# *Ricks v. Idaho Contractors Board* and Religious Freedom

Case Summary
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The Supreme Court of the United States could decide an Idaho case concerning the free exercise of religion. George Ricks holds a religious belief that social security numbers are the "mark of the beast."[1] Due to this belief, he refused to provide his social security number on an application for a state work license.[2] The Idaho Bureau of Occupational Licensing denied the application, refusing to grant a religious exemption.[3] Ricks brought suit, claiming the state *must* provide an exemption because of his sincere religious belief.[4] After failing in the Idaho courts, Ricks filed his petition for writ of certiorari to the U.S. Supreme Court in July 2019; the Court relisted the case several times, and has kept the case on hold since February 2020.[5]

*Employment Division v. Smith* is the leading case in the law of religious free exercise.[6] In *Smith*, the Court held that the First Amendment right of free exercise "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability."[7] Critics immediately assailed the holding. They argued that under the *Sherbert/Yoder* "compelling interest" standard,[8] the free exercise clause did indeed require individual religious exemptions be made even to neutral laws.[9]

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[1] Ricks v. Idaho Contractors Bd., 435 P.3d 1, 4, 164 Idaho 689, 692 (Ct. App. 2018), *review denied by Idaho Supreme Court*.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] Ricks v. Idaho Contractors Board, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/ricks-v-idaho-contractors-board/ (last visited Apr. 21, 2021). A case is "relisted" when it is considered at several of the Justices' conferences. Amy Howe, *Frequently Asked Questions: Orders*, SCOTUSBLOG (June 24, 2013, 8:48 AM), https://www.scotusblog.com/2013/06/frequently-asked-questions-orders/. A "hold" means that the Court is waiting to act on a case, usually because either (1) the Court is waiting to resolve a case presenting a similar issue, or (2) the Court is waiting for another petition that presents a similar question. *Id.*
[6] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).
[7] *Id.* at 879 (internal quotation marks omitted); *cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.").
[8] Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("We must . . . consider whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right."); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").
[9] *E.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1120–27 (1990). *But see* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412–13 (1992) ("Despite the obvious change *Smith* brought to the language of free exercise doctrine, the impact of the decision on the outcome of free exercise cases will likely be insignificant. . . . Indeed, perhaps the most lasting and helpful legacy of the case will be that it finally dispelled the mistaken notion that courts were the leading institutional protectors of religious liberty.").

Congress agreed with *Smith*'s critics and passed the Religious Freedom Restoration Act (RFRA).[10] The explicit purpose of RFRA was "to restore the compelling interest test . . . in all cases where free exercise of religion is substantially burdened."[11] RFRA's "compelling interest" test requires the government to demonstrate that any burden to a person's exercise of religion is in furtherance of a substantial government interest and is the least restrictive means of furthering that interest.[12]

The Roberts Court has applied and strengthened RFRA in several holdings.[13] Most notably, in *Burwell v. Hobby Lobby*, the Court held that an employer could claim RFRA exemption from a requirement to provide contraception coverage in employee health insurance plans.[14] Writing for the majority, Justice Alito noted that in RFRA, "Congress went far beyond what this Court has held is constitutionally required."[15] More recently, in *Tanzin v. Tanvir*, the Court unanimously held that RFRA provides for a right to seek damages against individual government officials in their personal capacities.[16]

Dicta from two opinions last term also demonstrate the conservative Justices' support of powerful RFRA protections for religious exercise. In *Bostock v. Clayton County*, the Court held that Title VII's ban on sex discrimination extended to protections for homosexual and transgender employees.[17] But in his majority opinion, Justice Gorsuch noted that RFRA, operating "as a kind of super statute," might "supersede Title VII's commands in appropriate cases."[18] In *Little Sisters of the Poor v. Pennsylvania*, the Court again examined the issue of employer religious exemption from participation in employee contraception coverage.[19] Although that case was disposed of under the Administrative Procedures Act, Justice Thomas emphasized that federal agencies should consider RFRA when promulgating rules and regulations.[20]

The addition of Justice Amy Coney Barrett to the Court further implicates the future of RFRA and the First Amendment's religion clauses. Joined by Justices Alito, Gorsuch, Kavanaugh, and Thomas, she voted to strike down New York state limitations imposed on religious gatherings during the COVID-19 pandemic.[21] The holding departed from prior decisions on substantially similar fact patterns, where Chief Justice Roberts joined the liberal

