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IN THE SUPREME COURT OF THE STATE OF IDAHO

LAWRENCE D. LEWIS )  
 )  
 Plaintiff/Appellant, )  
 vs. )  
 )  
 STATE OF IDAHO, )  
 DEPARTMENT OF TRANSPORTATION )  
 )  
 Defendant/Respondent. )  
 \_\_\_\_\_ )

Supreme Court No. 31833  
RESPONDENT'S MOTION TO  
REMAND FOR FURTHER  
ADMINISTRATIVE ACTION

Pursuant to Rule 13.3 of the Idaho Appellate Rules, Respondent State of Idaho Department of Transportation ("Department"), by and through their attorney of record in this matter, hereby moves this Court to vacate the district court's judgment in the above-entitled matter and to remand this matter back to the Department for further administrative action to grant the driver's license renewal application submitted by Appellant.

COPY

This motion is based upon the file herein and Respondent Idaho Transportation Department's Memorandum in Support of Respondent's Motion to Remand for Further Administrative Action.

DATED this 18<sup>th</sup> day of April, 2006.

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL

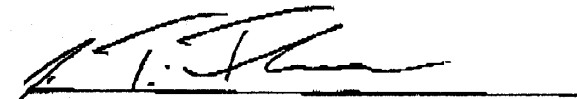
  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 18<sup>th</sup> day of April, 2006, I served two (2) true and correct copies of the foregoing RESPONDENT'S MOTION TO REMAND FOR FURTHER ADMINISTRATIVE ACTION by placing same in the United States Mail, postage prepaid, by facsimile, or by causing the same to be hand delivered, as follows:

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IN THE SUPREME COURT OF THE STATE OF IDAHO

LAWRENCE D. LEWIS	)	
	)	Supreme Court No. 31833
Plaintiff/Appellant,	)	
vs.	)	RESPONDENT'S MOTION
	)	BRIEF IN SUPPORT OF
STATE OF IDAHO,	)	MOTION TO REMAND FOR
DEPARTMENT OF TRANSPORTATION	)	FURTHER ADMINISTRATIVE
	)	ACTION
Defendant/Respondent.	)	

Respondent State of Idaho, Department of Transportation ("Department"), hereby respectfully requests that the district court's judgment be vacated and that this matter be remanded for further administrative action to grant the driver's license renewal application submitted by Appellant.

**INTRODUCTION**

This appeal arises from the denial of Appellant's application for renewal of a driver's license. The denial was based on his refusal to include his social security number



on the application form. See Idaho Code § 49-306(2)(a). Appellant declined to supply the requested information on the basis of a religious belief that such identifier constitutes, as the Department understands his position, the "Mark of the Beast" or a "precursor" of such mark. R. Ex. A, p.18. The Department elected not to contest the sincerity of this belief. Appellant sought judicial review of the application's denial and was ultimately unsuccessful before the district court.

Although Appellant's *pro se* opening brief identified seven issues, the controlling question is whether the Department's action violated the Idaho Free Exercise of Religion Act ("FERA"), Idaho Code §§ 73-401 to -404. That statute, enacted in 2000 (2000 Idaho Sess. Laws ch. 134), parallels in most respects the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-2000bb-4, adopted by Congress almost seven years earlier (Pub. L. No. 103-141, 107 Stat. 1488 (1993)). Appellant, who is now represented by counsel, recently lodged with the Court a supplemental brief discussing the United States Supreme Court's February 21, 2006 decision in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006) ("*UDV*").

The Department disagrees with Appellant's contention that *UDV* is controlling here, but the parties' divergent views on *UDV*'s significance underscore that the core issue before this Court involves reconciling specific demands placed on the Department agency by federal law with requirements imposed under FERA. That is an issue of first impression whose resolution has ramifications likely outside the narrow confines of driver's license renewals.

In light of the issue's general importance and the fact that in May 2005, Congress modified the federal statutory framework applicable to issuance of driver's licenses by States, the Department has re-examined the relevant federal and state statutes and concluded that it has the authority to complete Appellant's license renewal application by its own entry of his social security number—which he disclosed in briefing before the hearing officer—and to issue the license. The Department therefore requests that the district court's judgment be vacated and that this matter be remanded for further administrative action pursuant to which Appellant's application will be granted and a driver's license issued.

