

December 6, 2001

**ALABAMA LAWSUIT CHALLENGING THE USE OF
SOCIAL SECURITY NUMBERS FOR IDENTIFICATION,
AND THE NATIONAL ID**

This document contains three legal briefs filed in the Alabama Court of Civil Appeals in the case of Scott McDonald v. Alabama Department of Public Safety, as follows:

1. BRIEF OF APPELLANT SCOTT McDONALD
2. BRIEF OF APPELLEE ALABAMA
DEPARTMENT OF PUBLIC SAFETY
3. REPLY BRIEF OF APPELLANT SCOTT
McDONALD

The case is a challenge to the Alabama Department of Public Safety's requirement that all driver license applicants must submit a social security number as a condition to being issued a license.

In the wake of the September 11, 2001, terrorist attacks on the US, the Association of Motor Vehicle Administrators and others are openly pushing to make drivers licenses into national identification documents using social security numbers to link driver records and information to the holder's financial, medical and other governmental records.

The parties undertaking this suit view it as a challenge to the national ID.

ADDITIONAL CASE DOCUMENTS CAN BE FOUND ON THE INTERNET:

<http://www.networkusa.org/fingerprint/page1b/fp-01-page1b-update.html>

IN THE SUPREME COURT OF ALABAMA

Case No. 1002114

**

SCOTT McDONALD,

Appellant,

v.

ALABAMA DEPARTMENT OF
PUBLIC SAFETY,

Appellee.

**

ON APPEAL FROM A JUDGMENT OF THE
CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA
HON. SARAH GREENHAW, CIRCUIT JUDGE PRESIDING

**

BRIEF OF APPELLANT SCOTT McDONALD

**

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October 30, 2001

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STATEMENT OF THE CASE

To fully understand the nature of this case and this appeal first requires a summary of prior litigation between the present parties involving an issue similar to one raised here. In January, 1998, Appellant Scott McDonald (alternatively referred to herein as either “Scott” or “McDonald”), on behalf of his minor sons, Nathan and Chris, instituted suit against the Alabama Department of Public Safety (“DPS”). That suit, filed in the circuit court of Montgomery County, sought a declaratory judgment regarding the validity of an administrative rule promulgated by the DPS which requires all applicants for Alabama learner or driver licenses to submit their federal social security numbers (“SSNs”). The McDonalds’ objection to this rule was based upon certain of their religious beliefs: they believe that the federal SSN is at least the precursor to the Biblical “Mark of the Beast” described in Revelation. Because of this firmly held religious belief, the McDonald sons objected to obtaining SSNs so that they could acquire “learner” licenses and consequently drive on Alabama highways.

The prior complaint filed against the DPS by the McDonalds was based upon the “free exercise” clause of the First Amendment to the United States Constitution. From summary judgment in favor of the DPS, the McDonalds appealed to the Court of Civil Appeals, which affirmed the

judgment of the circuit court; see *McDonald v. Alabama Department of Public Safety*, 756 So.2d 880 (Ala.Civ.App. 1999). It must be noted that the case of *Employment Division, D.H.R. of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990), proved to be the decisive authority for rejecting the McDonalds' "free exercise" claim in that appeal.

But during the course of that first appeal, the law regarding "free exercise" was undergoing change here in Alabama. In May, 1998, the Alabama legislature proposed a constitutional amendment to provide for "free exercise" rights. This amendment was submitted to the voters at the general election in November, 1998 and was approved.¹ This new Amendment 622 now provides in pertinent part as follows:

"SECTION II. The Legislature makes the following findings concerning religious freedom:

"(1) The framers of the United States Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution, and the framers of the Constitution of Alabama of 1901, also recognizing this right, secured the protection of religious freedom in Article I, Section 3.

"(2) Federal and state laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.

¹ Cumberland Professor Thomas Berg recounts the origins of this amendment in his law review article, *The Alabama Religious Freedom Amendment: An Interpretive Guide*, 31 Cum. Law Review 47 (2000).

“(3) Governments should not burden religious exercise without compelling justification.

“(4) In *Employment Division v. Smith*, 494 U.S. 872 (1990), the United States Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.

“(5) The compelling interest test as set forth in prior court rulings is a workable test for striking sensible balances between religious liberty and competing governmental interests in areas ranging from public education (pedagogical interests and religious rights, including recognizing regulations necessary to alleviate interference with the educational process versus rights of religious freedom) to national defense (conscription and conscientious objection, including the need to raise an army versus rights to object to individual participation), and other areas of important mutual concern.”

Clearly, this new amendment has application to issues such as those raised by the McDonalds. But further, the new amendment plainly rejects the decisional authority used by the court of appeals to deny these claims of the McDonalds. In essence, the decision in *Employment Division v. Smith* will play no future role in determining the “free exercise” rights protected by Amendment 622, although this case was dispositive regarding the claims of the McDonalds asserted in that first appeal.

This new Amendment 622 did not exist at the time the McDonalds filed their first complaint against the DPS; it did not exist when the circuit court granted summary judgment in favor of the DPS in July, 1998, nor did it exist when the McDonalds filed their notice of appeal. Only after the

McDonalds had filed their opening brief in that prior appeal did Alabama voters approve this amendment. With new constitutional authority supportive of their position in that appeal, the McDonalds asked the court of appeals to consider the new amendment in its decision, or allow the McDonalds to amended their complaint to set forth a claim based on the amendment. However, the court of appeals chose not to do so:

“As a final matter, we note that in the trial court Nathan and Christopher did not assert any claim that Regulation 760-X-1-19 violates the Alabama Constitution. We therefore do not reach that issue, because ‘[t]his court will not consider a theory or issue where it was not pleaded or raised in the trial court.’ *Garrison v. International Enters., Inc.*, 585 So.2d 84, 86 (Ala.Civ.App. 1991).

“However, in their reply brief to this court, Nathan and Christopher have sought leave from this court to amend their complaint to state a free-exercise claim under the Alabama Constitution. They candidly admit that they have sought such relief because the Alabama Constitution has recently been amended to provide for a ‘least restrictive means’ test with respect to analysis of the propriety of governmental burdens upon a person's free exercise of religion. Ala. Const. 1901, amend. 622. We decline this request:

"The trial court has committed no error in dismissing the complaint, and since we can only review alleged error by the trial court, it would be inappropriate to remand the cause to allow a new theory of liability to be presented at this stage of the proceeding. We do not have that authority under the general rules of appellate review and should not assume it under our inherent authority of general superintendence of the circuit courts.’

*“Brown v. Transportation Ins. Co., 448 So.2d 348, 349 (Ala. 1984).”*²

Thus the issue of whether Amendment 622 was violated by the DPS’s administrative rule requiring SSNs to obtain Alabama driver licenses was not litigated and decided in the McDonalds’ prior appeal.

In reference to this appeal made by Scott McDonald, the proceedings in the circuit court were simple and unfortunately quick. McDonald’s Alabama driver license was due to be renewed before March 31, 2001. In an effort to secure such renewal, he contacted several DPS offices in the Madison County area but was unable to obtain such renewal because of his refusal to supply a SSN. This prompted him to file on May 1, 2001, a new declaratory judgment action against the DPS in the circuit court of Montgomery County which again attacked the validity of the DPS rule requiring provision of SSNs (C. at 1 - 6).³ But this time, the basis for his complaint was not the First Amendment to the United States Constitution; instead, the complaint was squarely based upon Amendment 622 of the Alabama Constitution (C. at 5).

² See *McDonald v. Alabama Department of Public Safety*, 756 So.2d, at 886.

³ The designation “C.” means the “Clerk’s Record” in this cause and the appropriate page thereof. There are no transcripts or depositions of any testimony in this record.

In response to this new lawsuit, on July 3, 2001, the DPS moved to dismiss the complaint on three separate grounds: (1) the complaint failed to state a claim, (2) it was barred by principles of res judicata, and (3) the DPS was immune from suit (C. at 7). Without waiting for any response from McDonald, the circuit court granted the DPS motion to dismiss on July 6, 2001 (C. at 7).

Pursuant to Rule 59, A.R.C.P., McDonald moved on July 27, 2001, to vacate the offending order of dismissal dated July 6 (C. at 43). But, this motion was quickly denied on July 30, 2001 (C. at 43). Notice of appeal pursuant to Rule 4, A.R.A.P., was timely filed on August 29, 2001 (C. at 45).

STATEMENT OF THE ISSUES FOR REVIEW

ISSUE 1: Did the trial court err in granting the motion to dismiss of the Defendant Alabama Department of Public Safety on res judicata and/or collateral estoppel grounds?

ISSUE 2: Did the trial court err in granting the motion to dismiss of the Defendant Alabama Department of Public Safety on the ground that the Defendant was immune from suit via Art. 1, §14 of the Alabama Constitution?

ISSUE 3: Did the trial court err in granting the motion to dismiss of the Defendant Alabama Department of Public Safety on the ground that the McDonald complaint failed to state a claim upon which relief could be granted?

STATEMENT OF THE FACTS

In his complaint filed in the circuit court, McDonald alleged the following facts (C. at 2 - 3) regarding his religious beliefs about the Biblical “Mark of the Beast” and their relationship to SSNs:

“4. The Plaintiff holds Christian beliefs. He firmly knows and believes that Jesus Christ is the Son of the one and true living God; that nobody goes unto the Father except by belief and faith in the Lord; that the Lord forgives all sin, and that salvation is the gift of God, obtainable only by belief that Christ is the Son of God sent to save the world from its sins.

“5. The Plaintiff further possess [sic] a firmly held religious belief that sometime in the future and most likely during his lifetime, the Anti-Christ, as described in the Bible’s Book of Revelation, will appear upon the Earth and will attempt to cause all people to be marked upon their right hand or forehead with the ‘Mark of the Beast.’

“6. The Plaintiff believes that discerning Christians may recognize the Beast’s symbolic ‘Mark’ by way of its connection to the number ‘666’ as described in Revelation 13. Further, McDonald believes that as a Christian he cannot worship the Beast or identify with the Beast’s mark upon penalty of eternal damnation.

“7. The Plaintiff sincerely believes that the social security number, as established under federal law, is either the precursor to the ‘Mark of the Beast,’ or is actually the mark itself and it will in the future be implanted on an individual’s right hand or forehead.

“8. As a result of such firmly held religious beliefs, Plaintiff McDonald has renounced his previous acquisition of a social security number for himself.”

