

Comment

You Better Smile When You Say “Cheese!”: Whether the Photograph Requirement for Drivers’ Licenses Violates the Free Exercise Clause of the First Amendment

All fifty states require that a licensee’s photograph be included on his or her driver’s license.¹ While many people willingly comply with the photograph requirement and say “Cheese!” without complaint, the photograph requirement presents an obstacle to others that may in fact prevent them from obtaining valid drivers’ licenses even though they are otherwise qualified. The photograph requirement causes a problem when an applicant for a driver’s license has religious beliefs that forbid the taking of his or her photograph. An applicant is faced with the dilemma of following his or her religious beliefs or obtaining a valid driver’s license in both of the following situations: (1) when the applicant adheres to a particular religion that prohibits the taking of his or her photograph, or (2) when the applicant believes that being photographed is against his or her religion even though this belief is not shared by others. Recognizing this lose–lose choice that some people face, some states—but not all—allow exceptions to the photograph requirement and

1. *Dennis v. Charnes (Dennis II)*, 646 F. Supp. 158, 161 (D. Colo. 1986).

issue valid drivers' licenses notwithstanding the fact that the licensees' photographs are not taken.²

In some of the states that have not granted exceptions to the photograph requirement for applicants with religious objections, courts have addressed whether the photograph requirement violates the Free Exercise Clause of the First Amendment to the United States Constitution³ or their respective state constitutions.⁴ Some of these courts have held that the challenged statutes are unconstitutional infringements into the plaintiffs' free exercise of religion and have required that the states grant exceptions to the plaintiffs who challenge them.⁵ Other courts have upheld the challenged statutes after declaring that the states' alleged interests should prevail over any intrusions the statutes make into the plaintiffs' free exercise of religion.⁶ When the court determines whether to uphold the challenged statute, the context in which the case is decided appears to be of extreme importance in explaining the government's interest and whether such interest is sufficient to allow an intrusion into the plaintiff's free exercise of religion. In particular, cases decided since the terrorist attacks on the United States on September 11, 2001, focus on the identification purpose served by the photograph requirement and how it aids airport security and prevents future terrorist attacks.⁷ In light of these new found public safety concerns, courts throughout the United States analyze cases decided after September 11 differently from the cases decided before September 11.

In Section I, this Comment traces the rather complex history of the Free Exercise Clause and explains the current law. In Section II, this Comment discusses the cases from various jurisdictions throughout the United States that have considered whether the photograph requirement on drivers' licenses violates the Free Exercise Clause. In Section III, this Comment considers the relevancy of the context in which the case is

2. *See id.*

3. U.S. CONST. amend. I.

4. *See, e.g.,* Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984), *aff'd per curiam sub nom.* Jensen v. Quaring, 472 U.S. 478 (1985); *Dennis II*, 646 F. Supp. 158; Valov v. Dep't of Motor Vehicles, 34 Cal. Rptr. 3d 174 (Cal. Ct. App. 2005); Johnson v. Motor Vehicle Div., Dep't of Revenue, 593 P.2d 1363 (Colo. 1979) (en banc); Freeman v. Dep't of Highway Safety & Motor Vehicles, 924 So. 2d 48 (Fla. Dist. Ct. App. 2006); Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc., 380 N.E.2d 1225 (Ind. 1978).

5. *See Quaring*, 728 F.2d at 1128; *Dennis II*, 646 F. Supp. at 164; *Pentecostal House of Prayer, Inc.*, 380 N.E.2d at 1229.

6. *See Valov*, 34 Cal. Rptr. 3d at 183; *Johnson*, 593 P.2d at 1366; *Freeman*, 924 So. 2d at 57.

7. *See Valov*, 34 Cal. Rptr. 3d at 186-87; *Freeman v. State*, 2002-CA-2828, 2003 WL 21338619, at *7 (Fla. Cir. Ct. June 6, 2003), *aff'd sub nom. Freeman*, 924 So. 2d 48.

decided in explaining the government's interest and whether such interest is sufficient to allow an intrusion into the plaintiff's free exercise of religion. Of particular importance in Section III is a discussion of how the terrorist attacks of September 11, 2001, may have affected the courts' evaluation of state interests in photographing licensees. In Section IV, this Comment concludes with an analysis of the potential impact of post-September 11 safety concerns on future cases involving First Amendment challenges.

I. HISTORY OF THE FREE EXERCISE CLAUSE

A. *Extent of Application*

The First Amendment to the United States Constitution states, "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*."⁸ The emphasized clause, which is the focus of this Comment's constitutional analysis, is commonly referred to as the Free Exercise Clause.⁹ The United States Supreme Court efficiently summarizes the protection provided by the Free Exercise Clause as follows: "The Free Exercise Clause commits government itself to religious tolerance, and . . . [l]egislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices."¹⁰ Importantly, the protection of the Free Exercise Clause does not apply solely to acts of Congress (even though the Clause's explicit language may cause one to think otherwise) because the Fourteenth Amendment to the United States Constitution¹¹ makes the Clause applicable to state legislation as well.¹² As a result, both Congress and state legislatures are prohibited from enacting legislation that amounts to religious persecution.¹³

In *Reynolds v. United States*,¹⁴ the Supreme Court first considered the impact of the Free Exercise Clause and whether it allows a person to circumvent the established law on the basis that his or her religious beliefs are contrary to what the law requires or forbids.¹⁵ While discussing the extent to which the legislature may intrude into one's religion, the Court noted that the legislature may interfere with religious

8. U.S. CONST. amend. I (emphasis added).

9. *See id.*

10. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993).

11. U.S. CONST. amend. XIV, § 1.

12. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

13. *Id.*

14. 98 U.S. 145 (1878).

15. *See id.* at 162–67.

practices but not religious beliefs.¹⁶ Therefore, one is free to believe whatever he or she chooses, and the government cannot reward or punish him or her for doing so.¹⁷ To protect society, however, the government may regulate one's religious practices.¹⁸ Based on this reasoning, the Court held that one violates the established law when he or she does not comply with a law interfering with his or her religious practices due to his or her religious beliefs.¹⁹ To hold otherwise, the Court believed, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."²⁰

B. Evolution of the Proper Test for Free Exercise Challenges

1. *Sherbert v. Verner*: Introduction of the Strict Scrutiny Test.

In the cases following *Reynolds*, the Court considered whether challenged laws violated the Free Exercise Clause by unlawfully intruding into religious beliefs but did not initially set forth an explicit test for making such determinations.²¹ In fact, the Court did not articulate a specific test until 1963.²² During that year, in *Sherbert v. Verner*,²³ the Court ruled that all laws allegedly violating the Free Exercise Clause had to be analyzed under the strict scrutiny test.²⁴ Under the strict scrutiny test, laws substantially burdening the free exercise of religion are upheld only if: (1) the government has a compelling interest that the challenged law helps attain, and (2) there are no alternatives to the challenged law that would intrude less into one's free exercise of religion.²⁵

In order to prevail under the strict scrutiny test, a plaintiff must first plausibly assert that he or she objects to a law due to his or her religious

16. *Id.* at 166.

17. *See id.*

18. *Cantwell*, 310 U.S. at 304; *Reynolds*, 98 U.S. at 166.

19. *See Reynolds*, 98 U.S. at 166–67.

20. *Id.* at 167.

21. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1247 (3d ed. 2006).

22. *See Sherbert v. Verner*, 374 U.S. 398, 406–08 (1963); CHERMERINSKY, *supra* note 21, at 1247–48.

23. 374 U.S. 398 (1963).

