

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

LAWRENCE D. LEWIS,	)	
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	Supreme Court No. 31833
	)	
STATE OF IDAHO,	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Defendant/Respondent.	)	

**APPELLANT’S BRIEF IN OPPOSITION TO RESPONDENT’S  
MOTION TO REMAND FOR FURTHER ADMINISTRATIVE ACTION**

Pursuant to Rule 32(d) of the Idaho Appellate Rules, Appellant Lawrence D. Lewis (“Mr. Lewis”) submits herewith his brief in opposition to the motion of Respondent, the State of Idaho, Department of Transportation (“the State of Idaho”), seeking an order from this Court to vacate the district court’s judgment and to remand this matter “for further administrative action to grant the driver’s license renewal application submitted by [Mr. Lewis].” For the reasons herein stated, the State of Idaho’s motion should be denied, and this case should be resolved on the merits.

**I. INTRODUCTION**

In an attempt to “moot” Mr. Lewis’s appeal, the State of Idaho has, in Humpty-Dumpty-like fashion, attempted to pick up the pieces of a fractured argument, and to put together a brand-new factual and legal claim, as if the old one had never been made. But just as all the king’s horses and all the king’s men could not put Humpty-Dumpty together again, neither can the State

of Idaho manufacture a justifiable reason for remanding this matter without ruling on Mr. Lewis's claim that the State of Idaho violated his free exercise of religion rights secured by Idaho Code Section 73-402.

**II. THIS CASE SHOULD BE DECIDED ACCORDING TO WHAT ACTUALLY HAPPENED, AS OPPOSED TO WHAT COULD HAVE HAPPENED HAD THE DEPARTMENT OF TRANSPORTATION EXERCISED THE DISCRETION TO PROCESS MR. LEWIS'S APPLICATION WITHOUT MR. LEWIS'S HAVING ENTERED A SOCIAL SECURITY NUMBER ON HIS APPLICATION FOR RENEWAL OF DRIVER'S LICENSE FORM.**

**A. Prior to its April 18, 2006 Motion to Remand, the State of Idaho Asserted that Both State and Federal Law Mandated that Mr. Lewis State a Valid and Verified Social Security Number on His Application for Renewal of Driver's License Form.**

Prior to April 18, 2006 — the date upon which the State of Idaho filed its Motion to Remand — the State of Idaho consistently — and persistently — insisted that both state and federal law require Mr. Lewis to enter a valid and verified Social Security Number (“SSN”) in the space provided for that number on the driver's license renewal application.

On July 14, 2003, in its Brief on Appeal in the district court, the State of Idaho contended that “[t]his action arose when [Mr. Lewis] **completed an application** for the renewal of his driver's license, but refused to provide his [SSN] **thereon.**” R., p. 39, L. 25-26 (emphasis added). Thus, the State of Idaho argued that:

Idaho Code section **requires** the applicant to provide his or her [SSN] if one has been previously issued. Although the Code provides alternatives for those who have not been issued a number, it does not address the issue of one who has been

issued a number but has, for whatever reason, discontinued use of the number. The Code provides alternatives for “An applicant who has not been assigned a social security number,” but **clearly requires** it of those to whom a number has been assigned. Mr. Lewis admits that he has been assigned a[n] [SSN] (citation omitted). Thus, because the number has been issued, **it must accompany the application for a driver’s license renewal per the requirements of Idaho Code §49-306....”**

[R., pp. 45 (L.25-26) - 46 (L. 1-7) (emphasis added).]

On March 22, 2004, in its Brief on Remand filed with the State’s Transportation Department, the State of Idaho reiterated its position that “[t]his action arose when [Mr. Lewis] completed an application for the renewal of his driver’s license, but refused to provide his [SSN] **thereon.**” R., p. 138, L. 17-18 (emphasis added). In this Brief, the State of Idaho reinforced its claim that Idaho Code § 49-306 had been amended for the very purpose of requiring “every applicant for a driver’s license ... to provide a [SSN] **on their driver’s license application,**” in order to comply with 42 U.S.C. § 666(a)(13)(A). R., p. 141, L. 16-21 (emphasis added). Further, the State of Idaho claimed that “[o]ne of the primary compelling interests of the States in collecting the [SSN’s] **on driver’s license applications is that it is a requirement of federal law,**” citing and quoting from 42 U.S.C. § 666(a)(13)(A). R., pp. 140 (L. 18-22) -141 (L. 1-15) (emphasis added).