Regarding these same religious beliefs, McDonald also submitted to the circuit court an affidavit in support of his motion to vacate which stated (C. at 22-23):

“I have concluded, and I believe, that the Social Security number is the precursor to, or is itself the ‘Mark of the Beast’ as described in the Holy Bible, Book of Revelation, chapter 13, verses 16 and 17.⁴ My belief is based upon a study of Bible prophecy in light of current events, and on the ever increasing demands for Social Security numbers as a condition for engaging in activities which previously did not require the use of such number. I also believe that it is an abomination to number God’s people and in violation of God’s Law. For this reason, I do not use a social security number for identification. I do not have a social security card.”⁵

⁴ Revelation 13: 11-18, N.I.V. makes the following prophecy: "Then I saw another beast, coming out of the earth. He had two horns like a lamb, but he spoke like a dragon. He exercised all the authority of the first beast on his behalf, and made the earth and its inhabitants worship the first beast, whose fatal wound had been healed. And he performed great and miraculous signs, even causing fire to come down from heaven to earth in full view of men. Because of the signs he was given power to do on behalf of the first beast, he deceived the inhabitants of the earth. He ordered them to set up an image in honor of the beast who was wounded by the sword yet lived. He was given power to give breath to the image of the first beast, so that it could speak and cause all who refused to worship the image to be killed. He also forced everyone, small and great, rich and poor, free and slave, to receive a mark on his right hand or on his forehead, so that no one could buy or sell unless he had the mark, which is the name of the beast or the number of his name. *This calls for wisdom. If anyone has insight, let him calculate the number of the beast, for it is a man's number. His number is 666.*"

⁵ In the McDonald’s prior appeal, the court of appeals noted that McDonald submitted in support of his motion for summary judgment a 38 page affidavit. Of course, this Court does not have the benefit of that affidavit in this record.

McDonald has possessed an Alabama driver license since 1970, and his last current license expired on March 31, 2001 (C. at 3). Thereafter in an attempt to secure a renewed driver license, he visited several DPS offices located in Madison County, yet he was unable to obtain such renewal because he refused to supply his SSN. During one such visit to the Madison County courthouse, the DPS administrative rule requiring the provision of SSNs, Rule No. 760-X-1-.19,⁶ was displayed (C. at 3 - 4).

As mentioned by the court of appeals in *McDonald v. Alabama Department of Public Safety*, 756 So.2d at 883, the DPS allowed at that time applicants who objected to providing SSNs for religious reasons to execute an affidavit in lieu thereof. After the decision in that appeal, Nathan and Chris McDonald secured their driver licenses by executing that affidavit (C. at 25, 36 - 37). However by the spring of 2001, Scott was denied the opportunity to execute that affidavit to obtain his driver license (C. at 26).

Scott holds firm religious beliefs that Revelation predicts a time in the future when the Anti-Christ will appear on this earth and compel all to take the “mark” in order to live and work. By following events of this present day world, he has concluded that the SSN and its use by government as a means of identification will lead to the “Mark of the Beast”. Fearing damnation and

⁶ A copy of the Rule is within this record, C. at 31 - 32.

desiring to save his soul, he is required by his faith to resist assisting in any way this “Mark” system, including providing a SSN to the DPS to obtain a renewed driver license. Because this Rule No. 760-X-1-.19 burdens and abridges Scott’s religious beliefs, he instituted this suit pro se.

ARGUMENT

ISSUE 1: Did the trial court err in granting the motion to dismiss of the Defendant Alabama Department of Public Safety on res judicata and/or collateral estoppel grounds?

In January, 1998, Scott McDonald, on behalf of his sons, Nathan and Chris, sued the Alabama Department of Public Safety. Generally, the complaint in that case alleged that Nathan and Chris McDonald held religious beliefs against obtaining and using SSNs, which were required in order for them to secure Alabama driver licenses from the DPS. In that action, the McDonalds sought declaratory relief against DPS Rule No. 760-X-1-.19 which mandated that Nathan and Chris supply SSNs to secure driver licenses. This “free exercise” claim was based upon the First Amendment of the United States Constitution.⁷ Within a few months, both parties moved

⁷ The Court of Civil Appeals described the basis for this claim in the following manner: “Nathan and Christopher next contend that Rule No. 760-X-1-.19 is an impingement upon their rights, as afforded by the First Amendment to the United States Constitution, held applicable to the states by incorporation into the Fourteenth Amendment's Due Process Clause,” 756 So.2d, at 884.

for summary judgment, and on July 24, 1998, the circuit court granted the DPS's motion and denied that of the McDonalds. Appeal followed (C. at 14).

In the court of appeals, the McDonalds raised the following issues:

“Issue 1: Does the Alabama APA require formal promulgation as ‘rules’ the separate procedure permitting a religious exception to the mandate of Rule 760-X-1-.19 as well as the ‘Affidavit For Application or Renewal of Driver License’?”

“Issue 2: Does Rule 760-X-1-.19 have a statutory foundation?”

“Issue 3: Did the circuit court err in granting summary judgment to the DPS when there were conflicting facts regarding the McDonalds’ equal protection argument?”

“Issue 4: Did the circuit court err in denying the McDonalds’ first motion for summary judgment?”

However, the appellate court affirmed the judgment of the circuit court; see *McDonald v. Alabama Department of Public Safety*, 756 So.2d 880 (Ala.Civ.App. 1999).

The McDonalds submitted their opening brief in that appeal on or about October 12, 1998. At the general election held in the following weeks, the citizens of Alabama approved Amendment 622 to the Alabama Constitution. This newly adopted amendment provided a state constitutional remedy for the problems facing the McDonald sons. The amendment declared that burdens imposed upon the exercise of religious beliefs were to

be the “least restrictive,” and therefore the amendment was directly relevant for the issues being pursued by the McDonalds. They consequently sought to have this new amendment considered in their appeal. However as shown above, the court of appeals refused to consider this new amendment in deciding that appeal.

Because the appellate court did not consider this new amendment in that prior appeal, Scott McDonald expressly based his current claim against the DPS upon this amendment. There has never been any litigation based upon Amendment 622 until Scott did so with this case. The amendment provides a new remedy for Scott which had not been litigated or considered even in the prior case against the DPS. Nonetheless, the circuit court here appears to have dismissed this new suit upon a mistaken belief that Scott’s claim was barred by principles of res judicata (or possibly collateral estoppel) (C. at 7). This was error requiring reversal. New constitutional amendments like Amendment 622 can create new rights and remedies which are not prejudiced by prior litigation.

Many Alabama decisional authorities define the elements of both res judicata and collateral estoppel. In *Coyle v. Alabama Power Company*, 611 So.2d 1019, 1020 (Ala. 1992), these elements were identified:

“The elements of collateral estoppel are: (1) that an issue in question is identical to one presented in a prior action, (2) that the issue was

actually litigated in the prior action, (3) that resolution of the issue was necessary to the judgment in the prior action, and (4) that the two actions involve the same parties. If these elements are present, any claim that was or could have been adjudicated in the prior action is barred from further litigation [cites omitted].

“The elements of res judicata are: (1) a prior action with a judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties in the prior action and in the present action, and (4) with the same cause of action presented in both actions [cite omitted].”

See also *Wheeler v. First Alabama Bank of Birmingham*, 364 So.2d 1190, 1199 (Ala. 1978), *Lott v. Toomey*, 477 So.2d 316, 319 (Ala. 1985), *Martin v. Reed*, 480 So.2d 1180, 1182 (Ala. 1985), and *Adams v. Carpenter*, 566 So.2d 236, 241-42 (Ala. 1990).

The nature of the prior litigation at issue here may be easily determined by review of the decision in *McDonald v. Alabama Department of Public Safety*, supra. Scott McDonald, on behalf of his sons, sued the Department to challenge the constitutionality of the requirement that SSNs be provided to obtain Alabama driver licenses, and the complaint in that case was based upon the First Amendment to the United States Constitution. First Amendment jurisprudence includes such authorities as *Employment Division, D.H.R. of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990), and *Bowen v. Roy*, 476 U.S. 693, 106 S.Ct. 2147 (1986). These two cases

were particularly dispositive in the appeal of *McDonald v. Alabama Department of Public Safety*, supra.

However, in this present case involving Scott McDonald solely, his claim is **not** based upon the First Amendment of the United States Constitution. Instead, it is based upon a new amendment to the Alabama Constitution, Amendment 622, which was adopted just before he filed his reply brief in the appeal of *McDonald v. Alabama Department of Public Safety*, supra. This new amendment establishes a right to “freely exercise” religious beliefs protected by the Alabama Constitution. Further, by express provisions in this new amendment, decisional authorities like *Employment Division, D.H.R. of Oregon v. Smith*, supra, are rejected as controlling precedence for determination of the rights protected thereby. Yet, it was *Employment Division, D.H.R. of Oregon v. Smith* which proved controlling in the former McDonald appeal.

Under these conditions, principles of collateral estoppel or res judicata simply do not apply. It is true that there is an identity of parties here: Scott McDonald was plaintiff in the former case against the DPS and he is plaintiff here in another case against the same DPS. He raised in that prior case the validity of Rule No. 760-X-1-.19, and he does so here. The circuit court of Montgomery County as well as the Alabama Court of Civil Appeals

were clearly courts of competent jurisdiction to decide that prior case and they did so, rejecting the merits of McDonald's arguments. But here, the cause of action is decidedly different: it is based upon a very recent constitutional amendment which completely changed the relevant law applicable to cases of this nature. This change in the law thus prevents application of "former adjudication" principles.

One case decisive of this issue is *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 68 S.Ct. 715 (1948), which dealt with the question of whether a party could repeatedly litigate similar tax issues for different tax years. In discussing res judicata principles, the U.S. Supreme Court held:

"But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes," *Id.*, at 599.

"And where the situation is vitally altered between the time of the first judgment and the second, the prior determination is not conclusive," *Id.*, at 600.

"Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment," *Id.*, at 601-02.

Accord *Duke v. State*, 48 Ala.App. 188, 263 So.2d 165, 167 (1971), and *State v. Hunt Oil Co.*, 49 Ala.App. 445, 273 So.2d 207, 212 (1973). See also *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 162, 65 S.Ct. 573, 577

(1945)(“it is nevertheless the general rule that res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation”); *Jackson v. DeSoto Parish School Board*, 585 F.2d 726, 729 (5th Cir. 1978)(“It has long been established that res judicata is no defense where, between the first and second suits, there has been an intervening change in the law or modification of significant facts creating new legal conditions”); and *Manning v. City of Auburn*, 953 F.2d 1355, 1359 (11th Cir. 1992).⁸

Comparison of the issues raised in the first case against the DPS with those raised here shows no identity of issues. The McDonalds raised in the prior case an issue regarding the DPS’s compliance with the Alabama Administrative Procedure Act; Scott does not raise that question here. That prior case questioned the statutory foundation for Rule No. 760-X-1-.19; this issue is not raised here. The equal protection issue presented in the first case is not again raised here.

But in the prior action between these parties, Scott, Nathan and Chris McDonald did assert that their “free exercise” rights protected by the First

⁸ See also *Dawson v. Haygood*, 235 Ala. 648, 180 So. 705, 707 (1938)(“where the second action between the same parties is upon a different claim, the demand and claim or issue in the prior action operates an estoppel, only, as to matters in issue or points controverted upon the determination of which the final judgment was rendered”).

