No. 22-737

In the Supreme Court of the United States

BRIAN A. TRUSKEY, PETITIONER

v.

THOMAS J. VILSACK, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals abused its discretion by declining to overlook petitioner's forfeiture of his challenge to the dismissal of his claim under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*

2. Whether the Department of Agriculture (USDA) violated RFRA by requiring petitioner to provide a social security number to be hired as a USDA firefighter.

3. Whether the court of appeals correctly held that petitioner's Title VII claim fails because excusing him from the requirement to provide a social security number would have violated another federal statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is not published in the Federal Reporter but is available at 2022 WL 3572980. The memorandum opinion and order of the district court (Pet. App. 13-24) is not published in the Federal Supplement but is available at 2021 WL 9316104.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2022. The petition for a writ of certiorari was filed on November 17, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Social Security Administration (SSA) is required by statute to issue social security numbers to United States citizens, lawful permanent residents, and

noncitizens who are legally authorized to work in the United States. 42 U.S.C. 405(c)(2)(B)(i). The SSA uses social security numbers to track workers' wages and self-employment income for purposes of calculating old-age, survivors, disability, and other benefits. 42 U.S.C. 405(c)(2)(A) and (F).

Congress has also required federal agencies to collect and use social security numbers in many other contexts. For example, any person required to file a federal income tax return must provide a social security number if eligible to receive one. 26 U.S.C. 6109(a)(1) and (d). Section 6109 also requires employers (including federal employers) to collect and report to the Internal Revenue Service (IRS) the social security numbers of their employees. 26 U.S.C. 6109(a)(3) and (d); see *Yeager* v. *FirstEnergy Generation Corp.*, 777 F.3d 362, 363 (6th Cir.) (per curiam), cert. denied, 577 U.S. 817 (2015). The IRS uses that information to administer the tax system and prevent fraud. See, *e.g.*, *Davis* v. *Commissioner*, No. 12859-98, 2000 WL 924630, at *2 (T.C. July 10, 2000).

2. Petitioner believes that "Scripture prohibits the use of a social security number" because "identification by number" would cause him "to be besmeared with the 'mark of the beast.'" Pet. App. 2 (citation omitted). Petitioner alleges he has never had a social security number and that he could not obtain one without violating his religious beliefs. *Id.* at 13.

In 2014, petitioner began volunteering at a recreation area administered by the Department of Agriculture (USDA). Pet. App. 2. Petitioner later sought to be hired as a firefighter with the Forest Service, an agency within the USDA. *Ibid.* But the USDA explained that

"switching from a volunteer position to federal employment required supplying a social security number," and it declined to hire petitioner when he refused to provide one. *Ibid.*

3. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, provides that federal personnel actions "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a). The statute defines prohibited religious discrimination to include the failure to reasonably accommodate an employee's religious observance or practice unless the accommodation would impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j). An employee or applicant for employment with a federal agency who believes he has suffered prohibited discrimination may consult with an equal employment opportunity (EEO) counselor, file an administrative complaint, and, if the administrative process does not resolve the dispute, bring suit in federal district court. 42 U.S.C. 2000e-16(b) and (c); see 29 C.F.R. 1614.105-1614.110.

After contacting an EEO counselor, petitioner filed an administrative complaint alleging religious discrimination in violation of Title VII. Pet. App. 3 & n.1. An administrative law judge dismissed his complaint as untimely and for failure to state a claim. *Ibid.*

4. Petitioner then filed suit in federal district court asserting claims under Title VII and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* The court dismissed his complaint. Pet. App. 13-24.

As relevant here, the district court first held that petitioner could not bring a RFRA claim. Pet. App. 18-20. Consistent with the government's position at the time

and with decisions of the Third and Eighth Circuits, the court concluded that Title VII "provides the exclusive remedy for claims of discrimination in federal employment." *Id.* at 18 (citation omitted).

The district court next held that petitioner's Title VII claim failed on the merits. Pet. App. 20-22. The court explained that "26 U.S.C. § 6109 requires employers to collect and provide the social security numbers of their employees." *Id.* at 20. And the court noted that the Sixth Circuit had rejected a claim materially identical to petitioner's on the ground that "Title VII does not require an employer to reasonably accommodate an employee's religious beliefs if such accommodation would violate a federal statute." *Ibid.* (quoting *Yeager*, 777 F.3d at 363).

In the alternative, the district court dismissed petitioner's Title VII claim because he failed to "timely exhaust his administrative remedies." Pet. App. 22. Federal employees "must initiate contact" with an EEO counselor "within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. 1614.105(a)(1). Here, petitioner did not initiate contact until more than six months after USDA told him that it could not make an exception to the requirement that he provide a social security number, and more than 60 days after USDA's final communication on that issue. Pet. App. 2-3 & n.1. And the court rejected petitioner's contention that he was entitled to an extension of the 45-day deadline or to equitable tolling. *Id.* at 22-23.

5. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-12. The court agreed with the district court that its decision in *Yeager* "squarely foreclosed [petitioner's] Title VII claim." *Id.* at 8. And the court emphasized that "*Yeager* joined the Fourth,

Eighth, Ninth, Tenth, and Eleventh Circuits" in holding that an employee's religious objection to social security numbers "does not require an employer to violate federal law." *Id.* at 7; see *id.* at 7-8 (collecting cases). As a result, the court did not reach the district court's alternative holding that petitioner had failed to timely exhaust his administrative remedies. *Id.* at 10.

The court of appeals also declined to disturb the district court's dismissal of petitioner's RFRA claim. Pet. App. 10-12. The court explained that petitioner's opening brief had raised only his Title VII claim and had not "address[ed] the basis of the district court's dismissal of his claim under the RFRA." *Id.* at 11. Petitioner's reply brief attempted to revive his RFRA claim after the government's brief notified the court that the government had reconsidered its position and now acknowledges that Title VII does not preclude federal employees from bringing employment-related RFRA claims. *Id.* at 11-12; see *id.* at 62-66 (government brief). But the court declined to consider the issue, concluding that petitioner had forfeited the argument by failing to raise it "until his reply brief." *Id.* at 11. The court emphasized that "it would be ill-advised" to decide an "unsettled" question "on the basis of an argument not subjected to developed adversarial briefing." *Id.* at 12.

ARGUMENT

The court of appeals concluded that petitioner forfeited his RFRA claim and that his Title VII claim fails on the merits. Both of those holdings are correct, and petitioner does not suggest that either of them conflicts with any decision of another court of appeals or otherwise satisfies this Court's traditional certiorari standards. Nor does petitioner provide any reason for the Court to depart from its ordinary practice by granting

review to consider in the first instance the merits of the RFRA claim the lower courts did not reach. Finally, there is no need to hold the petition pending this Court's decision in *Groff* v. *DeJoy*, No. 22-174 (argued Apr. 18, 2023), because that case presents a very different question about the extent of employers' obligation to accommodate their employees' religious exercise. The petition for a writ of certiorari should be denied.

1. Petitioner first asserts (Pet. 9-11) that the court of appeals improperly declined to consider his RFRA claim. But petitioner does not dispute that "an appellant forfeits an argument that he fails to raise in his opening brief." *Scott* v. *First S. Nat'l Bank*, 936 F.3d 509, 522 (6th Cir. 2019). Instead, petitioner cites (Pet. 9) decisions recognizing that courts "may" overlook a forfeiture if it would not prejudice the opposing party, and he asserts that the government would not have been prejudiced here because its brief addressed RFRA.

The decisions on which petitioner relies indicate that the court of appeals had *discretion* to reach his RFRA argument despite his forfeiture. But petitioner cites no precedent or principle suggesting that a court *must* disregard a forfeiture whenever it would not prejudice the opposing party. And petitioner does not acknowledge, much less refute, the court's additional reason for enforcing his forfeiture here: a concern that it would be "ill-advised" to decide an important question about the interaction of Title VII and RFRA without "developed adversarial briefing." Pet. App. 12.

Especially given that circumstance, the court of appeals acted well within its discretion in declining to consider an issue that petitioner had unquestionably forfeited. And even if there were some doubt on that score, petitioner identifies no reason for this Court to grant

certiorari to review the court of appeals' case-specific, discretionary determination.

2. Petitioner next asserts (Pet. 11-23) that the district court erred in holding that Title VII precludes federal employees from bringing employment-related RFRA claims and that USDA violated RFRA by requiring a social security number. The government agrees that federal employees (and applicants for employment) may bring claims under RFRA, but this case would not be an appropriate vehicle in which to consider that issue because the court of appeals did not address it. Nor is there any basis for granting review to consider petitioner's RFRA claim on the merits: Neither lower court considered that issue, and petitioner does not cite any decision, from any court, sustaining a RFRA claim in analogous circumstances.

a. RFRA provides that the government "shall not substantially burden a person's exercise of religion" unless the government "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." 42 U.S.C. 2000bb-1(a) and (b). The Executive Branch has long maintained that federal agencies must adhere to RFRA in accommodating employees' religious exercise. See, *e.g.*, Office of the Press Sec'y, The White House, *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace* § 2(E) (Aug. 14, 1997), https://perma.cc/TH2Q-Q5PH.