Counsel for Respondent has discussed this motion with Appellant's counsel.

#### GROUNDS FOR REMAND

**I. THE SUPREME COURT'S DECISION IN *UDV* IS NOT DISPOSITIVE OF APPELLANT'S FERA CLAIM. RESOLUTION OF THAT CLAIM NONETHELESS WILL REQUIRE THIS COURT TO RESOLVE LEGAL ISSUES OF FIRST IMPRESSION**

**A.**

*UDV* arose from a suit by a religious sect to enjoin enforcement of the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801-904, with respect to the use of a sacramental tea brewed with proscribed hallucinogenic plants. The sect contended that such use was protected under RFRA. The district court entered a preliminary injunction against enforcement, concluding with respect to the probability-of-success factor that the federal defendants had failed to establish a compelling governmental interest, and was affirmed

by both the court of appeals and the Supreme Court.<sup>1</sup> The Government did not challenge the district court's general determination that the evidence on the health risks associated with the tea's use was in "equipoise" but instead argued, in relevant part, that the mere inclusion of the plants' hallucinogenic element on a CSA schedule of prohibited drugs satisfied the compelling interest showing required under RFRA.

The Supreme Court was unpersuaded. In its view, "RFRA, and the strict scrutiny test it adopted, contemplates an inquiry more focused than the Government's categorical approach." 126 S. Ct. at 1220. The federal statute instead demands that the compelling interest "affirmative defense" (*id.* at 1219) be established with reference to the "application of the challenged law 'to the person'—the particular claimant whose religion is being substantially burdened" (*id.* at 1220). In this regard, the Court noted that RFRA "expressly adopted" the compelling governmental interest test as applied in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and that in those cases "this Court looked beyond broadly formulated interests justifying the general applicability of governmental mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *UDV*, 126 S. Ct. at 1220. "[T]he Government's mere invocation of the general characteristics of Schedule I substances, as set forth in the [CSA]," therefore, "cannot carry the day." *Id.* at 1221. The Court, however, did not end its analysis with a simple rejection of the Government's

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<sup>1</sup> The preliminary injunction was conditional insofar as it limited the plants' importation only pursuant to a federal permit, restricted control of the tea brewed from the plants, and required notice to church members of the dangers from the hallucinogenic substances. *UDV*, 126 S. Ct. at 1218. It also provided for expedited reconsideration of the injunction in the event that the Government acquires evidence that the tea's use is negatively affecting sect members' health or that specific shipments of the plants contain particularly high levels of hallucinogens. *Id.*

"categorical" claim premised on the inclusion of the tea's hallucinogenic ingredient on the involved CSA schedule. It pointed out that Congress itself had not drawn such a bright-line, since the statute grants authority to the Attorney General to waive its requirements "if he finds it consistent with the public health and safety" (*id.*, quoting 21 U.S.C. § 822(d)) and that just such an exemption had been carved out for peyote use by the Native American Church before its being congressionally extended to all members of federally recognized Indian tribes (*id.* at 1221-22).

The Supreme Court also rejected the Government's contention that the CSA creates "a closed regulatory system that admits of no exceptions under RFRA." 126 S. Ct. at 1222. It distinguished two prior decisions—*United States v. Lee*, 455 U.S. 252 (1982), and *Braunfeld v. Brown*, 366 U.S. 599 (1961)—which had rejected Free Exercise Clause claims directed against, respectively, mandatory participation in the Social Security system and application of Sunday closing laws because "granting the requested religious accommodations would seriously compromise [the involved government's] ability to administer the program." 126 S. Ct. at 1223. The Court deemed the situation before it different because the Government's position "rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law." *Id.* Although it acknowledged "there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA[,] the Court did not find application of the CSA to the UDV's religious practice to be such an instance "given the longstanding exemption from the [CSA] for religious use of peyote[]

and the fact that the very reason Congress enacted RFRA was to respond to a decision denying a claimed right to sacramental use of a controlled substance." *Id.* at 1224.

B.