Amendment were unconstitutionally burdened by DPS Rule No. 760-X-1-19. Naturally, that First Amendment claim had to be construed by considering *Employment Division, D.H.R. of Oregon v. Smith* and its new and very restrictive “hybrid rights” test. Try as they did, still the court of appeals rejected their claim. But Scott’s present claim based upon Amendment 622 is far different. While he now, once again asserts that his “free exercise” rights are unconstitutionally burdened by DPS Rule No. 760-X-1-19, the test for determination of that claim is different, that test being the “compelling state interest/least restrictive means” test, which has been created by a very recent change in the law, Amendment 622. If any party to this case is subject to any former adjudication principles, it is the DPS, which cannot now question that Scott’s Amendment 622 issue was not litigated in the prior case. For this reason, Scott’s new claim is not subject to a res judicata or collateral estoppel defense. The trial court therefore erred when it dismissed Scott’s new complaint on this ground.

ISSUE 2: Did the trial court err in granting the motion to dismiss of the Defendant Alabama Department of Public Safety on the ground that the Defendant was immune from suit via Art. 1, §14 of the Alabama Constitution?

An examination of the present McDonald complaint (C. at 1- 6) reveals that it was crafted in such a fashion so as to avoid any possible immunity defenses. The complaint itself was styled “Complaint for Declaratory and Injunctive Relief.” Paragraph 2 thereof identified an agency rule, DPS Rule No. 760-X-1-19, which was being challenged by the complaint, and the complaint specifically cited §41-22-10 of the 1975 Alabama Code as its jurisdictional basis. This statute provides:

“The validity or applicability of a rule may be determined in an action for a declaratory judgment or its enforcement stayed by injunctive relief in the circuit court of Montgomery county, unless otherwise specifically provided by statute, if the court finds that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. In passing on such rules the court shall declare the rule invalid only if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without substantial compliance with rulemaking procedures provided for in this chapter.”

In an abundance of caution, McDonald even cited *State Personnel Board v. Cook*, 600 So.2d 1027 (Ala.Civ.App. 1992), a case which plainly held that actions of this nature could be instituted against state agencies (C. at 1).

Review of the complaint itself demonstrates that McDonald was asserting “free exercise” rights predicated upon Amendment 622 of the

Alabama Constitution.⁹ In the complaint, McDonald set forth in summary fashion certain of his religious beliefs regarding SSNs (C. at 2) and he alleged that the agency rule, DPS Rule No. 760-X-1-19, interfered with, impaired and abridged his constitutional “free exercise” rights: “17. The Plaintiff contends that the requirement made by the Defendant, that he must provide a social security number in order to renew his license, is illegal and invalid because such rule abridges his religious rights and freedoms which are protected by the Alabama Constitution” (C. at 4). McDonald clearly alleged a controversy between the parties and a need for declaratory relief:

“19. There is currently a controversy between the Plaintiff and the Defendant regarding the necessity of obtaining and submitting a social security card and number in order to secure or renew a license, which controversy is capable of resolution only by this suit for declaratory relief in which the respective rights of the parties may be adjudicated and determined.”

McDonald’s complaint seeking declaratory relief was thus well plead.

Notwithstanding sufficient jurisdictional allegations, the DPS moved the trial court to dismiss this complaint, and one of the reasons for doing so was its alleged immunity defense: “the Alabama Department of Public

⁹ While McDonald oddly cited this amendment (“Alabama Religious Freedom Act [sic] of 1998 ... See Alabama Act 98-409, SB 604, Ratified: November 3rd, 1998”) (C. at 5), the DPS was not confused thereby: it mentioned this amendment in its brief in support of its motion to dismiss (C. at 11). Still later, McDonald quoted from the amendment itself (C. at 15 - 16).

Safety is absolutely immune from suit under Article 1, Section 14 of the Constitution of Alabama of 1901" (C. at 7). The trial court's general grant of this motion may well have been based upon this contention. If so, the trial court erred.

Art. 1, §14 of the Constitution provides "That the State of Alabama shall never be made a defendant in any court of law or equity." This constitutional provision "prohibits the State and its agencies from being made a defendant to a suit. [cites omitted] Section 14 also prohibits a suit against State officers and agents in their official capacity and individually when a result favorable to the plaintiff would directly affect a contract or property right of the State." See *Gill v. Sewell*, 356 So.2d 1196, 1198 (Ala. 1978). But, there are several exceptions to this general rule, and some actions in a court against a state agency do not fall with the scope of this constitutional immunity provision.

These exceptions were summarized in *Aland v. Graham*, 287 Ala. 226, 250 So.2d 677, 679 (1977), as follows:

"Without professing to cover every situation that has arisen, there are four general categories of actions that we have held do not come within the prohibition of Sec. 14. (1) Actions brought to compel State officials to perform their legal duties. [cites omitted] (2) Actions brought to enjoin State officials from enforcing an unconstitutional law. [cites omitted] (3) Actions to compel State officials to perform ministerial acts. [cites omitted] (4) Actions brought under the Declaratory Judgments Act..."

The complaint in this case seeking declaratory relief thus fell within the exceptions to §14; this was not a suit against the State of Alabama or any of its agencies which was within this constitutional prohibition.

But there is another reason why the proffered immunity defense of the DPS is meritless. Section III of Amendment 622 states that the amendment's purpose "is to guarantee that the freedom of religion is not burdened by state and local law; and to provide a **claim** or defense to persons whose religious freedom is burdened by government" [emphasis added]. Section V(c) of this amendment provides that a "person whose religious freedom has been burdened in violation of this section may assert that violation as a **claim** or defense in a judicial, administrative, or other proceeding and obtain appropriate relief against a government" [emphasis added]. This new constitutional provision constitutes a waiver of the sovereign immunity defense provided in Art. 1, §14. A citizen whose "free exercise" rights have been "burdened" by a state law or agency rule may assert a claim against government, and these provisions can only mean that a state agency can be sued directly for violations of Amendment 622.¹⁰

¹⁰ It must also be noted that this particular immunity defense was available to the DPS when the McDonalds filed their first suit. The DPS could have but did not raise this issue then. Is it not estopped from raising this issue now?

The trial court thus erred in dismissing this action because of the DPS's alleged immunity defense.

ISSUE 3: Did the trial court err in granting the motion to dismiss of the Defendant Alabama Department of Public Safety on the ground that the McDonald complaint failed to state a claim upon which relief could be granted?

In response to McDonald's complaint (C. at 1 - 6), the DPS filed on July 3, 2001, a motion to dismiss (C. at 7), one ground of which was its contention that "the Complaint fails to state a claim upon which relief can be granted." A review of the brief submitted in support of that motion (C. at 8 - 12) indicates one probable basis for this argument: Rule No. 760-X-1-19 is mandated by federal law, 42 U.S.C. §666, and thus there is a "compelling need" for the state to comply with this federal law. The order of the trial court dismissing the complaint (C. at 7), may very well have been predicated on this argument. But, there is also the possibility that the trial court dismissed the complaint because of its insufficiency and failure to properly plead the elements for a claim of this nature. However as explained below, the trial court erred if it did dismiss the complaint on either of these bases.

A. The complaint did not suffer from any pleading deficiencies.

I. Nature of McDonald's religious beliefs.

It seems to be common knowledge that for more than the last 30 years, many Christians have been greatly interested in Bible prophecy and the meaning of the last book, Revelation. In the seventies, Hal Lindsey wrote *The Late Great Planet Earth*, a book which analyzed Revelation and predicted a future period within our lifetimes when the Anti-Christ would arise, causing a period of tribulation and rapture, ending with The Final Judgment. Since then, many similar works have been published depicting these “end times”; popular movies like “Left Behind” built around this view of Revelation have been watched by millions. Evangelists and preachers like Jerry Falwell, Benny Hinn, and Jack Van Impe frequently give sermons on this topic. One may tune into virtually any Christian television program such as Pat Robertson’s or Paul Crouch’s and hear the latest news regarding current world events and their relationship to Bible prophecy. Obviously, Scott McDonald is just one of perhaps millions having these religious beliefs.

A central figure in these beliefs is the forthcoming Anti-Christ, who is predicted to have religious and political control of at least the Western world and particularly the United States. This demon and his system will compel worship by the people. But further to control the populace, all will be required to take a “mark,” without which they cannot live. But taking the

“mark” carries a very heavy price: eternal damnation. To save their souls, Christians cannot take the “mark”. Those who hold these beliefs will oppose anything perceived to be either the precursor of the “mark” or the “mark” itself.

The “mark” has some relationship to the number “666”: *“This calls for wisdom. If anyone has insight, let him calculate the number of the beast, for it is a man's number. His number is 666.”* Some, like Mary Relf of Montgomery, contend that the “bar code” is encoded with this number having special religious significance. But for McDonald, the fact that 42 U.S.C. §666 is the basis for the requirement that SSNs be provided to obtain a driver license is particularly disturbing (C. at 2, 6 - 7, 27).

While the substance and merit of an individual’s religious beliefs are legally irrelevant,¹¹ it cannot be doubted that McDonald’s beliefs in this respect are very strong. He instituted one lawsuit in 1998 to challenge the requirement that SSNs be provided to obtain driver licenses, without which it is difficult to live. Even though he did not prevail then, when the relevant law in Alabama changed, he commenced his second suit, even doing so pro se. McDonald’s actions only prove the truth of the adage that a “legislature

¹¹ See *United States v. Ballard*, 322 U.S. 78, 86, 64 S.Ct. 882 (1944), where the Court declared that men “may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.”

must not obstruct our obedience to [H]im from whose punishments they cannot protect us."¹²

II. The elements plead in the complaint.

To determine whether McDonald's pro se complaint was sufficient and consequently stated a valid claim for relief first requires an identification of its legal basis. If the foundation for a lawsuit is a constitutional provision or statute, the complaint must be examined to detect whether all of the essential elements have been plead. Here, the basis for McDonald's complaint was the very recent Amendment 622, which reads as follows:

“SECTION I. The amendment shall be known as and may be cited as the Alabama Religious Freedom Amendment.

“SECTION II. The Legislature makes the following findings concerning religious freedom:

“(1) The framers of the United States Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution, and the framers of the Constitution of Alabama of 1901, also recognizing this right, secured the protection of religious freedom in Article I, Section 3.

“(2) Federal and state laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.

“(3) Governments should not burden religious exercise without compelling justification.

¹² See *Robin v. Hardaway*, 1 Jefferson 109, 114 (Va. 1772).

“(4) In *Employment Division v. Smith*, 494 U.S. 872 (1990), the United States Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.

“(5) The compelling interest test as set forth in prior court rulings is a workable test for striking sensible balances between religious liberty and competing governmental interests in areas ranging from public education (pedagogical interests and religious rights, including recognizing regulations necessary to alleviate interference with the educational process versus rights of religious freedom) to national defense (conscription and conscientious objection, including the need to raise an army versus rights to object to individual participation), and other areas of important mutual concern.

“(6) Congress passed the Religious Freedom Restoration Act, 42 U.S.C., § 2000bb, to establish the compelling interest test set forth in prior federal court rulings, but in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), the United States Supreme Court held the act unconstitutional stating that the right to regulate was retained by the states.

“SECTION III. The purpose of the Alabama Religious Freedom Amendment is to guarantee that the freedom of religion is not burdened by state and local law; and to provide a claim or defense to persons whose religious freedom is burdened by government.