24. *Id.* at 406–08 (citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

25. *Id.* (citing *Collins*, 323 U.S. at 530).

beliefs.²⁶ Next, he or she must show that enforcement of the challenged law substantially burdens the free exercise of his or her religion.²⁷

To make this showing, the plaintiff must first plausibly assert that he or she has sincere religious beliefs.²⁸ The first step of this inquiry is a consideration of whether the plaintiff's beliefs are religious.²⁹ "Although a religious belief requires something more than a purely secular philosophical or personal belief, courts have approved an expansive definition of religion."³⁰ The second step of this inquiry is a consideration of whether the plaintiff sincerely holds the beliefs.³¹ Notably, the sincerity of the plaintiff's beliefs is often not disputed by the parties because the government normally stipulates that the plaintiff's beliefs are sincere.³² In the rare instances in which the parties dispute the plaintiff's sincerity, there is no judicial determination regarding whether his or her religious beliefs are in fact true because such a question is beyond the powers of the court.³³ Rather, the focus of the analysis is whether the plaintiff appears to believe what he or she professes to believe.³⁴ The plaintiff may prove this by explaining the precepts of his or her professed faith and demonstrating that he or she follows its mandates in his or her daily life.³⁵

Once the plaintiff plausibly asserts the sincerity of his or her religious beliefs (or the sincerity is stipulated by the government), the plaintiff must then prove that the challenged law causes a substantial burden on his or her free exercise of religion.³⁶ The plaintiff may prove this by demonstrating either of the following: (1) the challenged law pressures him or her to violate his or her religious beliefs in order to obtain an

26. See *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 713–14 (1981).

27. See *id.* at 717–18.

28. See *id.* at 714–16.

29. *Quaring v. Peterson*, 728 F.2d 1121, 1123 (8th Cir. 1984), *aff'd per curiam sub nom. Jensen v. Quaring*, 472 U.S. 478 (1985).

30. *Id.* (citation omitted).

31. See *id.* at 1125.

32. See, e.g., *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 531; *Wisconsin v. Yoder*, 406 U.S. 205, 209 (1972); *Sherbert*, 374 U.S. at 399 n.1.

33. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990) (quoting *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)), *superseded by* 42 U.S.C. § 2000bb (2006); see also *Quaring*, 728 F.2d at 1125 (citing *Thomas*, 450 U.S. at 715–16).

34. See *Quaring*, 728 F.2d at 1125.

35. See *id.* ("Because Quaring's beliefs are based on a passage from scripture, receive some support from historical and biblical tradition, and play a central role in her daily life, they must be characterized as sincerely held religious beliefs.").

36. See *Thomas*, 450 U.S. at 717–18.

important state benefit,³⁷ or (2) the challenged law compels the plaintiff to violate his or her religious beliefs.³⁸ An example of a challenged law pressuring one to violate his or her religion may be found in *Sherbert*. The plaintiff in *Sherbert*, a member of the Seventh-day Adventist Church, satisfied her burden by proving that the state statute setting forth the eligibility requirements for unemployment compensation forced her to choose between receiving the government benefit or violating her religious belief regarding the acceptability of Saturday work.³⁹ Although the state statute did not compel the plaintiff to forego her Saturday worship, the Court stated that the resultant ineligibility for unemployment compensation pressured the plaintiff to violate her religious belief.⁴⁰ An example of a challenged law compelling one to violate his or her religion may be found in *Wisconsin v. Yoder*.⁴¹ In *Yoder* members of the Amish religion satisfied their burden by proving that the state statute requiring children to attend school until reaching the age of sixteen compelled them, under the threat of criminal sanction, to violate their religious belief prohibiting formal education beyond the eighth grade.⁴² The Court held that the state statute forced the individuals to violate their religious belief⁴³ because failure to follow the statute would have resulted in a fine, imprisonment, or both a fine and imprisonment.⁴⁴

After the plaintiff satisfactorily makes his or her showing, the challenged law may nonetheless be upheld if the government proves the following: (1) the government has a compelling interest that the challenged law achieves, and (2) there are no adequate alternatives that would minimize the intrusion into the plaintiff's free exercise of his or her religion.⁴⁵ To satisfy its burden of proof, the government cannot merely assert that it has an interest in what the challenged law regulates.⁴⁶ Rather, the government must set forth a *compelling*

37. *Id.*

38. *Yoder*, 406 U.S. at 218.

39. 374 U.S. at 399–401, 403–04.

40. *Id.* at 403–04.

41. 406 U.S. 205 (1972).

42. *Id.* at 207–08, 218. In *Yoder* the school district administrator for the public school brought suit against the Amish individuals for violating the state statute. *Id.* at 207–08. Thus, the individuals claiming constitutional protection in *Yoder* were defendants rather than plaintiffs. *See id.*

43. *Id.* at 218.

44. *Id.* at 207 n.2 (citing WIS. STAT. § 118.15(5) (1969) (current version at WIS. STAT. ANN. § 118.15 (2004 & Supp. 2006))).

45. *Thomas*, 450 U.S. at 718.

46. *Sherbert*, 374 U.S. at 406.

interest, which is limited to those instances when “[t]he conduct or actions so regulated . . . pose[] some substantial threat to public safety, peace[,] or order.”⁴⁷ Furthermore, the government must prove that the compelling government interest cannot be achieved by any alternative that would create less of a burden on the plaintiff’s free exercise of religion than does the challenged law.⁴⁸ As shown by the heavy burden of proof the government bears, the strict scrutiny test is supposed to set an extremely high standard by which laws allegedly violating the Free Exercise Clause are judged.

2. *Employment Division, Department of Human Resources of Oregon v. Smith: Application of the Strict Scrutiny Test and the Rational Basis Test.* Despite the stringent requirements of the strict scrutiny test, the Court invalidated few laws under this standard in the years following its enunciation.⁴⁹ In fact, in some cases, the Court even expressly rejected the strict scrutiny test and applied a lower standard.⁵⁰ For example, in *Bowen v. Roy*,⁵¹ the Court considered the constitutionality of two federal statutes that conditioned the receipt of government benefits on whether applicants provided the Social Security numbers for the members of their households.⁵² The government planned to use the Social Security numbers in the administration of the benefit plan.⁵³ The plaintiffs, who were Native Americans, alleged that the governmental use of a unique identifier, such as a Social Security number, for their child would “rob the [child’s] spirit.”⁵⁴ Despite the plaintiffs’ religious concerns, the Court applied a standard lower than the strict scrutiny test because the challenged statutes were neutral and generally applied to the public.⁵⁵ The Court upheld the challenged statutes after concluding that they were enacted for the legitimate government interest of preventing fraud and were a reasonable means of achieving that goal.⁵⁶

47. *Id.* at 403.

48. *Id.* at 407.

49. CHEMERINSKY, *supra* note 21, at 1248.

50. *See, e.g.*, *Bowen v. Roy*, 476 U.S. 693, 707–08 (1986).

51. 476 U.S. 693 (1986).

52. *Id.* at 695.

53. *Id.* at 699.

54. *Id.* at 696 (internal quotation marks omitted).

55. *See id.* at 707–12.

56. *Id.* at 709–12.

In accordance with the already prevailing trend, the Court explicitly limited the application of the strict scrutiny test in 1990.⁵⁷ During that year, the Court in *Employment Division, Department of Human Resources of Oregon v. Smith*⁵⁸ held that the right to free exercise of religion does not insulate one from following neutral statutes that are generally applied to the public.⁵⁹ Rather, in such a situation, the applicable test is the rational basis test, which has notably less stringent requirements than those required by the strict scrutiny test.⁶⁰ Namely, under the rational basis test, a challenged law that is both neutral and generally applicable will be upheld even if it substantially burdens the free exercise of religion so long as the government proves the following: (1) the government has a legitimate interest, and (2) the challenged statute is a reasonable way of achieving the interest.⁶¹

The strict scrutiny test, however, has not been completely eliminated. This is because the strict scrutiny test applies when a statute is not neutral or not generally applicable.⁶² Under the strict scrutiny test, a challenged law that is not neutral or not generally applicable and that substantially burdens the free exercise of religion will be upheld only if the government proves the following: (1) the government has a compelling interest that the challenged law achieves, and (2) there are no adequate alternatives that would minimize the intrusion into the plaintiff's free exercise of religion.⁶³ Due to the stringency of this test, a law that is not both neutral and generally applicable rarely will be upheld.⁶⁴ Importantly, the issues of whether the challenged law is neutral and whether it is generally applied to the public are connected.⁶⁵ Therefore, answering one of these issues may help answer the other issue.⁶⁶

When determining whether the challenged law is neutral, the relevant question is whether the law purposefully targets religious practices

57. *Smith*, 494 U.S. at 879 (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 595 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

58. 494 U.S. 872 (1990).

59. *Id.* at 879, 881–82.

60. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 531 (citing *Smith*, 494 U.S. 872).

