

IN THE SUPREME COURT OF THE STATE OF IDAHO

LAWRENCE D. LEWIS,)	
)	
Plaintiff/Appellant,)	
)	
v.)	Supreme Court No. 31833
)	
STATE OF IDAHO,)	APPELLANT'S REPLY BRIEF
DEPARTMENT OF TRANSPORTATION,)	
)	
Defendant/Respondent.)	
_____)	

APPELLANT'S REPLY BRIEF

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

Honorable Steve Verby, District Judge. Presiding

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ARGUMENT

I. THE STATE OF IDAHO HAS FAILED TO “DEMONSTRATE” THAT THE “SUBSTANTIAL BURDEN” THAT IDAHO CODE § 49-306 (2) PLACES UPON LAWRENCE D. LEWIS’S FREE EXERCISE OF RELIGION IS BOTH “ESSENTIAL TO FURTHER A COMPELLING GOVERNMENTAL INTEREST” AND “THE LEAST RESTRICTIVE MEANS OF FURTHERING THAT COMPELLING GOVERNMENTAL INTEREST,” AS REQUIRED BY IDAHO CODE § 73-402(3).

Respondent, the Department of Transportation of the State of Idaho (“the State of Idaho”) has conceded that, on account of his “sincere religious belief,” Appellant, Lawrence D. Lewis (“Mr. Lewis”) refused to “provide his social security number for driver’s license purposes.” Respondent’s Brief (“Resp. Br.”), p. 2.¹ But, it has failed to acknowledge the nature and extent of the burden imposed upon Mr. Lewis’s free exercise right by the Idaho Code § 49-306(2) requirement that Mr. Lewis “state” on his application for a driver’s license “the applicant’s social security number.” *See* Resp. Br., pp. 12-13.

As a consequence of this failure to acknowledge the “substantiality” of the burden imposed on Mr. Lewis’s “fundamental right” to free exercise of religion, the State of Idaho has failed to “**demonstrate**” that the “**application of the burden**” to Mr. Lewis’s free exercise right is “both ... [**e]ssential** to further a compelling governmental interest

¹ *See also* R., p. 140, L. 1-8; R., p. 184, L. 13-15.

[and] **the least restrictive means** of furthering that compelling governmental interest,” as required by Idaho Code §§ 73-401(1) and 73-402(3) (emphasis added). *See Horen v. Commonwealth of Virginia*, 23 Va. App. 735, 479 S.E.2d 553, 557-560 (Va. Ct. of Appeals 1997). Instead, the State of Idaho has ignored its statutory “burdens of going forward with evidence, and persuasion under the standard of **clear and convincing evidence**” (Idaho Code § 73-401(1)), erroneously substituting therefor various **unsupported** claims and assertions that the burden placed by Idaho Code § 49-306(2) upon Mr. Lewis’s free exercise of religion are justified under Idaho Code § 73-402(3).

A. Requiring Mr. Lewis to “State” on his Driver’s License Application the Social Security Number Assigned to Him Substantially Burdens Mr. Lewis’s Free Exercise of Religion.

According to Idaho Code § 73-402(3), the State of Idaho need justify a statutory burden upon a person’s free exercise of religion only if that burden is “substantial.” According to Idaho Code § 73-401(5) a “substantial... burden” occurs if a statutory requirement “inhibit[s] or curtail[s] religiously motivated practices.” The record in this case clearly establishes that the Idaho Code § 49-306(2) provision requiring Mr. Lewis to “state” on his application the Social Security Number (“SSN”) assigned to him “substantially burdens” Mr. Lewis’s free exercise of religion.

According to the District Court below, Mr. Lewis asserted that “the United States

social security scheme ... violates five of the Ten Commandments.” R., p. 183, L. 5-6 - p., 184, L.1. In his Brief on Remand before the Idaho Transportation Department, Mr. Lewis spelled out in detail how the social security system violates the First, Fifth, Eighth, Ninth and Tenth Commandments. R., p. 119 (beginning with L. 3) - R., p. 129 (ending with L. 28). Further, the District Court found that Mr. Lewis stated his belief that “the Social Security number is ‘either the precursor to the “Mark of the Beast,” or actually the mark itself...” R., p. 183, L. 2-3. In his Brief on Remand before the Idaho Transportation Department, Mr. Lewis made it clear that for him to be identified with a social security number in any way puts him at risk of “eternal damnation.” R., p. 117, L. 23 - p. 118, L. 9. Finally, quoting from Mr. Lewis's Brief on Remand before the Idaho Transportation Department, the District Court below found that Mr. Lewis's ““Scriptural convictions”” are such that “he is prohibited from making application for a social security account and number — OR using it in ANY form to obtain benefits, even — especially — the renewal of Idaho Driver License.” R., p. 130, L. 21-24.

