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Idaho Supreme Court
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No. 45396-2017

In the Supreme Court of the State of Idaho

GEORGE Q. RICKS,

Petitioner,

v.

STATE OF IDAHO CONTRACTORS BOARD; IDAHO BOARD OF OCCUPATIONAL LICENSES; LAWRENCE G. WASDEN, ATTORNEY GENERAL,

Respondents.

PETITION FOR REVIEW BY THE IDAHO SUPREME COURT

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INTRODUCTION

This appeal presents four substantial questions of first impression for this Court concerning the scope of federal and state religious liberty protections. They arise here in the context of Idaho laws that require disclosure of an individual's Social Security number to become a registered contractor. The issues are critically important to Petitioner George Ricks, whose religious beliefs compel him not to participate in the Social Security program or otherwise use his social security number. Forced to choose between his sincere religious beliefs and contractor registration, Ricks has elected to follow his conscience, even though that means regularly turning down work for which he is otherwise qualified, thereby depriving him the full ability to provide for his family.

The Idaho District Court for the First Judicial District and the Idaho Court of Appeals both rejected Ricks's *pro se* arguments that federal and state laws require the state to accommodate his religious beliefs. The Court of Appeals, for example, held that the federal Free Exercise Clause does not require the state to accommodate Ricks, even though it already accommodates individuals who lack social security numbers for nonreligious reasons. It held that the federal Religious Freedom Restoration Act ("RFRA") does not apply to the state's disclosure requirements, even though they were enacted to comply with federal law. 42 U.S.C. § 2000bb-2(1). Paradoxically, it also held that the state Free Exercise of Religion Protected Act ("FERPA") does not apply specifically because federal law imposes the disclosure requirements. And finally, it held that the Idaho Constitution's religious liberty protections do not provide protection against neutral and generally applicable state civil laws, effectively adopting a controversial legal standard from the *federal* constitution that is incongruent with the text of the *Idaho* constitution.

Each of these rulings either addresses "a question of substance not heretofore determined" by this Court or is a decision "not in accord with applicable decisions of the Idaho Supreme Court

or of the United States Supreme Court." Idaho App. R. ("I.A.R.") 118(b)(1)-(2). These rulings particularly require this Court's review given that "the importance of the religion clauses cannot be overstated," since they are "central both to the framers' and to our current day conception of freedom." *Osteraas v. Osteraas*, 124 Idaho 350, 355, 859 P.2d 948, 953 n.5 (1993). Indeed, Idaho's commitment to the guarantee that "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State" is reflected in that "the Idaho Constitution is an even greater guardian of religious liberty" than the First Amendment. *Id.* at 953 & n.5.

These issues are important for all Idahoans, regardless of their religious beliefs. As the expanding administrative state increasingly touches more aspects of life, conflicts with religious beliefs and practices are increasingly common. No individual should be forced—like Ricks—to choose between their religious beliefs and access to basic government services without full consideration of their rights under federal and state law. This case presents an excellent opportunity for the Court to address these issues and provide needed guidance for the lower courts going forward. To ensure the proper scope of religious liberty protections, the Court should to grant Ricks's petition. If the petition is granted, Ricks also requests the Court to schedule full briefing by the parties so that the issues can be thoroughly addressed with the assistance of counsel.

STATEMENT OF THE CASE

A. George Ricks's Religious Beliefs

Petitioner George Ricks is an Idaho construction worker. When he was in his early twenties and feeling disillusioned with "the party scene," Ricks's mother converted to Christianity and encouraged him to read the Bible. He converted and was baptized in 1982. He believes that the

Bible warns Christians against participating in a universal government identification system to buy or sell goods and services. *See* Aplt. Br. 5 (citing Revelation 13:16-18).

That biblical injunction first came to mind in 1993, when Ricks's second son was born and the doctor told him he would have to file for a social security number before he could take his baby home. But because Ricks was still able work (or "sell" his labor) as an independent contractor without using his own number, he was not convinced that using it was a religious violation. It was in November 2008, when he was first required to provide his number to an employer, that he felt convicted that what he was doing was wrong. The next year he made a personal commitment to God that he would never again use his social security number in order to make a living. In 2012, he formally forswore any reliance on the social security system. Certificate of Agency Record ("CAR") 21-22. And in 2013, he left his employment out of concern that he was benefitting from having provided his number in 2008.