“SECTION IV. As used in this amendment, the following words shall have the following meanings:

“(1) DEMONSTRATES. Meets the burdens of going forward with the evidence and of persuasion.

“(2) FREEDOM OF RELIGION. The free exercise of religion under Article I, Section 3, of the Constitution of Alabama of 1901.

“(3) GOVERNMENT. Any branch, department, agency, instrumentality, and official (or other person acting under the color of law) of the State of Alabama, any political subdivision of a state, municipality, or other local government.

“(4) RULE. Any government statute, regulation, ordinance, administrative provision, ruling guideline, requirement, or any statement of law whatever.

“SECTION V. (a) Government shall not burden a person's freedom of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

“(b) Government may burden a person's freedom of religion only if it demonstrates that application of the burden to the person:

“(1) Is in furtherance of a compelling governmental interest; and

“(2) Is the least restrictive means of furthering that compelling governmental interest.

“(c) A person whose religious freedom has been burdened in violation of this section may assert that violation as a claim or defense in a judicial, administrative, or other proceeding and obtain appropriate relief against a government.

“SECTION VI. (a) This amendment applies to all government rules and implementations thereof, whether statutory or otherwise, and whether adopted before or after the effective date of this amendment.

“(b) Nothing in this amendment shall be construed to authorize any government to burden any religious belief.

“(c) Nothing in this amendment shall be construed to affect, interpret, or in any way address those portions of the First Amendment of the United States Constitution permitting the free exercise of religion or prohibiting laws respecting the establishment of religion, or those provisions of Article I, Section 3, of the Constitution of Alabama of 1901, regarding the establishment of religion.

“SECTION VII. (a) This amendment shall be liberally construed to effectuate its remedial and deterrent purposes.

“(b) If any provision of this amendment or its application to any particular person or circumstance is held invalid, that provision or its application is severable and does not affect the validity of other provisions or applications of this amendment.”

Clearly, this is a complicated amendment, and certain of its provisions may have latent ambiguities requiring judicial construction. The amendment alternatively uses terms like “free exercise of religion”, “religious freedom” and “religious exercise”, yet these very same terms may have gray contours and imprecise features. What do these phrases mean? Are they synonymous with the “free exercise” clause of the First Amendment to the U.S. Constitution? If so, do these terms encompass McDonald’s particular religious beliefs?

The amendment provides that any litigation involving the rights protected thereby must utilize the “compelling state interest test”, a test developed via “free exercise” jurisprudence. The amendment mentions the cases of *Employment Division v. Smith* and *City of Boerne v. Flores*, supra, which are cases concerning the First Amendment’s “free exercise” clause. The amendment indicates that the decision in *Employment Division v. Smith* should not have any precedential value in litigation involving this amendment. In general, it appears clear that the amendment recognizes a right of “free exercise” of religious beliefs. It also appears clear that burdens upon such rights are to be weighed by the compelling state interest/least

restrictive means test. While this amendment was the brainchild of Attorney General Bill Pryor,¹³ the DPS may deny that the amendment protects the same right of free exercise that formerly was protected by the First Amendment. Perhaps exploring the reason why this amendment was adopted and made a part of the Alabama Constitution may be one method to determine its meaning and consequently its proper construction.

The genesis of the “compelling state interest test” mentioned in Amendment 622 is the case of *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963). Here, a Seventh Day Adventist who believed that it was unbiblical to work on Saturdays, her Sabbath, was refused unemployment benefits because she would not work on these days. In finding this denial by the State violative of Sherbert’s “free exercise” rights protected by the First Amendment, the Court used the “compelling state interest” test:

“For ‘[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.’ [cite omitted] Here not only is it apparent that appellant’s declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of

¹³ See *The Alabama Religious Freedom Amendment: An Interpretive Guide*, 31 Cum. Law Review 47, 56 (2000).

such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship,” *Id.*, at 404.

“We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, ‘[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,’ *Thomas v. Collins*, 323 U.S. 516, 530 ,” *Id.*, at 406.

Some few years later in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526 (1972), at issue was a generally applicable state law which required all children to attend school until age 16; this requirement, however, conflicted with the beliefs of the Amish that children should not attend public schools beyond the 8th grade lest they adopt “worldly ways” at variance with their own religious beliefs. The Court was thus required to balance the State’s interest in compulsory education for children against these Amish beliefs:

“Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, ‘prepare [them] for additional obligations,’” *Id.*, at 213.

Here, the Court found that the state’s interest in enforcing the mandatory schooling law was not so compelling as to abridge the beliefs of the Amish:

“A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion,” *Id.*, at 220.

In *Thomas v. Review Board*, 450 U.S. 707, 101 S.Ct. 1425 (1981), the Court again was faced with a conflict between a state law and the religious beliefs of another Jehovah’s Witness. Here, Thomas worked at a steel foundry and was ultimately given a job producing turrets for military tanks. He quit his job and was denied unemployment compensation because of his religious beliefs. In holding that he was entitled to those benefits, the Court used the compelling state interest test to declare the denial unlawful:

“In a variety of ways we have said that ‘[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion,’” *Id.*, at 717.

“Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial,” *Id.*, at 717-18.

“The mere fact that the petitioner’s religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest,” *Id.*, at 718.

See also *Hobbie v. Unemployment Appeals Comm. of Florida*, 480 U.S. 136, 107 S.Ct. 1046 (1987), and *Frazee v. Ill. Dep't. Of Employment Security*, 489 U.S. 829, 109 S.Ct. 1514 (1989).

Based upon the compelling state interest test developed by the *Sherbert-Yoder-Thomas* trilogy, a wide variety of courts started using this test to resolve conflicts between state laws and religious beliefs. For example, in *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff'd. sub nom. Jensen v. Quaring*, 472 U.S. 478, 105 S.Ct. 3492 (1985), at issue was a Nebraska law¹⁴ requiring photographs on driver licenses; but, this requirement violated Mrs. Quaring's beliefs based on Exodus 20:4 that photographs were "graven images." This federal appellate court found that Mrs. Quaring's beliefs were sincerely held religious beliefs which were in fact burdened by this state law. Weighing this law against the First Amendment, "free exercise" claims of Mrs. Quaring, the court concluded that the state interests were not so compelling that her beliefs could not be accommodated and the court required Nebraska to issue her a driver license. See also the similar case of *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, 269 Ind. 361, 380 N.E.2d 1225 (1978).

¹⁴ Nebraska officials' actions in padlocking a church were found violative of the First Amendment in *McCurry v. Tesch*, 738 F.2d 271 (8th Cir. 1984).

In *Dennis v. Charnes*, 571 F.Supp. 462 (D.Colo. 1983), Mr. Dennis had the same beliefs as Mrs. Quaring regarding Colorado's requirement for a photograph upon driver licenses which he challenged in this litigation. He appealed the dismissal of his complaint and the appeals court reversed in *Dennis v. Charnes*, 805 F.2d 339 (10th Cir. 1984). On remand in *Dennis v. Charnes*, 646 F.Supp. 158 (D.Colo. 1986), the district court held the photograph requirement void as to Mr. Dennis since it abridged his religious beliefs.

In *People v. Swartzentruber*, 170 Mich. App. 682, 429 N.W.2d 225 (1988), state law required as a safety precaution large, orange reflectors to be placed upon buggies traveling the public highways. Certain Amish defendants were prosecuted for violating this law and they raised "free exercise" objections to it. That court disposed of the issue in favor of these Amish defendants through use of the compelling state interest test. In another case, *State v. Hershberger*, 444 N.W.2d 282 (Minn. 1989), that appellate court followed the rationale of *Swartzentruber* only to have the decision vacated by the U.S. Supreme Court on the authority of *Employment Division v. Smith*, supra.¹⁵ But on remand, the Minnesota Supreme Court in

¹⁵ A number of other courts have expressed disagreement with the rationale of *Smith*; see *Rourke v. N.Y.S. Dep't. of Corr. Services*, 159 Misc.2d 324, 603 N.Y.S.2d 647 (N.Y.Sup.Ct. 1993), aff'd 201 A.D.2d 179, 615 N.Y.S.2d 470
Continued on next page.

State v. Hershberger, 462 N.W.2d 393 (Minn. 1990), still found in favor of the Amish. Even more recently in *State v. Miller*, 196 Wis.2d 238, 538 N.W.2d 573 (1995), that court used the compelling state interest test to set aside another reflector law which abridged the religious rights of the Amish. And long before the Supreme Court addressed the issue of the religious use of peyote by native Americans, a number of courts had used this test to uphold the use of this drug in religious ceremonies; see *People v. Woody*, 61 Cal.2d 716, 394 P.2d 813 (1964); *State v. Whittingham*, 19 Ariz.App. 27, 504 P.2d 950 (1973); *Whitehorn v. State*, 561 P.2d 539 (Okla.Crim.App. 1977); *Native American Church of New York v. United States*, 468 F.Supp. 1247 (S.D.N.Y. 1979), aff'd. 633 F.2d 205 (2nd Cir. 1980); and *Peyote Way Church of God, Inc. v. Smith*, 742 F.2d 193 (5th Cir. 1984).

Not only have there been “free exercise” challenges to various state laws as noted above, there has also been similar litigation regarding the use of SSNs. Perhaps the first case where this issue was raised was *Stevens v. Berger*, 428 F.Supp. 896 (E.D.N.Y. 1977). Here, the Stevenses were receiving welfare benefits and they objected to a regulation mandating that

(N.Y.App.Div.3d Dep't. 1994); *First Covenant Church of Seattle v. City of Seattle*, 120 Wash.2d 203, 840 P.2d 174 (1992). Another just ignored it; see *Society of Jesus of New England v. Boston Landmarks Comm'n.*, 409 Mass. 38, 564 N.E.2d 571, 574 (1990).

SSNs for their children be provided on the grounds that the SSN was the "Mark of the Beast." When they were denied welfare benefits because of their refusal to provide these numbers for the children, they instituted suit to enjoin enforcement of that regulation. In deciding in favor of the Stevenses, Judge Weinstein concluded that the religious belief at issue in a case of this nature must be sincerely held and it must have some theological foundation. He further concluded that to enforce the regulation, the state's interest in its enforcement must be more compelling than recognition of the religious belief in question:

"Under the United States Constitution, an individual's right to believe in anything he or she chooses is unquestioned. Religious beliefs are not required to be consistent, or logical, or acceptable to others. Governmental questioning of the truth or falsity of the beliefs themselves is proscribed by the First Amendment," *Id.*, at 899.

"What is, in essence, involved is a balancing of the interests of the plaintiffs in the free exercise of their religion against the governmental interest in the challenged policy or statute. 'The gain to the subordinating interest provided by the [challenged governmental] means must outweigh the incurred loss of protected rights,' [cite omitted] before an infringement of those protected rights will be countenanced," *Id.*, at 906.

"Once a bona fide First Amendment issue is joined, the burden that must be shouldered by the government to defend a regulation with impact on religious actions is a heavy one," *Id.*, at 906.

The court in *Stevens* found that the requirement to provide SSNs to obtain welfare benefits burdened these religious beliefs and did not outweigh the

religious freedoms sought to be protected. Enforcement of the regulation was therefore enjoined.