In sum, the record in this case establishes that the burden placed upon Mr. Lewis's free exercise of religion by the Idaho Code § 49-306(2) requirement that Mr. Lewis “state ... the applicant's [SSN]” on his driver's license application — compliance with which

would place Mr. Lewis in disobedience of God's commandments and at risk of God's eternal punishment — is “substantial,” not “trivial, technical or de minimis.” *See* Idaho Code § 73-402(5). Moreover, the record in this case establishes that it is Mr. Lewis's practice not to be identified in any way with the SSN assigned to him, even to the point of Mr. Lewis's having attempted to cancel or revoke that SSN. *See* Resp. Br., p. 1. By conceding in its brief that it is Mr. Lewis's “sincere religious belief that motivates his refusal to provide his [SSN] for driver's license purposes” (*see* Resp. Br., p. 2), the State of Idaho has acknowledged that the Idaho Code § 49-306(2) requirement that Mr. Lewis “state” the SSN assigned to him on his driver's license application imposes a “substantial burden” by “inhibit[ing] or curtail[ing] [Mr. Lewis's] religiously motivated practice **not** to be identified **in any way** with that SSN.

According to Idaho Code § 73-402(3), the State of Idaho cannot place such a burden on Mr. Lewis unless it “demonstrates” — that is, comes “forward with evidence, and persuasion” making out a “clear and convincing” case (Idaho Code § 73-401(1)) — that imposing such a burden on Mr. Lewis is **both** “essential to further a compelling governmental interest” and “the least restrictive means of furthering [a] compelling governmental interest.” The State of Idaho has failed to meet this burden.

B. The State of Idaho Has Failed to Produce Any Clear and Convincing Evidence that the Substantial Burden on Mr. Lewis's Free Exercise of Religion is Essential to Further a Compelling Governmental Interest.

1. The State of Idaho's Duty to Comply with 42 U.S.C. § 666(a)(13) Does Not Establish a Compelling Governmental Interest.

The State of Idaho has argued that it has a compelling governmental interest to require Mr. Lewis to “state” on his application for a driver’s license the SSN assigned to him because 42 U.S.C. § 666(a)(13) requires such a statement. *See* Resp. Br., pp. 13-14. This is not true. On its face, 42 U.S.C. § 666(a)(13) does not mandate that the State of Idaho require a driver’s license applicant to “state” or otherwise provide a SSN on the driver’s license application; nor does it indicate that the “recording” of the SSN assigned to a driver’s license applicant serves a compelling governmental interest. Rather, 42 U.S.C. § 666 only requires that a state “have in effect laws requiring the use of ... procedures ... to **increase the effectiveness** of the [Child Support Enforcement] program [by] requiring that the social security number of ... any applicant for a ... driver’s license ... be recorded on the application” (emphasis added).

Additionally, there is nothing in the federal statute indicating that the State of Idaho would be found in noncompliance with 42 U.S.C. § 666(a)(13)(A), if it accommodated persons, like Mr. Lewis, whose religious convictions prohibited

identification by the SSN assigned to them. Rather, 42 U.S.C. § 666(a) provides that “the use of the ... procedures” set forth in subsection (a)(13)(A) need only be “consistent with this section and with the regulations of the Secretary” of Health and Human Services. Accordingly, 42 U.S.C. § 666(d) provides that the State of Idaho may seek an exemption from “any procedure ... required by this section ” if it “demonstrates to the satisfaction of the Secretary” that the “use” of such procedure — namely, the recording of assigned SSN’s to **all** driver’s license applications, without accommodation of religious conscientious objectors, like Mr. Lewis — “will not increase the effectiveness and efficiency of the State child support enforcement program.” While the Secretary has indicated by past action that it would not **totally** exempt a state from compliance with 42 U.S.C. § 666(13)(A),² there is no reason to presume, as the State of Idaho has in its brief, that the Secretary would not grant a **partial** exemption for religious objectors in light of the overriding Idaho state policy of protecting the free exercise of religion. *See* 2000 Senate Bill 1394, Statement of Purpose (Legislative Services Office, Idaho State Legislature).