In its Response Brief in this Court, the State of Idaho again reiterated these legal positions. In its Statement of the Case, the State of Idaho submitted that “[a]s a result of his refusal to provide his [SSN] **as a part of the application for renewal,** Lewis’ license was suspended.” Respondent’s Brief (“Resp. Br.”), p. 1. And, in support of that action, the State of

Idaho contended that “[a]n applicant who has been assigned a [SSN] must provide the number as verified by his social security card or the [SSA].” Resp. Br., p. 7. Even more explicitly, the State of Idaho argued that “[r]equiring disclosure of a [SSN] **on an application for a driver’s license** is the least restrictive means of accomplishing a compelling state interest.” Resp. Br., p. 16 (emphasis added). Reinforcing this argument, the State of Idaho contended further that “the federal mandat[e] requir[ing] [SSN’s] on applications for driver ... licenses,” means that “the Department’s requirement that **individuals** assigned [SSN’s] **provide them** is not only the least restrictive means, it is the **only means.**” Resp. Br., p. 17 (emphasis added).

**B. In Its Brief in Support of its Motion to Remand, the State of Idaho Not Only For the First Time Asserts that Neither State nor Federal Law Requires Mr. Lewis to State a Valid and Verified SSN on His Application for Renewal of His Driver’s License, But Also Has Provided No Assurance That Its New Position is Binding on the Department of Transportation.**

In its Brief in Support of its Motion to Remand, the State of Idaho claims **for the very first time** that Idaho Code § 49-306(2)(a) “does not require the [driver’s license] *applicant* to enter [the applicant’s SSN] on the form.” Respondent’s Motion Brief in Support of Motion to Remand for Further Administrative Action (“Resp. Remand Br.”), p. 10 (italics original). Additionally, **for the very first time**, the State of Idaho claims that 42 U.S.C. § 666(a)(13) does **not** require a state to mandate that an applicant for a driver’s license provide his SSN, but only that there be some procedure whereby such SSN “be recorded on the application” for a driver’s license. Resp. Remand Br., pp. 10-11. Because of these assertions that it has changed its

interpretation of these two statutes, the State of Idaho **now** maintains that it is only the Department of Transportation’s “**practice** to require applicants to display a social security card as verification of such number to facilitate the registration process,” and that such “practice is **not** mandated statutorily or by administrative rule.” Resp. Remand Br., pp. 10-11 (emphasis added). Thus, the State of Idaho **now** asserts that it is within the “permissible discretion” of the Department of Transportation to “process [Mr. Lewis’s] application” and issue Mr. Lewis a driver’s license, even though Mr. Lewis has **not** stated a valid and verified SSN on that application. Resp. Remand Br., p. 11.

But the State of Idaho has failed to provide any assurance that its new legal position in this case is binding; rather, it appears that the State’s has changed its legal position as an expedient measure to resolve this case, and this case only.

In its brief in support of its motion to remand, the State of Idaho has not acknowledged that it is correcting an earlier erroneous interpretation of Idaho Code § 49-306(2) or of 42 U.S.C. § 666(a)(13)(A), nor has it provided any authority upon which its correction is based. Instead — in contrast to its previous position, which it supported by analysis of both the language and history of the interrelationship between those two statutory provisions — the State of Idaho has jettisoned that analysis by fiat — stating that neither Idaho Code § 49-306(2) nor 42 U.S.C. §666(a)(13)(A) requires an applicant to fill in the SSN box on the driver’s license renewal application. *Compare* R. 140 (1-23) - 141 (1-24) *with* Resp. Remand Br., pp. 10-11.