61. *See Bowen*, 476 U.S. at 707–08. The court in *Smith*, however, identified some exceptions to this rule. 494 U.S. at 881–82, 884 (referring to the hybrid right exception and the individualized exemption exception).

62. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546.

63. *See id.* (citing *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)).

64. *Id.*

65. *Id.* at 531.

66. *See id.*

borne from religious beliefs.⁶⁷ A law can target religious beliefs in one of two ways. First, the text of the statute may be explicitly directed at religious beliefs.⁶⁸ This occurs when the statute uses words with religious connotations, and the statute's text or context eliminates the application of possible secular meanings.⁶⁹ Second, the text of the statute may be neutral, but the legislature may nonetheless design the statute to target religious beliefs.⁷⁰ When considering what the legislature designed the statute to accomplish, the statute's effect is strong evidence of what the legislature intended; however, it is not determinative.⁷¹ For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,⁷² the Court determined that the city ordinances concerning religious animal sacrifices targeted Santeria sacrifices because, with their numerous exceptions, the only conduct subject to the ordinances was the practices of the Santeria church.⁷³

When determining whether the challenged law is generally applicable, the relevant inquiry is not whether the law is applied to the public at large.⁷⁴ Such a requirement would be unreasonably broad and would fail to recognize the fact that “[a]ll laws are selective to some extent.”⁷⁵ Rather, the applicability requirement provides that the “government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief.”⁷⁶

As a result of *Smith*, the answer to these two related issues—neutrality and applicability—determines whether the strict scrutiny test or the rational basis test applies when analyzing the constitutionality of a challenged law.⁷⁷ The appropriate level of constitutional scrutiny determines whether the statute is constitutional and thus should either be upheld or invalidated.⁷⁸

3. The Religious Freedom Restoration Act of 1993: Congress's Response to *Smith*. In *Smith* the Court stated that the threshold question for determining what standard to apply to a law allegedly

67. *Id.* at 533.

68. *Id.*

69. *Id.*

70. *See id.* at 534–35.

71. *Id.* at 535.

72. 508 U.S. 520 (1993).

73. *Id.* at 542.

74. *See id.*

75. *Id.*

76. *Id.* at 543.

77. *See id.* at 546; *Smith*, 494 U.S. at 879.

78. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546.

violating the Free Exercise Clause was whether the challenged law was both neutral and generally applicable.⁷⁹ If this question was answered in the affirmative, then the challenged law was upheld so long as it satisfied the rational basis test.⁸⁰ In response to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA).⁸¹ The RFRA's stated purpose is "to restore the compelling interest test as set forth in *Sherbert* . . . and to guarantee its application in *all* cases [in which] free exercise of religion is substantially burdened."⁸² Thus, Congress legislatively changed the threshold question in the inquiry and made it whether the challenged law substantially burdens the free exercise of religion.⁸³ If such a burden is in fact found, then the challenged law is upheld only if the strict scrutiny standard is met.⁸⁴

When the RFRA was enacted, it had extensive coverage. First, the RFRA's analytic framework applied to challenged federal, state, and local laws.⁸⁵ Second, the RFRA applied to all subject matters.⁸⁶ Third, the RFRA applied to all laws, regardless of when the challenged law was enacted.⁸⁷ As a result, under the RFRA, "[a]ny law [was] subject to challenge at any time by any individual who allege[d] a substantial burden on his or her free exercise of religion."⁸⁸

4. *City of Boerne v. Flores: Judicial Limitation on the Religious Freedom Restoration Act of 1993.* The RFRA was not in effect long before it was challenged. In *City of Boerne v. Flores*,⁸⁹ the Court held that the RFRA is unconstitutional as it applies to state laws.⁹⁰ In concluding this, the Court reasoned that the RFRA exceeds Congress's power "to enforce, by appropriate legislation," the constitutional guarantees of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.⁹¹ Notably, *Flores* declares that the RFRA is unconstitutional only as it

79. See *Smith*, 494 U.S. at 879.

80. See *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 531.

81. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)).

82. 42 U.S.C. § 2000bb(b)(1) (emphasis added).

83. *Id.*

84. See *id.*

85. *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (citing 42 U.S.C. § 2000bb-2(1)).

86. *Id.*

87. *Id.* (citing 42 U.S.C. § 2000bb-3(a)).

88. *Id.*

89. 521 U.S. 507 (1997).

90. *Id.* at 535-36.

91. U.S. CONST. amend XIV; *Flores*, 521 U.S. at 536.

applies to challenged state laws.⁹² As a result, it appears as though the RFRA remains good law when a federal law is challenged.⁹³

5. State RFRA and State Constitutional Provisions: The States' Responses to *Flores*. In response to *Flores*, some state legislatures enacted their own religious freedom and restoration acts or amended their state constitutions to provide for the exclusive use of the strict scrutiny test.⁹⁴ For example, a portion of Florida's Religious Freedom Restoration Act of 1998⁹⁵ states:

The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (a) [i]s in furtherance of a compelling government interest; and (b) [i]s the least restrictive means of furthering that compelling governmental interest.⁹⁶

Consequently, Florida and other states whose legislatures responded to *Flores* in a similar manner use the strict scrutiny test even when the text of the challenged statute is neutral and generally applicable, so long as the statute substantially burdens the free exercise of one's religion.⁹⁷

As shown by this explanation, the evolution of the proper test for free exercise challenges is rather complex. However, it is important to note the level of constitutional scrutiny the various courts use in making decisions because whether plaintiffs satisfactorily make the requisite showing ultimately depends on the applicable scrutiny level.

II. CASES ADDRESSING THE PHOTOGRAPH REQUIREMENT FOR DRIVERS' LICENSES

Adhering to the appropriate levels of constitutional scrutiny for the relevant time period and jurisdiction, various courts throughout the United States have considered whether the photograph requirement violates the Free Exercise Clause of the First Amendment to the United

92. Caroline E. Kuerschner, Comment, *Our Vulnerable Constitutional Rights: The Supreme Court's Restriction of Congress' Enforcement Powers in City of Boerne v. Flores*, 78 OR. L. REV. 551, 557 n.42 (1999).

93. *Id.*

94. *See, e.g.*, *Freeman v. Dep't of Highway Safety & Motor Vehicles*, 924 So. 2d 48, 53 (Fla. Dist. Ct. App. 2006).

95. FLA. STAT. ANN. §§ 761.01-.05 (West 2005).

96. *Id.* § 761.03(1).

97. *See id.*

States Constitution.⁹⁸ When a court determines whether to uphold the challenged statute, the context in which the case is decided appears to be of extreme importance in explaining the government's interest and whether such interest is sufficient to allow an intrusion into the plaintiff's free exercise of religion.

A. *Pre-Smith Cases*

1. Limiting the State's Interest to Identifying Licensed Drivers During Traffic Stops. In *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*,⁹⁹ the Indiana Supreme Court applied the strict scrutiny test and considered whether the photograph requirement of the state statute violated the free exercise of religion, as asserted by the Pentecostal House of Prayer, Inc. (PHPI) and the National Committee for Amish Religious Freedoms (NCARF).¹⁰⁰ The relevant statute, Indiana Code § 9-1-4-37(b),¹⁰¹ stated, "Every . . . permit or license . . . shall contain the name, age, residence address, a brief description, and, with the exception of a learner's permit, a photograph of such person for the purpose of identification . . ." ¹⁰²

Both religious groups involved in the case followed a literal reading of the Bible.¹⁰³ Importantly, the Second Commandment states, "Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth."¹⁰⁴ Because the Second Commandment forbids the making of "graven images," these religious groups believed that their faiths prohibited them from posing for photographs, including those statutorily required on drivers' licenses.¹⁰⁵

As a result of this belief, the religious groups claimed that the photograph requirement forced their members to choose between

98. U.S. CONST. amend. I; *see, e.g.*, *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff'd per curiam sub nom. Jensen v. Quaring*, 472 U.S. 478 (1985); *Dennis v. Charnes (Dennis II)*, 646 F. Supp. 158 (D. Colo. 1986); *Valov v. Dep't of Motor Vehicles*, 34 Cal. Rptr. 3d 174 (Cal. Ct. App. 2005); *Johnson v. Motor Vehicle Div., Dep't of Revenue*, 593 P.2d 1363 (Colo. 1979) (en banc); *Freeman v. Dep't of Highway Safety & Motor Vehicles*, 924 So. 2d 48 (Fla. Dist. Ct. App. 2006); *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, 380 N.E.2d 1225 (Ind. 1978).

