No. 19-66

In The
Supreme Court of the United States

GEORGE Q. RICKS,

Petitioner,

v.

STATE OF IDAHO CONTRACTORS BOARD, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Idaho

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court overrule *Employment Division v. Smith*, 494 U.S. 872 (1990), which reaffirmed that the Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id*. at 878-79.

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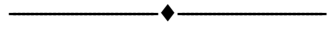
INTRODUCTION

The petition seeks a writ of certiorari on one issue alone: whether this Court should revisit *Employment Division v. Smith*, 494 U.S. 872 (1990), which affirmed the long-established rule that neutral government laws that incidentally affect religion are subject to rational basis review. There is no reason for this Court to take such a drastic step, but even if the Court desires to take that step, this case is not the appropriate vehicle. The Court should not take that step because first and foremost, *Smith* was correctly decided and based on long-standing Free Exercise Clause precedents. Second, *stare decisis* weighs heavily in support of maintaining *Smith*. And finally, even if this Court desires to revisit *Smith*, this case presents an inappropriate vehicle for doing so because Ricks' case is subject to an independent state-law jurisdictional bar and because the Idaho Court of Appeals already held that his claim fails on the merits even under his requested heightened legal standard. Any decision by this Court reinstating Ricks' Free Exercise claim would effectively be advisory because he has no realistic hope of obtaining relief on that claim. For these reasons, Respondents ask that the Petition be denied.



STATEMENT OF THE CASE

I. Statutory Framework

Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. (Pet.

App. 10a.) The Act, a cooperative endeavor with the states, aimed, among other things, to improve child support enforcement effectiveness by collecting information from the states for the Federal Parent Locator Service, a database established to track down parents with child support obligations. *See Idaho Dep't of Health & Welfare v. McCormick*, 153 Idaho 468, 471, 283 P.3d 785, 788 (2012) (detailing the system by which states enact legislation and rules in compliance with a federal statute in order to accept federal grant money); *Lewis v. State, Dep't of Transp.*, 143 Idaho 418, 422-23, 146 P.3d 684, 688-89 (Ct. App. 2006). (Pet. App. 10a.) As an exercise of Congress' spending authority, the Act offered grants to states in exchange for compliance with the Act. *Id.* One requirement of the Act is that states collect the social security number of any applicant for a professional license. 42 U.S.C. § 666(a)(13).

The Idaho Legislature chose to participate in the cooperative endeavor in 1998 by passing Idaho Code § 73-122 to bring Idaho into compliance with 42 U.S.C. § 666(a)(13), although Idaho already requested social security numbers on professional license applications. H.B. 431, 54th Leg., 2nd Reg. Sess. (Idaho 1998) (Statement of Purpose/Fiscal Note). Idaho Code § 73-122 states:

> (1) The social security number of an applicant shall be recorded on any application for a professional, occupational or recreational license.
>
> (2) The requirement that an applicant provide a social security number shall apply only

> to applicants who have been assigned a social security number.
>
> (3) An applicant who has not been assigned a social security number shall:
>
> > (a) Present written verification from the social security administration that the applicant has not been assigned a social security number; and
> >
> > (b) Submit a birth certificate, passport or other documentary evidence issued by an entity other than a state or the United States; and
> >
> > (c) Submit such proof as the department may require that the applicant is lawfully present in the United States.

(Pet. App. 11a.)

Applicants for contractor registration must also comply with the Idaho Contractors Registration Act, which the Idaho Legislature enacted because "[t]he state of Idaho has no way of stopping unscrupulous or dishonest building contractors from continuing to practice in this state. There is nothing in current law that would prohibit a contractor – even if known to be a 'bad actor' – from acting as a building contractor." H.B. 163, 58th Leg., 1st Reg. Sess. (Idaho 2005) (Statement of Purpose). (Pet. App. 11a.) One section of the Act requires "[a]n applicant for registration as a contractor [to] submit an application under oath upon a form to be prescribed by the board and which shall include the

following information pertaining to the applicant: . . . Social security number." Idaho Code § 54-5210.