Further, the State of Idaho has **not** represented that, because of a previous

misinterpretation of the state and federal statutes, the Department of Transportation has been instructed to change its “practice to require applicants to display a [SSN] as verification of such number [as the applicant has submitted on the application form] to facilitate the registration process.” *See* Resp. Remand Br., pp. 10-11. Nor has the State of Idaho represented to this Court that, in light of its change of legal position concerning the Idaho Code § 49-306(2) and 42 U.S.C. § 666(a)(13)(A) requirement, it is has changed, or is changing, the driver’s license renewal form to indicate that submitting an SSN with the application is optional. *See id.*

To the contrary, by its statement that “[t]he driver’s license application submitted by [Mr. Lewis] is **complete otherwise**,” the State of Idaho has indicated that any application for a driver’s license that does not contain an SSN is incomplete. *See* Resp. Remand Br., p. 11 (emphasis added). Further, by its unreserved citation to the Department’s “Idaho Driver’s Licenses and Identification Cards Fact Sheet,” the State of Idaho has indicated that its practice of notifying applicants to “[b]ring your [SSN] or original card issued by the [SSA]” in order to “verify” your [SSN] will continue unchanged. *See* Resp. Remand Br., p. 11, n. 6 and Idaho Driver’s Licenses and Identification Cards Fact Sheet, p. 2 [http://itd.idaho.gov/dmv/driverservices/driver\\_license\\_facts.htm](http://itd.idaho.gov/dmv/driverservices/driver_license_facts.htm) (4/25/06). Thus, the State of Idaho has effectively affirmed that the Department of Transportation will continue to engage in its practice of requiring the SSN on the form and verification of that SSN by an applicant, unless an applicant objects. Then, and only then, will the Department decide whether to exercise its self-appointed “discretion” not to require the applicant to complete an application form by

entering an SSN on that form and by displaying an SSN card to verify that number.

**C. The State of Idaho Has Provided No Assurance that the Department of Transportation Will Exercise Its Newly Discovered Discretion in the Future.**

In its motion for remand, the State of Idaho has acknowledged that “the same dispute” may arise in the future, but it has given Mr. Lewis no assurance that the legal position taken by the State of Idaho with respect to the controlling statutes in this case will be binding on any such future application, or that the proposed exercise of discretion to resolve this case will be exercised in the same way in the future. *See* Resp. Remand Br., pp. 11-12. Instead, the State of Idaho has urged this court not to resolve this case on the merits of Mr. Lewis’s Idaho Code § 73-204 claim because of a “[p]ossible modification of the present Idaho statutory framework” governing the “issuance of drivers’ licenses” triggered by a new federal law that will come into effect in 2008. *See id.*, p. 12. Because of this possibility, the State of Idaho contends that Mr. Lewis’s claim based on the law **now in place** is “academic.” *See id.*, p. 13.

The State of Idaho’s contention is outlandish. According to the State of Idaho’s own description of the driver’s license provisions of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terrorism, and Tsunami Relief Act, those provisions do not operate as a direct mandate requiring all 50 states to conform to certain standards as a prerequisite for issuing a state driver’s license. Rather, as the State of Idaho has asserted, the “new provisions **prohibit any federal agency** from accepting ‘for any official purpose’” a State-issued driver’s license as an identifying document which does not comply with the federal

statutory SSN requirement. *See* Resp. Remand Br., p. 12 (emphasis added). Thus, according to the State of Idaho’s representation of the new law’s provisions, a state could issue a valid driver’s license without “presentation and verification of ...[p]roof of the [applicant’s] [SSN] or verification that the person is not eligible for a social security account number,” as provided for in the new law. The person to whom such a license is issued would simply not be able to utilize that license for identification purposes before a federal agency.

It is wholly speculative whether the Idaho legislature would enact a law providing for such an alternative procedure whereby a person could obtain a driver’s license that did not conform to the federal identification provisions of the new federal law. Indeed, it is wholly speculative that the Idaho legislature would enact any state law in conformity with these identification provisions. Significant opposition to those provisions have already emanated from several states, including the state of New Hampshire which voted in March “against strict new federal standards for issuing driver’s licenses.”

[Http://www.cbsnews.com/stories/2006/04/25/ap/politics/mainD8H7B90G8.shtml](http://www.cbsnews.com/stories/2006/04/25/ap/politics/mainD8H7B90G8.shtml).