According to Idaho Code § 73-402(3), the burden is on the State of Idaho, not upon Mr. Lewis, to “demonstrate” — that is, come forward with clear and convincing evidence — that the Idaho Code § 49-306 requirement that Mr. Lewis “state” his social

² *See Michigan Dept. of State v. U.S. Dept. of Health and Human Services*, 166 F. Supp.

security number on his application (or even otherwise provide it) is “essential” — that is, indispensable or unavoidable — “further a compelling state interest,” as required by Idaho Code § 73-402(3). Having failed to seek an exemption, as provided for in 42 U.S.C. § 666(d), the State of Idaho has utterly failed to carry that burden.

2. The State of Idaho's General Interest in Child Support, Health and Welfare Does Not Supply It With a Compelling Governmental Interest.

Citing *Zeigler v. Zeigler*, 107 Idaho 527, 691 P.2d 773 (Ct. App. 1985), the State of Idaho has argued that its “compelling ... interest in the support of its children, which protects and promotes their health and welfare” mandates the Idaho Code § 49-306(2) requirement that Mr. Lewis “state” on his driver’s license application, or otherwise provide to the State of Idaho, the SSN assigned to him. *See* Resp. Br., p. 14. Not only is the State of Idaho’s reliance upon *Zeigler* misplaced, but it has made absolutely no effort to provide any clear and convincing evidence that such a forced disclosure is essential to its interest in the welfare of children living within its boundaries.

Zeigler concerned the constitutionality of a court order restricting the place of residence of the children of a divorced couple issued in a divorce case and designed to

2d 1228, 1231, 1236 (W.D. Mich. 2001).

meet the best interests of those children. In rejecting the claim of one of the parents that the restriction unconstitutionally impaired her “right to travel,” the *Zeigler* court found that “[p]roviding and assuring the maximum opportunities for parental love, guidance, support and companionship is a compelling state interest,” as **established by the evidence** in the divorce court. *Zeigler*, 691 P.2d at 780-81. It did not find, as the State of Idaho has asserted in its brief, that **generally** “providing and assuring maximum opportunities for parental love, guidance, support and companionship is a compelling state interest.” *See* Resp. Br., p. 14. As the *Zeigler* court so painstakingly pointed out, whether the state has such an interest in the welfare of a child depends upon the facts and the circumstances of each case. *See Zeigler*, 691 P.2d at 780-81.

The State of Idaho has made no effort whatsoever to “demonstrate” any specific facts and circumstances herein that would elevate its concern for the welfare of any child, or even children generally, to create a compelling state interest requiring Mr. Lewis (or even driver’s license applicants generally) to state the SSN assigned to him (or them) on his (or their) driver’s application, or otherwise to provide that SSN to the State of Idaho. Admittedly, 42 U.S.C. § 666(a)(13)(A) has required the State of Idaho to establish procedures to “record” SSN’s of such applicants, but such a “recording” requirement is not, on its face, clear and convincing evidence of a compelling governmental interest. To

be sure, one federal district court has found that “Congress has demonstrated a strong public policy for utilizing ... an individual’s SSN, to locate absent parents and to collect child support.” *See Mich. Dept. of State v. U.S. Dept. of Health and Human Services*, 166 F. Supp. at 1232. But, for a governmental interest to be compelling, it must be “of the **highest order**.” *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (emphasis added). Even then, “only the gravest of abuses [by religious adherents], **endangering paramount** interests, give occasion for permissible limitation [on the exercise of religion].” *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (emphasis added).