99. 380 N.E.2d 1225 (Ind. 1978).

100. *Id.* at 1226, 1228.

101. IND. CODE ANN. § 9-1-4-37(b) (LexisNexis 1976 & Supp. 1978) (current version at IND. CODE ANN. § 9-24-11-5 (LexisNexis 2004 & Supp. 2008)).

102. *Id.*

103. *Pentecostal House of Prayer, Inc.*, 380 N.E.2d at 1226.

104. *Exodus* 20:4 (King James); *accord Deuteronomy* 5:8 (King James).

105. *Pentecostal House of Prayer, Inc.*, 380 N.E.2d at 1226.

obtaining a valid driver's license and following an important religious mandate. Due to this nearly impossible decision, the PHPI brought suit against the Bureau of Motor Vehicles, seeking (1) a declaration that the photograph requirement was unconstitutional when applied to its church members and (2) an injunction prohibiting the bureau from enforcing the photograph requirement against its church members. The trial court allowed the NCARF to intervene in the action because the bureau had revoked an exception to the photograph requirement that it had previously granted to the Beachy Amish sect. In responding to the suit, the bureau did not contest the sincerity of the religious groups' beliefs regarding the biblical prohibition against photographs. Rather, the bureau contended that the photograph requirement aided the state in identifying licensed drivers and that the state's interest in identification should prevail over the religious groups' constitutional right to the free exercise of religion.¹⁰⁶

In deciding this case, the court considered the bureau's contention that the photograph requirement helped to ensure that state roads were safe by enabling the quick and accurate identification of licensed individuals.¹⁰⁷ Even though the court noted that there is a greater likelihood of the state's interest prevailing over the individual's interest when the state's interest concerns the public welfare,¹⁰⁸ it nevertheless affirmed the lower court's decision and held that the photograph requirement was unconstitutional.¹⁰⁹ In reaching this conclusion, the court reasoned that the state's interest in identifying licensed drivers was not a compelling interest and that the interest could be achieved by other means that do not intrude onto the religious groups' free exercise of religion.¹¹⁰ For instance, the court explained that the statistics concerning a licensee's physical appearance, which are usually included on a driver's license, would achieve the same end as the photograph requirement.¹¹¹

2. Extending the State Interest to Identification in Numerous Other Situations. In *Johnson v. Motor Vehicle Division, Department of Revenue*,¹¹² the Colorado Supreme Court applied the strict scrutiny test and considered whether the photograph requirement of a state

106. *Id.* at 1226–27.

107. *Id.* at 1229.

108. *Id.* at 1228.

109. *Id.* at 1229.

110. *Id.*

111. *Id.*

112. 593 P.2d 1363 (Colo. 1979) (en banc).

statute violated the free exercise of religion, as asserted by members of the Assembly of YHWHHOSHUA.¹¹³ The statute in question, Colorado Revised Statutes § 42-2-106(3),¹¹⁴ stated, “Every application for a driver’s, minor driver’s, or provisional driver’s license, and the license issued as a result of said application, shall . . . contain the photograph of the applicant or licensee.”¹¹⁵

Like the plaintiffs in *Pentecostal House of Prayer, Inc.*, the plaintiffs in *Johnson* followed a literal reading of the Bible and believed that the Second Commandment prohibited them from posing for any photographs. Because they refused to be photographed, the Motor Vehicle Division of the Department of Revenue would not issue them drivers’ licenses even though they were otherwise eligible. Accordingly, the plaintiffs brought suit against the department, seeking (1) a declaratory judgment that the photograph requirement was unconstitutional as applied to them and (2) injunctive relief invalidating the photograph requirement in regards to them.¹¹⁶

Like the defendant in *Pentecostal House of Prayer, Inc.*, the department did not contest the sincerity of the plaintiffs’ beliefs regarding the biblical prohibition against photographs. Additionally, the department did not contest the plaintiffs’ assertion that the photograph requirement intruded into their free exercise of religion. Instead, the department contended that the state’s interest in identification was compelling and could not be achieved by alternative means that lessened the intrusion into the plaintiffs’ free exercise of religion.¹¹⁷

In deciding this case, the court was persuaded by the department’s argument concerning the importance of the photograph requirement for identification purposes.¹¹⁸ Namely, the department stated that the photographs on drivers’ licenses were relevant in numerous situations other than the identification of drivers during traffic stops. For example, the photographs (whose negatives the department stored) were used when police photographic lineups were conducted and when a victim’s identity at an accident had to be ascertained.¹¹⁹ Due to these instances, the court declared that the state’s interest was compelling.¹²⁰ Additionally, the court believed that providing any exception to the

113. *Id.* at 1363–65.

114. COLO. REV. STAT. § 42-2-106(3) (1973) (current version at COLO. REV. STAT. ANN. § 42-2-107 (2006)).

115. *Id.*

116. *Johnson*, 593 P.2d at 1363–64.

117. *Id.* at 1364–65.

118. *Id.* at 1365–66.

119. *Id.* at 1365.

120. *Id.*

photograph requirement, including one to the plaintiffs, would prevent the state from achieving the important identification purpose served by drivers' licenses.¹²¹ As a result, the court affirmed the lower court's decision and held that the photograph requirement was constitutional.¹²²

3. Recognizing the Impact of Other Exceptions. In contrast to the groups of plaintiffs involved in the two previous cases, in *Quaring v. Peterson*,¹²³ the United States Court of Appeals for the Eighth Circuit applied the strict scrutiny test and considered whether the photograph requirement of the state statute violated the free exercise of religion, as asserted by an individual plaintiff.¹²⁴ The state statute required that drivers' licenses contain photographs of those who were licensed; however, there were numerous exceptions to the photograph requirement.¹²⁵

Frances Quaring, the plaintiff in this case, wanted an exception to be extended to herself. She refused to be photographed, claiming that she adhered to a literal interpretation of the Bible and that posing for photographs was against her personal religious convictions (even though others in the church she attended did not share this belief). Solely because of her refusal to be photographed, officials from the Nebraska Department of Motor Vehicles denied her application. Following the denial, Quaring brought suit against the officials, seeking a court order requiring the issuance of a valid driver's license to her.¹²⁶

As in the two previous cases, the officials did not contest the sincerity of Quaring's personal religious beliefs. Instead, the officials asserted the following: (1) the photograph requirement did not burden Quaring's free exercise of religion; (2) even if that was not the case, the state's interests should prevail over Quaring's right to the free exercise of religion; and (3) there were no alternatives that would be less restrictive of Quaring's free exercise of religion and achieve the same end as the photograph requirement.¹²⁷

Even though the officials did not contest the religious nature of Quaring's beliefs, the court noted that Quaring's beliefs were unusual in

121. *Id.*

122. *Id.* at 1366.

123. 728 F.2d 1121 (8th Cir. 1984). An equally divided United States Supreme Court affirmed the Eighth Circuit's decision without opinion. *Jensen*, 472 U.S. at 478.

124. *Quaring*, 728 F.2d at 1122, 1126–27.

125. *Id.* at 1122.

126. *Id.* at 1122–23.

127. *Id.* at 1122.

modern society.¹²⁸ Nevertheless, beliefs need not be held by society at large or by all members of a certain religious sect to be considered religious and thus given constitutional protection.¹²⁹ Therefore, the court stated that it would not let the unusual nature of Quaring's beliefs influence its decision because they were her personal religious convictions.¹³⁰

After noting this, the court then discussed its conclusion regarding the first two contentions made by the officials.¹³¹ First, the court concluded that the photograph requirement burdened Quaring's free exercise of religion.¹³² The court reasoned that the photograph requirement forced Quaring to choose between following her religious convictions and being granted an important state benefit.¹³³ Second, the court concluded that Quaring's interest in the free exercise of religion outweighed the state's combined interests of (1) protecting the public safety by ensuring that only licensed drivers operate vehicles, (2) facilitating the identification of people in financial transactions, and (3) avoiding the administrative burden of considering applications from those seeking exceptions from the photograph requirement due to their religious beliefs.¹³⁴ While making its determination, the court considered whether granting Quaring an exception to the photograph requirement would impair the state's interests.¹³⁵ Notably, the state already permitted numerous exceptions to the photograph requirement, including "learner's permits, school permits issued to farmers' children, farm machinery permits, special permits for those with restricted or minimal driving ability, [and] temporary licenses for individuals outside the state whose old licenses [had] expired."¹³⁶ Based in part on the existence of the other exceptions to the photograph requirement, the court believed that the state's interests would not be further frustrated by the granting of an exception based on one's religious aversion to having his or her photograph

128. *Id.* at 1123.