But the injury inflicted upon Mr. Lewis under the current law is real and deserves redress. For over four years the State of Idaho has insisted that Mr. Lewis was required by current law to state a valid and verified SSN on his application for renewal of his driver’s license. During that period he has invested many hours and considerable resources to vindicate his religious freedom claims before an administrative hearing officer and a district court without obtaining the driver’s license that he is seeking. And now — at the twelfth hour — the State of

Idaho has the audacity to assert that his claim is no longer justiciable, because the State of Idaho changed its mind at the very last minute and is finally willing to grant Mr. Lewis his “renewal application.”

Not only is Mr. Lewis entitled to an adjudication of his Idaho Code § 73-204 claim on the facts as they actually occurred, but, as shown in Part III below, the action proposed by the State of Idaho on remand would be equally violative of Mr. Lewis’s free exercise of religion secured by Idaho Code § 73-204.

**III. THE STATE OF IDAHO’S PROPOSED ACTION TO GRANT MR. LEWIS A DRIVER’S LICENSE BY THE DEPARTMENT OF TRANSPORTATION’S ENTRY OF AN SSN ON MR. LEWIS’S “INCOMPLETE APPLICATION” FOR RENEWAL OF DRIVER’S LICENSE WOULD VIOLATE MR. LEWIS’S FREE EXERCISE OF RIGHTS SECURED BY IDAHO CODE § 73-402.**

With respect to Mr. Lewis’s application, the State of Idaho has represented to this Court that it would not require Mr. Lewis to include an SSN on his application form as a prerequisite to obtaining a driver’s license, because, according to the State of Idaho, Mr. Lewis “**has admitted** that he “is **registered** with the Social Security Administration (“SSA”) and **possesses** a[n] [SSN] [and] has disclosed [that SSN] in pleadings to the Department before the hearing officer.” Resp. Remand Br., p.10 (emphasis added). Further, the State of Idaho has asserted that Mr. Lewis has “disclosed the number in pleadings to the Department before the hearing officer.” *Id.* Thus, the State of Idaho contends, the Department is in a position to “enter [that] number on Mr. Lewis’s application,” enabling the “process [to] go forward,” to the issuance of an Idaho driver’s license

to Mr. Lewis presumably without this Court's having to determine whether, in the process, the State of Idaho has violated Mr. Lewis's free exercise of religion rights protected by Idaho Code § 73-402. *See* Resp. Remand Br., pp. 10-13. The State of Idaho is both factually and legally mistaken.

**A. Because of his Religious Convictions, Mr. Lewis Has Renounced All Claims to Social Security Benefits and Made Every Effort to Disassociate Himself From the SSN Assigned to Him by SSA.**

The State of Idaho claims that “[n]o dispute exists that [Mr. Lewis] is registered with the [SSA] and possesses a [SSN].” Resp. Remand Br., p. 10 (emphasis added). Significantly omitted from this assertion is any citation to the record on appeal. And for good reason. The record is replete with numerous efforts by Mr. Lewis to dispute the allegations that he “has” an SSN and is “registered” with the SSA.

In his Findings of Fact, Conclusions of Law and Preliminary Order of June 20, 2002, the Idaho Transportation hearing officer, Michael B. Howell, found “that on an application for a renewal of driver's license, [Mr. Lewis] refused to provide **his** [SSN] alleging that he had religious objections to doing the same and that he had ceased using that number, but it had not been officially canceled by the [SSA].” R., Ex. A, p. 101, L. 14-19 (emphasis added). In response, Mr. Lewis filed a Petition for Reconsideration in which he took issue with the hearing officer's characterization of his relationship to the SSN assigned to him by SSA in his youth:

First of all, it is the department's number not the possession of any individual. It is the SSA's number applied to a man, but not the possession of any man. This

really goes to the heart of the matter. Additionally fraud on the contract also makes the number as if it never existed, so I can with a clear conscience state that **I have no [SSN].** [R., Ex. A, p. 94, L. 36-41 (bold original)].

Thereafter, and throughout the agency and court proceedings in this case, Mr. Lewis has continued to “hotly dispute” the State of Idaho’s contention that he “**has**” an SSN. *See* R., Ex. A, p.58, L. 11-15; R., Ex. A, p. 23 (L. 25-26) -24 (L. 1-7); R., p. 12, L. 17-21; Appellant’s Opening Brief (“App. Br.”), pp. 9-11 (“... I must be regarded as one with NO USABLE [SSN]....” (bold original)).

