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IN THE SUPREME COURT OF THE STATE OF IDAHO

GEORGE Q. RICKS,)
) **Supreme Court**
 Plaintiff/Appellant) **Docket No. 45396**
)
v.)
)
STATE OF IDAHO CONTRACTORS BOARD,)
 IDAHO BOARD OF OCCUPATIONAL)
 LICENSES, LAWRENCE WASDEN,)
 ATTORNEY GENERAL,)
)
 Defendants/Appellees.)
)

DEFENDANTS'/APPELLEES' BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho, in and for the County of Kootenai

* * * * *

Honorable Lansing Haynes, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

Defendant-Appellant George Q. Ricks (hereinafter “Ricks”) appeals the District Court’s decision dismissing Defendants-Appellees State of Idaho Contractors Board, Idaho Board of Occupational Licenses and Lawrence Wasden (hereinafter “State Defendants”) for failure to state a claim. Ricks brought suit seeking relief against Idaho’s Contractor Registration Act alleging that the requirement that he provide a social security number as part of his application violated his rights under Idaho’s Religious Freedom Act and his constitutional right to contract.¹ Ricks subsequently amended his complaint to add a claim under the United States Constitution’s Free Exercise Clause and the Religious Freedom Restoration Act (“RFRA”). State Defendants sought dismissal in three separate motions on the grounds that (1) the Idaho Free Exercise claim was already decided by the Idaho Court of Appeal in *Lewis v. State Dep’t of Transp.*, 143 Idaho 418, 146 P.3d 684 (Ct. App. 2006); (2) there is no constitutional right to contract; (3) there is no First Amendment right to withhold a social security number on religious objection; and (4) RFRA is unconstitutional as applied to the States. State Defendants ask that the District Court’s dismissal be upheld.

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¹ Ricks also alleged that the statute was void for vagueness, violated the separation of powers, and violated his right to equal protection. Those claims do not appear to be a part of this appeal.

B. Statement of the Facts and Allegations

All of the allegations in Ricks' complaint titled Amended Civil Action for Violation of Constitutional and Statutory Rights² (hereinafter "Amended Complaint") arise from the Idaho Bureau of Occupational Licenses' ("IBOL's") alleged refusal to process Ricks' application for an Individual Contractor Registration because he would not provide his social security number. (CRA pp. 18-23.) Ricks alleges that on June 14, 2014, he filed his application and omitted his social security number and that on June 19, 2014, an employee of the IBOL notified him that in order to process his application, he would need to provide his social security number pursuant to Idaho Code § 54-5210(a). (CRA p. 19.) Ricks did not provide his social security number and instead provided an affidavit asserting his religious objection.³ (See CRA pp. 18-23.) On August 12, 2014, the IBOL denied Ricks' application for a license. (CRA p. 19.) In the Amended Complaint, Ricks alleged that by denying his application for Individual Contractor Registration, IBOL is in fact denying him free exercise of his religious beliefs and his fundamental right to contract and to ". . . carry on his private business his own way." (CRA p. 23.) The District Court interpreted the Amended Complaint to include a claim 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

² Ricks' original complaint was filed at the same time as the Amended Complaint. (Clerk's Record on Appeal ("CRA") pp. 12-23.)

³ Ricks does not allege that he does not have a social security number, but simply that he should not have to disclose it in order to obtain a contractor's license.

Federal Privacy Act of 1974.⁴ (*Id.*) 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. (*Id.*) Ricks later amended his complaint to add a claim under the United States Constitution's Free Exercise Clause and RFRA. (CRA pp. 41-42.)

C. Course of the Proceedings

Ricks filed his Amended Complaint on August 11, 2016. (CRA pp. 18-23.) State Defendants moved to dismiss the Amended Complaint on the grounds that 42 U.S.C. § 666 preempts Ricks' religious objections under Idaho state law, which was supported by the court's decision in *Lewis v. State, Dep't of Transp.*, 143 Idaho 418, 146 P.3d 684 (Ct. App. 2006). (CRA p. 49.) The District Court agreed and dismissed that portion of Ricks' Amended Complaint in a memorandum decision and order issued on November 15, 2016. (*Id.*) As noted above, the District Court did not dismiss the Amended Complaint in its entirety because it found some alleged claims that were not addressed in the State's first motion. The State Defendants then filed a second motion to dismiss the Amended Complaint on November 29, 2016 and a supporting memorandum on December 7, 2016, on the remaining grounds that providing a social security number does not violate the "fundamental right" to contract because there is no right to contract, and that the Idaho Contractor Registration Act is not void for vagueness, a violation of the Equal Protection Clause, a violation of separation of powers, or a violation of the Federal

⁴ After State Defendants' first motion to dismiss, the District Court only partially dismissed the Amended Complaint finding that these vaguely stated claims had not been addressed. State Defendants filed a second motion to dismiss to address these claims, which were eventually dismissed. These claims do not appear to be a part of this appeal.