Ricks sincerely believes that his personal use of the social security number is impermissible, but he does not object to the government's *internal* use of the number for its own purposes. *See* Clerk's Record Vol. 1 ("CR1") at 12 ("[P]laintiff refused *to disclose* a social security Number (SSN) based on a religious objection." (emphasis added)); *id.* at 13 ("[M]y religious objections [are] *to disclosing* [a] SSN." (emphasis added)). Defendants concede that Ricks sincerely believes that his faith forbids the use of a social security number. Addendum ("Add.") 12a n.10.[1]

[1] Courts have likewise credited the sincere religious foundation of similar beliefs. *See Bowen v. Roy*, 476 U.S. 693 (1986) (five justices recognizing individual's right not to provide social security number); *Stevens v. Berger*, 428 F. Supp. 896, 902 (E.D.N.Y. 1977) (surveying historical and theological foundations of "mark of the beast" beliefs and concluding that objections to compelled disclosure of a social security number clearly "have their roots, not in secular civil-libertarianism, but in religion"); *accord Leahy v. District of Columbia*, 833 F.2d 1046, 1048 (D.C. Cir. 1987) (Ruth Bader Ginsburg, J.) (crediting religious nature of "mark of the beast" objections); *see also State v. Morris*, 28 Idaho 599, 155 P. 296, 298–99 (1916) (under the

After Ricks left employment in 2013 to avoid using his social security number, *see* CAR 15, he began doing odd jobs to provide for his family. His former employer, however, encouraged him to register with the state as an independent contractor to continue working on that basis. Ricks applied for registration, but did not list his social security number where requested on the application form. Aplt. Br. 5. Instead, he attached a letter explaining his religious beliefs. CAR 20. Citing Idaho Code § 54-5210(a), the Idaho Contractors Board refused to accept Ricks's application without his social security number. CAR 14. In response, Ricks attached an affidavit restating his sincere religious objection. *Id.* at 15-16. The Contractors Board nonetheless proceeded to deny the application. *Id.* at 12.

Without being a registered contractor, Ricks is unable to obtain employment that adequately provides for his family. He attempts to make ends meet by doing small jobs for cash payments. Due to his inability to obtain permanent employment, in the last four years Ricks has had to forgo needed dental care, car maintenance, and other basic needs. Though he is willing to work and has many requests for contract work, he has instead been forced to seek out odd jobs that do not require him to be registered with the state, sometimes leaving him to rely on family or friends to provide for his and his family's needs.

B. Idaho's Social Security Disclosure Laws

Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("the Work Act") to, *inter alia*, condition federal block grants on states implementing Child Support Enforcement (CSE) programs. Pub. L. No. 104-193 § 317, 110 Stat. 2105, 2220-21 (1996) *codified at* 42 U.S.C. §§ 651-69. To comply with federal CSE standards, states must enact

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Idaho constitution, "it is not for this court to decide" religious questions "where entire good faith is apparent, and where the exercises were not being conducted merely in the name of religion and as a pretense and subterfuge"); *accord Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981).

laws "requiring that the social security number of . . . any applicant for a professional license . . . be recorded on the application." 42 U.S.C. § 666(a)(13)(A). Section 666 does not specify which person—the applicant or the state official reviewing the application—must record the social security number.

To implement the Work Act, Idaho mandated that the "social security number of an applicant shall be recorded on any application for a professional, occupational or recreational license." Idaho Code § 73-122(1); *see* H.B. 431, 54th Leg., 2d Sess. (Idaho 1998) (enacting Idaho Code § 73-122 to "bring the State of Idaho into compliance with federal [Work Act] requirements regarding child support enforcement laws."). But not all individuals are required to provide a social security number. The state law was amended to accommodate "[l]egal aliens such as children or unemployed spouses of employed immigrants or migrant workers" who are otherwise "fully qualified" but "cannot obtain a professional or occupational license" because they do not have social security numbers. S.B. 1159, 55th Leg., 1st Sess. (Idaho 1999). Under the accommodation process, "[a]n applicant who has not been assigned a social security number" may still receive an occupational license if they provide alternative identification such as a "birth certificate" or "passport." Idaho Code § 73-122(3).