Having provided in 42 U.S.C. § 666(d) for an exemption from the use of procedures —, such as the procedure set forth in 42 U.S.C. § 666(a)(13(A) — the required procedure of “recording” the SSN assigned to a driver’s license applicant is, by definition, **not** clearly and convincingly **compelling**. Rather, as 42 U.S.C. § 666(a) states, a state’s use of such a procedure is calculated, along with numerous other procedures, only to “increase the effectiveness” of a state’s program to enforce child support; **not** as an “essential [element] to further a compelling governmental interest,” within the meaning of Idaho Code § 73-402(3). The State of Idaho’s claim to the contrary (*see* Resp. Br., p. 15) is, therefore, erroneous.

3. The State's Interest in Road Safety Does Not Supply It With a Compelling Governmental Interest.

The State of Idaho has maintained that “the courts of this state have consistently held that the state has a **compelling interest** in the regulation and enforcement of motor vehicle laws in order to protect the health, safety, and welfare of the traveling public through the reasonable exercise of the state’s police power.” Resp. Br., p. 15 (emphasis added). But the three cases cited by the State of Idaho to support this proposition do **not**, in fact, support it. Rather, they stand for the proposition that the state has a “**legitimate**” interest in regulating safety on the highways through the licensing of drivers, the registration of automobiles, and the requirement of liability insurance. *See Gordon v. State*, 108 Idaho 178, 697 P.2d 1192, 1194 (Ct. App. 1985) (emphasis added); *State v. Reed*, 107 Idaho 162, 686 P.2d 842, 847 (Ct. App. 1984); *Adams v. City of Pocatello*, 91 Idaho 99, 416 P.2d 46, 48 (1966).

Even the four cases — cited by the State of Idaho on page 15 of its brief — in which such licensing, registration and insurance requirements have been constitutionally challenged as violations of the free exercise of religion, do not stand for the proposition that such requirements are compelling. *See Bissett v. State*, 111 Idaho 865, 727 P.2d 1293, 1296 (1986); *State v. Bissett*, 116 Idaho 477, 776 P.2d 1196, 1198 (Ct. App. 1989); *State v. Crisman*, 123 Idaho 277, 846 P.2d 928, 932 (Ct. App. 1992); *Hutchinson v. State*,

134 Idaho 18, 995 P.2d 363, 367-68 (Ct. App. 1999). Although the leading case, *Bissett v. State* — upon which all the other three cases relied — did identify the state’s interest in licensing drivers, registering automobiles, and carrying liability insurance as “essential to accomplish an overriding interest,” it did **not** classify that “overriding interest” as a compelling one. Rather, it cited in support of its conclusion of an “overriding interest” the *Gordon*, *Reed*, and *Adams* cases, observing that “[t]hese laws are constitutional exercises of the state’s police power and **reasonably further the legislative objective** of public order.” *Bissett v. State*, 727 P.2d at 1296 (emphasis added).

Finally, in support of its contention that the its interest generally in public safety and order upon the streets and highways is a compelling one, the State of Idaho has cited *State v. Wilder*, 138 Idaho 644, 67 P.3d 839 (Ct. App. 2003). *See* Resp. Br., pp. 14-15. Yet, even the lengthy quote from *Wilder* (Resp. Br., p. 14) reveals that the court in that case did not identify the State of Idaho’s interest in such safety and order on any scale higher than “legitimate.” *See* Resp. Br., p. 15. Indeed, the *Wilder* court rejected a constitutional right-to-travel challenge to the state’s denial of a driver’s license for nondisclosure of his social security number on the sole ground that “[i]t is **reasonable**, in furtherance of [the state’s] objective [of public safety and order] for the state to **employ means to verify the identity of license applicants**, such as **the use** of [SSN’s].” *Wilder*,

67 P.3d at 842 (emphasis added).

The question in this case, however, is **not** whether it is “reasonable” for the State of Idaho to “employ means” whereby it may “use” SSN’s to “verify the identity of license applicants.” Rather, the issue is whether the State of Idaho has “demonstrated” that the **specific means** whereby Mr. Lewis is required to state on his driver’s license application the SSN assigned to him is “essential to further a compelling governmental interest,” and thus, sufficient to override the substantial burden imposed upon Mr. Lewis’s free exercise of religion. Just because an SSN is useful as a “means to verify the identity of license applicants” and, thus, useful as a means to promote public safety and order, does **not** mean that **forced identification** with a SSN is **essential** to the furtherance of public safety and order.

