail on June 24, 2015. *See* R. 13-3, June 24, 2015 e-mail, Page ID # 87-88.

On November 19, 2015, Ms. Johnson sent Mr. Truskey an e-mail confirming that he could not be added to the AD pay plan without a social security number. *See* R. 13-1, Complainant's Aff., Page ID # 81. Four days later, two other USDA officials [6] informed Mr. Truskey that he would not be allowed to participate in certain classes because he was not on the AD pay plan. *See id.*

Mr. Truskey also reached out to the Office of Personnel Management (OPM) regarding this matter. On November 30, 2015, OPM sent him an automated e-mail advising that he needed to contact the Equal Employment Opportunity Commission (EEOC) regarding any claim of discrimination; that he could access the EEOC's web site for information on how to file a claim (with a link provided: http/www.eeoc.gov/laws/types/religion.cfm); and that "[*f*]*ederal employees have 45 days to contact an EEO* [*c*]*ounselor*." R. 19-1, AJ Order, Page ID # 150.

Despite having been repeatedly notified of the 45-day period for contacting an EEO counselor from the

date of the alleged discrimination, Mr. Truskey waited until January 25, 2016, to initiate contact with the Forest Service's Informal Complaints Management Staff regarding his claim of religious discrimination. *See* R. 24, FAC, Page ID # 169; R. 13-5, EEO Counselor Letter, Page ID # 95.

b. EEO Administrative Claim

After he contacted an EEO counselor, Mr. Truskey filed a formal administrative complaint with USDA, which denied the complaint. *See* R. 19-1, AJ Order, Page ID # 145. Mr. Truskey appealed that decision to the EEOC's Office Federal Operations (OFO), which remanded the matter to USDA for further processing. *See id.*, Page ID # 146. USDA thereafter accepted Mr. Truskey's administrative complaint for [7] investigation, *see id.*, and collected evidence, including affidavits from Mr. Truskey, *see* R. 13-1, Complainant's Aff., Page ID # 78, and USDA employee Lisa Swenka, *see* R. 13-4, Swenka Aff., Page ID # 90.

Ms. Swenka's affidavit confirmed that USDA could not hire Mr. Truskey as an AD emergency firefighter because the payroll system USDA uses to pay AD workers "does not have the capability to issue a payroll check with anything other than an SSN." R. 13-4, Swenka Aff., Page ID # 92 (noting that "[i]ndividual tax identification numbers (ITIN) and employee identification numbers (EIN) are not valid in [that] system"; that "there are no other options under [that] system to issue payment to [an AD] worker"; and that ITINs and

EINs "are not . . . accepted on the electronic filing for Form W-2 . . . reported to the Internal Revenue System").

USDA thereafter moved to dismiss Mr. Truskey's administrative claim. After holding a hearing, *see* R. 19-1, AJ Order, Page ID # 145, the Administrative Judge granted USDA's motion. *See id.*, Page ID # 152. The Administrative Judge noted that a complainant must initiate contact with an EEO counselor within 45 days of the date of the alleged discriminatory action or, in the case of personnel action, within 45 days of the effective date of the action. *See id.*, Page ID # 147 (citing 29 C.F.R. § 1614.105(a)(1)). The Administrative Judge concluded that Mr. Truskey became aware of his religious conflict with USDA's social security number-collection obligations on June 15, 2015, when USDA employee Bonita Johnson so informed him by e-mail. *See id.*, Page ID # 148. The Administrative Judge thus concluded that Mr. Truskey had until July 30, 2015, [8] (45 days from June 15, 2015) in which to initiate contact with an EEO counselor but waited nearly six months, until January 25, 2016, to initiate his first contact with an EEO counselor regarding his alleged religious conflict. *See id.*, Page ID # 149.

The Administrative Judge found that Mr. Truskey had constructive knowledge of the 45-day deadline to contact an EEO counselor on or before June 15, 2015, by virtue of a poster on a bulletin board at USDA's Golden Pond, Kentucky, facility, where he worked as an unpaid volunteer. *See* R. 19-1, AJ Order, Page ID # 149; R. 19-2; Baker Aff., Page ID # 158-159. The

Administrative Judge also noted that Mr. Truskey's own June 24, 2015, e-mail to Bonita Johnson reflected his knowledge of the 45-day limitation period by directing Ms. Johnson to the section of the Agency's main web site which contains a link to the Agency's anti-discrimination policy. That web site contains links that address how and when to file an EEO complaint. *See* R. 19-1, AJ Order, Page ID # 149.

The Administrative Judge also observed that Mr. Truskey was reminded of the 45-day period to contact an EEO counselor on November 30, 2015, when the Office of Personnel Management sent him an e-mail that directed him to the EEOC's web page. *See* R. 19-1, AJ Order, Page ID # 149-150. As the Administrative Judge correctly observed, the first page of that web page states that federal employees have 45 days to contact an EEO counselor with a discrimination complaint. *See id.*, Page ID # 150. The Administrative Judge concluded that Mr. Truskey's initial EEO-counselor contact on January 25, 2016, was untimely because he delayed contacting an EEO counselor for [9] nearly *six* months after he first received the Agency's June 15, 2015, e-mail informing him of the Agency's inability to hire him because of its statutory SSN collection obligation. *See id.*, Page ID # 150.