To be sure, Mr. Lewis’s efforts to divorce himself from that SSN, to date, have failed to be administratively or judicially recognized, but that fact provides no basis for the State of Idaho’s assertion that Mr. Lewis does not dispute that he “possesses a SSN.” Insofar as “possess” connotes ownership and control, or even the exercise of control without ownership, Mr. Lewis has made every effort to “dispossess” the SSN assigned to him in his youth for the religious reasons articulated in various pleadings, memoranda and papers filed with the SSA, Department of Transportation and the courts. *See, e.g.,* R., Ex. A, p. 109, L. 28-30 (“My religious training, beliefs and duty to God forbid me to hold or possess the social security number (xxx-xx-xxxx) which causes me to sin ... and I must revoke said number or be liable to the wrath of God.”)

With respect to the State of Idaho’s claim that Mr. Lewis does not dispute that he is “registered” with the SSA, the State of Idaho has simply disregarded Mr. Lewis’s oft-repeated claim that he has made a herculean effort to “disassociate” himself from the SSN assigned to him

by SSA. *See* App. Br., pp. 3-5. On June 16, 2002, Mr. Lewis attempted to “renounce” all of his rights to Social Security benefits by means of an SSA Form, “Request for Withdrawal of Application,” setting forth his request in detail in an attached 3-page letter and two-page declaration. *See* R., Ex. A, pp. 107-110. According to both the agency record and the record before this Court, the SSA has never officially responded to, or complied with, this request.<sup>1</sup> In Mr. Lewis’s Reply Brief filed with the Department’s hearing officer, Mr. Lewis stated that he did not know “what the SSA has done” with that request. R., Ex. A, p. 24, L. 18-20.

In the district court, Mr. Lewis argued that SSA’s nonresponse had relieved him of any relationship to an SSN or to SSA. R., p.151 (L. 8-24) - 152 (L. 1-9). By its rejection of Mr. Lewis’s legal arguments and conclusions, the district court did not find that Mr. Lewis did not

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<sup>1</sup> According to 5 U.S.C. §552(a)(d), a federal agency is required, within 10 days after the date of receipt of a request for an “amendment of a record pertaining” to any individual, “acknowledge in writing such receipt,” and “promptly, either — (i) make correction of any portion [of the record] which the individual believes is not accurate, relevant, timely or complete; or (ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official ....”

dispute that he was “registered with the [SSA],” as the State of Idaho has now claimed. *See* Resp. Remand Br., p. 10. Rather, the district court simply concluded that the SSA’s “failure to respond would not have any legal significance.” R., p. 187, L. 9-11. That is a far cry from the State of Idaho’s assertion that there is no factual dispute that Mr. Lewis is “registered with the [SSA]”; to the contrary, Mr. Lewis has, by his action and statements, indicated that, while he may once have been so registered, he has withdrawn that registration and, if the SSA still considers him to be “registered,” it is against his will and violative of his religious conscience. *See, e.g.,* App. Br., pp. 8-9.

**B. By Disclosing the SSN Assigned to Him to the Hearing Officer, Mr. Lewis Did Not Indicate that the Department’s Entry of that SSN on His Application for Renewal of Driver’s License Would Not Violate His Religious Convictions and Beliefs.**

Taking advantage of Mr. Lewis’s having “disclosed” the SSN assigned to him “in pleadings to the Department before the hearing officer,” the State of Idaho has asserted that the Department of Transportation is free to enter that number on Mr. Lewis’s application for renewal of his driver’s license, as if such entry would not violate Mr. Lewis’s free exercise of religion secured by Idaho Code § 73-402. *See* Resp. Remand Br., pp. 10-11. That is not true.

Mr. Lewis did **not** — as the State of Idaho would have this Court infer — disclose the card showing the SSN assigned to him in order to enable the Department to complete his otherwise incomplete driver’s license application by “entering the number on the application.” *See* Resp. Remand Br., pp. 3, 10-11. Rather, Mr. Lewis made that disclosure initially for the

purpose of emphasizing that “possession” of that SSN “constitutes an abrogation of [his] religious freedom [by] caus[ing] [him] to sin ...” R., Ex A, p. 109, L. 27-29. Thus, as Mr. Lewis has consistently maintained, his religious convictions prevent him **not** merely from including that SSN on the driver’s license renewal application, but even from “**provid[ing]**” the SSN assigned to him “for Driver’s License Purposes” (R., pp. 115-31 (emphasis added)):

Compelled by these Scriptural convictions, I have acted lawfully and legally to extricate myself from the human servitude of the social security system, and am prohibited from making any application for a social security account and number — OR using it in ANY form to obtain benefits, even — especially — the renewal of Idaho Driver’s License. [R., p. 130, L. 21-24 (emphasis original).]