Previously, however, the government took the position that federal employees could not enforce their RFRA rights in court. In *Brown* v. *General Services Administration*, 425 U.S. 820 (1976), this Court held

that Title VII's comprehensive remedial scheme provides the "exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." *Id.* at 829. The government argued, and two courts of appeals agreed, that Title VII as interpreted in *Brown* precludes federal employees from bringing employment-related claims under RFRA. See *Harrell* v. *Donahue*, 638 F.3d 975 (8th Cir. 2011); *Francis* v. *Mineta*, 505 F.3d 266 (3d Cir. 2007). The district court reached the same conclusion here. Pet. App. 18-20.

Subsequently, however, the government reconsidered this issue. RFRA applies to "all Federal law, * * * whether adopted before or after" RFRA's enactment. 42 U.S.C. 2000bb-3(a). This Court has thus emphasized that RFRA "displac[es] the normal operation of other federal laws," and has suggested (albeit in the context of an employer's defense to liability) that RFRA "might supersede Title VII's commands in appropriate cases." *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020). The government now acknowledges, as it did in the court of appeals in this case, that federal employees may rely on RFRA to bring claims seeking religious accommodations in the workplace (although in some circumstances such claims must be brought pursuant to procedures set forth in the Civil Service Reform Act of 1978, 5 U.S.C. 7513, 7701). Pet. App. 62-65; see, *e.g.*, Gov't Br. in Opp. at 17-18 & n.*, *Groff*, *supra* (No. 22-174).

Although the district court erred in holding that Title VII precluded petitioner's RFRA claim, that error does not warrant this Court's review. No court of appeals has considered the government's new position on the interaction between RFRA and Title VII, and only the Third and Eighth Circuits have addressed the issue

at all. In any event, this case would not be an appropriate vehicle in which to consider the issue even if it otherwise warranted review: Petitioner forfeited the issue, the court of appeals declined to address it, and this Court could not reach the question unless it first reviewed and reversed the court of appeals' case-specific decision to enforce petitioner's conceded forfeiture.

b. For similar reasons, the Court should decline petitioner's request to take up the underlying merits of his RFRA claim. This Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). But neither court below considered petitioner's claim on the merits. And even if the Court wished to consider that issue in the first instance, it could not do so without reviewing and reversing the court of appeals' case-specific forfeiture determination and the district court's holding that Title VII displaces RFRA.

Petitioner offers no justification for such a departure from this Court's ordinary practices. He does not cite any decision, from any court, sustaining a RFRA challenge to the statutes requiring employers to obtain social security numbers. To the contrary, it appears that the few courts that have considered the issue have rejected such challenges, explaining that requiring social security numbers is the "least restrictive means" of furthering the "compelling governmental interests" in "preventing fraud and abuse and administering the tax system." *Davis* v. *Commissioner*, No. 12859-98, 2000 WL 924630, at *2 (T.C. July 10, 2000); see, *e.g.*, *Hansen* v. *SSA*, No. 04-cv-322, 2005 WL 8161646, at *3 (D. Nev. Mar. 30, 2005); *Miller* v. *Commissioner*, 114 T.C. 511, 516-518 (2000).

Those decisions are consistent with this Court's precedents interpreting the Free Exercise Clause before its decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). In RFRA, Congress found that those "prior Federal court rulings" provided appropriate protection for religious liberty and declared that RFRA "restore[s] the compelling interest test" set forth in this Court's pre-*Smith* decisions. 42 U.S.C. 2000bb(a)(5) and (b)(1). The Court's pre-*Smith* precedents are thus highly instructive in applying RFRA. And those decisions "establishe[d] that even a substantial burden" on religious exercise "would be justified by the 'broad public interest in maintaining a sound tax system.'" *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989) (quoting *United States* v. *Lee*, 455 U.S. 252, 260 (1982)).

The Court also rejected a free exercise claim asserted by parents who objected to a law requiring the government to use a social security number to identify their daughter in processing a claim for welfare benefits filed on her behalf. *Bowen* v. *Roy*, 476 U.S. 693, 699-701 (1986). To be sure, the Court has suggested (without deciding) that the government should not insist that a party provide a number or other information that the party has a religious objection to providing in circumstances where the government already has the number or information. Cf. *Zubik* v. *Burwell*, 578 U.S. 403, 406-409 (2016) (per curiam) (explaining that the government could rely on plaintiffs' litigation position in lieu of a formal notice that plaintiffs had a religious objection to providing); *Roy*, 476 U.S. at 715 (Blackmun, J., concurring in part) (observing that it was not clear that the government would "insist that [the parents] resupply" the social security number given that the government already had the number); *Roy*, 476 U.S. at 723 & n.20

(Stevens, J., concurring in part and concurring in the result). But even if RFRA codified that principle, it has no bearing here, where petitioner alleges that he has never had a social security number at all.