The Administrative Judge also concluded that Mr. Truskey failed to establish a prima facie case of religious discrimination. *See* R. 19-1, AJ Order, Page ID # 150. The Administrative Judge noted that Mr. Truskey's religious beliefs "conflict with a Federal statute, the Internal Revenue Code," and that his requested

accommodation (to use an alternative number) could "pose a National Security threat with regards to background checks conducted by the [FBI] and required by the [DHS]." *Id.*, Page ID # 151. Based on the Administrative Judge's ruling, USDA issued a final denial of Mr. Truskey's administrative claim. *See* R. 24-1, Final Order, Page ID # 173.

c. Civil Complaint and Dismissal

Mr. Truskey filed a pro se civil complaint on April 12, 2019. *See* R. 1, Compl., Page ID # 1. After USDA moved to dismiss, the district court directed Mr. Truskey, who by then had retained counsel, to file an amended complaint. *See* R. 23, Order, Page ID # 164. Mr. Truskey's amended complaint asserts two claims: a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and a violation of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq*. *See* R. 24, FAC, Page ID # 169-171. The FAC requests (1) an injunction requiring USDA to hire Mr. Truskey to the Wildland Firefighter position and to provide reasonable accommodation to Mr. Truskey's religious beliefs; (2) damages for the lost compensation he has suffered from [10] the date of USDA's allegedly illegal actions in an amount proven at trial; and (3) additional compensatory damages, including, but not limited to, damages for emotional distress, pain and suffering, embarrassment, and humiliation. *See id.*, Page ID # 171.

USDA moved to dismiss, and the district court granted that motion. *See* R. 32, Mem. Op., Page ID # 249. The court held that Mr. Truskey's failure to report the alleged discriminatory event within 45 days, as required by 29 C.F.R. § 1614.105(a)(1), bars his Title VII claim. *See id.*, Page ID # 253. The court held that Mr. Truskey was on constructive notice of that deadline for the reasons identified by the Administrative Judge, *see id.*, and that he is not entitled to equitable tolling because he does not allege that anything out of his control prevented him from timely contacting an EEO counselor, *see id.* The court also dismissed Mr. Truskey's Title VII claim because 26 U.S.C. § 6109 requires employers to collect and provide the social security numbers of their employees and because Title VII does not require employers to provide exemptions to that requirement. *See id.*, Page ID # 252 (citing *Yeager v. FirstEnergy Generation Corp.*, 777 F.3d 362, 363 (6th Cir. 2015) (per curiam)). The court dismissed Mr. Truskey's RFRA claim on the ground that Title VII provides the exclusive remedy for claims of discrimination in federal employment. *See id.*, Page ID # 251.

Summary of Argument

1. The district court correctly held that Mr. Truskey's Title VII claim fails because he failed to contact an EEO counselor within 45 days of when USDA advised him it could not hire him as an emergency firefighter because of his failure to provide [11] a social security number. The court concluded that Mr. Truskey had constructive knowledge of the 45-day time period

as of June, 2015, and at the very latest as of November 2015, but failed to contact an EEO counselor until January 25, 2016. Mr. Truskey argues that he was not aware of the poster at his workplace disclosing the 45-day deadline for contacting an EEO counselor, but the case law firmly establishes that workplace postings conclusively establish constructive knowledge of that deadline. Mr. Truskey's request for equitable tolling fails because nothing prevented him from timely consulting an EEO counselor.

2. The district court also correctly ruled that Mr. Truskey's Title VII claim is foreclosed by Circuit precedent. In *Yeager v. FirstEnergy Generation Corp.*, 777 F.3d 362 (6th Cir. 2015) (per curiam), this Court held that an employer did not violate Title VII by refusing to hire an employee whose religion forbade him from providing a social security number. Mr. Truskey disagrees with *Yeager*'s reasoning and result, but *Yeager* is consistent with how other circuits have ruled, and a panel of this Court cannot reassess circuit precedent in any event.

3. The district court dismissed plaintiff's RFRA claim on the ground that Title VII provides the exclusive judicial remedy for an employment-related religious discrimination claim in the federal sector. That conclusion reflected the government's position on that issue at the time, but the government has since adopted the opposite view given RFRA's plain language, which provides that RFRA applies to "*all* [f]ederal law[] and the implementation of that law," 42 U.S.C. § 2000bb-3(a) (emphasis added), [12] and that a person

may assert a RFRA violation "as a claim or defense in a judicial proceeding and obtain appropriate relief against a government," *id.* § 2000bb-1(c).