In 2005 and unconnected to its Work Act obligations, Idaho also passed the Contractor Registration Act. The law makes it "unlawful for any person to engage in the business of, or hold himself out as, a contractor within [the] state without being registered." Idaho Code § 54-5204(1). To register as a contract, an applicant must "submit an application . . . which shall include . . . [the applicant's] [s]ocial security number." Idaho Code § 54-5210(1)(a). The Contractors Board and Idaho Board of Licensure ("Board of Licensure") are responsible for

carrying out § 73-122 and § 54-5210. When Ricks applied to register, his application was denied for failure to include his social security number as required by both provisions.

C. Proceedings Below

In 2016, pursuant to Idaho Code § 10-1201, Ricks filed a pro se action in the district court for "relief in the forms of declaratory judgement and damages" against the Contractors Board and the Board of Licensure. CR1 at 42. Ricks alleged that, among other things, the Idaho Constitution and the Idaho Free Exercise of Religion Protected Act ("FERPA") give him the right to a religious accommodation on his contractor's application. *See* CR1 at 18-23; Add. 2a. Ricks sought "all appropriate relief." CR1 at 22. Ricks later submitted an amended complaint adding claims under the First Amendment and the federal Religious Freedom Restoration Act ("RFRA"), again seeking "relief in the [form] of declaratory judgement." CR1 at 41-42; CR4 at 12. The district court dismissed Ricks's four claims without prejudice. CR1 at 95. Ricks timely filed a Notice of Appeal. CR1 at 78-80.

The Court of Appeals affirmed the district court in full. Add. 1a. It held that federal law preempted Ricks's claim to a religious accommodation under FERPA because it "would cause the Idaho statute to operate with exceptions while the federal [Work Act] required the Idaho statute to operate without exceptions." Add. 9a. The court denied Ricks's RFRA claim because Ricks did not "list any federal defendants." Add. 13a. Finally, the court rejected Ricks's claims arising under federal and the state constitutions because it found that Idaho Code § 54-5210 and § 73-122 are neutral, generally applicable laws to which no religious accommodations are required. Add. 15a.[2] Ricks timely petitioned this Court for review.

[2] Though the Idaho attorney general never claimed that Ricks needed to exhaust administrative remedies, the Court of Appeals raised exhaustion as a potential issue. That concern misconceives

REASONS TO GRANT THE PETITION

This Court reviews decisions by the Court of Appeals "when there are special and important reasons." I.A.R. 118(b). This includes matters in which the Court of Appeals "decide[s] a question of substance not heretofore determined by [this] Court" or when it "decide[s] a question of substance probably not in accord with applicable decisions of the Idaho Supreme Court of the United States Supreme Court." I.A.R. 118(b)(2). This case presents four such matters meriting the Court's full consideration.

I. The Court of Appeals' Free Exercise Clause holding misapplied United States Supreme Court precedent.

Under the Free Exercise Clause, laws that are not "neutral" or "generally applicable" with respect to religion are presumptively unconstitutional. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). A law is not generally applicable when it exempts nonreligious conduct that undermines the government's interests "in a similar or greater degree than [religious conduct] does." *Id.* at 544. Applying the Supreme Court's unanimous decision in *Lukumi*, federal circuits and state supreme courts have sustained free-exercise challenges against laws that exempt conduct motivated by a nonreligious reason but deny any accommodation for the same conduct motivated by religion. For example, a police department's no-beard policy was not generally applicable because it allowed beards grown for medical reasons but not for religious ones. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.). And a zoning ordinance for a business district

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Ricks's complaint. This action is not an appeal from an adverse agency decision and does not ask the court to order the Bureau to grant his contractor's application. Rather, Ricks seeks "declaratory judgement," CR1 at 42, that § 54-5210 and § 73-122 are unlawful as applied. Exhaustion is not a jurisdictional prerequisite to declaratory judgment actions. *See Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 629, 586 P.2d 1068, 1073 (1978); Idaho Code § 10-1201; *see also Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012) (noting that RFRA does not require exhaustion).

was not generally applicable when it exempted nonprofit clubs and lodges, but not houses of worship. *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234-35 (11th Cir. 2004). *See also Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 16 (Iowa 2012) (finding ban on using steel tires on public streets was not generally applicable where it exempted some secular usages and not Amish ones).