Privacy Act of 1974. (CRA p. 49.) The District Court granted that motion at hearing on February 2, 2017. (*Id.*; February 2, 2017 Transcript.)

Prior to that motion being heard, Ricks filed a motion for reconsideration on the November 15, 2016, decision and a motion to amend his Amended Complaint. (CRA pp. 24-42, 49.) The Court denied the request to reconsider its decision on the first and second motion to dismiss, but granted Ricks the opportunity to submit a proposed second amended complaint to add a claim that providing his social security number violated his First Amendment Right. (CRA p. 49; February 2, 2017 Transcript.) After argument, the Court granted Plaintiff's request and lodged his second Proposed Amended Complaint⁵ ("Second Amended Complaint") on March 6, 2017. (CRA pp. 41-42, 49; February 2, 2017 Transcript.)

On March 20, 2017, State Defendants filed their third motion to dismiss the Second Amended Complaint on the ground that there was no First Amendment right to withhold a social security number from a contractor registration application. (CRA pp. 48-55.) At oral argument on May 1, 2017, Ricks clarified that his Second Amended Complaint was also bringing a claim under RFRA, which was not addressed in the State Defendants' third motion to dismiss because that claim was not clear from the text of the Second Amended Complaint. (May 1, 2017 Transcript, 10:12-20, 12:13-17.) State Defendants sought leave to file a supplemental memorandum in support of the third motion to dismiss and the Court granted the request and the hearing was continued to June 8, 2017. At the hearing on June 8, 2017, the District Court denied

⁵ Ricks filed the proposed Second Amended Complaint without briefing on February 10, 2017. Court deemed the proposed Second Amended Complaint filed as of the date of the hearing (March 6, 2017 Transcript 13:7-14).

State Defendants’ motion as it related to the RFRA claims and found that RFRA could be used to challenge a state statute despite the United States Supreme Court’s ruling in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). (June 8, 2017 Hearing Transcript 7:11-8:20) (“[T]he state statute that is applicable and involved in this case exists, if not solely, but at least substantially to because 42 U.S.C. 666. The obtaining of a social security number from a contractor is substantially intertwined with a federal statute and exists in large part to service that federal statute for child support enforcement. Therefore, if RFRA applies to the federal statute, that gives life to the state statute, then the State’s motion to dismiss cannot be granted.”) On July 5, 2017, the District Court issued a memorandum decision and order, granting in part, and denying in part, State Defendants’ third motion to dismiss – dismissing the First Amendment Claims, but not the RFRA claims. (CRA pp. 68-77.)

On August 16, 2017, Ricks filed the instant appeal to the Idaho Supreme Court from the Memorandum Decision and Order entered on July 5, 2017. (CRA pp. 78-90.) This action was dismissed in its entirety on September 1, 2017, after the district court reconsidered its decision on the RFRA claims. (CRA p. 95.) Ricks’ notice of appeal listed issues far narrower than his opening brief. (CRA p. 79.)

II. ISSUES PRESENTED ON APPEAL

Ricks has phrased the issues on appeal as follows:

1. “42 Did the U.S. Congress intend to infringe on the People’s liberty to contract or their free exercise of religion in enacting 42 U.S.C. 666?”
2. “Is the Liberty to contract an inalienable right that can only be denied by due process of law?”

3. “Does the requirement of a SSN in order to register as a contractor violate [his] free exercise of religion?”

3.a. “Did Congress intend to preempt [his] free exercise of religion under Idaho’s Free Exercise of Religion Act. (FERA)?”

3.b. “Does I.C. 54-5210(a) in direct connection with I.C. 73-122 comply with Federal law?”

4. “Is I.C. 73-122 discriminatory toward those who have a religious objection to providing a SSN in order to register as a contractor?”