Mr. Truskey's RFRA claim still falls short, however, because requiring him to provide a social security number to be hired as a USDA emergency firefighter is the least restrictive means to accomplish multiple compelling interests. Those interests include, among others, complying with USDA's statutory duty to collect and provide social security numbers to the IRS, which allows the IRS to pursue its compelling interest in preventing error and fraud in the federal income tax system. USDA also had a compelling need for Mr. Truskey's social security number because the computer payroll system USDA uses to pay the salaries of emergency firefighters only accepts a social security number as an identifying employee number. Mr. Truskey's offer to provide an Internal Revenue Service Number (IRSN) is not a reasonable less-restrictive alternative because an IRSN is not an adequate substitute for a social security number in terms of preventing fraud and error in the federal tax system, and because the payroll system USDA uses for paying its emergency firefighters only works with a social security number.

Statement of the Standard of Review

The district court dismissed this case for lack of exhaustion of administrative remedies and for failure to state a plausible claim on the merits. *See* R. 32, Mem. Op., Page ID # 251. This Court reviews the

dismissal of a complaint for failure to state a claim de novo. *See Wesley v. Campbell*, 779 F.3d 421, 428 (6th Cir. 2015).

[13] **Argument**

I. The District Court Properly Dismissed Plaintiff's Title VII Claim Because Plaintiff Failed to Timely Exhaust His Administrative Remedies.

Title VII provides that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. "The right to bring an action under Title VII regarding equal employment [opportunity] in the federal government is predicated upon the timely exhaustion of administrative remedies, as set forth in [the EEOC regulations]." *Hunter v. Secretary of U.S. Army*, 565 F.3d 986, 993 (6th Cir. 2009) (alterations in original) (quoting *Benford v. Frank*, 943 F.2d 609, 612 (6th Cir. 1991)). "Under 29 C.F.R. § 1614.105(a)(1), an aggrieved employee 'must initiate contact with a[n EEO] [c]ounselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action' in order to facilitate informal resolution of the dispute." *Id.* (alterations in original). "Failure to timely seek EEO

counseling is grounds for dismissal of the discrimination claims." *Id.*

The district court dismissed Mr. Truskey's Title VII claim because he failed to seek EEO counseling within 45 days of the date of the religious discrimination he alleges. *See* R. 32, Mem. Op., Page ID # 253-254. That ruling is correct in all respects.

[14] **A.** Mr. Truskey does not contest that he first contacted an EEO counselor regarding his religious discrimination claim more than 45 days after the allegedly discriminatory event he alleges. *See* R. 32, Mem. Op., Page ID # 253. On June 15, 2015, USDA informed him that it could not exempt him from having to submit a social security number in order to be hired as an emergency firefighter. *See* R. 13-2, June 15, 2015 e-mail, Page ID # 85. As the Administrative Judge properly held in dismissing Mr. Truskey's administrative claim, the June 15, 2015, e-mail is the relevant event for evaluating whether Mr. Truskey timely sought EEO counseling regarding his religious discrimination claim. *See supra* p. 7.

In addition, the record shows that USDA confirmed its inability to hire Mr. Truskey as an emergency firefighter without a social security number on November 19, 2015, and again five days later. *See* R. 13-1, Complainant's Aff., Page ID # 81. Even if the 45-day period for contacting an EEO counselor were to run from either of those dates (rather than on June 15, 2015, when Mr. Truskey first learned that information), Mr. Truskey still waited more than 45 days—

until January 25, 2016—in which to contact an EEO counselor. *See supra* p. 8-9.

B. The EEOC's regulations require an agency to extend the 45-day deadline for contacting an EEO counselor "when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them" or that "despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits." 29 C.F.R. § 1614.105(a)(2).

[15] **1.** Mr. Truskey argued below that he was unaware of, and had not been informed of, the 45-day time limit for contacting an EEO counselor prior to an unspecified date in January 2016. The district court rejected that argument because "[p]osters at the site of [Mr.] Truskey's apprenticeship clearly displayed the 45-day time limit." R. 32, Mem. Op., Page ID # 253. The Administrative Judge so found in dismissing Mr. Truskey's administrative claim, *see id.*, citing the affidavit of a USDA employee who worked at the same location and time as Mr. Truskey. *See* R. 19-1, AJ Order, Page ID # 149; R. 19-2, Baker Aff., Page ID # 158-159.

Mr. Truskey acknowledges that constructive knowledge of the 45-day time limit to contact an EEO counselor "is 'attributed' to an employee . . . where an employer has fulfilled his statutory duty by conspicuously posting the official EEOC notices that are designed to inform employees of their . . . rights." Appellant Br. 14 (second alteration in original) (quoting *Snow v. Napolitano*, No. 10-02530, 2013 WL 3717732, *3 (W.D.

Tenn. July 11, 2013)); *see also Ransdell v. U.S. Postal Serv.*, No. 3:15-cv-00084, 2017 WL 1190912, *5 (E.D. Ky. Mar. 30, 2017).

Neverthetless, Mr. Truskey argues that "[i]f permitted to proceed to discovery," he "would have testified that . . . he did not recall any EEO posters in the areas in which he worked and, if any were there, he never looked at them." Appellant Br. 16. Whether Mr. Truskey recalls seeing the posters at his workplace advising him of the 45-day limit to contact an EEO counselor is irrelevant. As explained, the posting of that deadline at his workplace provided him with constructive knowledge of the deadline.