[10] 42 U.S.C. §§ 2000bb to 2000bb-4. RFRA is colloquially pronounced as "riff-ruh."
[11] *Id.* § 2000bb.
[12] *Id.* § 2000bb-1.
[13] *E.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 432–34 (2006) (requiring RFRA exemption from the Controlled Substance Act for religious use of the drug *hoasca*).
[14] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728–32 (2014).
[15] *Id.* at 706; *see also id.* at 706 n.18 ("[T]here is no reason to believe . . . that the law was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases.").
[16] Tanzin v. Tanvir, 141 S. Ct. 486 (2020). Justice Barrett did not take part in the decision.
[17] Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020).
[18] *Id.* at 1754.
[19] Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020).
[20] *Id.* at 2382–84 (discussing the extent to which an agency should consider RFRA when promulgating rules).
[21] Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020); *see also* Amy Howe, *Justices Lift New York's COVID-Related Attendance Limits on Worship Services*, SCOTUSBLOG (Nov. 26, 2020, 2:18 AM), https://www.scotusblog.com/2020/11/justices-lift-new-yorks-covid-related-attendance-limits-on-worship-services/.

justices, including the late Justice Ginsburg, to uphold such limitations.[22] Justice Barrett's influence will also be felt in a forthcoming decision on *Fulton v. City of Philadelphia*, where the Court will analyze RFRA's application to a religious foster agency that refuses to grant adoption certificates to unmarried or same-sex partners.[23]

How do these broader developments affect George Ricks' chances at the nation's highest court? Ricks argues that the Supreme Court should overturn *Smith*,[24] and the current Court may be amenable to doing so.[25] Overturning *Smith* would give constitutional status to the "compelling interest" standard. This would be a victory for religious liberty proponents because RFRA, a law enacted by federal statute, cannot be applied against the states.[26]

But the Court could also resolve Ricks' case short of overturning *Smith*. The Idaho Bureau of Occupational Licensing denied Ricks' application because a federal law (Section 666, appropriately enough) required the agency to collect social security numbers.[27] The Idaho Court of Appeals refused to apply RFRA's "compelling interest" standard to the federal law in question, reasoning that RFRA was inapplicable because "a RFRA claim . . . must include federal government defendants."[28] The Court could reverse on this narrow basis, concluding that Idaho was in fact required to review the federal law under RFRA.

Other actions remain available to the Court on Ricks' case. The Court could deny certiorari, leaving the Idaho decision standing. The Court might also choose to dispose of the case without a hearing, perhaps in tandem with a forthcoming decision in *Fulton*. Because the case has been pending before the Court for some time, it is likely that at least some of the Justices are interested in taking up the case. Overall, given the broader developments that have taken place with the Court's makeup and the development of RFRA doctrine, Ricks' case is certainly one to watch.

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[22] *See* South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020); *see also* Erwin Chemerinsky, *Chemerinsky: COVID-19 Ruling Reveals Much About the New Supreme Court*, ABA Journal (Dec. 3, 2020, 9:14 AM), https://www.abajournal.com/columns/article/chemerinsky-covid-19-ruling-reveals-much-about-the-new-supreme-court? ("[T]he decision is the first clear indication of the importance of the late Justice Ruth Bader Ginsburg having been replaced by Barrett.").

[23] Fulton v. City of Philadelphia, Oyez, https://www.oyez.org/cases/2020/19-123 (last visited Apr. 21, 2021); Amy Howe, *Argument Analysis: Justices Sympathetic to Faith-Based Foster-Care Agency in Anti-Discrimination Dispute*, SCOTUSblog (Nov. 4, 2020, 8:36 PM), https://www.scotusblog.com/2020/11/argument-analysis-justices-sympathetic-to-faith-based-foster-care-agency-in-anti-discrimination-dispute/.

[24] Petition for Writ of Certiorari, *Ricks v. Idaho Contractors Bd.*, 435 P.3d 1, 164 Idaho 689 (No. 19-66), http://www.supremecourt.gov/DocketPDF/19/19-66/107759/20190710194325684_FINAL%20CERT%20PETITION.pdf.

[25] *See generally* Michelle Boorstein, *Religious Conservatives Hopeful New Supreme Court Majority Will Redefine Religious Liberty Precedents*, Wash. Post (Nov. 3, 2020, 11:31 AM MST), https://www.washingtonpost.com/religion/2020/11/03/supreme-court-religious-liberty-fulton-catholic-philadelphia-amy-coney-barrettt/.

[26] *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

[27] 42 U.S.C. § 666(a)(13); Idaho Code § 73-122(1).

[28] Ricks v. Idaho Contractors Bd., 435 P.3d 1, 12, 164 Idaho 689, 700 (Ct. App. 2018).