The Idaho Contractors Board ("Board") and Idaho Board of Occupational Licenses ("IBOL") administer both Idaho Code § 54-5210 and Idaho Code § 73-122 by requiring social security numbers to be listed on a contractor's application for registration. Idaho Code § 54-5207. (Pet. App. 11a.) Although not addressed in the courts below, there are several exemptions to registering as a contractor, one of which includes being employed by a contractor that is registered. Idaho Code § 54-5205(2)(a).

II. Factual Background

Because this case was resolved through motions to dismiss, Ricks' factual allegations are accepted as true. That said, Respondents accept as true only those allegations in the record before the Idaho Court of Appeals[1] and not additional allegations made for the first time in the petition.

Ricks has a social security number,[2] but refuses to disclose it due to a religious objection. (Pet. App. 88a.)

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[1] Not all the records from the district court proceeding were before the Idaho Court of Appeals. However, all the allegations made in the Amended Complaint and Second Amended Complaint were before the Idaho Court of Appeals. The records before this Court in the Petition that were not within the record before the Idaho Court of Appeals are Pet. App. 29a-31a, 58a-77a.

[2] There is no evidence in the record to determine whether Ricks has suppressed his social security number through the

He summarized his reasoning in the Amended Complaint, asserting his "religious belief that the SSN, as it is now being imposed, is a form of the mark, and in substance (essence) the number of the 2-horned beast written of in the Holy Bible[.]" (Pet. App. 90a.)[3] Due to the case being resolved through motions to dismiss, the sincerity of Ricks' religious beliefs have not been challenged.

On June 14, 2014, Ricks filed an application for a contractor registration with IBOL and omitted his social security number.[4] Five days later, Ricks was notified by an employee of the IBOL that, in order to process his application, he would need to provide his social security number pursuant to Idaho Code § 54-5210(a). (Pet. App. 3a, 88a-89a.) Ricks did not provide his social security number and instead alleges (Pet. 7) that he provided an affidavit asserting his religious

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Social Security Administration, which is a process that is available to him. https://secure.ssa.gov/poms.nsf/lnx/0110225035.

[3] Contrary to the Petition, there is no evidence to support the contention that "[h]e has long had concerns . . . that it is morally wrong to participate in a governmental universal identification system." (Compare Pet. 7 with Pet. App. 3a, 88a-90a.)

[4] Ricks maintains (Pet. 7) that he has been working as a contractor in the construction industry for the last 40 years, but he failed to allege that in any of his complaints. If his petition's allegation is correct and any of those 40 years were after 2005, he may have been violating Idaho's registration requirement for many years before seeking to register in 2014. Idaho Code § 54-5202.

objection.[5] On August 12, 2014, the IBOL denied Ricks' application for a license. (Pet. App. 89a.)

Ricks filed a petition for judicial review of IBOL's denial in Idaho district court on September 18, 2014 (see Pet. App. 89a) – 35 days after the denial. He did this, even though he was informed that he had to appeal within 28 days and even though Idaho Rule of Civil Procedure 84(c) makes that time limit jurisdictional. (Supp. App. 1-2.)

III. Procedural Background

Almost two years later, Ricks filed this action in Idaho district court contesting IBOL's denial of his registration. (Pet. App. 97a.) All of the allegations in his Amended Complaint arise from IBOL's refusal to process Ricks' application for an Individual Contractor Registration because he did not provide all the information required by the Contractor Registration Act. Namely, he did not provide a social security number and did not respond to the question of "[h]ave you ever received a conviction, finding of guilt, withheld judgment or suspended sentence for any felony in any jurisdiction?" (Pet. App. 88a-97a, 105a.) The proceedings

[5] The correspondence, applications, and affidavit – which are included in the Petition Appendix (at 98a-109a) – were not in the record below. Nor is there anything in the record that demonstrates – as his petition now alleges (Pet. 1) – that he "was willing to offer his birth certificate as an alternative form of identification."

below only addressed the issue related to the social security number.