[16] For the same reasons, Mr. Truskey's argument that as an apprentice, he did not receive all the EEO training a permanent employee would be provided, *see* Appellant Br. 4, is similarly irrelevant. Mr. Truskey properly concedes that posting of the 45-day deadline provides constructive knowledge, and as noted, that deadline was posted at the job site where Mr. Truskey's worked, albeit as an unpaid volunteer.

In addition, even if Mr. Truskey's subjective awareness of the deadline were critical, discovery was and is unnecessary for Mr. Truskey to resist dismissal of his Title VII claim on the ground that he allegedly did not see the posters. But neither the complaints filed in this litigation, nor the affidavit Mr. Truskey provided to support his administrative claim, contain any such assertion. *See* R. 13-1, Complainant's Aff., Page ID # 78-83. More fundamentally, however, as noted, the

poster displayed at Mr. Truskey's workplace conclusively establishes his constructive knowledge of the deadline, triggering the 45-day time period to contact an EEO counselor that Mr. Truskey failed—by months—to comply with.

2. The Administrative Judge also properly identified other reasons for concluding that Mr. Truskey contacted an EEO counselor outside the required 45-day period. To begin, the Administrative Judge correctly noted that Mr. Truskey's June 24, 2015, e-mail to USDA employee Bonita Johnson "reflects his knowledge of the [USDA]'s EEO process and the 45-day limitation period." R. 19-1, AJ Order, Page ID # 149. As the Administrative Judge observed, that e-mail "directed Ms. Johnson to the section of the [USDA]'s main website at www.usda.gov, which contains a link to the [17] Agency's anti-discrimination policy as well as links that address how, when and where to file an EEO complaint." *Id.*; *see* R. 13-3, June 24, 2015 e-mail, Page ID # 88.[4] Mr. Truskey argues that the Administrative Judge did not have access to the USDA web site as it existed as of June 24, 2015, *see* Appellant Br. 7, but

[4] As USDA noted below, *see* R. 19, Defendants' Reply Brief in Support of Motion to Dismiss, Page ID # 131-132, the USDA web site identified in the June 24, 2015, e-mail, https://www.usda.gov/wps/portal/usda/usdahome?navtype=FT&navid=NONDISCRIMINATION provides a link to a "Non-Discrimination Statement," which leads to a web page which states that an employee has "45 days of the date of the alleged discriminatory act, event, or in the case of a personnel action" to contact an EEO counselor. *See* USDA, *Filing a Discrimination Complaint as a USDA Employee*, https://go.usa.gov/xtztb (last visited Feb. 16, 2022).

cites no plausible reason to believe the USDA's web site would not have provided the same information as of June 24, 2015.

The Administrative Judge also found that Mr. Truskey had constructive knowledge of the 45-day limit to contact an EEO counselor as of November 30, 2015, by virtue of an e-mail he received from the Office of Personnel Management. *See* R. 19-1, AJ Order, Page ID # 149-150. As the Administrative Judge correctly observed, that e-mail directed Mr. Truskey to an EEOC web page expressly identifying the 45-day deadline to contact an EEO counselor. *See id.*, Page ID # 150. Mr. Truskey argues that the current version of the EEOC's web site does not recite that deadline, *see* Appellant Br. 15, but that is incorrect. *See* EEOC, *Religious Discrimination*, https://go.usa.gov/xtztr (last visited Feb. 16, 2022). And that is the same web site [18] referred to in the November 30, 2015, e-mail from OPM to which Mr. Truskey refers. *See* R. 25-2, Nov. 30, 2015 e-mail, Page ID # 205.

C. Mr. Truskey also contends that he should be excused from having missed the 45-day deadline to contact an EEO counselor under the doctrine of equitable tolling. The district court rejected that argument because "[t]ypically, equitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control," R. 32, Mem. Op., Page ID # 253 (quoting *Steiner v. Henderson*, 354 F.3d 432, 438 (6th Cir. 2003)), and because Mr. Truskey "does not allege that anything out of his control prevented him

from timely contacting an EEO counselor." *Id.* "He simply argues that he was not aware that he needed to contact an EEO counselor, and that he took other, reasonable measures to pursue his claim," but "in light of his constructive knowledge of the time limit and the high bar for justifying equitable tolling, this cannot overcome the time limits set forth through EEOC regulations." *Id.*, Page ID # 253-254.

Mr. Truskey's argument that he did not actually know about the 45-day time limit until January 2016 is irrelevant because he had constructive knowledge of that limit far enough in advance to allow him to satisfy that requirement. *See supra* pp. 14-17. Mr. Truskey contends that he acted diligently in seeking to negotiate a compromise with USDA after he was informed that he could not be hired as an emergency firefighter without providing a social security number, *see* Appellant Br. 5, 16, but his own EEO affidavit recites that he considered USDA's rejection of his request for an exemption in [19] November 2015 to be "final," R. 13-1, Complainant's Aff., Page ID # 81, yet he also waited more than 45 days from *that* date to contact an EEO counselor.