129. *Id.* at 1124–25 (citing *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 715–16 (1981)).

130. *Id.* at 1125.

131. *See id.* at 1125–27. The majority did not discuss whether there were alternatives that would be less restrictive of Quaring's free exercise of religion and achieve the same end as the photograph requirement. *See id.* This omission in the majority's analysis was noted by the dissent. *Id.* at 1128 (Fagg, J., dissenting).

132. *Id.* at 1125 (majority).

133. *Id.*

134. *Id.* at 1126–27.

135. *Id.* at 1126 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

136. *Id.*

taken.¹³⁷ Therefore, the court affirmed the lower court's order exempting Quaring from the photograph requirement and requiring the officials to issue her a valid driver's license.¹³⁸

In *Dennis v. Charnes*,¹³⁹ the United States District Court for the District of Colorado applied the strict scrutiny test and considered whether the photograph requirement of the state statute violated the free exercise of religion as asserted by William Dennis, a member of the Assembly of YHWHHOSHUA.¹⁴⁰ The state statute, Colorado Revised Statutes § 42-2-112(1),¹⁴¹ stated that drivers' licenses "shall bear thereon a photograph of the licensee."¹⁴²

Like the plaintiffs in the earlier cases, Dennis believed that the Second Commandment prohibited him from posing for any photographs. Because Dennis refused to be photographed, Alan Charnes, the director of revenue for the State of Colorado, would not issue him a driver's license. As a result, Dennis brought suit against Charnes and the State of Colorado, seeking a court order requiring the issuance of a valid driver's license to him. In response to the suit, the defendants did not contest the fact that the photograph requirement burdened Dennis's free exercise of religion. Rather, the defendants alleged that the state's interest in the identification of drivers during traffic stops should prevail.¹⁴³

When it first heard the case, the district court relied on the Colorado Supreme Court's opinion in *Johnson* because there were no relevant federal cases at that time.¹⁴⁴ As in *Johnson*, the district court dismissed this case because it believed that the identification purpose drivers' licenses served was a compelling state interest that could not be achieved by less burdensome alternatives, such as the use of fingerprints.¹⁴⁵

However, the Eighth Circuit issued its opinion in *Quaring* while Dennis's appeal of his case's dismissal was pending.¹⁴⁶ Due to the decision in favor of the plaintiff in *Quaring*, the United States Court of

137. *Id.* at 1126–27.

138. *Id.* at 1128.

139. *Dennis II*, 646 F. Supp. 158 (D. Colo. 1986).

140. *Id.* at 159, 163–64.

141. COLO. REV. STAT. § 42-2-112(1) (1973) (current version at COLO. REV. STAT. ANN. § 42-2-114(1)(a)(III)(A) (West 2006)).

142. *Id.*

143. *Dennis II*, 646 F. Supp. at 159–61.

144. *Id.* at 161 n.2 (citing *Johnson*, 593 P.2d 1363).

145. *Dennis v. Charnes (Dennis I)*, 571 F. Supp. 462, 464 (D. Colo. 1983), *rev'd*, *Dennis II*, 805 F.2d 339 (10th Cir. 1984).

146. *Dennis I*, 646 F. Supp. at 161 n.2 (citing *Quaring*, 728 F.2d 1121).

Appeals for the Tenth Circuit held that Dennis's complaint may have stated a cause of action against the defendants.¹⁴⁷ Because of the lack of information about the various exceptions to the state statute, the Tenth Circuit reversed the district court's dismissal of the case and remanded the case to be reconsidered by the district court.¹⁴⁸

When it again heard the case, the district court considered the exceptions to the state statute.¹⁴⁹ In certain circumstances, the state issued special drivers' licenses for short periods of time that did not require photographs to be placed on the drivers' licenses. For example, those circumstances included when an individual was suspected of drunk driving and either refused to take or failed the alcohol intoxication test, when one accumulated too many points on the regular driver's license and was issued a probationary driver's license, and when one was beginning to learn how to drive. When one of these circumstances applied, the licensing agency took a photograph of the driver and placed the photograph in the agency's files. However, because the licensees' photographs were not on the special drivers' licenses, they did not serve the instantaneous identification purpose as did regular drivers' licenses.¹⁵⁰

In reconsidering its initial decision, the district court paid heed to what the Tenth Circuit suggested and considered the impact of *Quaring* on this case.¹⁵¹ Notably, the district court stated, "The district court decision in *Quaring v. Peterson* appears to be indistinguishable."¹⁵² As a result, the district court exempted Dennis from the photograph requirement and ordered that the defendants issue him a valid driver's license if he was otherwise qualified.¹⁵³ While explaining its reasoning for this conclusion, the district court stated that the filed photographs for special drivers' licenses did not serve a useful identification purpose for drivers during traffic stops because law enforcement would not likely access the filed photographs at the relevant time.¹⁵⁴ Additionally, the court noted the irony in the fact that the drivers who were issued special drivers' licenses (suspected drunk drivers, drivers on probation, and inexperienced drivers) were the types of drivers for whom the identification purpose would have been the most useful.¹⁵⁵ As such, the district

147. *Dennis I*, 805 F.2d at 340 (citing *Quaring*, 728 F.2d 1121).

148. *Id.*

149. *See Dennis II*, 646 F. Supp. at 161–62.

150. *Id.*

151. *See id.* at 161 n.2, 162–64 (citing *Quaring*, 728 F.2d 1121).

152. *Id.* at 162 (citation omitted) (citing *Quaring*, 728 F.2d 1121).

153. *Id.* at 164.

154. *Id.* at 163.

155. *Id.*

court found that the state's interest in instantaneous identification was not so compelling that exceptions could not be granted to those seeking them on religious grounds.¹⁵⁶

B. Post-Smith Cases

1. Focusing on the Recent Terrorism Concerns. In *Valov v. Department of Motor Vehicles*,¹⁵⁷ the Court of Appeals for the Second District of California considered whether the photograph requirement of two state statutes violated the free exercise of religion, as asserted by Jack Valov, a member of the Molokan religious faith.¹⁵⁸ In this case, the following statutes were in question: California Vehicle Code § 12811(a)(1)(A),¹⁵⁹ which states that drivers' licenses shall have an "engraved picture or photograph of the licensee for the purpose of identification,"¹⁶⁰ and California Vehicle Code § 12800.5(a)(1),¹⁶¹ which states that "[a] license shall bear a fullface engraved picture or photograph of the licensee."¹⁶² Unlike some of the challenged statutes in earlier cases, California's Vehicle Code did not provide for any exceptions to the photograph requirement.¹⁶³

Similar to the plaintiffs in earlier cases, Valov followed a literal interpretation of the Bible and believed that the Second Commandment prohibited him from posing for any photographs. Due to his religious beliefs, the Department of Motor Vehicles (DMV) previously granted Valov an exception from the photograph requirement. However, the DMV refused to continue the exception when Valov's driver's license was up for renewal in 2003.¹⁶⁴ The DMV alleged that the revocation of the exception was justified "in the interest of national security and to prevent identity theft."¹⁶⁵ Because of the DMV's revocation of his previously granted exception, Valov brought suit against the DMV for violating the United States Constitution and the California Constitution. For his requested remedy, Valov sought a court order requiring the renewal of his driver's license.¹⁶⁶

156. *Id.*

157. 34 Cal. Rptr. 3d 174 (Cal. Ct. App. 2005).

158. *Id.* at 176.