Even if the state’s interest in public safety and order on its streets and highways could be classified as a compelling governmental one, the issue in this case is **not** resolved by such a **generalized** assessment. And for two reasons.

First, in *Adams v. City of Pocatello*, *supra*, this Court did not assess whether the state had a “compelling public interest” in the administration of its compulsory liability insurance program by evaluating its summary procedures in light of the overall interest that the state has in promoting the public safety and order on the state’s streets and

highways. To the contrary, it made its determination of a compelling interest in relation to the **specific** interest that the state had in protecting the public from uninsured motorists. *Adams*, 416 P.2d at 49-50.

Second, and more importantly, Idaho Code § 73-402(3) states that the issue is whether the State of Idaho has “demonstrated” that the “application of the burden” upon Mr. Lewis to “state” on his driver’s license application the SSN assigned to him, or otherwise to provide that SSN to the State of Idaho, is a compelling state interest, **not** whether the State of Idaho has a compelling interest in the public safety and order on its streets and highways. Further, the State of Idaho must show that it has a compelling interest to obtain from Mr. Lewis a statement identifying the SSN assigned to him as an essential part of its program of identifying drivers on the public roadways.

Clearly, the State of Idaho has not carried its burden here, for it has not come forward with any evidence, much less any “clear and convincing evidence,” to persuade that it would have no access to the SSN assigned to Mr. Lewis except by means of the Idaho § 49-306(2) forced disclosure. Nor has it produced any evidence that such a forced identification with the SSN assigned to Mr. Lewis constitutes a compelling governmental interest in complying with, or otherwise taking advantage of, a nationally recognized, uniform system of identification. To the contrary, as the State of Idaho has

acknowledged, the record in this case establishes that the SSN card furnished to Lewis states that the SSN as it appears on that card is “For Social Security and Tax Purposes — Not for Identification.” *See* Resp. Br., p. 10. With the possible exception of the use of the SSN as a federal identifier for the very limited purpose of improving the collection of child support across state lines,³ the SSN has not been mandated by law as a national identifier. As the Electronic Privacy Information Center has recently summarized:

When the ... (SSN) was created in 1936, it was meant to be used only as an account number associated with the administration of the Social Security system. Though the use of the SSN has expanded considerably, it is not a universal identifier and efforts to make it one have been consistently rejected. In 1971, the Social Security Administration task force on the SSN rejected the extension of the Social Security Number to the status of an ID card. In 1973, the Health, Education and Welfare Secretary's Advisory Committee on Automated Personal Data Systems concluded that a national identifier was not desirable. In 1976, the Federal Advisory Committee on False Identification rejected the idea of an identifier.

In 1977, the Carter Administration reiterated that the SSN was not to become an identifier and in 1981 the Reagan Administration stated that it was “explicitly opposed” to the creation of a national ID card...

When it created the Department of Homeland Security, Congress made clear in the enabling legislation that the agency could not create a national ID system. In September 2004, then-DHA Secretary Tom Ridge reiterated, “[t]he legislation that created the Department of Homeland Security was very specific on the question of a national ID card. They said there will be no national ID card.”

[Electronic Privacy Information Center, “National ID Cards and REAL ID Act” http://www.epic.org/privacy/id_cards/ (12/23/05).]

³ *See Mich. Dept. of State v. U.S. Dept. of Health and Human Services*, 166 F. Supp. 2d at 1232-1233.

Notwithstanding, these express disclaimers rejecting the notion of the SSN as a national identifier, the State of Idaho has maintained that “the social security number is part of a national identification system that simplifies verification of a person’s identity, preventing confusion due to name variations or as between individuals with the same name.” *See* Resp. Br., p. 10, 15. But the State of Idaho has introduced no concrete “evidence” of the existence of such a “national identification system” wherein the SSN serves as the sole verification of a person’s identity. Rather, it has simply made the naked assertion that the SSN serves that purpose without regard for its statutory duty under Idaho Code §§ 73-402(3) and 73-401(1) to come forward with clear and convincing evidence of its claim that “the social security number is part of a national identification system.”