Thus, had the Department — in the first instance — decided not to require Mr. Lewis to fill in the SSN block on the renewal of driver’s license application, but to request Mr. Lewis to furnish a SSN so that the Department could “enter” the SSN assigned to Mr. Lewis, Mr. Lewis would have refused to provide the Department with the card, registering the same religious objection that he made to the request to enter a SSN himself.

By attempting, in its motion to remand, to take advantage of Mr. Lewis’s “disclosure” to the hearing officer of the SSN assigned to him, the State of Idaho is actually repeating an earlier effort to invite Mr. Lewis to compromise his religious convictions. On July 9, 2002, the Drivers Service Manager wrote to Mr. Lewis requesting his permission for “the department to enter” the SSN disclosed to the hearing officer “into your driver’s license record so you can renew your license and continue your driving privileges.” *See* R., Ex. A, pp. 89, L.1-3. Mr. Lewis declined to grant such permission, reiterating that his religious convictions required him to be completely

disassociated from that SSN because it represented a right to “Social Welfare benefits ... which violate my religious beliefs.” R., Ex. A, p. 86, L. 31. As Mr. Lewis explained subsequently, in his Request for Review by the Director of Transportation, he “cannot in good conscience use the Social Security system for any reason.”<sup>2</sup> R., Ex. A, p. 79, L. 13.

Thus, the proposed remand submitted by the State of Idaho does not moot the central issue in this case: whether the State of Idaho has a compelling governmental interest to force Mr. Lewis to identify himself with a SSN that entitles him to welfare benefits as a prerequisite for obtaining renewal of his Idaho driver’s license. This issue is not “academic,” as the State of Idaho would have this Court believe. *See* Resp. Remand Br., p. 13. Rather, there is a real case or controversy that cannot be resolved on the basis of this record, or even on the basis of the State of Idaho’s proposed revised record, without this Court addressing Mr. Lewis’s substantive claims or the State of Idaho confessing error, including a violation of Mr. Lewis’s free exercise rights secured by Idaho Code § 73-402.

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<sup>2</sup> To be sure, Mr. Lewis also disclosed the SSN assigned to him when he introduced as evidence the Social Security card assigned to him. But that disclosure was a necessary incidence to Mr. Lewis’s effort, by introduction of the card — which states on its face: “For Social Security and Tax Purposes — Not for Identification” — to rebut the State of Idaho’s contention that the SSN was part of a national identification system. *See* Resp. Br., p. 10. *See also* Appellant’s Reply Brief, pp. 13-14.

**C. The State of Idaho Has Not Sustained Its Burden of Proof Under Idaho Code Sections 73-401(1) and 73-402(3) That Entry Into the Department of Transportation’s Records of the SSN Assigned to Mr. Lewis is Essential to Further a Compelling Government Interest or Is the Least Restrictive Means of Furthering that Compelling Government Interest.**

Because of its faulty assumption that Mr. Lewis’s religious beliefs would not be compromised by its proposal that the Department of Transportation enter the SSN assigned to Mr. Lewis on his renewal of driver’s license application, the State of Idaho has failed to address specifically whether its remand request, if granted by this Court, would “substantially burden” Mr. Lewis’s free exercise of religion and, therefore, would be subject to the compelling government interest and least restrictive alternative tests set forth in Idaho Code § 73-402(3).