State Defendants rephrase these issues on appeal as follows:

1. Whether “the freedom to contract” is a constitutional right protected under the due process clause.

2. Whether the State Defendants are properly named parties as they relate to the constitutionality of 42 U.S.C. § 666.

3. Whether I.C. § 54-2110’s requirement that a contractor submit a social security number violates the First Amendment of the United States Constitution.

4. Whether this Court should reconsider the decision in *Lewis v. State Dep’t of Transp.*, 143 Idaho 418, 146 P.3d 684 (Ct. App. 2006).

5. Whether I.C. § 73-122 is discriminatory by failing to include a religious exemption for individuals who have a social security number and for religious reasons do not want to provide that social security number.

For clarity of argument, these issues will be addressed below in an order different than that listed above.

III. SUMMARY OF ARGUMENT

Idaho Contractor Registration Act requires an individual to submit a social security number as part of one’s application. I.C. § 54-5210(a). This requirement is based in Federal law, 42 U.S.C. § 666, which is part of the Federal Welfare Reform Act and implements enforcement for child support enforcement. It is contained in subchapter IV, which is entitled

“Grants to States For Aid and Services to Needy Families with Children and For Child Welfare Services.” This federal law to collect social security numbers for all occupational and professional licenses is enacted under the Spending Clause and States – like Idaho – can opt to accept federal welfare money in exchange for complying with the law. *See* 42 U.S.C. § 666(a)(13)(A). Idaho has done so, which is why the Idaho Contractor Registration Act requires that all applicants provide a social security number.

Because the Idaho Contractor Registration Act is based on federal law, the Idaho Court of Appeals found that by accepting federal dollars, Idaho is bound by the federal law, and that law (42 U.S.C. § 666) preempts Idaho’s Religious Freedom Act. Ricks has provided no authority for why that decision should be reversed. However, even if he had, Idaho and the federal courts have long held that there is no religious right to not comply with non-discriminatory general laws on the grounds of a religious objection.

Finally, to the extent that Ricks is making some form of challenge to the constitutionality of 42 U.S.C. § 666, 42 U.S.C. § 666 is constitutionally sound and State Defendants are not among those officials with authority to enforce that statute. There is no inalienable right to contract under the First Amendment as the freedom to contract is qualified and not absolute. The at-issue statute here has a proper legislative purpose and is neither arbitrary nor discriminatory. Further, the statutory requirement that applicants provide a social security number is wholly neutral in religious terms and uniformly applicable. Appellant was and is required to provide his social security number in order to obtain a contractor’s license.

Therefore, the State Defendants ask the Court to uphold the dismissal of Ricks' claims in their entirety.

IV. STANDARD OF REVIEW

The standard of review in reviewing a district court's order granting a motion to dismiss is the same as that used in summary judgment. *McCabe v. Craven*, 145 Idaho 954, 188 P.3d 896 (2008)(quoting *Gibson v. Ada County*, 142 Idaho 746, 751-52, 133 P.3d 1211, 1216-17 (2006)). "In an appeal from an order of summary judgment, this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment." *Infanger v. City of Salmon*, 137 Idaho 45, 46-47, 44 P.3d 1100, 1101-02 (2002)(citation omitted). "All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Id.* at 47. "Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* "If there is no genuine issue of material fact, only a question of law remains, over which this Court exercises free review." *Id.*

V. ARGUMENT

A. The Court Should Uphold the Decision in *Lewis v. State Dep't of Transp.* Because That Decision Correctly Found That Idaho's Religious Freedom Statute was Preempted by Federal Law

This case is and always has been a challenge to the Idaho Court of Appeals' decision in *Lewis v. State Dep't. of Transp.*, 143 Idaho 418, 146 P.3d 684 (Ct. App. 2006). In *Lewis*, the

court analyzed whether the submission of a social security number for purposes of obtaining a driver's license violated Lewis' rights under Idaho's religious freedom statutes. The court held that any statutory religious rights in Idaho were preempted by the federal requirements contained in 42 U.S.C. § 666. *See Id.* This Court should not reconsider that decision.

The facts in *Lewis* are nearly identical to this case with the exception of the type of license that Plaintiff has applied for. In that case, Lewis failed to provide a social security number as required by the application to renew his driver's license. *Id.* at 420. Lewis would not provide his social security number because "Lewis believes the number issued to him by the federal government is either the precursor to, or actually is, the biblical 'mark of the beast.'" *Id.* He claimed that the requirement to submit his social security number violated his state statutory and constitutional rights under Idaho's Free Exercise of Religion Act, codified at Idaho Code § 73-402. The Idaho Court of Appeals rejected Lewis' claims without reaching the religious freedom issue because the submission of a social security number for a driver's license renewal was a federal requirement that was dictated by federal law.