3. Petitioner briefly renews his contention (Pet. 24-27) that the USDA violated Title VII by requiring a social security number. The court of appeals correctly rejected that argument, and its decision does not warrant further review.

a. Title VII generally requires an employer to accommodate an employee's religious exercise unless the accommodation would impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j). Here, the Sixth Circuit adhered to its precedent holding that an employer does not violate Title VII when it declines to grant an accommodation that "would require violating federal law." Pet. App. 7. "This conclusion is consistent with Title VII's text, which says nothing that might license an employer to disregard other federal statutes." *Yeager* v. *FirstEnergy Generation Corp.*, 777 F.3d 362, 363 (6th Cir.) (per curiam), cert. denied, 577 U.S. 817 (2015).

Petitioner does not appear to dispute that premise. Instead, he maintains (Pet. 24-27) that the court of appeals erred in concluding that USDA would have violated 26 U.S.C. 6109(a)(3) and (d) had it allowed him to work without a social security number. But the court's decision followed from the plain text of the relevant provisions. Section 6109(a)(3) provides that any person required "to make a return, statement, or other document with respect to another person"—including an employer with respect to an employee—"shall request from such other person, and shall include in any such return, statement, or other document, such identifying

number as may be prescribed for securing proper identification of such other person." Section 6109(d), in turn, directs that a "social security account number" shall, "except as shall otherwise be specified under regulations of the Secretary [of the Treasury], be used as the identifying number for such individual."

Petitioner briefly asserts (Pet. 25) that he has been issued an alternative identifying number known as an "Internal Revenue Service Number" (IRSN). But petitioner cites no regulation authorizing an employer to accept an IRSN in lieu of a social security number, and none exists. Cf. IRS, U.S. Dep't of the Treas., *Internal Revenue Manuals* § 3.13.5.75(3) (last updated Jan. 1, 2022), https://go.usa.gov/xtztq (explaining that an IRSN is a temporary number "used for internal processing only" and "is not a valid [taxpayer identification number]").

Petitioner also relies (Pet. 25-27) on a separate statutory provision specifying that "[n]o penalty shall be imposed" for violations of certain provisions, including Section 6109, "if it is shown that such failure is due to reasonable cause and not to willful neglect." 26 U.S. 6724(a). But by its plain terms, Section 6724(a) merely suspends the penalties that would otherwise apply for a violation; it does not create an exception to Section 6109 or otherwise render the underlying conduct lawful.

b. The court of appeals' decision does not conflict with any decision of another court of appeals. "Job applicants whose religious beliefs reject the use of social security numbers as marks of the beast routinely bring Title VII claims." Pet. App. 6. But petitioner cites no decision by any court accepting such a claim, and several circuits have rejected them. See *Seaworth* v. *Pearson*, 203 F.3d 1056, 1057 (8th Cir.) (per curiam), cert.

denied, 531 U.S. 895 (2000); *Sutton* v. *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830-831 (9th Cir. 1999); *Weber* v. *Leaseway Dedicated Logistics, Inc.*, 166 F.3d 1223, 1999 WL 5111, at *1 (10th Cir. 1999) (Tbl.); *Baltgalvis* v. *Newport News Shipbuilding Inc.*, 132 F. Supp. 2d 414, 418 (E.D. Va.), aff'd, 15 Fed. Appx. 172 (4th Cir. 2001) (per curiam). The court of appeals' nonprecedential decision adhering to that consensus position does not warrant further review.

c. Finally, there is no need to hold the petition pending this Court's forthcoming decision in *Groff*, *supra*. In that case, the Court is considering whether to overrule or clarify the portion of its decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), reasoning that an accommodation that would require an employer to operate shorthanded or to regularly pay premium wages to secure replacement workers would impose an undue hardship because it would require the employer to bear "more than a *de minimis* cost." *Id.* at 84.

The Court's resolution of that question will not affect the outcome here. The court of appeals did not cite *Hardison* either in the decision below or in *Yeager*, *supra*, and its rejection of petitioner's Title VII claim did not rely on considerations of employer cost. Instead, the court relied on the independent principle that an employer "cannot be found liable for a Title VII violation for complying with federal law." Pet. App. 10. The court specifically declined to decide whether that principle is grounded in the "'undue hardship'" standard at issue in *Groff* or instead in the idea that "an employer's statutory obligation to supply the IRS with employees' [social security numbers] is not an 'employment requirement'" subject to Title VII at all. *Id.* at 8 n.2 (citations omitted); see *Yeager*, 777 F.3d at 364. And

again, petitioner does not challenge the court's premise that Title VII does not require employers to violate other federal laws; instead, his petition takes issue only with the court's analysis of the applicable provisions of the Internal Revenue Code. Those tax laws are not at issue in *Groff*, and there is no reason to expect the Court's forthcoming decision in that case to provide any basis for revisiting the court of appeals' decision rejecting the very different religious-accommodation claim at issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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