Moreover, Mr. Truskey's alleged attempts to negotiate a compromise with USDA is not the kind of diligence the law recognizes. For example, in *Steiner*, the plaintiff's argument that "she was proactive in seeking conciliation" with the agency did not reflect the kind of diligence required for equitable tolling. 354 F.3d at 437; *see also id.* at 434 (discussing the plaintiff's efforts to contact other employer personnel regarding

her complaint rather than an EEO counselor within the allowed 45-day period). As this Court noted, "[i]n Title VII, Congress set up an elaborate administrative procedure, implemented through the EEOC, that is designed to assist in the investigation of claims of . . . discrimination in the workplace and to work towards the resolution of these claims through conciliation rather than litigation." *Id.* at 437 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 180-181 (1989)). The plaintiff's efforts in *Steiner* to conciliate her issues with her employer herself, rather than by following the prescribed procedure of conducting an EEO counselor, "contravene[d] the congressional decision that the role of conciliator belongs to a third party with expertise, the EEOC." *Id.* at 438; *see also id.* at 327 (noting that "[v]oluntary compliance is Title VII's preferred method for promoting the goal of nondiscrimination; it also is the reason for the EEOC's existence" (quoting *St. John v. Employment Dev. Dep't*, 642 F.2d 273, 275 (9th Cir. 1981))); *Leeds v. Potter*, 249 F. App'x 442 (6th Cir. 2007) (plaintiff's decision to file a grievance with his union instead of contacting an EEO counselor [20] failed to show due diligence for equitable estoppel purposes). As the Supreme Court noted in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Id.* at 151.

Steiner also defeats Mr. Truskey's argument that USDA "lulled [him] into inaction" by advising him to contact OPM regarding USDA's authority to hire him as an emergency firefighter without a social security

number. Appellant Br. 16, 17. Long before November 2015, when OPM replied to him, USDA had already advised him that he could not be so hired without a social security number. *See supra* p. 5. Moreover, even after OPM responded to his November 2015 inquiry, by pointing him to an EEO web site that noted the 45-day limit to contact an EEO counselor, Mr. Truskey still waited more than 45 days to contact an EEO counselor. *See supra* p. 6. The cases Mr. Truskey cites involving employer misconduct involved no such affirmative employer efforts. *See* Appellant Br. 16 (first citing *Hampton v. Caldera*, 58 F. App'x 158 (6th Cir. 2003); and then citing *Leake v. University of Cincinnati*, 605 F.2d 255 (6th Cir. 1979)).

Mr. Truskey also wrongly contends that he is entitled to equitable tolling because USDA would not be prejudiced by waiving his non-compliance with the 45-day time limit. *See* Appellant Br. 17. As the Supreme Court held in *Baldwin County Welcome Center*, "[a]lthough absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified, it is not an independent basis for invoking the doctrine and sanctioning [21] deviations from established procedures." 466 U.S. at 152. Mr. Truskey has identified no such predicate factor supporting his request for equitable tolling, which is applied "only sparingly." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990).

II. The District Court Also Correctly Held that Plaintiff's Title VII Claim Fails to State a Cause of Action.

Title VII, as noted, provides that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2.

Section 2000e(j) of Title 42 defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." The intent and effect of this provision is to make it an unlawful employment practice "for an employer not to make reasonable accommodation, short of undue hardship, for the religious practices of his employees and prospective employees." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

In 1972, Congress extended the protection of Title VII to federal employees. *See* 42 U.S.C. § 2000e-16. As the district court correctly ruled, however, *Yeager v. FirstEnergy* [22] *Generation Corp.*, 777 F.3d 362 (6th Cir. 2015) (per curiam), plainly forecloses plaintiff's Title VII religious discrimination claim here.

A. In *Yeager*, the plaintiff alleged that his employer violated his rights under Title VII by either refusing to hire or terminating him because he failed to provide a social security number. *See* 777 F.3d at 362-363. The plaintiff alleged that he had no social security number because he had disclaimed and disavowed it on account of his sincerely held religious beliefs. *See id.* at 363. The district court dismissed the plaintiff's Title VII claim for failure to state a claim and this Court affirmed, holding that Title VII did not require a religious accommodation because an accommodation would require the employer to violate federal law. *See id.* at 363 (citing 26 U.S.C. § 6109(a)(3), (d)) (noting that "[t]he Internal Revenue Code requires employers such as FirstEnergy to collect and provide the social security numbers of their employees").

Yeager is directly controlling here. Mr. Truskey contends that his religious beliefs preclude him from providing USDA with a social security number, but as explained, *Yeager* rejected exactly that kind of claim, holding that an employer's obligation to collect and provide the IRS with the social security numbers of its employees would constitute an undue burden for Title VII purposes. *See* 777 F.3d at 363. Every other court to have addressed this issue of which we are aware has ruled similarly. *See Seaworth v. Pearson*, 203 F.3d 1056, 1057 (8th Cir. 2000) (per curiam); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830-831 (9th Cir. 1999); *Weber v. Leaseway Dedicated Logistics, Inc.*, 166 F.3d 1223, 1999 WL 5111, at *1 (10th Cir. 1999) (unpublished); *Baltgalvis v. Newport News* [23] *Shipbuilding*

Inc., 132 F. Supp. 2d 414, 418 (E.D. Va.), *aff'd*, 15 F. App'x 172 (4th Cir. 2001) (per curiam); *EEOC v. Allendale Nursing Ctr.*, 996 F. Supp. 712 (W.D. Mich. 1998).