In the Amended Complaint, Ricks alleged that by denying his application for failure to provide a social security number, IBOL is denying him his rights under the Free Exercise of Religion Act ("FERPA"), Idaho Code §§ 73-401 to 404, Idaho's version of the Religious Freedom Restoration Act ("RFRA"); denying him his fundamental right to contract and to "carry on his private business his own way"; and that the Contractor Registration Act was "void for vagueness as a 'police power' of the State"; a violation of the Equal Protection Clause; a violation of separation of powers and a violation of Federal Privacy Act of 1974. (Pet. App. 63a, 90a-91a.) Ricks requested compensatory damages for loss of earnings and all other remedies that the Court deems just under Idaho Code § 73-402 and 42 U.S.C. § 1983. (Pet. App. 95a-97a.) Ricks did not invoke or reference Idaho's Declaratory Judgment statutes, which are found in Idaho Code § 10-1201. (*See id.*)

Respondents moved to dismiss the Amended Complaint on the grounds that 42 U.S.C. § 666 preempts Appellant's claims under Idaho state law. (Pet. App. 62a-73a.) The district court agreed and dismissed that portion of Plaintiff's Amended Complaint. (*Id.*)

Ricks then filed a Second Amended Complaint and for the first time added a claim under the United States Constitution alleging that his rights were violated under the Free Exercise Clause of the First Amendment. (Pet. App. 5a, 56-57a.) This is the first time

Ricks identified *Smith*, but there is no mention that it was supposedly wrongly decided. (Pet. App. 85a.) Instead it is buried in a string cite, which also identifies *Yoder*, *Sherbert*, and *Hobbie*. (Pet. App. 85a.) The Second Amended Complaint obliquely references that Ricks was seeking a declaratory judgment, although, as the Idaho Court of Appeals later ruled, Pet. App. 9a n.7, that throw-away comment was insufficient to state a declaratory action in Idaho.

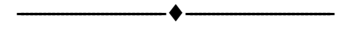
At oral argument on Respondents' motion to dismiss his Free Exercise claim, Ricks clarified that his Second Amended Complaint was also bringing a claim under RFRA. (Pet. App. 40a, 51a-54a.) The district court granted Respondents' motion in part and denied it in part – dismissing the First Amendment claims, but not the RFRA claims. (Pet. App. 5a, 36a-48a.)

Ricks appealed the district court's ruling on the Free Exercise claim to the Idaho Supreme Court and the matter was assigned to the Idaho Court of Appeals.[6] (Pet. App. 32a-35a.) In the interim, the district court dismissed the action in its entirety after the State sought reconsideration of the RFRA claims and the district court agreed with the State's arguments. (Pet. App. 5a, 29a-31a.) Ricks' appeal to the Idaho Court of Appeals argued that (1) the requirement that he provide his social security number violated his free exercise of religion as protected by FERPA, RFRA, and

[6] The Idaho Supreme Court has original jurisdiction of all appeals in Idaho. Idaho Code § 1-204. The Idaho Supreme Court may assign certain matters to the Idaho Court of Appeals, which it did in this instance. Idaho Code § 1-2406.

the United States and Idaho Constitutions, and (2) the statutes violated his inalienable right to contract under the Due Process Clause and was an illegitimate exercise of state and federal police power. (Pet. App. 7a.)