Ironically, if a “national identification system” exists in the United States, as the State of Idaho has claimed, it would take the form of a system of state driver’s licenses, as some have asserted to have resulted from congressional passage of the REAL ID Act of 2005. *See* Electronic Privacy Information Center, “National ID Cards and REAL ID Act,” http://www.epic.org/privacy/id_cards/ (12-23-2005). But the SSN would not serve as the identifying number under the REAL ID Act, Congress having previously “repealed a controversial provision in the Illegal Immigration Reform and Immigrant Responsibility

Act of 1996 which gave authorization to include [SSN's] on driver's licenses." *See id.*

Indeed, any driver's license issued in Idaho since "on or after January 1, 1993" would **not** "contain an applicant's [SSN]," because Idaho Code § 49-306(2)(b) prohibits such use of the SSN.

C. The State of Idaho Has Failed to Produce Clear and Convincing Evidence that the Substantial Burden on Mr. Lewis's Free Exercise of Religion Is the Least Restrictive Means of Furthering a Compelling Governmental Interest.

1. Forcing Mr. Lewis to Provide the SSN Assigned to Him Is Not the Least Restrictive Means for the State of Idaho to Identify Dangerous Drivers.

According to the State of Idaho, forcing Mr. Lewis to "state" the SSN assigned to him on his application for a driver's license is the "least restrictive means of accomplishing [a] compelling state interest..." because the required "disclosure ... was the **most efficient method** of locating interstate driving records, identifying drivers in-state, and keeping dangerous drivers off the road." Resp. Br., p. 16 (emphasis added). Having claimed that requiring Mr. Lewis to provide the SSN assigned to him is the "most efficient method," the State of Idaho has tacitly admitted that means other than forcing Mr. Lewis to provide that SSN — albeit less efficient — exist to locate interstate driving records, to identify drivers in-state and to keep dangerous drivers off the road. Hence, the

State of Idaho has admitted that forced disclosure is **not** the “least restrictive means” of furthering its interests.

While the State of Idaho has not acknowledged what those alternative means are, its admission that they exist demonstrates that it has failed to carry its burden to come forward with “clear and convincing evidence” that forcing Mr. Lewis to disclose the SSN assigned to him on his driver’s license application is the **only** means available to “locat[e] interstate driving records, identify...drivers in-state, and keep... dangerous drivers off the road.” Idaho Code § 49-306(2)(b), itself, suggests several alternative identifying means, including the requirement that an applicant furnish a “birth certificate [or] passport” or other “proof of identity acceptable to the examiner or the department.” Such proof would reveal the names of the applicant’s parents, the place of birth, and other identifying information.

Idaho Code § 49-306(2)(b) also indicates that the State of Idaho could obtain information related to Mr. Lewis’s driving history to ascertain whether he might be a dangerous driver, requiring him to furnish his driver’s licensing history, including the states or countries which have issued him a license and any adverse actions taken against him as a driver. Finally, the State of Idaho could require any applicant, like Mr. Lewis, to take a driver’s test before issuing or renewing a driver’s license.

In sum, the State of Idaho has clearly failed to carry its burden to “demonstrate” by “clear and convincing evidence” that requiring Mr. Lewis to produce the SSN assigned to him is the least restrictive means to further its objectives to locate interstate driving records, identify in-state drivers and keep dangerous drivers off the road.

2. Forcing Mr. Lewis to Provide the SSN Assigned to Him is Not the Least Restrictive Means for the State of Idaho to Comply with 42 U.S.C. § 666(a)(13)(A).

The State of Idaho has contended that “the federal statute mandating states to require social security numbers on applications for driver (and other) licenses” demonstrates that “the Department’s requirement that individuals assigned social security numbers provide them is not only the least restrictive means, it is the **only** means.” *See* Resp. Br., p. 17 (emphasis added). This claim is false.