In *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981), an almost identical fact situation was before that appellate court. Here, Callahan had spent a number of years in San Quentin prison and had been religiously converted. After release from jail, he sought dependent child welfare benefits but was denied them due to his failure to provide the SSNs for his children. He sued in court to enjoin enforcement of the regulation on the grounds that this requirement violated his religious beliefs, and he specifically argued that the SSN was the "Mark of the Beast." While the district court found that Callahan's beliefs were sincere, it also concluded that his challenge was really politically motivated. In reversing that judgment, the Ninth Circuit declared:

"A religious claim, to merit protection under the free exercise clause of the First Amendment, must satisfy two basic criteria. First, the claimant's proffered belief must be sincerely held; the First Amendment does not extend to 'so-called religions which... are obviously shams and absurdities and whose members are patently devoid of religious sincerity'.... Second,... the claim must be rooted in religious belief, not in 'purely secular' philosophical concerns."

That court held that Callahan had made a sufficient showing of a protected religious belief and that remand was needed in order for the lower court to balance such beliefs against the claimed "compelling needs of the state."

On remand, the district court once again ruled against Callahan, holding that the compelling interests of the state outweighed the burden imposed on his religious beliefs and naturally a second appeal ensued. In *Callahan v. Woods*, 736 F.2d 1269 (9th Cir. 1984), that court again reversed the decision of the district court, holding:

"It is therefore the 'least restrictive means' inquiry which is the critical aspect of the free exercise analysis. This prong forces us to measure the importance of a regulation by ascertaining the marginal benefit of applying it to all individuals, rather than to all individuals except those holding a conflicting religious conviction. [cite omitted] If the compelling state goal can be accomplished despite the exemption of a particular individual, then a regulation which denies an exemption is not the least restrictive means of furthering the state interest. A synthesis of the two prongs is therefore the question whether the government has a compelling interest in not exempting a religious individual from a particular regulation," *Id.*, at 1272-73.

"In determining whether a neutrally based statute violates the free exercise clause, we consider three factors:

“(1) the magnitude of the statute's impact upon the exercise of the religious belief;

“(2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief; and

“(3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state," *Id.*, at 1273.

Compare, however, *Bowen v. Roy*, 476 U.S. 693, 106 S.Ct. 2147 (1986).

Finally, the case of *Leahy v. District of Columbia*, 833 F.2d 1046 (D.C.Cir. 1987), is also illustrative. Here like the other parties mentioned

above, Leahy feared that the SSN was the "Mark of the Beast." Leahy objected to providing a SSN to obtain a District of Columbia driver license, was denied a license and instituted suit to enjoin the requirement. The district court concluded that the District of Columbia had an interest in obtaining SSNs for driver licenses, but it failed to engage in the essential balancing of Leahy's religious beliefs against the compelling interests of the government. The Court of Appeals for the District of Columbia¹⁶ reversed the district court's order and remanded for a finding by the lower court as to whether Leahy's religious beliefs outweighed the claimed compelling state interest.

For some 27 years after its advent in *Sherbert*, the compelling state interest test was used by state and federal courts across this country to resolve those inevitable clashes between religious beliefs and laws of general applicability. But matters changed in 1990 with the decision in *Employment Division, D.H.R. of Oregon v. Smith*, 494 U.S. 872, 879, 110 S.Ct. 1595 (1990). In this case involving some parties who used peyote in Native American religious rituals contrary to state law, the compelling state interest test was substantially abandoned, the Court concluding that "the

¹⁶ The decision in this appeal was written by Justice Ginsburg when she was sitting on that appellate court.

right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability’.” Thereafter, the only test available to judge “free exercise” claims was *Smith*’s “hybrid rights” test.

Since the compelling state interest test had been widely accepted and enjoyed apparent popular support, there was a reaction to *Smith*, ultimately taking the form of the Religious Freedom Restoration Act of 1993 (“RFRA”), P.L. 103-141, 107 Stat. 1488, codified at 42 U.S.C. §2000bb, et seq. (see p. 49 hereof). The obvious purpose of RFRA was to reverse *Smith* and reinstate use of the “compelling state interest/least restrictive means” test which had been used by the courts prior to *Smith* to resolve “free exercise” claims.

But the vitality of RFRA was short-lived. In *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157 (1997), the constitutionality of this act based upon the 14th Amendment was challenged. Here, the City of Boerne had imposed certain zoning restrictions upon a Catholic church within that city. To contest the applicability of those zoning restrictions, this suit based upon the RFRA was instituted. The city’s contention that RFRA was unconstitutional was accepted here by the Supreme Court and RFRA was

held inapplicable to state laws. As a result, it became apparent that new state laws were the only effective way to protect the free exercise of religion.

During the 1998 spring legislative session of the Alabama legislature, Senate Bill 604 was introduced proposing an amendment to the Alabama Constitution which would protect the free exercise of religion.¹⁷ This measure appeared upon the November, 1998 ballot for that general election and was approved by Alabama voters, thus making it Amendment 622. It is undoubted that the design and purpose of the federal RFRA was to make the “compelling state interest/least restrictive means” test once again applicable to “free exercise” claims. A comparison of RFRA with Amendment 622 reveals that the drafters of Amendment 622 substantially copied RFRA, changing it only to the extent of making it applicable to the Alabama Constitution. Since RFRA had a clear meaning, purpose and intent, its progeny, Amendment 622, has the same meaning and purpose. What Amendment 622 accomplished was the creation of a right to “free exercise” of religion under the Alabama Constitution (to the extent it did not previously exist). Further, the amendment allows those whose “ free

¹⁷ McDonald makes no attempt here to fully recount the facts regarding the proposal and adoption of Amendment 622 as Prof. Berg has done so via his law review article, *The Alabama Religious Freedom Amendment: An Interpretive Guide*, 31 Cum. Law Review 47 (2000).

exercise” rights are burdened by any state or local law to challenge such burdens via lawsuits. According to the amendment, such claims must be decided by Alabama courts through use of the “compelling state interest/least restrictive means” test.

Since the meaning of Amendment 622 is clear, its review discloses the various elements which must be alleged for a party to state claim based upon the amendment. Those elements are simple: (1) a party must alleged that he possesses certain religious beliefs which he wishes to freely exercise, and (2) he must alleged that some state law or rule burdens the exercise of such religious beliefs. The defense to such a claim consists of showing that such burden is the least restrictive means to further a valid state interest. Here, McDonald clearly plead the above essential elements in his complaint (C. at 2 (¶¶ 4, 5, 6, 7 and 8); C. at 3 - 4 (¶¶ 13, 14, 15 and 17)).

Besides it being clear that McDonald’s complaint is more than sufficient, it must also be noted that his claim is very strong. In *Thomas v. Review Board*, supra, a burden on a religious belief was described: “Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon

religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial,” 450 U.S., at 717-18. Here, McDonald is being denied a driver license “because of conduct mandated by religious belief”, and the consequence of such denial is self evident. And, there is a remedy for McDonald consisting of simply letting him execute a religious exemption affidavit which the DPS allowed to his own sons. “If the compelling state goal can be accomplished despite the exemption of a particular individual, then a regulation which denies an exemption is not the least restrictive means of furthering the state interest”; see *Callahan v. Woods*, 736 F.2d, at 1272-73.

If the trial court’s order dismissing this case was premised upon a theory that the complaint was not well plead, the court erred.

B. The DPS’s alleged compelling interest is inadequate and insufficient.

In response to McDonald’s complaint, the DPS alleged in its motion that the complaint failed to state a claim upon which relief could be granted (C. at 7). What the DPS may have meant by this allegation appears to have been clarified via its brief: since 42 U.S.C. §666(a) (13)(A) imposes a requirement on States to collect SSNs from driver license applicants, Rule No. 760-X-1-.19 is valid because it is compelled by federal law (C. at 11 -

12). If the trial court accepted this argument as the basis for dismissing McDonald's complaint, it erred.

In general, the legal proposition asserted by the DPS that Congress can through some welfare scheme impose conditions upon States regardless of constitutionality is so meritless as to require the citation of no authority to refute. Suppose that Congress amended 42 U.S.C. §666 so as to mandate that States, to obtain welfare funding, must dispense with probable cause requirements for search warrants executed for premises controlled by "deadbeat dads"; see Art. 1, §5 of the 1901 Alabama Constitution. It is difficult to imagine any Alabama or federal court which could possibly conclude that such a condition is valid. This same objection applies to this argument made by the DPS, and Congress cannot compel Alabama to violate the free exercise rights of Alabama citizens, which are protected by the Alabama Constitution.

But there are other significant problems with the DPS claim that Rule No. 760-X-1-.19 is compelled by 42 U.S.C. §666 and that exemptions to the Rule's requirement cannot be made. Section 666 is just simply one provision within a broad and complicated federal welfare scheme.¹⁸ This section is

¹⁸ Federal welfare laws generally provide wide discretion and latitude to the States. See, *e.g.*, 42 U.S.C. §617: "No officer or employee of the Federal
Continued on next page.

contained within the social security laws which are codified at 42 U.S.C., chapter 7, and this chapter commences at §301. Chapter 7, subchapter IV is entitled “Grants to States for aid and services to needy families with children and for child welfare services”; this subchapter commences at §601.¹⁹ Part D of this particular subchapter, entitled “child support and establishment of paternity,” contains §§651 through 669b. In Part D, §654 is entitled “State plan for child and spousal support”; §654(20)(A) provides that, “to the extent required by section 666 of this title, ... the State (A) shall have in effect all of the laws to improve child support enforcement effectiveness which are referred to in that section.” Thus, §654 simply establishes certain

Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part.”

¹⁹ This subchapter was described in *Blessing v. Freestone*, 520 U.S. 329, 333-34, 117 S.Ct. 1353 (1997) as follows: “Arizona participates in the federal Aid to Families with Dependent Children (AFDC) program, which provides subsistence welfare benefits to needy families. Social Security Act, Title IV-A, 42 U.S.C. §§601-617. To qualify for federal AFDC funds, the State must certify that it will operate a child support enforcement program that conforms with the numerous requirements set forth in Title IV-D of the Social Security Act, 42 U. S. C. A. §§651-669b (Nov. 1996 Supp.), and will do so pursuant to a detailed plan that has been approved by the Secretary of Health and Human Services (Secretary). §602(a)(2); see also §652(a)(3). The Federal Government underwrites roughly two thirds of the cost of the State's child support efforts. §655(a). But the State must do more than simply collect overdue support payments; it must also establish a comprehensive system to establish paternity, locate absent parents, and help families obtain support orders. §§651, 654.” The Court here also acknowledged that the federal government “cannot, by force of [its] own authority, command the State to take any particular action or to provide any services to certain individuals,” 520 U.S. at 344.

requirements of a “State plan” which must be in place so that a State may received welfare funding. Section 666, entitled “Requirements of statutorily prescribed procedures to improve effectiveness of child support enforcement,” lists a plethora of additional requirements imposed upon States. Thus, the object and purpose of the collection of SSNs from driver license applicants as required by §666(a)(13(A) is to just simply assist in the improvement of child support enforcement.²⁰

This same scheme manifests itself within corresponding Alabama laws and regulations. Alabama Code §30-3-194(a) requires state licensing agencies to collect SSNs from all applicants. The purpose of such collection of SSNs is explained in §30-3-194(e): “Any agency charged with the duty to record an individual’s Social Security number shall provide the individual’s Social Security number to the state Title IV-D agency at the agency’s request for the purpose of administering the child support program.” It appears that in this state the Alabama Department of Human Resources (“DHR”) is the “state Title IV-D agency” (Ala. Admin. Code §660-1-2-.01),

²⁰ These particular federal welfare laws are very complex and a study thereof is not essential for decision of the issues raised in this appeal. A short summary of these parts of these federal welfare laws is found in *Wehunt v. Ledbetter*, 875 F.2d 1558, 1559-61 (11th Cir. 1989). That court described the program established under this statutory scheme as follows: “The AFDC program is a contractual arrangement by which the federal government and the states work together,” *Id.* at 1560.

and it uses these SSNs collected by other state licensing agencies to assist in locating “deadbeat” child support obligors, collecting unpaid child support (Ala. Admin. Code, chapters 660-3-11 and 660-3-12), and possibly revoking licenses via §30-3-170 . Thus, the use made of these collected SSNs is to just simply assist the DHR in locating these deadbeats as §30-3-194(e) plainly states.