Although Idaho has declared by statute that "Free exercise of religion is a fundamental right[,]” it has also declared that an applicant for registration as a contractor shall include on the application the applicant's "Social security number[.]” I.C. §§ 73-402(1); 54-5201(1)(a). The requirement to submit one's social security number for a professional or occupational license is based on a federal requirement for the interstate tracking of child support orders, found at 42 U.S.C. § 666(a)(13)(A). "The federal statute in question, 42 U.S.C. § 666, is part of the Welfare Reform Act which requires each state to have effective interstate child support enforcement laws

and implement those procedures set forth by federal statute.” *Lewis*, 143 Idaho at 422. This includes the recording of the social security number for anyone applying for “a professional license, driver’s license, occupational license, recreational license, or marriage license[.]” 42 U.S.C. § 666(a)(13)(A). As was found in *Lewis*, and should be found in this case, the federal requirement to record a social security number for a professional or occupational license preempts Idaho’s religious freedom statute where there is a conflict between the two laws. *See Lewis*, at 425 (“The state is compelled to follow a federal mandate, and any portion of I.C. § 73-402 that creates a conflict with that mandate is without effect.”). This is because Idaho has consented to be bound by the federal law/procedures by accepting the federal money associated with this Spending Clause Bill.

Ricks’ arguments run directly counter to the *Lewis* decision, and indeed, provides no authority or point of error in that decision other than his general disagreement with the result. However, even if this Court wants to revisit these findings, there is no substantial burden on religious practice by requiring individuals to comply with state regulatory laws. *See Bissett v. State*, 111 Idaho 865, 866-67 (Ct. App. 1986). In *Bissett*, the court addressed “whether the state is infringing impermissibly on Bissett’s constitutionally protected freedom of religion by requiring him to possess a driver’s license, to register his motor vehicle and display license plates, and to obtain liability insurance in order to drive in the state[.]” *Id.* The court found that Bissett’s religious freedoms were “incidentally affected[ed]” and that compliance with the law would not affect Bissett’s underlying beliefs. *Id.* at 868. Importantly, *Bissett* was addressed prior to the Supreme Court’s holding in *Emp’t Div. v. Smith*, 494 U.S. 872 (1990) (superseded by

RFRA). See *Bissett* at 867 (citing *United States v. Lee*, 455 U.S. 252 (1982) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). In other words, *Bissett* was analyzed under the pre-*Smith* framework, which is the framework that Idaho's Religious Freedom Act sought to restore.

SECTION 1. LEGISLATIVE INTENT. The Legislature finds that:

- (1) The Constitution of the State of Idaho recognizes the free exercise of religion.
- (2) Laws that are facially neutral toward religion, as well as laws intended to interfere with religious exercise, may burden religious exercise.
- (3) Governments should not substantially burden religious exercise without compelling justification.
- (4) This state has independent authority to protect the free exercise of religion by principles that are separate from, complementary to and more expansive than the first amendment of the United States Constitution.
- (5) Under its police power, the Legislature may establish statutory protections that codify and supplement rights guaranteed by the Constitution of the State of Idaho.
- (6) The compelling interest test, as set forth in the federal cases of *Wisconsin v. Yoder*, (1972) and *Sherbert v. Verner*, 374 U.S. 398, (1963) is a workable test for striking sensible balances between religious liberty and competing government interests. S.B. 1394, 2000 Leg. Sess. (Idaho 2000).

For that reason, if this Court determines that Idaho's Religious Freedom Act is not preempted by 42 U.S.C. § 666, it is long-standing law in Idaho that neutral regulations with an incidental burden on religion do not adversely affect an individual's right to freely exercise his/her religion under Idaho's heightened standard as it applies to religious freedom in Idaho's Religious Freedom Act.

B. I.C. § 54-2110's Requirement That a Contractor Submit a Social Security Number Does Not Violate the First Amendment of the United States Constitution

The Supreme Court, and several lower courts, have already addressed the issue of whether the requirement to submit a social security number violates the First Amendment's Free Exercise Clause. "The statutory requirement that applicants provide a social security number is

I.C. § 54-5210(1)(a). There is nothing in this language to demonstrate a discriminatory intent or animus towards religion.