Section 73-122 is not generally applicable because it exempts applicants for secular reasons, like their immigration status, but not for religious reasons. *See* Idaho Code § 73-122(3). Rather than require legal aliens to obtain social security numbers, *see* 42 U.S.C. § 405(c)(2)(B)(i)(I) (declaring certain legal aliens eligible for social security numbers), Idaho uses an alternative identification process. Excluding religious persons from that exemption subjects § 73-122 to heightened scrutiny. And it almost certainly fails that scrutiny since the state can have no compelling interest in denying its own citizens what it readily provides for temporary residents. Indeed, Idaho already has a turnkey system for identification through birth certificates—the obvious less restrictive means—which would sufficiently accommodate Ricks's religious beliefs. Other states implementing 42 U.S.C. § 666 as Idaho has done in § 73-122 have also adopted a flexible identification system. *Compare* Cal. Bus. & Professions Code § 30(a) (accepting Individual Taxpayer Numbers rather than social security numbers on license applications) *with* Cal. Family Code §§ 5208, 17304 (complying with other requirements of § 666).

The Court of Appeals' application of rational basis review conflicts with *Lukumi*. Section 73-122 categorically exempts those without social security numbers, directly undermining the alleged government interest in broadly collecting social security numbers to enforce child support from absent parents. The refusal to provide a narrow religious exemption—in which the state agency records Ricks's social security number or relies on alternative identification

information—represents "a value judgment in favor of secular motivations, but not religious motivations," and thus, under *Lukumi*, requires strict scrutiny. *See Fraternal Order*, 170 F.3d at 366; *accord Zimmerman*, 810 N.W.2d at 16.

Nor is § 54-5210's independent requirement to gather social security numbers generally applicable. For example, the Act exempts "[a] person who engages in the construction of buildings to be used primarily for industrial chemical process purposes." Idaho Code § 54-5205(2)(q); *see also id*. at (a)-(r). Since Idaho's proclaimed objective in requiring social security numbers is protecting public health, safety, and welfare, it is hard to fathom why construction work on industrial chemical plants should be categorically exempt, but omitting a social security number is not.

Because the "proffered objectives"—here, "health" etc.—"are not pursued with respect to analogous nonreligious conduct," Idaho's "interests could be achieved by narrower ordinances that burden[] religion to a far lesser degree." *Lukumi*, 508 U.S. at 546.

Perhaps most alarming, Defendant's inflexible application of § 54-5210 has deprived a citizen of his livelihood because he cannot, consistent with his faith, fill out a line of paperwork. If *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), countenances that result, it has "drastically cut back on the protection provided by the Free Exercise Clause." *Kennedy v. Bremerton Sch. Dist.*, No. 18-12, 2019 WL 272131, at *3 (U.S. Jan. 22, 2019) (Alito, J., joined by Justices Thomas, Gorsuch, and Kavanaugh). An enumerated constitutional right deserves better.[3]

[3] Ricks preserves this argument for the purpose of seeking certiorari at the United States Supreme Court. Additionally, while this Court cannot overrule *Smith*, it should grant review to consider all other issues, including whether the Court of Appeals correctly held that Article I, § 4 of the Idaho Constitution adopted the *Smith* rule. *See infra* Section IV.

In any event, because the Court of Appeals' Free Exercise holding is "probably not in accord with applicable decisions of . . . the United States Supreme Court," I.A.R. 118(b)(2), the case warrants this Court's review.

II. The Court of Appeals' FERPA holding misapplied United States Supreme Court precedent on an issue of first impression.

No decision by this Court has applied FERPA. Because the Court of Appeals decided a substantive issue of first impression, and since its determination is inconsistent with the United States Supreme Court's preemption precedents and RFRA, this Court should grant review. *See* I.A.R. 118(b)(1)-(2).