The Department does not dispute the direct relevance of decisions issued prior to FERA's adoption concerning the scope of RFRA when an Idaho court is called upon to construe and apply the state law or the possible utility of decisions issued subsequent to FERA's passage. *E.g.*, *Hoskins v. Howard*, 132 Idaho 311, 315, 971 P.2d 1135, 1139 (1998) (examining precedent under the Omnibus Crime Control and Safe Streets Act in construing the Idaho Communications Security Act that was patterned after the federal law); *Corp. of Presiding Bishop v. Ada County*, 123 Idaho 410, 417-19, 849 P.2d 83, 90-92 (Idaho 1993) (looking to the construction of "parsonage" by courts in other States when construing the term in an Idaho tax statute). It therefore concurs with Appellant that *UDV* may well provide doctrinal assistance in applying FERA but draws different conclusions about the nature of the decision's import for present purposes.

That *UDV* rejected the Government's reliance on the inclusion within the CSA schedule of the sacramental tea's hallucinogenic ingredient as "categorical" proof of a compelling interest adequate under RFRA does not mean, as Appellant seemingly suggests, that *any* unqualified statutory condition, including the social security number requirement in Idaho Code § 49-306(2)(a), cannot be applied without violating FERA. The obligation that a driver's license application include the applicant's social security number "as verified by the [applicant's] social security card or the social security administration" embodies a 1999 amendment (1999 Idaho Sess. L. ch. 319, §1)

discharging the federal mandate in 42 U.S.C. § 666(a)(13)(A) that, to satisfy 42 U.S.C. § 654(20)(A) with respect to state spousal support plans,<sup>2</sup> a State must institute "[p]rocedures requiring that the social security number of[] any applicant for a professional license, driver's license, occupational license, recreational license, or marriage license be recorded on the application."<sup>3</sup> The notion that Idaho has any discretion to exempt Appellant's application from the social security number requirement under § 49-306(2)(a) on the basis of his religious beliefs thus runs squarely into a federal law mandate which the state statute implements. No comparable overriding restraint on the Government's authority to create an *ad hoc* exemption for use of the sacramental tea existed in *UDV*.

Equally untenable is the claim that the exemption provision in 42 U.S.C. § 666(d) somehow advances Appellant's position in this litigation.<sup>4</sup> Section 666(d) authorizes exemptions from otherwise mandatory spousal-support-plan elements only if such

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<sup>2</sup> Section 654(20)(A) requires qualifying state plans to "provide, to the extent required by section 666 of this title, that the State (A) shall have in effect all of the laws to improve child support enforcement effectiveness which are referred to in that section, and (B) shall implement the procedures which are prescribed in or pursuant to such laws." The requirements in § 666(a)(13) were introduced into federal law as part of the Personal Responsibility and Work Opportunity Act of 1996. Pub. L. No. 104-193, § 317, 110 Stat. 2105, 2220-21 (1996).

<sup>3</sup> It bears noting that § 666(a)(13) is a broad net insofar as it captures every individual with a social security number who engages in "family matters"—a term that encompasses not only the state-issued licenses specified in subparagraph (A) but also divorce decrees, support orders, paternity determinations or acknowledgments, and death certificates in subparagraphs (B) and (C). Accepting Appellant's claim, in other words, would have immediate consequences substantially beyond his driver's license renewal application.

<sup>4</sup> Section 666(d) provides:

If a State demonstrates to the satisfaction of the Secretary, through the presentation to the Secretary of such data pertaining to caseloads, processing times, administrative costs, and average support collections, and such other data or estimates as the Secretary may specify, that the enactment of any law or the use of any procedure or procedures required by or pursuant to this section will not increase the effectiveness and efficiency of the State child support enforcement program, the Secretary may exempt the State, subject to the Secretary's continuing review and to termination of the exemption should circumstances change, from the requirement to enact the law or use the procedure or procedures involved.

elements will not further, in comparison to existing state procedures, various child support collection considerations and does not anticipate exceptions premised on religious belief. Appellant cannot maintain plausibly that "data pertaining to caseloads, processing times, administrative costs, and average support collections" exist that are relevant to the quite discrete question of whether religion-based objections to inclusion of a social security number on various "family matters" documents. See *Michigan Dep't of State v. United States*, 166 F. Supp. 2d 1228, 1237 (W.D. Mich. 2001) (Secretary's review authority under § 666(d) is not limited to "consider[ing] the effect and efficiency of the SSN collection requirements within Michigan" but also extends "to consider[ing] the effect of an exemption on interstate cases"). The Department has no obligation to engage in a feckless effort to secure an exemption under a provision that plainly has no application to the controversy at hand.