There is no question, however, that the proposed entry would “substantially burden” that free exercise, because the State of Idaho is proposing that entry of the SSN assigned to Mr. Lewis would be made by utilizing the SSN that the Department of Transportation obtained through the hearing process triggered by Mr. Lewis’s appeal — which was an appeal from the Department’s initial effort to force Mr. Lewis to identify himself with the SSN assigned to him as a precondition for the granting of Mr. Lewis’s application for renewal of his driver’s license. As demonstrated hereinabove, it is unmistakably clear that the record shows that: (a) Mr. Lewis would not have disclosed the assigned SSN had the Department of Transportation not required that Mr. Lewis provide that SSN on his driver’s license renewal application in order to obtain favorable action on his request for renewal of his driver’s license; (b) such disclosure was made

only for the purpose of explaining his religious conviction and for rebutting the State of Idaho's contention that the assigned SSN was part of a national identification system; and (c) Mr. Lewis's religious convictions require him **not** to identify himself in anyway with the SSN assigned to him in order to obtain a driver's license, **not** just to avoid identifying himself with that SSN on the driver's license renewal application form.

It would be incumbent upon the State of Idaho, therefore, to "demonstrate" by "clear and convincing evidence" that entry of the SSN assigned to Mr. Lewis is "[e]ssential to further a compelling government interest [and] [t]he least restrictive means of furthering that compelling government interest." *See* Idaho Code §§ 73-401(1) and 73-402(3). Having falsely assumed that Mr. Lewis's exercise of religion would **not** be "substantially burdened" by its proposed departmental entry, the State of Idaho has utterly failed to meet its burden of going forward with any evidence of a compelling government interest, as well as any evidence of the least restrictive means of furthering that interest — much less of carrying its burden of persuasion on those issues — as required by Idaho Code § 73-401(1).

Further, inasmuch as the State of Idaho's continuing contention in its brief in support of its motion to remand — that compliance with 42 U.S.C. § 666(a)(13)(A), standing alone, suffices to establish a compelling government interest — might be applied to its newly-crafted solution of the Department's recording of the SSN assigned to Mr. Lewis's onto his driver's license renewal application, it fails to meet the clear and convincing standard of Idaho Code § 73-401(1). According to the State of Idaho, 42 U.S.C. § 666(a)(13)(A) is an absolute federal

mandate with which states must comply, and therefore, it would be “feckless” for the State of Idaho to make any “effort to secure an exemption under [42 U.S.C. § 666(d)],” which, according to the State of Idaho, “plainly has no application to the controversy at hand.” Resp. Remand Br., pp. 7-8.

In making this argument the State of Idaho would usurp the authority that Congress has conferred upon the Secretary of Health and Human Services: It is the Secretary, not the State of Idaho, who is to determine, in the first instance, the scope and application of 42 U.S.C. § 666(d), including whether it “anticipate[s] exceptions premised on religious belief.” Indeed, it would be the Secretary, not the State of Idaho, who would have the duty to interpret and apply 42 U.S.C. § 666(d) in light of the **federal** Religious Freedom Restoration Act and the interpretive gloss placed on that Act by the United States Supreme Court in *Gonzales v. O Centro Espirita Beneficente Unido Do Vegetal*, 546 U.S. ---, 163 L.Ed.2d 1017, 2006 LEXIS 1815 (2006). The State of Idaho cannot discharge its duty under Idaho Code § 73-402(3) to demonstrate a compelling government interest to comply with 42 U.S.C. § 666(a)(13)(A) by putting its own limiting interpretative gloss on a federal statute, when the statute at issue sets forth the requirements for “qualifying” for federal funds subject not only to statutory guidelines, but to the discretion of the executive official in charge of enforcing those qualifying standards. *See generally Michigan Department of State v. United States, Department of Health and Human Services*, 166 F. Supp. 1228 (S.D. Mich. 2001).

#### IV. CONCLUSION

For the foregoing reasons, the State of Idaho's Motion to Remand for Further Administrative Action should be denied and the appeal be set for oral argument on the merits. Alternatively, with the State of Idaho's concurrence and confession of error and violation of Idaho Code §73-402, judgment could simply be entered for Mr. Lewis.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this \_\_\_\_ day of May 2006, I caused to be served two (2) true and correct copies of the foregoing Appellant's Brief in Opposition to Respondent's Motion to Remand for Further Administrative Action by United States mail postage prepaid to the attorneys for Respondent addressed to the Honorable Lawrence D. Wasden, Attorney General, P.O. Box 83720, Boise, Idaho 83720-0010.

Stanley D. Crow