McDonald holds certain religious beliefs which are entitled to protection under Amendment 622. These beliefs cause him to object to the requirements of Rule No. 760-X-1-19. Further consternation is caused to McDonald because the DPS asserts that such a demand is made of him to satisfy a federal requirement imposed by 42 U.S.C. §666.²¹ Yet, the collection of SSNs from ALL license applicants in Alabama is not for the purpose of solving some great and profound social problem confronting all of the people of Alabama. Instead, such numbers are collected and used by DHR to solve a problem involving only a small segment of people in Alabama: those receiving child support benefits. But then again, the collection of SSNs from every Alabama driver does not affect even this small class of people receiving child support benefits. The problem which

²¹ The number of this section alone has a direct relationship to the “mark” and McDonald’s beliefs.

needs to be addressed by DHR is related to only a small subset of “deadbeats” who refuse to pay child support to a smaller subset of the class of people receiving child support benefits. While the SSN of everyone is available in computer data bases around this state and nation, those numbers are used only to assist in locating delinquent child support obligors. Consequently, the only reason for providing SSNs to DPS is to make them available to DHR for some remote contingency. Is “administrative convenience” for a state agency sufficient justification for burdening the free exercise of religion?

This issue of has been resolved at least in federal courts. A number of those courts have held that when some constitutional right is in question, a plea of “administrative convenience” as justification for burdening such right is inadequate; see *Frontiero v. Richardson*, 411 U.S. 677, 690, 93 S.Ct. 1764 (1973)(“In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, ‘the Constitution recognizes higher values than speed and efficiency.’ *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). And when we enter the realm of ‘strict judicial scrutiny,’ there can be no doubt that ‘administrative convenience’ is not a shibboleth, the mere recitation of which dictates constitutionality”); *Schneider v. Rusk*, 377 U.S. 163, 167, 84

S.Ct. 1187 (1964)(“As stated by Judge Fahy, dissenting below, such legislation, touching as it does on the ‘most precious right’ of citizenship (*Kennedy v. Mendoza-Martinez*, 372 U.S., at 159), would have to be justified under the foreign relations power ‘by some more urgent public necessity than substituting administrative convenience for the individual right of which the citizen is deprived’”); *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 102 fn9, 92 S.Ct. 2286 (1972)(“This attenuated interest, at best a claim of small administrative convenience and perhaps merely a confession of legislative laziness, cannot justify the blanket permission given to labor picketing and the blanket prohibition applicable to others”); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 647, 94 S.Ct. 791 (1974) (“administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law”); *Taylor v. Louisiana*, 419 U.S. 522, 535, 95 S.Ct. 692 (1975)(“But that task is performed in the case of men, and the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials”); *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 152, 100 S.Ct. 1540 (1980)(“We think, then, that the claimed justification of administrative convenience fails, just as it has in our prior cases”); *Orr v. Orr*, 440 U.S. 268, 281, 99 S.Ct.

1102 (1979)(“In such circumstances, not even an administrative-convenience rationale exists to justify operating by generalization or proxy”); and *Wessmann v. Gittens*, 160 F.3d 790, 799 fn. 5 (1st Cir. 1998)(“But administrative convenience is not a sufficient justification for promoting racial distinctions”).

Here, the DPS claims that its rule requiring SSNs is mandated by federal law; its obvious position in this matter is that carving out some exception to this rule for McDonald simply cannot be done. But suppose that McDonald himself will never become a “deadbeat dad.” Suppose that his children are almost grown and he has a stable marriage. Under these circumstances, it is highly unlikely that the DPS will ever need McDonald’s SSN for the purpose of locating him to collect child support he may owe. Why then does the DPS need his SSN at all? How does having the SSN of McDonald help to locate other “deadbeat dads”? While SSNs are collected as an administrative convenience to the DPS, how does collection of SSNs from people who have religious objections to providing their numbers hinder the job of the DPS?

If the reason for the collection of SSNs is to comply with 42 U.S.C. §666, what consequence will result if an exception to this requirement is granted to McDonald? These consequences are factual matters best left to

discovery between the parties in the circuit court. Since the trial court here failed to balance the needs for Rule No. 760-X-1-.19 against McDonald's free exercise rights, the dismissal should be reversed and this case remanded for further proceedings.

CONCLUSION

For the reasons noted above, the circuit court's dismissal of McDonald's complaint should be reversed and this cause remanded.

Respectfully submitted this the 30th day of October, 2001.

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RELEVANT STATUTES

Regarding declaratory judgements.

Alabama Code § 6-6-222: Power of courts of record; form and effect of declarations.

“Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment is requested. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment.”

Alabama Code § 6-6-223: Construction or validity of instruments, statutes, ordinances, contracts or franchises.

“Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.”

IN THE COURT OF CIVIL APPEALS OF ALABAMA

Case No. 2010114

SCOTT MCDONALD,

Appellant,

vs.

**ALABAMA DEPARTMENT OF
PUBLIC SAFETY,**

Appellee.

**ON APPEAL FROM A JUDGMENT OF THE
CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA
HON. SARAH GREENHAW, CIRCUIT JUDGE PRESIDING**

BRIEF OF APPELLEE ALABAMA DEPARTMENT OF PUBLIC SAFETY

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STATEMENT OF THE CASE

Mr. McDonald filed his complaint in the Circuit Court of Montgomery County, Alabama on May 1, 2001 naming as the Defendant, the Alabama Department of Public Safety (C1). The Alabama Department of Public Safety filed a motion to dismiss on July 3, 2001, which was granted by the Court on July 6, 2001 (C7). A motion to vacate the dismissal was filed by Mr. McDonald, which motion was denied by the Court on July 30, 2001 (C43).

Notice of appeal was filed by Mr. McDonald on or about August 27, 2001 (C45).

STATEMENT OF THE ISSUES

I.

WHETHER THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY ON RES JUDICATA AND/OR CALLATERAL ESTOPPEL GROUNDS.

II.

WHETHER THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY ON THE GROUND OF ABSOLUTE IMMUNITY UNDER ARTICLE I SECTION 14 OF THE CONSTITUTION OF ALABAMA OF 1901.

III.

WHETHER THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY FOR FAILURE OF THE PLAINTIFF TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

STATEMENT OF THE FACTS

Scott McDonald is a citizen of the State of Alabama, residing in Gurley, Alabama (C1). Defendant, Alabama Department of Public Safety is an agency of the State of Alabama established pursuant to the Code of Alabama 1975, Section 32-2-1 (C1). The Department of Public Safety has implemented an administrative rule, 760-X-1-.19 under the Alabama Administrative Code (C1).

On April 24, 2001, Mr. McDonald attempted to renew his driver's license but was denied such renewal because of his refusal to provide to the Department of Public Safety any social security card or number (C3). Mr. McDonald sincerely believes that the social security number, as established under federal law, is either the precursor to the "Mark of the Beast" or is actually the mark itself (C2).

Mr. McDonald sought declaratory and injunctive relief in his complaint filed in the Circuit Court of Montgomery County, Alabama (C1). His action was brought pursuant to the Code of Alabama 1975, Section 41-22-10 (C1).

ARGUMENT

1.

THE APPELLANT IS BARRED FROM RELITIGATING ISSUES THAT WERE LITIGATED OR COULD HAVE BEEN LITIGATED IN MCDONALD V. ALABAMA DEPARTMENT OF PUBLIC SAFETY

In Shelby County Planning Comm. v. Seale, 564 So.2d 900 (Ala. 1990), the Court stated the principle of res judicata as follows:

“The principle of *res judicata* provides that once there is a final judgment, ‘those who have contested an issue shall be bound by the ruling of the court; and issues once tried shall be considered forever settled between those same parties and their privies.’”

The elements of res judicata are as follows:

“The elements of *res judicata* are: (1) a prior action with a judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties in the prior action and in the present action, and (4) with the same cause of action presented in both actions. *Hughes v. Allenstein*, 514 So.2d 858, 860 (Ala. 1987).”

The doctrine of collateral estoppel, or issue preclusion, does not require identity of the causes of action. Dairvland Ins. Co. v. Jackson, 566 So.2d 723, 726 (Ala. 1990). The elements of collateral estoppel are: (1) an issue identical to the one litigated in the prior suit; (2) that the issue was actually litigated in the prior suit; (3) that resolution of the issue was necessary to the prior judgment; and (4) the same parties. Dairvland, supra at 726.

There is a prior action with a judgment on the merits. McDonald v. Alabama Department of Public Safety, 756 So.2d 880 (Ala. Civ. App. 1999). That case was decided by a court of competent jurisdiction.

The Defendant in this case and in the prior case is identical. Mr. McDonald was a party in the earlier suit as next of friend of his two sons. The party identity criterion of res judicata does not require complete identity, but only that the party against whom res judicata is asserted was either a party or in privity with a party to the prior action. Dairvland, supra. Since Mr. McDonald was a party to the earlier suit, the party identity criterion is met.

The same cause of action Mr. McDonald seeks to litigate in this action was litigated in the earlier action. In the earlier action, he was challenging the application of Department of Public Safety Rule No. 760-X-1-19 on religious freedom grounds in a declaratory judgment action. The only difference is that in that action his sons had been denied a driver's license while this action is based upon the denial of a driver's license to him because of his refusal to give a social security number.

Under the principles of res judicata or collateral estoppel, Mr. McDonald would be precluded from relitigating any issues that were actually litigated in the earlier McDonald case, supra. The only claim in Mr. McDonald's present action that was not actually litigated in the prior McDonald case, supra, is his claim under the Alabama Religious Freedom Act of 1998, Amendment 622 to the Constitution of Alabama of 1901. McDonald, supra at 886.