The Idaho Court of Appeals affirmed the dismissal of Ricks' claims. That court stated it was unclear from the factual record below if Ricks had exhausted his administrative remedies prior to filing suit. (Pet. App. 10a, 28a.) This is significant because, under Idaho law, a failure to exhaust administrative remedies deprives a district court of subject matter jurisdiction. The court then stated that, "[t]o the extent this Court has subject matter to review Ricks' appeal, the merits of his claim also fail." (Pet. App. 10a.) The court concluded that Ricks' First Amendment Free Exercise rights were not violated by requiring him to list his social security number on a building contractor application, relying on *Smith* and determining that Idaho Code § 73-122 was a neutral law of general applicability. (Pet. App. 23a-25a, 41a-46a.) And in rejecting Ricks' claim under FERPA, Idaho's version of RFRA, it found that the Idaho statutes were supported by compelling government interests – to conform to 42 U.S.C. § 666(a)(13) and thereby improve child support enforcement effectiveness and to ensure the quality of contracts in Idaho – and that requiring a social security number on Ricks' license application was the least restrictive means of accomplishing such interests. (Pet. App. 21a n.10.)



REASONS FOR DENYING THE PETITION

I. *Smith* was correctly decided

As early as 1878, this Court recognized that state laws could be consistent with the Free Exercise Clause even if they interfere with religious practice. *See Reynolds v. United States*, 98 U.S. 145, 161-67 (1878). "To permit this [behavior that is contrary to law because of religious beliefs] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *Reynolds*, 98 U.S. at 166-67. More than a century later *Smith* cited *Reynolds* with approval and stated that "[s]ubsequent decisions have consistently held that the right to free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 494 U.S. 879 (citing *United States v. Lee*, 455 U.S. 252, 263 (1982); *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 595 (1940)).

Smith was not the grave departure from Free Exercise cases that the Petition describes. (Pet. App. 11a-15a.) "Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). While *Smith* has been widely debated in subsequent First Amendment cases, it also has been diligently

defended by *Smith*'s author, Justice Scalia. *See City of Boerne v. Flores*, 521 U.S. 507, 537-44 (Scalia, J., concurring, in part) ("The material that the dissent claims is at odds with *Smith* either has little to say about the issue or is in fact more consistent with *Smith* than with the dissent's interpretation of the Free Exercise Clause.").

Prior to *Smith*, neutral laws without religious animus were widely accepted as presumptively valid: the State may regulate conduct with general laws "to advance the State's secular goals, [and] the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden." *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (upholding Sunday closing laws despite an economic burden on Sabbatarian businesses). "To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good." *Lee*, 455 U.S. at 259 (upholding the obligation to pay social security tax despite Amish business owner's objection). "The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government. . . ." *Lyng v. Northwest Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 453 (1988).

While critics of *Smith* want to parade it as a "transformative change" in Free Exercise claims, it

was, in fact, only a departure from the Court's interpretation of the Free Exercise Clause as it relates to unemployment compensation and "hybrid-right" cases. *Smith* outlines the three occasions where the Court departed from this pre-*Smith* reasoning for purposes of unemployment compensation. *See Smith*, 494 U.S. at 883 (referring to the *Sherbert* test, which states that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest") (citing *Sherbert v. Verner*, 364 U.S. 402-03 (1963); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987)). Yet the *Sherbert* test was developed and applied *only* in the context of unemployment compensation. *See Smith*, 494 U.S. at 883-84 (citing *Bowen*, 476 U.S. 693) (declining to extend *Sherbert* test "to a federal statutory scheme that required benefit applicants and recipients to provide their Social Security numbers."); *Lyng*, 485 U.S. 439 (declining to apply *Sherbert* test to "Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes"); *Goldman v. Weinberger*, 475 U.S. 503 (1986) ("reject[ing] application of the *Sherbert* test to military dress regulations that forbade the wearing of yarmulkes."). The *Smith* Court found that the dangers of applying *Sherbert* in other contexts would "increase[] in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them." *Id.* at 888.

The reason for the departure from *Sherbert* in *Smith* was obvious: where prior unemployment compensation cases addressed conduct that was not prohibited by law (objections to war and refusing to work on Saturday), *Smith* was faced with religious conduct that was illegal under Oregon law (consumption of peyote by drug counselors). *Smith* recognized the unworkable nature of the *Sherbert* test in the Free Exercise context and correctly stated that, "[t]o make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' – permitting him, by virtue of his beliefs, 'to become a law unto himself,' – contradicts both constitutional tradition and common sense." *Smith*, 494 U.S. at 885 (internal citation to *Reynolds* omitted). This is in part because it has long been the position of this Court not to question the sincerity or centrality of any specific religious belief since "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. The rationale, logic, and case law all support the decision in *Smith* as being correctly decided.