Idaho Code § 54-5210 was added for the purpose of tracking and preventing “unscrupulous contractors” from performing work in the state of Idaho. *See* H.B. 163, 2005 Leg. Sess., Statement of Purpose (Idaho 2006). It was amended in 2009 to include language specific to insurance requirements. *See* H.B. 109, 2009 Leg. Sess. (Idaho 2009). There is nothing in the language of the statute or the statement of purpose for the original bill or the amendment to indicate that the Contractor Registration statute is not in relation to a proper legislative purpose or that it was enacted for an arbitrary or discriminatory purpose.

“Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs.” *United States v. Lee*, 455 U.S. 252, 260 (1982) (finding that all employers must submit social security taxes even if it burdens religious practice). There is no violation of the free exercise clause when a state refuses to issue a driver’s license to a person that fails to provide a social security number under religious objection. *Miller*, 176 F.3d at 1206. (“We also conclude that Miller’s free exercise of religion is not violated by California’s valid and neutral requirement that all applicants for a new or renewed driver’s license provide a social security number.”) There is also no violation of free exercise for citing someone for failure to possess a driver’s license, display a license plate, or obtain liability insurance even if that person refuses to do those things due to religious objection. *See Bissett*,

111 Idaho at 866-67. (“[W]e hold that the laws do not unconstitutionally infringe upon Bissett’s religious practice. Bissett remains subject to the law regardless of his refusal to consent to being regulated. . . . Compliance with the law may incidentally affect Bissett’s practice of his religion, but it will not inhibit or alter Bissett’s beliefs.”)

In fact, as several federal district courts have noted, no case has been successful that has challenged a neutral law requiring the submission of a social security number as an infringement of First Amendment freedoms under the First Amendment or the Religious Freedom Restoration Act (“RFRA”). *See McIlwain v. Comm’n of Internal Revenue*, 2006 WL 2192113, *3 (D. Oregon 2006) (“Federal Court have seen a number of challenges to the mandatory provision of social security numbers by individuals who believe that social security numbers are the ‘mark of the beast’ or a sin. . . . None of these challenges have been successful.”); *Hill v. DNA Med. Staffing, LLC*, 2010 WL 2280510, *1 (D. Arizona 2010); *see also Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830 (9th Cir. 1999) (failure to hire due to failure to submit a social security number under a religious objection does not violate Title VII’s religious protection because it would cause the employer to violate other federal law).

The requirement to provide a social security number in order to register as a contractor does not violate Ricks’ Free Exercise of Religion.

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C. The “freedom to contract” is Not a Constitutional Right Protected Under the Due Process Clause

Ricks relies upon several cases to claim there is an inalienable right to contract. (Ricks’ Appellant Brief, pp. 10-13.) His authority ultimately does not support such a proposition as there is no “inalienable right to contact”.

In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937). Further, “it was recognized in the cases cited, as in many others that freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses.” *Id.* at 392. Moreover, “the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution. . . . But it was recognized . . . that freedom of contract is a qualified, and not absolute right. There is no absolute freedom to do as one wills or to contract as one chooses.” *Chicago, Burlington, & Quincy Railroad Co. v. McGuire*, 31 S.Ct. 259, 262 (1911); *see also* *Nebbia v. New York*, 291 U.S. 502, 512 (1934) (“The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases.”). The right to contract must yield to the interests of the public and matters of public concern. *Nebbia*, 291 U.S.

at 510 (“Equally fundamental with the private right is that of the public to regulate it in the common interest.”) “If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied[.]” *Id.* at 516. Accordingly, Ricks’ authority does not demonstrate that the liberty to contract is an inalienable right protected by the due process clause. Finally, given the rulings in *McGuire* and *Parrish*, any authority pre-dating these opinions does not support Ricks’ position/argument.⁶

There is no inalienable right to contract. The freedom to contract is qualified and not absolute. Ricks was and is required to provide his social security number in order to obtain a contractor’s license and the requirement that he do so does not violate any “right to contract.”

D. The State Defendants Are Not Properly Named Parties as They Relate to the Constitutionality of 42 U.S.C. § 666.

Arguments made related to the constitutionality of 42 U.S.C. § 666 are disjointed and difficult to follow, but it appears that Ricks may be arguing some form of challenge to the constitutionality of 42 U.S.C. § 666 under RFRA.⁷ (Ricks’ Appellant Brief, pp. 9-10.) While the District Court found that “[Plaintiff] is implicitly challenging 42 U.S.C. 666 as it applies to that state statute,” (*see* CRA p. 71) State Defendants continue to maintain that Ricks has not

⁶ Ricks cites to *Butchers’ Union Co. v. Crescent City*, 111 U.S. 746 (1884); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Morehead v. New York ex rel Tipaldo*, 298 U.S. 587 (1936) all which pre-date *McGuire* and *Parrish*. (Ricks’ Memo., p. 10-12.)