A. Idaho's social security disclosure laws substantially burden Ricks's religious exercise and are not narrowly tailored to a compelling state interest.

Idaho enacted FERPA, Idaho Code §§ 73-401 to 73-404, to require the government to overcome strict scrutiny whenever it substantially burdens a claimant's religious freedom. *Id.* § 73-402. FERPA defines "substantially burden" to exclude only "technical or de minimis infractions" of religious belief. *Id.* It therefore "adopt[ed] a *much broader* definition" of substantial burden than the federal RFRA. *State v. Cordingley*, 154 Idaho 762, 765 n.2, 302 P.3d 730, 733 n.2 (Idaho Ct. App. 2013) (emphasis added).

FERPA forbids the government from imposing a substantial burden on religious exercise unless it can demonstrate that the burden is "[e]ssential to further a compelling governmental interest" and is "[t]he least restrictive means of furthering that compelling governmental interest." Idaho Code § 73-402(3). The Court of Appeals dismissed Ricks's FERPA claim in a footnote. Citing no authority, the court concluded that § 73-122 and § 54-5210 are narrowly tailored to compelling government interests in enforcing child support orders and having quality contractors. That decision merits further review.

The government does not dispute Ricks's sincere religious objection to providing his social security number as a precondition for engaging in commerce. Add. 12a n.10. FERPA therefore prohibits the government from imposing this burden on Ricks unless it can establish that compelled disclosure of social security numbers is narrowly tailored to a compelling state interest. Neither § 73-122 nor § 54-5210 pass muster.

The first, § 73-122, is not narrowly tailored because it has exemptions that undermine the government's alleged interest at least to the same extent as would an accommodation for Ricks. *See supra* Part I. The second, § 54-5210, lacks a compelling interest. The interest cited by the appeals court—"ensur[ing] the quality of contractors," Add. 13 n.10—is precisely the sort of "broadly formulated interest" that the First Amendment, RFRA, and FERPA deem insufficient. *See Gonzalez v. O Centro*, 546 U.S. 418, 431 (2006); Idaho Code § 73-402 (adopting same strict scrutiny standard). Instead, the state must prove the "harm of granting specific exemptions to particular religious claimants." *Id.* In *Wisconsin v. Yoder*, for example, it was not sufficient to show that the state had a "paramount" interest in child education, because the salient question was whether that interest would be adversely affected by granting an exemption to the Amish plaintiffs before the Court. 406 U.S. 205, 213 (1972). Likewise, Defendants have not demonstrated why exempting Ricks—by collecting his social security number themselves or using alternative identification information—would undermine their interest in collecting information on independent contractors.

Nor could it, given that Idaho categorically exempts construction workers "engage[d] in the construction of buildings to be used primarily for industrial chemical process purposes." Idaho Code § 54-5205(2)(q). FERPA, like RFRA and the Free Exercise Clause, prevails over an

underinclusive statute. *See Holt v. Hobbs*, 135 S. Ct. 853, 866 (2015) (underinclusiveness was an independent reason requiring accommodation).

B. FERPA is not preempted by § 666, and the Court of Appeals' contrary conclusion misapplied United States Supreme Court precedent.

Conflict preemption arises only when "compliance with both state and federal law is impossible," or where "the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015). Neither situation is implicated here. The narrow accommodation Ricks seeks is consistent with § 666. Nor can Idaho's protection of religious freedom by subjecting state laws that substantially burden religious exercise to the compelling interest test possibly interfere with Congress's objectives, because Congress passed RFRA to subject "all Federal law" to the same standard. Finally, the low bar set by the Court of Appeals to find preemption could be used to frustrate the purpose and application of all manner of Idaho laws. This Court should grant review to protect both state *and* federal law from the Court of Appeals' incorrect preemption holding.

In holding that § 666 preempted a FERPA-based exemption to § 54-5210, the Court of Appeals manufactured an artificial conflict in two ways. First, § 666 only sets standards for *licensing*, not *registration*, so it cannot preempt a religious exemption to the contractor registration requirements in § 54-5210. *Compare* Public Works Contractors License Act, Idaho Code § 54-1901 *et seq.* (forbidding public works contractors, architects, electrical contractors, engineers, and plumbers from working without a *license*) *with* Idaho Contractor Registration Act, Idaho Code § 54-5201 *et seq*. (setting alternative requirements for *registration*).