The "categorical" interest involved here, in short, cannot be analogized fairly to that asserted in *UDV* because the overall statutory context of the two controversies shares nothing in common. The requirement in § 666(a)(13) constitutes an existing federal law mandate that supersedes any contrary obligations imposed under FERA and contrasts sharply with the CSA where the Attorney General possesses the authority to exempt uses of scheduled substances from criminal liability. Thus, while the Department's obligation to comply with that requirement, as implemented in § 49-306(2)(a), may be characterized as a "compelling governmental interest" for purposes of § 73-402(3)(a), more precisely viewed the federal law mandate *displaces* any contrary duty that might be placed on the Department by FERA. Whether the requirement under § 666(a)(13) is treated as a

compelling interest or a substantive federal law limitation on the Department's discretion, however, the end result is the same: FERA neither can nor does authorize a state court to direct the Department to act inconsistently with § 666(a)(13) or a state statute like §49-306(2)(a) that discharges the federal law imposed duty.<sup>5</sup>

The only prior decision under FERA, *Roles v. Townsend*, 138 Idaho 412, 64 P.3d 338 (Ct. App. 2003), rejected a challenge to the Board of Corrections' prison tobacco policy but was able to do so without an extensive analysis of applicable legal standards. *See also Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 930 (9th Cir. 2004) (declining to reach merits of claimed violation based on conduct prior to FERA's effective date because the statute is not retroactive). Resolving the central issue raised by Appellant therefore will require this Court to address keenly disputed issues of statutory construction as a matter of first impression. They include, as indicated above, (1) the relationship between federal and state law, *i.e.*, between 42 U.S.C. § 666 and Idaho Code § 49-306(2)(a); (2) the impact of the requirements in § 666 on the Department's discretion and, hence, FERA's applicability; and (3) to the extent FERA is deemed capable of operation, whether the "compelling government interest" standard imposed under Idaho Code § 73-402(3) should be applied coterminously with the same term in

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<sup>5</sup> The situation here accordingly differs from that in *UDV* with respect to the relationship between the CSA and the United Nations Convention on Psychotropic Substances. *See UDV*, 126 S. Ct. at 1224-25. Even if FERA so required, the Department has no authority to act inconsistently with federal law, which here is unequivocal in requiring procedures for the recordation of social security numbers on drivers' license applications, while the Supreme Court's opinion indicates that the requirements of RFRA apply even with respect to matters subject to the Convention. FERA also is not susceptible to being read as delegating power to the Department to ignore unambiguous state law—here the requirement imposed under § 49-306(2)(a). The Department instead may formulate "least restrictive means" alternatives only pursuant to otherwise existing statutory authority. Its lack of discretion with respect to adhering to the express command in § 49-306(2)(a) must be contrasted with the Attorney General's authority under the CSA to establish exceptions for certain uses of scheduled drugs. *See* 21 U.S.C. § 822(d).

RFRA and, if so, the relevance of *UDV*—which constitutes the first United States Supreme Court decision concerning proper application of the compelling interest standard under the federal statute. The Department has concluded that, under the circumstances here, these issues need and should not be resolved in this appeal for the reasons explained below.

**II. REMAND IS APPROPRIATE BECAUSE THE DEPARTMENT HAS STATUTORY AUTHORITY TO PROCESS THE DRIVER'S LICENSE APPLICATION OF APPELLANT WITHOUT HIS PHYSICALLY ENTERING A SOCIAL SECURITY NUMBER AND BECAUSE RECENT FEDERAL STATUTORY CHANGES MAY EITHER ELIMINATE OR GREATLY REDUCE THE NEED FOR A DECISION ON FERA'S APPLICABILITY WITH RESPECT TO ADMINISTRATION OF IDAHO CODE § 49-306(2)(a)**

No dispute exists that Appellant is registered with the Social Security Administration and possesses a social security number. Not only has he so admitted, but he also has disclosed the number in pleadings to the Department before the hearing officer. In light of Appellant's disclosure, the question becomes whether the driver's license application process can go forward consistently with Idaho Code § 49-306(2) despite his refusal to enter the number on the application form. The Department believes that the process can, and should, go forward.