Mr. Truskey contends that USDA could have hired him as an emergency firefighter without violating 26 U.S.C. § 6109 because an employer is not subject to a penalty if its failure to provide its employees' social security numbers to the IRS is explained by reasonable cause. *See* Appellant Br. 20; 26 U.S.C. § 6724(a). That argument is foreclosed by *Yeager*, as Mr. Truskey appears to concede. *See* Appellant Br. 20. As the district court observed, *Yeager* specifically approved the district court's adoption there of the reasoning of *EEOC v. Allendale Nursing Ctr.*, 996 F. Supp. 712. *See* R. 32, Mem. Op., Page ID # 252 (citing *Yeager*, 777 F.3d at 363-364). *Allendale* rejected the above-noted argument that Mr. Truskey makes here, holding that Congress did not enact 26 U.S.C. § 6724(a) to benefit an employee who declines to provide his employer with a social security number. *See* R. 32, Mem. Op., Page ID # 252-253 (citing *Allendale*, 996 F. Supp. at 718). The only other federal courts to have addressed the issue have ruled similarly. *See Seaworth*, 203 F.3d at 1057-58; *Weber*, 166 F.3d 1223, 1999 WL 5111, at *2.

Any other way of viewing this matter would defeat the purposes for which Congress directed employers to provide the IRS with their employees' social security numbers. "Through cross-matching of SSN's, [the IRS] can detect erroneous or fraudulent claims by identifying whether an SSN has been claimed on another

return for the year." *Davis v. Commissioner*, No. 12859-98, 2000 WL 924630, *3 (T.C. Jul. 10, 2000); *see also Bowen v. Roy*, 476 U.S. 693, 710 (1986) (explaining that social security [24] numbers are unique numerical identifiers that are used to ferret out fraudulent applications, through the use of computer-matching techniques).

To construe Title VII as Mr. Truskey suggests here would preclude the IRS from achieving those compelling goals. In addition, it would be an undue burden to require an employer to bear the uncertainty of knowing whether the IRS would consider an employee's religiously-based refusal to provide a social security number reasonable cause for noncompliance with 26 U.S.C. § 6109(a). *See Seaworth*, 203 F.3d at 1057 (concluding that "the expense and trouble incident to applying for [a reasonable-cause waiver under 26 U.S.C. § 6724(a)] imposes a hardship that is more than de minimis, as a matter of law"); *see also Allendale Nursing Ctr.*, 996 F. Supp. at 717 (holding that "nothing . . . indicates that an employer is required to wait until it is actually penalized, or even investigated, by the IRS in order to demonstrate [that noncompliance with 26 U.S.C. § 6109(a) would cause] undue hardship").

Mr. Truskey argues that the IRS could achieve these compelling interests by assigning him a permanent Internal Revenue Service Number (IRSN), *see* Appellant Br. 20, but that is not so. An ISRN is a temporary number the IRS assigns to a taxpayer who does not provide a lawful tax identification number. *See* IRS, U.S. Dep't of the Treasury, *Internal Revenue Manual*

§ 3.13.5.75, https://go.usa.gov/xtztq (last updated Nov. 5, 2021). Allowing a taxpayer to use an ISRN as a permanent substitute for the social security number Congress required would substantially impair the IRS's ability to prevent erroneous or fraudulent tax refunds and credits. *See supra* pp. 2-3, 23.

[25] For similar reasons, courts have held that a person who is statutorily eligible to obtain a social security number[5] may not demand that the IRS accept an ITIN as a substitute for a social security number. "Issuing an ITIN to an individual who is otherwise eligible to receive an SSN creates the risk that the individual could subsequently obtain an SSN." *Davis*, 2000 WL 924630, at *3 (citing *Miller v. Commissioner*, 114 T.C. 511 (2000)). "In such cases, the individual would have two [tax identification numbers], each purporting to be a unique identifier." *Id.* "If an individual were to have two [tax identification numbers], [the IRS's] cross-matching program would be less effective in revealing duplicate claims than if the individual had only one identifying number." *Id.* (noting, for example, that the IRS's computer programs "would not be able to detect easily whether divorced parents are both trying to claim their children as dependents").

Mr. Truskey also contends that the IRS could continue to allow him to use an IRSN that it allegedly allowed him to use in certain prior years. *See* Appellant Br. 19-20. Mr. Truskey refers to that IRSN as

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[5] Mr. Truskey does not contend he fails to meet the statutory criteria for obtaining a social security number.