Second, while § 666 *does* apply to Idaho's general licensing statute, § 73-122, it does *not* preempt Ricks's FERPA-based exemption to § 73-122. That's because § 666 only requires the state to ensure that "the social security number . . . be recorded," not that applicants provide it

themselves. 42 U.S.C. § 666(a)(13). The statute does not stop state employees from using alternate identification information to locate and record Ricks's social security number. Congress knows how to require applicants to personally disclose their social security numbers when that is what it wants—a requirement it did not impose here. *See e.g.*, 42 U.S.C. § 1396a(a)(78) ("A State plan for medical assistance must provide that . . . the State shall require *each provider* [to] . . . provide to the State agency the provider's . . . Social Security number"); 15 U.S.C. § 1681h(a)(1) ("A consumer reporting agency shall require . . . that the *consumer furnish* proper identification" (emphasis added)). It did not include that requirement in § 666.

Furthermore, the Court of Appeals' preemption holding mistakenly isolates Congress's intent with respect to § 666, both ignoring and undermining RFRA. The court held that a FERPA exemption conflicts with "Congress's intent" in § 666 because it would make it "more difficult to locate a parent who may have outstanding child support obligations." Add. 12a. But FERPA's purpose must be read in light of RFRA, which necessarily informs the preemption analysis by amending "all Federal law" unless that law is specially exempted by Congress. 42 U.S.C. § 2000bb-3. For instance, RFRA "has effectively amended the Bankruptcy Code," *In re Young*, 141 F.3d 854, 861 (8th Cir. 1998), the Age Discrimination in Employment Act, *Hankins v. Lyght*, 441 F.3d 96, 109 (2d Cir. 2006), and Title VII, *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 468 (D.C. Cir. 1996). Congress enacted § 666 just three years after RFRA and chose not to exclude it from RFRA's compass. *See* 42 U.S.C. § 2000bb-3(a). Therefore, Congress's purpose in § 666 includes suspending uniform compliance where that would substantially burden a claimant's religious exercise without passing strict scrutiny. *See id.* at § 2000bb-1. The consequence of the Court of Appeals' contrary ruling, then, is worse than the unnecessary displacement of FERPA and the diminution of Idaho law generally—though that is bad enough;

it also means that the Court invoked preemption to deprive effect to *federal* law (*i.e.*, RFRA). That inverts the United States Supreme Court's preemption precedents.

Because correct application of FERPA is a matter of first impression and because the Court of Appeals' holding that § 666 preempts FERPA does not accord with United States Supreme Court precedent, this Court should grant Ricks' petition for review.

III. The Court of Appeals' RFRA holding misapplied United States Supreme Court precedent.

Just one paragraph after the Court of Appeals decided that Idaho's social security disclosure laws constitute a "cooperative endeavor" with the federal government, thereby displacing contrary state law, the court held that federal RFRA is inapplicable because this suit does not involve the federal government. Add. 12a-13a. The challenged statutes thus somehow become federal law for preemption purposes but state law for RFRA purposes. That runs contrary to United States Supreme Court decisions and thus merits review.

The Court of Appeals' contention that RFRA only applies to "federal government defendants" is mistaken. Add. 14a. Any entity acting "under color of law" "of the United States" is constrained by RFRA. 42 U.S.C. § 2000bb-2(1). RFRA thus imposes liability even when private actors engage in "joint participation" with the government. *See Lugar v. Edmonson*, 457 U.S. 922, 941 (1982) ("[W]e have consistently held that a private party's joint participation with state officials . . . is sufficient to characterize that party as a 'state actor.'"). And "[a] person acts under color of federal law in respect to a cause of action by claiming or wielding federal authority in the relevant factual context." *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 313 (2011).

Here, § 73-122 was enacted specifically to implement the federal Work Act's standards so that the state could obtain federal welfare block grants. *See* H.B. 431, 54th Leg., 2d Sess. (Idaho

1998). Because the state law exists only to satisfy federal law, it was enacted "under color of law" of the United States and is thus subject to RFRA. 42 U.S.C. § 2000bb-2(1). This Court should accordingly grant Ricks' petition to review the Court of Appeals contrary determination.