*First*, § 49-306(2)(a) requires the "*application*" to "state . . . the applicant's social security number." (Emphasis supplied.) The statute does not require the *applicant* to enter that information on the form. Consequently, while it is the Department's practice to require applicants to display a social security card as verification of such number to

facilitate the registration process,<sup>6</sup> that practice is not mandated statutorily or by administrative rule. This construction of § 49-306(2)(a) additionally does not run afoul of 42 U.S.C. § 666(a)(13), since the latter provision demands only "[p]rocedures" for social security numbers to "be recorded on the application" for a driver's license. The driver's license application submitted by Appellant is complete otherwise. R., Ex. A, p.18. The application therefore can be made fully compliant with § 49-306(2)(a) by the Department's entering the number on the application.<sup>7</sup> In sum, creating an exception from ordinary procedures for processing Appellant's application is within the Department's permissible discretion under the governing Idaho and federal statutes.

*Second*, substantial grounds exist for remanding to allow the Department to exercise that discretion. Continuation of this appeal will necessitate, as developed above, this Court's addressing complex questions with potentially significant ramifications outside the context of the present controversy. As a prudential and often jurisdictional matter, Idaho courts should avoid deciding legal issues when the need to do so has disappeared. *See, e.g., Noh v. Cenarrusa*, 137 Idaho 798, 800, 53 P.3d 1217, 1219 (2002) ("[a] justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot"). Such is the situation here, since Appellant will receive on remand a driver's license, the denial of which precipitated his grievance, and thus has no entitlement to injunctive relief. Declaratory relief is also unsuitable given the speculative nature of any contention that

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<sup>6</sup> See Idaho Driver's Licenses and Identification Cards Fact Sheet, available at [http://itd.idaho.gov/dmv/driverservices/driver\\_license\\_facts.htm](http://itd.idaho.gov/dmv/driverservices/driver_license_facts.htm).

<sup>7</sup> The accuracy of the number itself has been verified with the Social Security Administration prior to this motion's filing.

the same dispute will arise in the future between Appellant and the Department and, if it does, that the statutory framework involved here will exist then. *Cf. Schneider v. Howe*, No. 30248, 2006 WL 910048, at \*6 (Idaho S. Ct. Apr. 11, 2006) ("[i]f deferring the adjudication 'would add nothing material to the legal issues presented' so that a court will be in no better position in the future and if a declaration of the rights of parties will 'certainly afford a relief from uncertainty and controversy in the future' the case may be presently ripe for adjudication").

Possible modification of the present Idaho statutory framework is a particularly germane consideration. As part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terrorism, and Tsunami Relief Act, 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), Congress adopted minimum standards for the issuance of drivers' licenses and personal identification cards. *Id.*, §§ 201-207, 119 Stat. at 311-15 (codified at 49 U.S.C. § 30301 note). The new provisions prohibit any federal agency from accepting "for any official purpose" a driver's license unless, *inter alia*, the issuing State has required "presentation and verification of . . . [p]roof of the person's social security account number or verification that the person is not eligible for a social security account number" (*id.*, § 202(c)(1)(C)) and has instituted the "practice[]" of "[c]onfirm[ing] with the Social Security Administration a social security number presented by a person using the full social security account number" (*id.*, § 202(d)(5)). Compliance with these and the legislation's remaining requirements must be effected by the States no later than May 11, 2008. *Id.*, § 202(a)(1). The 2005 law contains no authorization for the Secretary of Homeland Security, who is charged with implementing

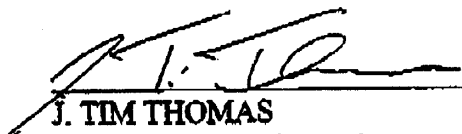
the statute, to exempt States from those requirements. The federal statutory change, together with the need for the Idaho legislature to respond to it within the next two years, highlights the academic quality of Appellant's FERA claim given the Department's willingness to grant the renewal application.

**CONCLUSION**

The district court's judgment should be vacated, and this matter should be remanded for further administrative proceedings and issuance of a driver's license to Appellant.

DATED this 18<sup>th</sup> day of April, 2006.

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL

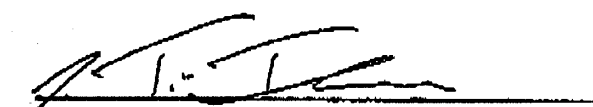
  
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