159. CAL. VEH. CODE § 12811(a)(1)(A) (West 2000 & Supp. 2010).

160. *Id.*

161. CAL. VEH. CODE § 12800.5(a)(1) (West 2000).

162. *Id.*

163. *Valov*, 34 Cal. Rptr. 3d at 181.

164. *Id.* at 176.

165. *Id.* at 177 (internal quotation marks omitted).

166. *Id.* at 176.

In response to Valov's suit, Joe Barnett, special advisor/consultant to the director of the DMV, made a declaration regarding the numerous state interests the photograph requirement served. Namely, the photographs were used for the following purposes: (1) to encourage the safety of the vehicle in question, other vehicles on the highway, and law enforcement officers; (2) to deter fraudulent activities; (3) to prevent identity theft; and (4) to aid in combating terrorism. For example, law enforcement officers used the photographs to quickly and precisely identify drivers while making traffic stops. Also, DMV employees used the photographs when issuing duplicate drivers' licenses and identification cards to prevent the issuance of these documents to the wrong people. Additionally, businesses used the photographs when transacting with customers. Moreover, federal authorities used the photographs in their efforts to aid airport security. Therefore, Barnett claimed that the photograph requirement served a number of identification purposes that promoted public safety.¹⁶⁷

While analyzing what standard to follow for the alleged violation of the United States Constitution, the court concluded that the photograph requirement was neutral and generally applied to anyone who sought a driver's license.¹⁶⁸ The court reached this decision because the statutes were facially neutral and were not designed to target religious practices.¹⁶⁹ As such, the court followed the rational basis test and considered whether the state had a legitimate interest and whether the challenged statutes were a reasonable way to achieve the state's interest.¹⁷⁰

In making this determination, the court accepted the state's interests put forth in Barnett's declaration and assuredly stated that the challenged statutes provided a reasonable way of achieving these identification purposes.¹⁷¹ Because the statutes satisfied the rational basis test, the court denied Valov's claim concerning the alleged violation of the United States Constitution even though the photograph requirement substantially burdened his religious beliefs.¹⁷²

Importantly, while analyzing the alleged violation of the California Constitution, the court considered whether the challenged statutes survived the strict scrutiny test (and thus the rational basis test as

167. *Id.* at 177–78.

168. *Id.* at 179–80.

169. *Id.* at 180.

170. *Id.*

171. *Id.* at 179–80.

172. *Id.* at 183.

well).¹⁷³ The court considered both of these levels of constitutional scrutiny because the California Supreme Court had previously decided a case that “left open the question of whether California’s free exercise clause required strict scrutiny or some other level of review.”¹⁷⁴

In its analysis, the court distinguished the case at hand with similar cases decided in other jurisdictions prior to September 11, 2001.¹⁷⁵ For example, the court specifically rejected the Indiana Supreme Court’s assertion in *Pentecostal House of Prayer, Inc.* that statistics concerning a licensee’s physical appearance, which are usually included on a driver’s license, would achieve the same end as the photograph requirement.¹⁷⁶ Rather, the court agreed with the DMV that photographs provide the quickest and most precise way for law enforcement to identify people while out in the field.¹⁷⁷ Also, the court refused to follow the Eighth Circuit’s decision in *Quaring*, which held that the state did not have a compelling interest in identification.¹⁷⁸ The court distinguished this case from *Quaring*, in part, because in *Quaring* the Eighth Circuit “had no occasion to assess whether contemporary counterterrorism concerns justified the refusal to accommodate religious objections to identifying photographs.”¹⁷⁹ Moreover, the court distinguished this case from *Quaring* and *Dennis* because the challenged statutes in this case did not allow for any exceptions, unlike the statutes in the earlier cases.¹⁸⁰ Therefore, the court denied Valov’s claim concerning the alleged violation of the California Constitution, regardless of whether the alleged infringement was to be evaluated under the strict scrutiny test or the more lenient rational basis test.¹⁸¹

2. Analyzing the Photograph Requirement as Applied to Veiled Muslim Women. In *Freeman v. Department of Highway Safety and Motor Vehicles*,¹⁸² the District Court of Appeal of Florida for the Fifth District considered how the photograph requirement of the state statute

173. *See id.* at 183–88.

174. *Id.* at 183 (citing *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004)).

175. *See id.* at 186–87 (discussing *Quaring*, 728 F.2d 1121; *Pentecostal House of Prayer, Inc.*, 380 N.E.2d 1225).

176. *Id.* at 187 (citing *Pentecostal House of Prayer, Inc.*, 380 N.E.2d at 1229).

177. *Id.*

178. *Id.* (citing *Quaring*, 728 F.2d at 1126).

179. *Id.*

180. *Id.* (citing *Quaring*, 728 F.2d at 1127; *Dennis II*, 646 F. Supp. at 162).

181. *Id.* at 187–88.

182. 924 So. 2d 48 (Fla. Dist. Ct. App. 2006), *aff’g* *Freeman v. State*, No. 2002-CA-2828, 2003 WL 21338619 (Fla. Cir. Ct. June 6, 2003).

applied to Sultaana Lakiana Myke Freeman, a veiled Muslim woman.¹⁸³ The relevant state statutes were the following: Florida Statutes § 322.14(1)(a),¹⁸⁴ which states, “a driver’s license . . . shall bear thereon a color photograph or digital image of the licensee,”¹⁸⁵ and Florida Statutes § 322.142(1),¹⁸⁶ which states, “a color photographic or digital imaged driver’s license [shall] bear[] a fullface photograph or digital image of the licensee.”¹⁸⁷ However, the photograph requirement was not absolute because Florida allowed exceptions for some temporary driving permits and replacement drivers’ licenses.¹⁸⁸

After studying the Qur’an and Sunnah, Freeman began regularly wearing a traditional Muslim headdress that included a veil.¹⁸⁹ The veil covered Freeman’s entire face with the exception of a slit in the fabric for her eyes. She wore the veil while around strangers and Muslim men who were not part of her family.¹⁹⁰ As such, Freeman wore the veil when she went to the Department of Highway Safety and Motor Vehicles to be photographed for her driver’s license. Initially, the department allowed Freeman to be photographed while wearing the veil. However, the department notified Freeman ten months later that her license would be revoked if she did not take another photograph while not wearing the veil.¹⁹¹ Freeman “firmly believe[d] that Islam mandate[d] that she wear the veil in situations such as . . . the taking of a photograph.”¹⁹² Because Freeman would only be photographed while wearing the veil, the department revoked her driver’s license.¹⁹³ Freeman brought suit against the department, claiming that the department violated the Florida Constitution as well as Florida’s Religious Freedom Restoration Act of 1998 (FRFRA).¹⁹⁴ Namely, Freeman claimed that the state singled her out due to her Islamic

183. *Freeman*, 924 So. 2d 48 at 50–51.

184. FLA. STAT. ANN. § 322.14(1)(a) (West 2001) (current version at FLA. STAT. ANN. § 322.14(1)(a) (West 2005 & Supp. 2010)).

185. *Id.*

186. FLA. STAT. ANN. § 322.142(1) (West 2001) (current version at FLA. STAT. ANN. § 322.142(1) (West 2005 & Supp. 2010)).

187. *Id.*

188. *Freeman*, 2003 WL 21338619, at *6.

189. *Freeman*, 924 So. 2d at 51.

190. *Freeman*, 2003 WL 21338619, at *1.

191. *Freeman*, 924 So. 2d at 51–52.

192. *Id.* at 52.

193. *Freeman*, 2003 WL 21338619, at *1.