The *Smith* Court further identified scenarios where "hybrid-rights" existed – that is, where Free Exercise was paired with another "communicative activity or parental right." *See Smith*, 450 U.S. at 882. The Petition takes issue with *Wisconsin v. Yoder*, 406 U.S. 205 (1972), being coined by *Smith* as a "hybrid-rights" case, stating that it addressed the Free Exercise clause alone. This argument ignores the plain language of the

Court in *Yoder* that a State's interest in education "is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, *and* the traditional interest of parents with respect to the religious upbringing of their children." *Yoder*, 406 U.S. at 214 (emphasis added).

In short, while Petitioner criticizes *Smith* as a departure from Free Exercise cases, it is not. Opponents of *Smith* viewed Free Exercise cases from 1878 forward in the vacuum of *Sherbert* and *Yoder*, which "ignores, or treats as non-binding or less binding, other important cases[.]" Marci A. Hamilton, *Employment Division v. Smith at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 Cardozo L. Rev. 1671, 1672 (2011) (citing *Reynolds*, 98 U.S. 145; *Braunfeld*, 366 U.S. 599; *Lee*, 455 U.S. 252; *Gillette v. United States*, 401 U.S. 437 (1971)). Therefore, *Smith* was correctly decided.

II. *Stare decisis* weighs against granting the Petition

"Overruling precedent is never a small matter. *Stare decisis* – in English, the idea that today's Court should stand by yesterday's decisions – is 'a foundation stone of the rule of law.'" *Kimble v. Marvel Entm't, LLC*, 135 S.Ct. 2401, 2409 (2015) (quoting *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2036 (2014)). "[I]t is usually 'more important that the

applicable rule of law be settled than that it be settled right.' . . . To reverse course, we require as well what we have termed a 'special justification' – over and above the belief 'that the precedent was wrongly decided.'" *Kimble*, 135 S.Ct. at 2409 (quoting *Burnet v. Coronado Oil & Gas Co*., 285 U.S. 393, 46 (1932) (dissenting opinion) and *Haliburton Co. v. Erica P. John Fund, Inc*., 134 S.Ct. 2398, 2407 (2014)).

Although "[t]he doctrine 'is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions[,]'" *stare decisis* still has force in this context and requires special justifications to be overcome. *Janus v. Am. Fed'n of State*, 138 S. Ct. 2448, 2478-79 (2018) (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997)). That is fully so in First Amendment cases. *See Janus*, 138 S.Ct. at 2478-79 (emphasis added) (revisiting *Abood v. Detroit Bd. of Ed*., 431 U.S. 209, 235-36 (1977) because special justifications existed to do so). While the Petition relies heavily on *Janus* to demonstrate that *Smith* should be revisited, the Free Speech issue in *Janus* involved a number of special justifications that went further than mere disagreement with the prior precedent – yet that is virtually all Petitioner presents here.

The reasons for overruling existing law that are most commonly considered special justification are (1) "statutory and doctrinal underpinnings [that] have [] eroded over time"; and (2) the rules established in the case "ha[ve] proved unworkable." *Kimble*, 135 S.Ct. at 2410-11 (citing *Patterson v. McLean Credit Union*, 491

U.S. 164, 173 (1989)). Other special justifications include "the quality of [the] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Janus*, 138 S.Ct. at 2478-79. None supports overruling *Smith*.