"nominally" temporary, *id.* at 19, but as noted, an IRSN is not a permanent substitute for a legal tax identification number. *See supra* p. 24. To allow permanent use of an IRSN would impair the IRS's ability to preclude error and fraud by employing its computerized cross-checking program. *See id.*

[26] For that reason, the IRS's alleged assignment of an IRSN to Mr. Truskey in the recent past does not waive its statutory obligation to insist that he provide a social security number as the lawful tax identification number Congress required. *See* 26 U.S.C. § 7701(a)(41); *id.* § 6109(d); *see also Allendale*, 996 F. Supp. at 717 n.4 ("To the extent that the [p]laintiff claims that the IRS would allow [the plaintiff] to have a temporary number for life based upon her religious beliefs, this Court notes that none of the statutes, regulations, cases, or documents provided to this Court indicate that such an allowance has been made in this case or in any case.").

Mr. Truskey also contends that whether an agency has unlawfully rejected a reasonable religious accommodation under Title VII is a question of fact for the jury. *See* Appellant Br. 23-24. As explained, however, Mr. Truskey's Title VII claim is foreclosed by this Court's prior decision in *Yeager* as a matter of law. Mr. Truskey suggests that *Yeager*'s rejection of the same arguments he raises here is "incorrect," Appellant Br. 20, but as noted, only the en banc Court (and definitely not a jury) would have the authority to consider that argument. *See Sykes v. Anderson*, 625 F.3d 294, 319 (6th Cir. 2010) (noting that a Sixth Circuit panel "is

without authority to overrule binding precedent"); 6th Cir. R. 32.1(b) (same). Moreover, none of the religious-discrimination cases cited at page 24 of Mr. Truskey's opening appeal brief involves a claim for a religious exemption to providing a social security number as a condition of employment. By contrast, *Yeager* is directly on point and plainly requires affirming the dismissal of Mr. Truskey's Title VII claim.

[27] **B.** While the district court did not address this issue, this Court also could affirm the dismissal of Mr. Truskey's Title VII claim on the ground that USDA could not hire him as an emergency firefighter because the electronic system used to process salary payments for that position accepted only a social security number. *See supra* pp. 5-7.

Mr. Truskey contends that "[b]ecause no discovery has been taken, no evidence exists regarding Appellee's payroll system or the impact of Mr. Truskey's use of an Internal Revenue Service Number on that system." Appellant Br. 25. Not so. The affidavit of USDA official Lisa Swenk explains why the payroll system for the emergency firefighter position for which Mr. Truskey applied requires a social security number. *See supra* p 7. That affidavit constitutes admissible and probative evidence, and Mr. Truskey has offered no plausible basis in fact for supposing that Ms. Swenk incorrectly apprehended how the applicable payroll system worked or that USDA could have modified that system (which is administered by a different federal agency, the U.S. Department of the Interior) to accommodate him. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678

(2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Accordingly, the Court could also affirm the dismissal of Mr. Truskey's Title VII claim on this alternative ground. *See*, *e.g.*, *Penn, LLC v. Prosper Bus. Dev. Corp.*, 773 F.3d 764, 766 (6th Cir. 2014) (noting that this Court may affirm based on any ground supported by the record).

[28] **III. This Court Also Should Affirm the Dismissal of Plaintiff's RFRA Claim.**

The district court dismissed Mr. Truskey's claim that USDA violated RFRA on the ground that Title VII is the exclusive remedy for employment-discrimination claims in the federal sector. *See* R. 32, Mem. Op., Page ID # 251-252. That ruling reflected the authorized government position on that issue at the time, but the government has since decided that the opposite view is correct. Nevertheless, Mr. Truskey fails to allege a valid RFRA claim for other reasons. *See*, *e.g.*, *Penn, LLC*, 773 F.3d at 766 (noting that this Court may affirm on any ground supported by the record).

A. Title VII Does Not Preempt a RFRA Claim for Employment Discrimination Arising in the Federal Sector.

RFRA provides that the federal government "shall not substantially burden a person's exercise of religion

even if the burden results from a rule of general applicability" unless the government demonstrates that application of the burden to that person "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that interest." 42 U.S.C. § 2000bb-1(a), (b). RFRA applies "to all [f]ederal law[] and the implementation of that law," *id.* § 2000bb-3(a), and states that a person whose religious exercise has been burdened in violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief," *id.* § 2000bb-1(c).

[29] RFRA's text makes no exception for Title VII claims—*i.e.*, claims that validly assert the elements of a RFRA claim but also validly assert the elements of a Title VII employment-discrimination claim. Accordingly, RFRA's plain language forecloses the idea that Title VII provides the exclusive remedy for a federal claim of religious discrimination in employment. As the Supreme Court recently noted in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), RFRA is a "super statute" that "displac[es] the normal operation of other federal laws" and therefore "might supersede Title VII's commands in appropriate cases." *Id.* at 1754.

Despite RFRA's language, two courts of appeals have held that Title VII provides the exclusive remedy for a claim of religious employment-discrimination in the federal sector. *See Harrell v. Donahue*, 638 F.3d 975 (8th Cir. 2011); *Francis v. Mineta*, 505 F.3d 266 (3d Cir. 2007). *Harrell* concluded that RFRA's plain text does not resolve this issue because RFRA "does not

precisely explain RFRA's interplay with Title VII," 638 F.3d at 983, and *Francis* similarly suggested (without explanation) that RFRA's text may be "ambigu[ous]" on this issue, 505 F.3d at 1153. Both courts, however, failed to appreciate the import of RFRA's text, which as noted provides that RFRA applies to "*all* [f]ederal law[] and the implementation of that law," 42 U.S.C. § 2000bb-3(a) (emphasis added), and confers a right to raise RFRA "as a claim or defense in a judicial proceeding." *Id.* § 2000bb-1(c).