194. FLA. STAT. ANN. §§ 761.01–.05 (West 2005); *Freeman*, 924 So. 2d at 50–51.

faith.¹⁹⁵ As relief, Freeman requested that the court order the department to reinstate her driver's license.¹⁹⁶

The Florida Circuit Court for the Ninth Judicial Circuit applied the strict scrutiny test to the alleged violation of the Florida Constitution.¹⁹⁷ While considering the state's interest, the trial court explained that it "agree[d] with the [s]tate that today it is a different world than it was 20–25 years ago. It would be foolish not to recognize that there are new threats to public safety, including both foreign and domestic terrorism, and increased potential for 'widespread abuse . . .'"¹⁹⁸ Based on this reasoning, the trial court held that the state's interest in instantaneous identification had to prevail over Freeman's right to the free exercise of religion. In making its decision, the trial court noted that it was not influenced by the fact that Freeman was Muslim. In fact, the trial court claimed that it would have reached the same decision for anyone, regardless of religion, who wished to cover his or her face with the exception of his or her eyes.¹⁹⁹

On appeal, the District Court of Appeal of Florida for the Fifth District applied the strict scrutiny test (with a modified definition of *substantial burden*) to the alleged violation of the FRFRA.²⁰⁰ The FRFRA utilizes the strict scrutiny test even when the text of the statute is neutral and generally applicable, so long as the statute substantially burdens the religious adherent's free exercise of his or her religion.²⁰¹ Under the FRFRA, the definition of *substantial burden* is restricted.²⁰² In fact, *substantial burden* is limited to those situations in which a law "either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires."²⁰³

At trial, both the department and Freeman presented expert witnesses who testified about the practice of Muslim women veiling their faces. The department's expert witness, Dr. El Fadl, testified that the primary purpose behind the veiling practice was to avoid arousing sexual desires in men. Also, Fadl testified that the Islamic faith allowed certain

195. *Freeman*, 2003 WL 21338619, at *6. Notably, the department contacted Freeman to retake her photograph three months after September 11, 2001. *Freeman*, 924 So. 2d at 51–52.

196. *Freeman*, 2003 WL 21338619, at *1.

197. *See id.* at *4–7.

198. *Id.* at *7 (discussing *Pentecostal House of Prayer, Inc.*, 380 N.E.2d at 1229).

199. *Id.*

200. *See Freeman*, 924 So. 2d at 52–57.

201. *Id.* at 55 (citing *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1032 (Fla. 2004)).

202. *Id.* at 55–56 (citing *Warner*, 887 So. 2d at 1033).

203. *Id.* (quoting *Warner*, 887 So. 2d at 1033).

exceptions to the veiling practice that arose out of necessity.²⁰⁴ For example, those exceptions included “medical necessity, identification for burial purposes, identification for purposes of receiving bequests or inheritance, and identification for the purpose of writing wills to be accepted by a judge.”²⁰⁵ Additionally, women were required to be photographed without veils in Saudi Arabia, a country heavily populated by Muslims, for the purposes of creating passports and taking examinations. Because of the presence of these exceptions, Fadl believed that a Muslim woman could momentarily remove her veil and thus comply with the photograph requirement without violating her religious beliefs by having the photograph taken by a female employee at a time when no men were around.²⁰⁶ In fact, the department had previously followed this practice for several other Muslim women who were regularly veiled.²⁰⁷ Based on Fadl’s testimony, the court held that no substantial burden on Freeman’s religion existed because the Islamic faith did not forbid Freeman from having her photograph taken without the veil.²⁰⁸ As a result, the court denied Freeman the requested relief.²⁰⁹

III. ANALYSIS

Context is defined as “[t]he circumstances in which a particular event occurs.”²¹⁰ In regards to context, the time period as well as the geographical location in which something occurs appear to be especially important in influencing the views of a group of people. As demonstrated by the reasoning of the courts in the cases discussed in Section II of this Comment, judges appear to be no different in that their opinions are shaped by the context in which they are formed. Namely, the context in which a case is decided appears to be of extreme importance in explaining the government’s interest and whether the court considers such interest to be sufficient to allow an intrusion into the plaintiff’s free exercise of religion.

A. *A Look at the Expanding List of Government Interests*

Notably, as the years have progressed, the proponents of challenged statutes have added to the list of government interests allegedly supporting the validity of the photograph requirement. In *Bureau of*

204. *Id.* at 52.

205. *Id.*

206. *Id.*

207. *Freeman*, 2003 WL 21338619, at *3.

208. *Freeman*, 924 So. 2d at 56–57.

209. *Id.* at 57.

210. WEBSTER’S II NEW COLLEGE DICTIONARY 243 (2001).

Motor Vehicles v. Pentecostal House of Prayer, Inc.,²¹¹ decided in 1978, the defendant argued that the state's interest was limited to identifying licensed drivers during traffic stops. Namely, the defendant asserted that the photograph requirement helped to ensure that state roads were safe by enabling the quick and accurate identification of licensed individuals.²¹² In *Johnson v. Motor Vehicle Division, Department of Revenue*,²¹³ decided in 1979, the defendant extended the state's interest to identification in numerous situations other than the identification of drivers during traffic stops. For example, the defendant noted that the photographs were also used when police photographic lineups were conducted and when a victim's identity at an accident had to be ascertained.²¹⁴ In *Quaring v. Peterson*,²¹⁵ decided in 1984, the defendants contended that the state's interests served by the photograph requirement included protecting the public safety by ensuring that only licensed drivers operate vehicles, facilitating the identification of people in financial transactions, and avoiding the administrative burden of considering applications from those seeking exceptions from the photograph requirement due to their religious beliefs.²¹⁶ In *Freeman v. State*,²¹⁷ decided in 2003, the defendant asserted that the state had an interest in preventing both foreign and domestic terrorism.²¹⁸ Finally, in *Valov v. Department of Motor Vehicles*,²¹⁹ decided in 2005, the defendant asserted that the state's interests served by the photograph requirement included encouraging the safety of the vehicle in question, other vehicles on the highway, and law enforcement officers; deterring fraudulent activities; preventing identity theft; and aiding in the fight against terrorism.²²⁰ As shown by these cases, the government's alleged interest in the photograph requirement has expanded over the past thirty years.

211. 380 N.E.2d 1225 (Ind. 1978).

212. *Id.* at 1229.

213. 593 P.2d 1363 (Colo. 1979) (en banc).

214. *Id.* at 1365.

215. 728 F.2d 1121 (8th Cir. 1984), *aff'd per curiam sub nom.* Jensen v. Quaring, 472 U.S. 478 (1985).

216. *Id.* at 1126–27.

217. No. 2002-CA-2828, 2003 WL 21338619 (Fla. Cir. Ct. June 6, 2003), *aff'd sub nom.* Freeman v. Dep't of Highway Safety & Motor Vehicles, 924 So. 2d 48 (Fla. Dist. Ct. App. 2006).

218. *Id.* at *7.

219. 34 Cal. Rptr. 3d 174 (Cal. Ct. App. 2005).

220. *Id.* at 178.

B. Tracing the Reasoning of the American Courts

Courts from various jurisdictions throughout the United States have reasoned differently over the years when considering whether the growing list of government interests allegedly supporting the validity of the photograph requirement is sufficient to withstand constitutional scrutiny.

1. Initial Focus on the Number of Government Interests. Initially, courts were likely influenced by the number of government interests allegedly supporting the validity of the photograph requirement. In 1978 the Indiana Supreme Court in *Pentecostal House of Prayer, Inc.* applied the strict scrutiny test and held that the photograph requirement was unconstitutional.²²¹ In reaching this conclusion, the court reasoned that the only plausible state interest allegedly justifying the photograph requirement—the state’s interest in identifying licensed drivers—was not a compelling interest and that the state interest could be achieved by other means that did not intrude into the religious groups’ free exercise of religion.²²² For example, the court believed that one alternative could be the use of the statistics concerning the licensee’s physical appearance, which are included on most drivers’ licenses.²²³ In contrast, in 1979 the Colorado Supreme Court in *Johnson* applied the same test and held that the photograph requirement was constitutional.²²⁴ The court declared that the state’s interest in identification of people in numerous situations—including, among others, traffic stops—was compelling.²²⁵ Additionally, the court believed that providing any exception to the photograph requirement would prevent the state from achieving the important identification purpose served by drivers’ licenses.²²⁶ As shown by the courts’ reasoning in these two early cases, the growing list of government interests allegedly supporting the validity of the photograph requirement may have influenced the courts’ conclusions regarding the constitutionality of the photograph requirement.

2. Consideration of Whether Others are Granted Exceptions. Following these initial cases, some courts were influenced by

221. 380 N.E.2d at 1229.

222. *Id.*

223. *Id.*

224. 593 P.2d at 1366.

225. *Id.* at 1365–66.