Here, while the Petition argues that special justification exists to overrule *Smith*, all those arguments boil down to one central point: *Smith* was wrongly decided. (Pet. 15-22, 30-31.) As argued above, the quality of the reasoning and the consistency with related decisions are carefully outlined throughout the *Smith* decision. *See Smith*, 494 U.S. at 876-89. *Smith* in fact takes great pains to harmonize the Court's Free Exercise precedents, which at the time of *Smith* were in conflict depending upon what type of Free Exercise claim an individual was bringing. *Id.*

Further, arguing that *Smith* was wrongly decided is not a sufficient basis to overrule that decision because "it is usually 'more important that the applicable rule of law be settled than that it be settled right.'" *Kimble*, 135 S.Ct. at 2409 (quoting *Burnet*, 285 U.S. at 46 (dissenting opinion)). Principles of *stare decisis* warrant this Court denying the Petition.

III. Even if the Court wants to revisit *Smith*, this case is not the vehicle to do so

Even if this Court wants to revisit *Smith*, this is the wrong case to do so because (1) powerful independent state grounds exist to dismiss Ricks' claim on

remand; and (2) Ricks' claims fail even if the *Sherbert* test is applied. Therefore, the Court should deny the Petition.

A. The Idaho Court of Appeals correctly questioned whether it had subject matter jurisdiction in this matter

The Idaho Court of Appeals – although *sua sponte* – questioned whether it had subject matter jurisdiction. "To the extent this Court has subject matter jurisdiction to review Ricks' appeal, the merits of his claims also fail." (Pet. App. 28a.) This is because under Idaho law, Ricks was required to exhaust his administrative remedies. Ricks appears to concede that he did not exhaust his administrative remedies, which is likely because it is true. (Pet. 10 at n.3.).

Ricks also failed to timely appeal the agency action by failing to file a petition for judicial review within 28 days from the date IBOL denied his application for contractor registration. This failure is jurisdictional.

Ricks filed his petition for judicial review from IBOL's denial of his application for contractor registration on September 18, 2014. (Supp. App. 1-2.) IBOL denied the application on August 12, 2014, and notice of the denial was served to Ricks. Ricks was specifically informed that he had 28 days to file a petition for judicial review. (Supp. App. 1-2.) His petition should have been filed by September 11, 2018, but was not filed until 35 days after of the Board's final decision and order.

(Supp. App. 3-11.) Accordingly, IBOL moved to dismiss Ricks' petition pursuant to Idaho Rule of Civil Procedure 84(n), which provides as follows:

> (n) Effect of Failure to Comply with Time Limits. *The failure to physically file a petition for judicial review or cross-petition for judicial review with the district court within the time limits prescribed by statute and these rules is jurisdictional and will cause automatic dismissal of the petition for judicial review on motion of any party, or on initiative of the district court.* Failure of a party to timely take any other step in the process for judicial review will not be deemed jurisdictional, but may be grounds only for such other action or sanction as the district court deems appropriate, which may include dismissal of the petition for review.

I.R.C.P. 84(n) (emphasis added). Given Ricks' failure to timely file a petition for judicial review, the district court dismissed the petition, which under Idaho law denies the court subject matter jurisdiction over Ricks' claim collaterally attacking the agency action: denial of his contractor registration application. (Supp. App. 3-11.)

In Idaho, a party must first exhaust their administrative remedies before filing a petition for judicial review of agency action, even if the challenge to the agency action asserts an issue of constitutionality. (Pet. App. 8a.) "[T]he exhaustion doctrine implicates subject matter jurisdiction because a district court does not acquire subject matter jurisdiction until all

the administrative remedies have been exhausted." *Fuchs v. State, Dep't of Idaho State Police, Bureau of Alcohol Beverage Control*, 152 Idaho 626, 629, 272 P.3d 1257, 1260 (2012) (quotations omitted). Accordingly, the Idaho Court of Appeals raised the issue of exhaustion *sua sponte* and determined that the issues brought by Ricks are subject to the Idaho Administrative Procedure Act's exhaustion requirement. Idaho Code § 54-5210(3). (Pet. App. 8a-9a.) The Idaho Court of Appeals found that if Ricks had not exhausted the appropriate administrative procedures that it would be "deprive[d] of subject matter jurisdiction." (Pet. App. 10a.)