⁷ This is partially derived from the arguments that were made below because it is less than clear what legal argument or relevance exists in the statement that the statute was not enacted under the supremacy clause, but was enacted under the spending clause. (Ricks’ Appellant Brief, p. 9.)

asserted a claim challenging the constitutionality of 42 U.S.C. § 666 in either his Amended Complaint or in his Second Amended Complaint. (See CRA pp. 18-23, 41-42.) Based on the language of both complaints, this has been and remains a challenge to Idaho Code § 54-5210(a) and its requirement that an applicant for a contractor's license submit a social security number for that license. (*Id.*) Idaho is a notice pleading state and the District Court's Order interpreting Plaintiff's complaint to include an "implicit challenge" to 42 U.S.C. § 666 does not put State Defendants on notice as to what it is they are defending in this action.

But if indeed the application of 42 U.S.C. § 666 to Ricks is being challenged under RFRA,⁸ officials with authority to enforce that statute should be named as defendants. See I.R.C.P. 19(a)(1). Defendants are not among those officials. RFRA states that the "[g]overnment shall not ..." and further defines "government" as "branch, department, agency, instrumentality, and official (or other person acting under color of law) **of the United States**, or of a covered entity[.]" 42 U.S.C. §§ 2000bb-1, -2 (emphasis added).

Within the express language of the statute, none of the named people/entities in this matter constitutes the "government" for purposes of RFRA because they are Idaho state actors and not persons acting under color of law of the United States, *nor has Ricks alleged as such*. In order for the named parties to be considered acting under color of law, Ricks must allege that the deprivation resulted from a governmental policy "or a rule of conduct imposed by the government." *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999).

⁸ It is well recognized that RFRA does not and cannot apply to state statutes after the United States Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) .

Additionally, “the party charged with the deprivation must be a person who may fairly be said to be a [governmental] actor.” *Sutton*, 192 F.3d at 835. In *Sutton*, the plaintiff attempted to sue a private entity under RFRA for enforcement of federal law – specifically, the requirement that all employees submit a social security number prior to employment. *Id.* at 836. The *Sutton* plaintiff argued that the private entity was subject to RFRA because federal law compelled the defendant to collect his social security number. The Ninth Circuit Court of Appeals found that the compulsion argument only applies “in cases in which the government itself, not a private entity, was the defendant.” In other words, the *Sutton* plaintiff did not sue the “government” as it is defined in RFRA and, therefore, did not state a claim under that statute. The same is true here. None of the named State Defendants constitutes the “government” for purposes of RFRA’s application, and any claim by Plaintiff so alleging fails.

Finally, to the extent Ricks is challenging 42 U.S.C. § 666’s requirement on the basis that it violates the Tenth Amendment (*see* reference to *S.D. v. Dole*, 483 U.S. 203 (1987), Ricks’ Appellant Brief, p. 10)), such an argument has already been defeated. *Carmichael v. Sebelius*, Civil Action No. 3:13CV129, 2013 WL 5755618 (E.D. Va. Oct. 23, 2013). In *Carmichael*, the court noted that the Fourth Circuit had held in a challenge to the Social Security Act (42 U.S.C. §§ 651-669) that the Act’s “conditions are not so overbearing as to create an unconstitutional compulsion.” *Id.* at *3. Similarly, the court noted in another challenge to the exact provision that is at issue here, 42 U.S.C. § 666(a)(13), the Western District of Michigan found no compulsion or coercion exists, stating that “Michigan has a free choice whether to comply with the requirement that it collect SSNs on drivers’ license applications and receive federal funds or

do not.” *Id.* (citing *Mich. Dep’t of State v. United States*, 166 F. Supp.2d 118, 1236 (W.D. Mich. 2001)). The *Carmichael* court then granted the defendants’ motion to dismiss for failure to state a claim regarding a violation of the Tenth Amendment. In this matter, Ricks has cited no law to refute this authority and his arguments in relation to the constitutionality of 42 U.S.C. § 666 fail.