[30] The term "all" refers to "every member or individual component of." *All*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/all (last visited Feb. 16, 2022). Thus, RFRA's statement that it applies to "all [f]ederal law and[] the implementation of that law" includes Title VII, which is "one member" of the class to which RFRA section 2000bb-3(a) refers ("all [f]ederal law"). Indeed, the whole point of using the term "all" is to refer to every member of a class without having to specifically identify each one.

In holding that Title VII forecloses any RFRA claim for religious discrimination in federal employment, the Sixth and Eighth Circuits relied on *Brown v. General Services Administration*, 425 U.S. 820 (1976), which held that Title VII is the "exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination." *Id.* at 829; *see Harrell*, 638 F.3d at 983; *Francis*, 505 F.3d at 1154. *Brown*, however, was decided more than 20 years prior to Congress's enactment of RFRA, and 42 U.S.C. § 1981 (which was the general remedial statute at issue in

Brown) does not contain any language similar to RFRA's sweeping "applies to all [f]ederal law" language. Moreover, "the crucial consideration [in this context] is what Congress intended," *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252 (2009) (alteration omitted) (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)), and it would be inappropriate to conclude that Congress affirmatively intended RFRA not to include federal employee-workplace claims given that RFRA postdates Title VII; states that it "applies to all [f]ederal law"; and provides an express cause of action.

[31] That RFRA provides substantially greater protection for religious freedom than Title VII further supports concluding that Congress intended RFRA to include religious employment-discrimination claims. *Cf. Fitzgerald*, 555 U.S. at 257 (holding that Title IX does not preclude 42 U.S.C. § 1983 suits alleging a violation of equal protection because, among other reasons, "the standards for establishing liability may not be wholly congruent" between the two). Similar to *Fitzgerald*, RFRA's compelling-interest standard is not "wholly congruent" with Title VII's "more than a de minimis cost" standard for determining when an "undue hardship" renders a Title VII religious accommodation unnecessary, *Hardison*, 432 U.S. at 84. Rather, RFRA's "least restrictive means" standard is considerably more exacting than what Title VII requires. Nevertheless, it is a standard which, as shown below, USDA meets in this case.

B. This Court Should Affirm the Dismissal of Plaintiff's RFRA Claim Because the Complaint Fails to Identify a Plausible RFRA Violation.

USDA does not contest for purposes of this appeal whether Mr. Truskey has properly pleaded a substantial burden on the free exercise of religion. This Court should affirm the dismissal of Mr. Truskey's RFRA claim, nonetheless, because USDA's inability to hire him as an emergency firefighter without a social security number is the least restrictive means to accomplish multiple compelling government interests.

As explained, this Court in *Yeager* noted that USDA has a statutory duty to collect and report to the IRS social security numbers for all its employees. *See supra* pp. 22-23. The IRS uses those social security numbers to ensure the sound administration [32] of the nation's federal income tax system and to prevent fraud and the erroneous payment of multiple claims for tax credits or refunds. *See supra* pp. 2-3. Preventing fraud and error in the federal income tax system are compelling government interests, *see Hernandez v. Commissioner*, 490 U.S. 680, 699-700 (1989); *United States v. Lee*, 455 U.S. 252, 260 (1982), and there are no less-restrictive alternatives available to achieve those ends. Mr. Truskey's suggestion that he be allowed to provide an IRSN as a permanent substitute for a social security number is not a less-restrictive alternative because the IRS requires and uses employees' social

security numbers in unique ways to prevent error and fraud in the federal income tax system. *See supra* pp. 24-25.

As explained, federal agencies also are required to collect and report their employees' social security numbers to other agencies, including to the Department of Homeland Security for enforcement of the nation's immigration laws and to the states for their enforcement of child-support orders. *See supra* pp. 3-4. The government has a compelling interest in the enforcement of those laws, *see*, *e.g.*, *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017), and Mr. Truskey fails to identify any less restrictive way the government could achieve those interests.

In addition, the computerized payroll system USDA uses to pay the salaries of its emergency firefighters works only with a social security number. *See supra* p. 7. The government has a compelling interest in operating an efficient payroll system for its employees, and the record shows "there are no other options under [that] system to issue payment to a worker," *supra* p. 7 (alteration omitted).

[33] **Conclusion**

For the foregoing reasons, the judgment of the district court dismissing the complaint should be affirmed.

Respectfully submitted,

Brian M. Boynton
Principal Deputy Assistant Attorney General
Michael Bennett
United States Attorney
Marleigh D. Dover
(202) 514-3511
s/s Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.
(202) 514-3427
Attorneys, Civil Division
Appellate Staff, Room 7241
U.S. Department of Justice
950 Pennsylvania Avenue, N. W.
Washington, D.C. 20530