The Petition hypothesizes (Pet. 10, n.3) that the reason exhaustion was not argued below is because Ricks actually brought a claim for declaratory relief, which would not require exhaustion.[7] This is contrary to the record below. The Idaho Court of Appeals expressly ruled that, "[b]ecause Ricks did not seek a declaratory judgment in the district court, this exception does not apply here." (Pet. App. 9a.) While the Second Amended Complaint states that Ricks "seeks relief in the form of declaratory judgment" the Idaho Court of Appeals still did not find that an exception to exhaustion applied in this case. (Pet. App. 86a.)

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[7] While the Petition hypothesizes why this was not raised by the State below – i.e., that exhaustion was not required in this matter – that presumption is incorrect. Exhaustion is required and the State strategically and effectively determined that efforts were better spent arguing the valid legal merits of the underlying claim rather than a procedural defect. (Pet. App. 10, n.3.)

On remand, Ricks' claim would be subject to dismissal by the district court because: (1) he was required to exhaust his administrative remedies; (2) he correctly concedes that he did not exhaust; (3) as the Idaho Court of Appeals stated, none of the exceptions to the exhaustion requirement apply; and (4) his claim would be subject to dismissal upon remand. While Ricks attempts to claim that he was exempt from the requirement because it was a declaratory action pursuant to Idaho Code § 67-5278(1), (3), that argument is incorrect under Idaho law as noted above and contrary to how this case was litigated below.[8]

Ricks was required to exhaust his administrative remedies and his failure to do so makes this case the inappropriate vehicle for this Court to revisit *Smith*. To hear this case would amount to any decision being no more than an "advisory opinion." *See Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

B. Ricks' claim fails even if the *Sherbert* test is applied

Following the Court's decision in *City of Boerne*, 521 U.S. 507 (1997), Idaho was one of many states that enacted a statute to protect religious freedom, including implementation of the compelling interest test from *Sherbert* and *Yoder*. (Supp. App. 18-21) (stating that the purpose of the bill was to reestablish the "compelling interest test"). Although the Idaho Court of

[8] This is the first time Ricks has referenced or cited Idaho Code § 67-5278(1), (3).

Appeals found that analysis of Ricks' state freedom of religion claim was barred by its prior decision in *Lewis*, 143 Idaho 418, 146 P.3d 684, it nonetheless analyzed the merits of his claim under the compelling interest test. (Pet. App. 12a-21a.) "Even if the Court were to address the merits of Ricks' FERPA claim, it would fail." (Pet. App. 20a.) The Idaho Court of Appeals found that the State had a compelling interest in conforming to 42 U.S.C. § 666(a)(13) "to improve child support enforcement effectiveness and to ensure the quality of contractors in Idaho" and that the least restrictive means of accomplishing those interests were to require Ricks to provide his social security number on his license application. (Pet. App. 21a.)

The petition argues that the Idaho Court of Appeals analysis "bears no resemblance to the heightened scrutiny applied in this Court's federal Free Exercise cases[.]" (Pet. 32, n.7.) In support, it cites to Justice O'Connor's dissent in *Bowen v. Roy*,[9] that is not a binding precedent on this Court as it relates to the *Sherbert* test. Here, the Idaho Court of Appeals analyzed whether there would be another method of identification that could be used to track child support orders across state lines and concluded "it is hard to imagine another uniformly used method of identification other than a social security number[.]" (Pet. App. 21a.) Therefore, even if *Smith* did not bar Ricks' claims, his claims would be otherwise barred under the *Sherbert* test, which makes this case an inappropriate

[9] Justice O'Connor's partial dissent in *Bowen v. Roy* was only supported by two other justices in the plurality opinion.

vehicle for what Petitioner asks this Court to do: "revisit its holding in *Employment Division v. Smith*[.]" (Pet. App. i.)

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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