According to 42 U.S.C. § 666(a), the State of Idaho meets the federal requirement to have in place a procedure requiring that “the [SSN] of ... any applicant for a ... driver’s license ... be recorded on the application,” so long as those procedures are “consistent with [42 U.S.C. § 666] and with the regulations of the Secretary, to increase the effectiveness of” a state’s child support enforcement program. As pointed out in Part I.B.1. above, Subsection (d) of 42 U.S.C. § 666 provides a means whereby a state may obtain an exemption from the required procedure set forth in 42 U.S.C. § 666(a)(13)(A)

upon a showing that “the **use** of any procedure ... required by or pursuant to this section will not increase the effectiveness and efficiency of the State child support enforcement program (emphasis added).” Thus, 42 U.S.C. § 666(d) clearly demonstrates that the State of Idaho might well be able to accommodate Lewis’s religious convictions by a showing that the 42 U.S.C. § 666(a)(13)(A) requirement — as applied to a limited number of religious conscientious objectors — would not “increase the effectiveness and efficiency of the State child support enforcement program.” But there is nothing in this record indicating that the State of Idaho has made any such effort to obtain such an exemption, much less been denied such an exemption.

In sum, the State of Idaho has failed to “demonstrate” by “clear and convincing evidence” that there is no less restrictive means for it to comply with the SSN recording requirement of 42 U.S.C. § 666(a)(13)(A) other than to require Lewis to “state” the SSN assigned to him on his application for a driver’s license.

II. IF IT PREVAILS, THE STATE OF IDAHO IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES AND REASONABLE EXPENSES ON APPEAL PURSUANT TO IDAHO CODE § 12-117, I.A.R. 41, AND I.R.C.P. 54.

If it prevails on this appeal, the State of Idaho has asked for an award of attorney fees and reasonable expenses on the ground that Mr. Lewis’s appeal has been “pursued ... frivolously, unreasonably and without foundation.” Resp. Br., p. 18. In support of this

claim, the State of Idaho has asserted that: (a) “[t]he facts are not in controversy”; (b) “[Mr.] Lewis makes no new arguments in his appeal”; and (c) [Mr. Lewis] has failed to show that the district court misapplied the law in this case.” *Id.* None of these grounds demonstrate that Mr. Lewis has “pursued” this appeal “frivolously, unreasonably and without foundation.”

First, by its failure to contest that Mr. Lewis’s free exercise of religion has been substantially burdened, the State of Idaho has conceded that Mr. Lewis’s reliance upon Idaho Code § 73-402 in this case is not based upon a “trivial, technical or de minimis infraction.” *See* Idaho Code § 73-402(5). Thus, the State of Idaho has conceded that, by his appeal, Mr. Lewis is attempting to secure a “fundamental right” to “refus[e] to act in a manner substantially motivated by a religious belief,” which is hardly a “frivolous” matter. *See* Idaho Code §§ 73-401(2) and 73-402.

Second, having established that his fundamental right to the free exercise of religion has been substantially burdened, it is not unreasonable for Mr. Lewis to insist that the State of Idaho carry its burden of “demonstrat[ing]” an overriding “compelling governmental interest” and “least restrictive means” by “clear and convincing” evidence, as provided by Idaho Code §§ 73-401(1) and 73-402(3), a standard neither applied by the District Court below nor acknowledged by the State of Idaho on this appeal. *See R.*, pp.

188-192; Resp. Br., pp. 11-18.

Mr. Lewis's having demonstrated that there is a solid foundation to his appeal, the State of Idaho's request for attorney fees and reasonable expenses should be denied. *See Brinkmeyer v. Brinkmeyer*, 135 Idaho 596, 21 P.3d 918, 923 (Ct. App. 2001).

III. CONCLUSION

For the reasons stated herein and in Mr. Lewis's opening brief, Mr. Lewis respectfully requests this Court to reverse the District Court's Decision on Judicial Review, and remand this case to the District Court: (a) with instructions to grant Mr. Lewis's Petition for Review and to order (i) the State of Idaho Department of Transportation to grant Mr. Lewis's application for a driver's license without Mr. Lewis being required to "state" on his driver's license application, or otherwise provide to the Department, the SSN assigned to him, and (ii) the State to pay Mr. Lewis's attorney fees and costs incurred in both the District Court and on appeal, as provided in Idaho Code § 73-402(4); or (b) with instructions to provide such other relief as is just and equitable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of December 2005, I caused to be served two (2) true and correct copies of the foregoing Appellant's Reply Brief by United States mail postage prepaid to the attorneys for Respondent addressed to the Honorable Lawrence G. Wasden, Attorney General, P.O. Box 83720, Boise, Idaho 83720-0010.

Stanley D. Crow