IV. The Court of Appeals' interpretation of Article I, § 4 of the Idaho Constitution conflicts with the decisions of this Court.

The Court of Appeals interpreted the Idaho constitution's religious liberty guarantee to operate "like the First Amendment" and not to protect conduct against *any* "neutral statute of general applicability." Add. 16a. In so doing, the Court of Appeals adopted the controversial *Smith* standard into Idaho constitutional law. *Smith*, 494 U.S. at 880 (generally limiting the reach of the Free Exercise Clause to laws that are not "neutral" or "generally applicable"). But this Court has long and directly rejected that standard, ruling three years after *Smith* was decided that "art. I, § 4 of the Idaho Constitution is an even greater guardian of religious liberty" than "the federal constitution." *Osteraas*, 859 P.2d at 953. This Court's conclusion is grounded in both the actual text of Article I, § 4 and in decades of previous decisions. As such, the Court of Appeals' ruling on a question of substance contrary to the decisions of this Court should be reviewed. I.A.R. 118(b)(2).

The text of Article I, § 4 protects the "exercise and enjoyment of religious faith and worship" subject only to specified limitations allowing Idaho to forbid, as relevant here, the commission of "crime." This Court has interpreted that guarantee to broadly apply to state civil laws, regardless of whether there was a "failure to maintain neutrality" or general applicability in the law. *Osteraas*, 859 P.2d at 953; *accord State v. Morris*, 28 Idaho 599, 155 P. 296, 298-99 (1916) (narrowly construing law against "the use of a moving picture machine on Sunday" to not reach films concerning "religious instruction," thus avoiding "conflict with § 4, art. 1").

In the single paragraph that the Court of Appeals devotes to Ricks's Idaho constitutional claim, it mistakenly relies on *State v. Fluewelling*, 150 Idaho 576, 249 P.3d 375 (2011) for the proposition that Article I, § 4 "does not protect against conduct that violates a neutral statute of general applicability." Add. 16a.[4] But *Fluewelling* merely applied the constitutional carve-out for criminal law, carefully specifying that Article I, § 4 "does not protect against prosecution for conduct that violates a neutral *criminal* statute of general applicability." *Fluewelling*, 150 Idaho at 579, 249 P.3d at 378 (emphasis added). The Court of Appeals ignored the distinction that the Idaho constitution makes between civil and criminal laws, instead construing Idaho law to operate "like the First Amendment" under *Smith*. Add. 16a.

That reliance on the United States Supreme Court's *Smith* jurisprudence violates this Court's precedent. *Osteraas*, 859 P.2d at 953 (holding that Article I, § 4 "is an even greater guardian of religious liberty" than the Free Exercise Clause); *see also Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 449-50 (9th Cir. 1994), *vacated on other grounds* 62 F.3d 1233 (9th Cir. 1995) (noting that Idaho's religious liberty provisions "bear no resemblance to those found in the First Amendment"). And contrary to this Court's instruction, it renders the long list of express exemptions listed in Article I, § 4 as surplusage. *See Idaho Press Club, Inc. v. State Legislature of the State*, 142 Idaho 640, 643, 132 P.3d 397, 400 (2006) ("We should avoid an interpretation which would render terms of a constitution surplusage."); *see also State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990) (requiring interpretation of Minnesota free exercise provisions to give effect to express exceptions). The Court of Appeals' interpretation effectively crosses out

[4] Conflict preemption has no bearing on Ricks's claim for a religious accommodation under Article I, § 4. Idaho's agreement to comply with federal standards in exchange for federal funds is "a contract," *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981), and the Idaho legislature has no power to enter contracts that violate its constitution.

seventy-two words of the Idaho Constitution. Because that decision conflicts with precedents of this Court, this case merits further review. I.A.R. 118(b)(1)-(2).

CONCLUSION

The Court should grant the petition and order additional briefing.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was via the Court's electronic filing system to the following counsel of record on the 29th day of January.

THE BECKET FUND FOR RELIGIOUS LIBERTY

By *Eric S. Baxter*
Eric S. Baxter