The Appellee does not dispute that Amendment 622 which was ratified January 6, 1999 did not become effective until after the earlier McDonald case, supra was on appeal to this Court. The Appellee submits, however, that Mr. McDonald's complaint as to any and all other claims was properly dismissed by the trial court on the basis of res judicata or collateral estoppel.

II.

THE ABSOLUTE IMMUNITY OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY UNDER ARTICLE I SECTION 14 OF THE CONSTITUTION OF ALABAMA OF 1901 REQUIRED THE DISMISSAL OF THE COMPLAINT OF THE APPELLANT BY THE TRIAL COURT

Article I, Section 14 of the Constitution of Alabama of 1901 provides, “that the State of Alabama shall never be made a defendant in any court of law or equity”. The state’s immunity under this section bars suits for relief by way of mandamus or injunction, no less than suits from any other remedy. Taylor v. Troy State University, 437 So.2d 472, 474 (Ala. 1983). In Unzicker v. State, 346 So.2d 931 (Ala. 1977), this Court indicated that the State cannot be named as a party in a declaratory judgment action. The prohibition of Article I, Section 14 applies to both the State and agencies of the State. Alabama State Docks v. Saxon, 63 1 So.2d 943 (Ala. 1994); Rutledge v. Baldwin County Com’n, 495 So.2d 49 (Ala. 1986). The Plaintiff is barred from bringing a declaratory judgment action against the Alabama Department of Public Safety.

The Code of Alabama 1975, Section 41-22-10, states that the agency involved in making a rule under the Administrative Procedures Act shall be made a party to an action challenging the validity of such a rule under Section 41-22-10. To the extent Section 41-22-10 requires the agency to be made a party to the action it is in conflict with Article I, Section 14 of the Constitution of Alabama of 1901. Neither the legislature nor any other state authority can consent to an action against the state. Dunn Const. Co. v. State Board of Adjustment, 234 Ala. 372, 376 (Ala. 1937).

The statute can of course be rationalized with the Constitution since the appropriate official of the agency could be named and Section 44-22-10 can be given that interpretation.

III.

THE APPELLANT'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The primary focus of the Plaintiffs brief is a challenge to Department of Public Safety Regulation 760-X-1-.19 under Amendment No. 622 to the Constitution of Alabama of 1901. Section V of that Amendment provides as follows:

“SECTION V. (a) Government shall not burden a person’s freedom of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Government may burden a person’s freedom of religion only if it demonstrates that application of the burden to the person:

(1) Is in furtherance of a compelling governmental interest; and

(2) Is the least restrictive means of furthering that compelling governmental interest.

(c) A person whose religious freedom has been burdened in violation of this section may assert that violation as a claim or defense in a judicial, administrative, or other proceeding and obtain appropriate relief against a government.”

Freedom of Religion is defined in the Amendment as follows:

“(2) FREEDOM OF RELIGION. The free exercise of religion under Article I, Section 3, of the Constitution of Alabama of 1901.”

Article I, Section 3 of the Constitution of Alabama of 1901 provides as follows:

“Sec. 3. Religious freedom. That no religion shall be established by law; that no preference shall be given by law to any religious sect, society, denomination, or mode of worship; that no one shall be compelled by law to attend any place of worship; nor to pay any tithes, taxes, or other rate for building or repairing any place of worship, or for maintaining any minister or ministry; that no religious test shall be required as a qualification to any office or public

trust under this state; and that the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles.”

Amendment No. 662 indicates that the standard it seeks to establish in justifying government burdens on religious exercise imposed by laws neutral towards religion is the standard used by the United States Supreme Court prior to Emnlovment Division v. Smith, 494 U.S. 872 (1990). That standard is a “compelling state interest in the regulation of a subject within the State’s constitutional power to regulate”. Sherbert v. Vemer, 324 U.S. 398, 10 L.Ed.2d 965, 83 S. Ct. 1790 (1963).

The states interest must be of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. Wisconsin v. Yoder, 406 U.S. 205, 214, 32 L.Ed.2d 15, 24 (1972). Only those interests of the highest order and not otherwise served can overbalance legitimate claims to the free exercise of religion. Wisconsin, supra at 215.

In the earlier McDonald case, supra, this Court identified three reasonable goals to be achieved by the State in requiring social security numbers to obtain a driver’s license. The Court stated at 885-86:

“As we have noted, practically every American citizen has obtained, or will at some time obtain, a unique Social Security number pursuant to federal law. At the same time, the Department is responsible for enforcing Alabama laws regarding motor vehicle driver’s license, which entails not only a duty of initially determining whether a driver’s license applicant actually is who he or she claims to be, but also of maintaining records concerning an applicant’s licensing and driving history in other states. See §§632-6-14 & 32-6-31, arts. III-V, Ala.Code 1975. Additionally, the failure to require driver’s-license applicants to provide Social Security numbers would result in Alabama’s loss of federal welfare grants; such a loss would necessarily affect the ability of numerous disadvantaged citizens of this state

to receive public assistance. See 42 U.S.C. §666(a)(13). We conclude that identifying applicants with bad driving records, distinguishing between drivers having the same name, and maintaining Alabama's eligibility for federal welfare grants are legitimate state goals, and that the Department's regulation requiring an applicant to provide a Social Security number, which is 'facially neutral and applies to all applicants,' is a reasonable means of achieving these goals."


The events of September 11, 2001 have only reinforced the compelling state security interest involved in the issuance of a driver's license since it is the most important form of identification and the most used form of identification for most citizens. The state has a compelling interest in the identification of persons receiving a driver's license as indicated in the earlier McDonald case, supra at 885.

Defendant believes that the previous findings of this Court are sufficient to support finding of a compelling state interest in the enforcement of Regulation 760-X-1-19. Defendant submits that the trial court therefore properly dismissed Mr. McDonald's complaint for failure to state a claim upon which relief could be granted.

CONCLUSION

For the foregoing reasons, Appellee submits that the decision of the trial court is due to be affirmed.

Respectfully submitted,



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IN THE COURT OF CIVIL APPEALS OF ALABAMA

Case No. 2010114

SCOTT McDONALD,

Appellant,

v.

**ALABAMA DEPARTMENT OF
PUBLIC SAFETY,**

Appellee.

ON APPEAL FROM A JUDGMENT OF THE
CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA
HON. SARAH GREENHAW, CIRCUIT JUDGE PRESIDING

REPLY BRIEF OF APPELLANT SCOTT McDONALD

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November 28, 2001

ORAL ARGUMENT REQUESTED

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ARGUMENT IN REPLY

ISSUE 1: Did the trial court err in granting the motion to dismiss of the Defendant Alabama Department of Public Safety on res judicata and/or collateral estoppel grounds?

In McDonald's opening brief regarding this first issue, he made the point that the claim asserted in the present suit is different from those made in *McDonald v. Alabama Department of Public Safety*, 756 So.2d 880 (Ala.Civ.App. 1999). The difference between the former case and this one consists of the fact that a new cause of action arose during the course of that first appeal: the adoption of Amendment 622. Since McDonald's prior complaint did not assert any claim based upon this amendment which did not exist until the appeal in that case, principles of former adjudication do not apply here. It appears now that the DPS is conceding that prior adjudication principles do not bar the present McDonald claim:

“The only claim in Mr. McDonald's present action that was not actually litigated in the prior McDonald case, supra, is his claim under the Alabama Religious Freedom Act of 1998, Amendment 622 to the Constitution of Alabama of 1901. McDonald, supra at 886.

“The Appellee does not dispute that Amendment 622 which was ratified January 6, 1999 did not become effective until after the earlier McDonald case, supra, was on appeal to this Court. The Appellee submits, however, that Mr. McDonald's complaint as to any and all other claims was properly dismissed by the trial court on the basis of res judicata or collateral estoppel.”¹

¹ Brief of the DPS at 5.

Based upon this concession, McDonald asserts that the trial court's order of dismissal is due to be reversed to the extent it was premised upon a res judicata theory.

ISSUE 2: Did the trial court err in granting the motion to dismiss of the Defendant Alabama Department of Public Safety on the ground that the Defendant was immune from suit via Art. 1, §14 of the Alabama Constitution?

As noted in McDonald's opening brief, a long line of authority has held that declaratory judgment actions against State officials have never been within the prohibitions of Art. I, §14. In reply, the DPS makes an argument of apparent first impression that Alabama Code §41-22-10 is perhaps violative of Art. I, §14 because it authorizes suits against State agencies. But, if such is the case here, still the trial court erred in dismissing McDonald's complaint if that dismissal was based upon this immunity contention.

Present day principles of sovereign immunity have their origins in the common law.

Perhaps Sir William Blackstone best described this common law immunity:

“That the king can do no wrong² is a necessary and fundamental principle of the English constitution; meaning only, as has formerly been observed, that, in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the king, nor is he, but his ministers, accountable for it to the people; and secondly, that the prerogative of the crown extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudice. Whenever, therefore, it happens that, by misinformation or inadvertence, the

² Today, public policy is the reason for the rule; see *Moon v. Hines*, 205 Ala. 355, 87 So. 603 (1921).

crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign (for who shall command the king?), yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute; and, as it presumes that to know of any injury and to redress it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.

“The distance between the sovereign and his subjects is such that it rarely can happen that any personal injury can immediately and directly proceed from the prince to any private man; and, as it can so seldom happen, the law in decency supposes that it never will or can happen at all, because it feels itself incapable of furnishing any adequate remedy without infringing the dignity and destroying the sovereignty of the royal person, by setting up some superior power with authority to call him to account. The inconveniency, therefore, of a mischief that is barely possible, is (as Mr. Locke has observed) well recompensed by the peace of the public and security of the government, in the person of the chief magistrate being set out of the reach of coercion. But injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom the law in matters of right entertains no respect or delicacy, but furnishes various methods of detecting the errors or misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice.”³

As Blackstone noted, while the King could not be sued, his ministers could.

The first Alabama constitutions did not contain blanket prohibitions upon suits against the State, and they allowed the legislature to authorize certain of these suits; see *Ex parte State of Alabama*, 52 Ala. 231 (1975). The first complete prohibition regarding suits against the State appeared in Art. I, §15 of the 1875 Alabama Constitution, which was continued into Art. I, §14 of the 1901 Alabama Constitution. But through all of these constitutions, including the present one, the principle expressed by Blackstone that

³ See Blackstone's *Commentaries on the Laws of England*, Book III, ch. 17, §326.

ministers or public officials could be sued has continued its vitality.

In *Glass v. Prudential Ins. Co. of America*, 246 Ala. 579, 22 So.2d 13, 16 (1945), it was held:

“The decided weight of authority is to the effect that a suit brought against State officers in their official capacity is not a suit against the State as is forbidden by law, where the suit is to enjoin a State official from enforcing an unconstitutional law.”⁴

In *Curry v. Woodstock Slag Corp.*, 242 Ala. 379, 6 So.2d 479, 480-81 (1942), a case involving a declaratory judgment suit with immunity as the sole question for appeal, the Supreme Court determined:

“When it is only sought to construe the law and direct the parties, whether individuals or State officers, what it requires of them under a given state of facts, to that extent it does not violate section 14, Constitution.”