E. I.C. § 73-122 is Not Discriminatory for Failing to Include a Religious Exemption for Individuals Who Have a Social Security Number and for Religious Reasons do Not Want to Provide that Number

Idaho Code Section 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.

The provision provides no exemption from the recording of a social security number on professional licenses for individuals who have a religious exemption to providing a social security number. As a preliminary matter, this claim, allegation, or argument was not raised in the Amended Complaint, Second Amended Complaint, or in any of the briefing below and should be dismissed. *See Krempasky v. Nez Perce County Planning and Zoning*, 150 Idaho 231, 236 (2010) (“[I]ssues not raised below but raised for the first time on appeal will not be considered or reviewed.”)

However, even if this Court would like to address the claim or argument, it appears that Ricks is attempting to bring an equal protection argument here arguing that he is denied equal protection of the laws because of his religion. “The Equal Protection Clause commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” *Animal Legal Def. Fund v. Otter*, 118 F.Supp.3d 1195, 1209 (D. Idaho 2015). “Under traditional equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest.” *Id.* at 1209.

“[I]n order to subject a law to any form of review under the equal protection guarantee, one must be able to demonstrate that the law classifies persons in some manner.” A law may create a classification in one of three ways: By showing that the law discriminates on its face; by showing that the law is applied in a discriminatory fashion; or by showing that the law, although neutral on its face and applied in accordance with its terms, was enacted with a purpose of discriminating.

Id., at 1210 (internal citation omitted) (quoting *Christy v. Hodel*, 857 F.2d 1324, 1331 (9th Cir. 1988)). “A law that neither targets a suspect class nor burdens a fundamental right is subject to rational basis scrutiny.” *Latta v. Otter*, 19 F.Supp.3d 1054, 1073 (D. Idaho 2014). “The Court in such cases presumed the law is valid unless the challenger can show the difference in treatment bears no rational relation to a conceivable government interest.” *Id.* at 1073.

The Idaho Contractor Registration Act does not discriminate on its face, is not applied in a discriminatory fashion, and there is no indication that it was enacted with a purpose of discrimination. Therefore, the law does not classify people in a manner that will subject it to review under an equal protection analysis.

Ricks now argues it is discriminatory for those individuals who have a religious objection to providing their social security number and that it is therefore not neutral. (Ricks' Appellant Brief pp. 16-17.) In support of his arguments, Ricks cites *Emp't Div. v. Smith*, 494 U.S. 872 (1990) and *Bowen v. Roy*, 476 U.S. 694 (1983), but neither case helps his cause. In *Smith*, and contrary to Ricks' characterization of the holding, the court declined to extend the prior balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963). More importantly, as noted above, the court in *Bowen* specifically held that "[t]he statutory requirement that applicants provide a Social Security Number is wholly neutral in religious terms and uniformly applicable." *Bowen v. Roy*, 476 U.S. at 703. *Bowen* specifically cuts against all of Ricks' remaining arguments. There is no discrimination within Idaho Code § 54-5210(a) and Idaho Code §73-122 as both are neutral. As such, the District Court correctly determined that Idaho Code § 54-5210's requirement of providing social security numbers on contractor license applications is a facially neutral law of general applicability and that that it does not mention religion and applies to any persons applying for an Idaho contractor's license

VI. CONCLUSION

For the reasons stated above, it is requested that this Court uphold the District Court's decision dismissing this action in its entirety.

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RESPECTFULLY SUBMITTED this 24th day of April, 2018.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL


By 
Leslie M. Hayes
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of April, 2018, I caused to be served a true and correct copy of the foregoing by the following method to:

George Q. Ricks
13825 N. Lauren Loop
Rathdrum, ID 83858

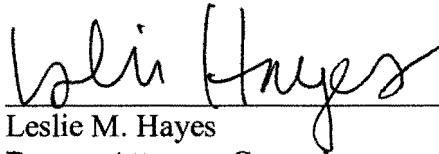
- U.S. Mail
- Hand Delivery
- Certified Mail
- Overnight Mail
- Facsimile
- Electronic Mail


Leslie M. Hayes
Deputy Attorney General

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A. R. 34.1 (an electronic copy was submitted to the Idaho Supreme Court emailed to sctbriefs@idcourts.net and, as Plaintiff/Appellant is pro se and his email address is unknown, two copies mailed to him via U.S. Mail).

Dated and certified this 24th day of April, 2018.



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