See also *Scott v. Alabama State Bridge Corp.*, 233 Ala. 12, 169 So. 273, 277 (1936), and *State v. Louis Pizitz Dry Goods Co.*, 243 Ala. 629, 11 So.2d 342, 345-46 (1943).

Here, McDonald’s complaint challenges as unconstitutional a certain rule promulgated by the DPS, and “it is the nature of the suit or relief demanded which the courts consider in determining whether a suit against a state officer is in fact one against the state within the rule of immunity”; see *Wallace v. Board of Education of Montgomery County*, 280 Ala. 635, 197 So.2d 428, 431 (1967). Clearly, McDonald’s complaint would

⁴ See also Annot. 43 A.L.R. 408, “Attack on constitutionality of statute under which the officer acts as affecting question of whether action or suit against him is to be deemed an action or suit against the state.”

be valid against officials of the DPS.

But here, McDonald only sued the DPS, as permitted by Alabama Code §41-22-10. The DPS suggests that such cannot be done because of the immunity of the State. However, this contention of the DPS overlooks the plain language of Amendment 622, which expressly waives the sovereign immunity of any units of government when the claim is based upon the amendment itself: “(c) A person whose religious freedom has been burdened in violation of this section may assert that violation as a **claim** or defense in a judicial, administrative, or other proceeding and obtain appropriate relief against a government.” Amendment 622, Section V. For this reason, the circuit court’s order dismissing the complaint must be reversed to the extent it was predicated upon this immunity contention.

ISSUE 3: Did the trial court err in granting the motion to dismiss of the Defendant Alabama Department of Public Safety on the ground that the McDonald complaint failed to state a claim upon which relief could be granted?

Section II of Alabama Constitution Amendment 622 acknowledges that “[t]he framers of the United States Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution, and the framers of the Constitution of Alabama of 1901, **also recognizing this right**, secured the protection of religious freedom in Article I, Section 3” [emphasis added]. This new constitutional amendment thus protects McDonald’s “free exercise” rights via the

“compelling state interest/least restrictive means” test. McDonald asserted this particular right in his complaint against the DPS and alleged that DPS Rule No. 760-X-1-.19 abridges his right of free exercise of religious beliefs. The proper defense to a claim based upon this amendment requires the government agency to demonstrate that its requirements are not only compelling, but also the least restrictive; see Section V(b)(2), Amendment 622.

In its brief, the DPS does not appear to challenge McDonald’s assertion that his complaint stated a valid claim based upon Amendment 622. It further appears that the DPS does not contest that Amendment 622 protects McDonald’s right to free exercise of religious beliefs. However, the DPS points to the prior opinion of this Court in *McDonald*, 756 So.2d at 885-86, and alleges that this Court agreed that there is a valid State interest for adopting DPS Rule No. 760-X-1-.19.

But the mere fact that there may be such a valid State interest does not mean that the DPS has established a defense to McDonald’s claim. Section V of Amendment 622 specifies more than one element for a defense to a claim based upon the amendment:

“(b) Government may burden a person's freedom of religion only if it demonstrates that application of the burden to the person:

“(1) Is in furtherance of a compelling governmental interest; and

“(2) Is the least restrictive means of furthering that compelling governmental interest.”

To establish a defense here, the DPS must not only show a compelling governmental

interest, but it must also show that its requirements are the least restrictive. Nothing in this record supports this position of the DPS. In fact, this record shows (as does the prior opinion of this court in *McDonald*) that a less restrictive means does exist: the DPS may allow Scott to execute the religious exemption affidavit just as Nathan and Chris McDonald did to secure their licenses (C. at 25, 26, 36, 37). “If the compelling state goal can be accomplished despite the exemption of a particular individual, then a regulation which denies an exemption is not the least restrictive means of furthering the state interest.” *Callahan v. Woods*, 736 F.2d 1269, 1272-73 (9th Cir. 1984). Of course, discovery may prove the existence of other less restrictive means.

Amendment 622 mandates that Alabama courts follow the federal First Amendment jurisprudence as practiced prior to *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990). As shown in McDonald’s opening brief, courts utilizing that jurisprudence balanced or weighed the complainant’s abridged constitutional rights against the compelling needs of the State. Such balancing did not happen here and the circuit court dismissed McDonald’s complaint via Rule 12, A.R.C.P. On remand, discovery undoubtedly will assist McDonald in acquiring evidence to refute the obvious DPS defense.

The DPS also contends that Rule No. 760-X-1-.19 is mandated by 42 U.S.C. §666(a)(13), thus establishing a compelling need for this rule. It also asserts that if this rule did not exist, Alabama would lose a great amount of federal welfare funds. However

as shown by *Blessing v. Freestone*, 520 U.S. 329, 344, 117 S.Ct. 1353 (1997), this is an argument without substance. *Blessing* dealt with some welfare recipients who sued Arizona officials because of Arizona's alleged failure to measure up to the federal requirements for State child support plans. The Court noted in this case that deprivation of federal funds can only occur when a State fails to substantially comply with the federal mandates. If a State should fall into substantial non-compliance, the penalty is small: "Moreover, even upon a finding of substantial noncompliance, the Secretary can merely reduce the State's AFDC grant by up to five percent; she cannot, by force of her own authority, command the State to take any particular action or to provide any services to certain individuals."

Here, it is virtually impossible for Alabama to lose any federal funds should an exemption be granted to McDonald (a point which might well be proven via discovery). The requirement to supply SSNs to secure Alabama driver licenses is predicated upon a need to locate delinquent child support obligors. But it is almost a certainty that McDonald will never be a delinquent child support obligor whose children receive welfare benefits. Having his SSN in the DPS computer data base will never assist DHR in locating other delinquent child support obligors. An exemption from the requirement of supplying SSNs to DPS for McDonald and others like him simply will not cause substantial non-compliance for Alabama.

Furthermore, the consequences of holding that this rule is mandated by 42 U.S.C.

§666(a)(13) must be considered. If any of these federal mandates for State child support plans are held to be compulsory, any State failing to comply therewith for any reason would be subject to civil liability like that asserted by the welfare recipients in *Blessing*. Does Alabama need angry hordes of welfare recipients suing it in federal court for damages and other forms of relief?

In short, while the DPS might have some facially sufficient justification for Rule No. 760-X-1-.19, that justification alone does not allow it to prevail in this litigation. It still must be shown that there is no less restrictive method to achieve the State's goal, a point obviously to be contested by McDonald. McDonald should be allowed to prove through discovery the existence of a less restrictive means.

Finally, the DPS relies upon the horrific and emotional events of September 11, 2001, as additional justification for the requirement that SSNs be provided for driver licenses. While this event is surely one which could be judicially noticed, still its relationship to the issues in this case is not explained by the DPS. But having raised the matter, McDonald feels compelled to reply by noting certain matters appearing in an official record. On November 8, 2001, the Hon. Benjamin L. Cardin, a Representative in Congress from the State of Maryland, appeared before and gave a statement to the House Ways and Means Committee. Congressman Cardin noted that the terrorists like Mohammed Atta had SSNs:

“* Chairman Shaw and Chairwoman Kelly, thank you for calling this joint hearing

to learn about the use of Social Security numbers by terrorists and criminals, including the use of numbers belonging to deceased persons.

“* Our subcommittee has been investigating this issue for several years now, yet identity theft⁵ continues to rise. The FBI considers it the fastest-growing crime in the U.S., and cases have hit 350,000 a year.

“* It has now come to light that the 19 hijackers had SSN’s – 13 of them legitimately, while 6 obtained fraudulent numbers. All used other aliases, as well, which presumably would include Social Security numbers.”⁶

The “9-11” tragedy was caused by the depraved hearts and insane minds of these foreign madmen. Possession of their SSNs by the Virginia driver licensing authorities did not prevent the commission of their crimes against humanity. Furthermore, possession of the SSNs of law abiding citizens like McDonald by State licensing authorities will never assist in solving the problems caused by terrorists and criminals.

In summary, constitutional rights and civil liberties have been eroding in recent years as the result of incremental measures like the requirement that SSNs be provided to obtain driver licenses. Today, there is a supposed need to collect everyone’s SSNs just to catch “dead beat dads”. Today, anyone’s irregular cash transactions with a bank are considered suspicious and reportable to the authorities. Next month, we may have to be physically searched whenever we enter public buildings. Next year, our cars might have to

⁵ As shown by his web site, <http://www.ago.state.al.us/>, Attorney General Bill Pryor shares these concerns about identity theft, a crime made possible by easy access to SSNs.

⁶ See <http://waysandmeans.house.gov/socsec/107cong/11-8-01/11-8card.htm>. At any hearing in a case such as this one, this Congressional Record would be admissible under Rule 902(5), Ala. Rules of Evidence.

be equipped with transponders connected to some global positioning system so that our travels can be recorded. Soon, we may be required to use some universal card so that our every move and purchase can be documented within a giant government data base. Imagine Hitler with this date base! Is such an Orwellian society what we want for ourselves, our children and grandchildren?

Perhaps John Stuart Mill's observation contained in the last paragraph of his essay

On Liberty appropriately addresses these concerns:

“[A] State which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes, will find that with small men no great thing can really be accomplished; and that the perfection of machinery to which it has sacrificed everything, will in the end avail it nothing, for want of the vital power which, in order that the machine might work more smoothly, it has preferred to banish.”

But Mill's observations were secular, though. Religion too can protect our liberties. As Henri Amiel commented, “If liberty is to be saved, it will not be by doubters, men of science or materialists: It will be by religious convictions; by the faith of the individuals who believe that God wills men to be free.” To this, McDonald would obviously add “Where the Spirit of the Lord is, there is Liberty.” II Cor. 3:17. While juries are reputed to be the protectors of our liberties, so too are our courts.

REQUEST FOR ORAL ARGUMENT

While the facts of this case are easy to understand, at least one of the issues presented by this appeal is very important and of first impression: the issue regarding

Amendment 622. As Prof. Berg notes in his law review article,⁷ several States have recently adopted laws to protect religious free exercise, but Alabama's effort is the most important because it elevated this right to a constitutional one. Since it appears that Alabama jurisprudence in this field may very well set national standards for this issue, oral argument would greatly aid the decisional process. For this reason, McDonald requests oral argument.

⁷ See *The Alabama Religious Freedom Amendment: An Interpretive Guide*, 31 Cum. Law Review 47 (2000).

CONCLUSION

For the reasons noted above, the circuit court's dismissal of McDonald's complaint should be reversed and this cause remanded.

Respectfully submitted this the 28th day of November, 2001.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing reply brief upon the below named counsel for the DPS by depositing the same in the United States mail, postage prepaid, in an envelope addressed to him at his correct mailing address:

Jack Curtis
Alabama Department of Public Safety, Legal Unit
P.O. Box 1511
Montgomery, Alabama 36102-1511

A copy has also been mailed to:

Bill Pryor, Attorney General
11 South Union Street
Montgomery, Alabama 36130

Dated this the 28th day of November, 2001.

Lowell H. Becraft, Jr.