226. *Id.* at 1365.

whether other groups of people were granted exceptions from the photograph requirement when determining whether the state must grant exceptions from the requirement to plaintiffs seeking them on religious grounds. For example, in the 1984 case of *Quaring*, the United States Court of Appeals for the Eighth Circuit applied the strict scrutiny test and held that the individual plaintiff should be granted an exception from the photograph requirement based in part on the existence of various other exceptions.²²⁷ Those exceptions included “learner’s permits, school permits issued to farmers’ children, farm machinery permits, special permits for those with restricted or minimal driving ability, [and] temporary licenses for individuals outside the state whose old licenses [had] expired.”²²⁸ Due to the exceptions to the photograph requirement, the court believed that the granting of an exception based on one’s religious aversion to having his or her photograph taken would not further frustrate the state’s interest in identifying drivers, preventing fraud, and avoiding the administrative burden of considering applications from those seeking exceptions due to religious reasons.²²⁹ Additionally, in the 1986 case of *Dennis v. Charnes*,²³⁰ the United States District Court for the District of Colorado applied the strict scrutiny test and held that the individual plaintiff should be granted an exception from the photograph requirement based in part on the existence of several situations in which licensees’ photographs were not included on their special drivers’ licenses.²³¹ Such situations arose when an individual was suspected of drunk driving and either refused to take or failed the alcohol intoxication test, when one accumulated too many points on the regular driver’s license and was issued a probationary driver’s license, and when one was beginning to learn how to drive.²³² Like the court in *Quaring*, the court in *Dennis* relied on the other exceptions in determining that the granting of an exception to the plaintiff would not further frustrate the state’s interests.²³³ Therefore, as demonstrated by both of these courts, the courts’ decisions were influenced by the fact that other groups of people were granted exceptions from the photograph requirement.

227. 728 F.2d at 1128.

228. *Id.* at 1126.

229. *Id.* at 1126–27.

230. 646 F. Supp. 158 (D. Colo. 1986).

231. *Id.* at 164.

232. *Id.* at 161–62.

233. *Id.* at 163 (citing *Quaring*, 728 F.2d at 1126).

3. Emphasis on Recent Terrorism Concerns. Following the United States Supreme Court's 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith*,²³⁴ and despite state responses to *City of Boerne v. Flores*²³⁵ providing for strict scrutiny, no American court (as of the date of this Comment) has granted an exception from the photograph requirement to an individual or group seeking such an exception on religious grounds, even if numerous exceptions are granted to others. Rather, the courts in the most recent cases have emphasized the terrorism concerns that Americans currently face.²³⁶ In 2005 in *Valov*, the Court of Appeals for the Second District of California applied the rational basis test and held that the photograph requirement did not violate the United States Constitution.²³⁷ The court reasoned that the state had legitimate interests in highway safety, fraud deterrence, identity theft prevention, and the fight against terrorism and that the challenged statutes were a reasonable way to achieve the state's interests.²³⁸ Additionally, the court applied the strict scrutiny test and held that the photograph requirement did not violate the California Constitution because the state had a compelling interest in identification due to the newly developed terrorism concerns, and the goals of this interest could not be achieved by any other means that were less intrusive.²³⁹ In 2003, much like the court in *Valov*, the Florida Circuit Court for the Ninth Judicial Circuit in *Freeman* applied the strict scrutiny test and held that the photograph requirement did not violate the United States Constitution because the state had a compelling interest in identification due to both foreign and domestic terrorism concerns.²⁴⁰

C. Contrasting the Most Recent American Cases with a Recent Canadian Case

The courts' reasoning in *Valov* and *Freeman*, the most recent American cases, can be contrasted with the Supreme Court of Canada's reasoning in the 2009 case of *Alberta v. Hutterian Brethren of Wilson Colony*.²⁴¹

234. 494 U.S. 872 (1990).

235. 521 U.S. 507 (1997).

236. See *Valov*, 34 Cal. Rptr. 3d at 187; *Freeman*, 2003 WL 21338619, at *7.

237. 34 Cal. Rptr. 3d at 183.

238. See *id.*

239. See *id.* at 187–88.

240. 2003 WL 21338619, at *7.

241. [2009] 2 S.C.R. 567 (Can.).

In *Hutterian Brethren of Wilson Colony*, the Hutterian Brethren objected on religious grounds to the Province of Alberta's requirement that all licensees have their photographs taken. The Province placed these photographs in its facial recognition data bank to reduce instances of identity theft through the issuance of multiple licenses to a single person.²⁴² The Supreme Court of Canada considered whether the photograph requirement violated section 2(a) of the Canadian Charter of Rights and Freedoms,²⁴³ which guarantees freedom of religion.²⁴⁴ The court concluded that the Province's goal of preventing identity theft was pressing and substantial,²⁴⁵ that the photograph requirement was rationally related to this goal,²⁴⁶ that the photograph requirement minimally impaired the plaintiffs' freedom of religion,²⁴⁷ and that the intrusion into the plaintiffs' religious freedom was proportionate with the benefits of the photograph requirement.²⁴⁸ As such, the court held that the photograph requirement was constitutional.²⁴⁹

Comparing the Supreme Court of Canada's reasoning in this case with the courts' reasoning in the two most recent American cases, it is noticeable that the Canadian court did not mention any terrorism concerns, whether foreign or domestic.²⁵⁰ Rather, the Canadian court focused only on the government's interest in identity theft prevention.²⁵¹ In contrast, the courts in the two most recent American cases discussed in detail the state's interest in the fight against terrorism.²⁵² In fact, the courts in these cases distinguish previous American cases because the previous cases did not have occasion to consider the newly developed terrorism concerns.²⁵³

Perhaps the courts in the two most recent American cases were influenced by the terrorist attacks on the United States on September 11, 2001, which was a day that undoubtedly had a significant impact on all Americans and continues to have such an impact over eight years later. On that day, the false sense of an impenetrable national security

242. *Id.* ¶ 1.

243. Part I of the Constitution Act, 1982, § 2(a), being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

244. *See Hutterian Brethren of Wilson Colony*, 2 S.C.R. 567, ¶¶ 28–66.

245. *Id.* ¶ 47.

246. *Id.* ¶ 52.

247. *Id.* ¶ 62.

248. *Id.* ¶¶ 102–03.

249. *Id.* ¶ 104.

250. *See Hutterian Brethren of Wilson Colony*, 2 S.C.R. 567.

251. *See id.*

252. *See Valov*, 34 Cal. Rptr. 3d at 183, 187; *Freeman*, 2003 WL 21338619, at *7.

253. *Valov*, 34 Cal. Rptr. 3d at 187; *Freeman*, 2003 WL 21338619, at *7.

system was devastatingly shattered. As a result of the attacks, Americans have seen an increased emphasis on the tools used to aid airport security and prevent future terrorist attacks. As demonstrated by the two most recent American cases, this context has already influenced and will continue to influence American courts. Even though September 11, 2001, was a day that had an impact on the entire world, Americans were particularly affected, as they were the target of the attack. As a result, the opinions of American judges are understandably more heavily influenced by these events than those of Canadian judges. Therefore, it is not surprising that American judges appear to be more willing to give adherence to the government interest of preventing future terrorist attacks, which the photograph requirement allegedly serves.

IV. CONCLUSION

In light of these new found public safety concerns, it appears as though few, if any, statutes challenged in the United States after September 11, 2001, for their photograph requirement will be declared unconstitutional as impermissible intrusions into the plaintiffs' free exercise of religion. As a result, the government can continue to command that those desiring drivers' licenses say "Cheese!" and refuse to grant exceptions to those who will not do so due to their religious beliefs.²⁵⁴

As shown by the two most recent American cases, the constitutionality of this requirement can withstand not only the rational basis test but also the strict scrutiny test.²⁵⁵ The state's interest in protecting its inhabitants from terrorism is surely important. In fact, in *Valov v. Department of Motor Vehicles*,²⁵⁶ the Court of Appeals for the Second District of California held that such an interest was compelling.²⁵⁷ Additionally, the need for instantaneous identification cannot be satisfactorily achieved by any current means other than a photograph. For example, in *Valov* the court rejected the Indiana Supreme Court's

254. Additionally, it will be interesting to see how various courts throughout the United States address plaintiffs who refuse to submit to the recent use of full-body scans prior to boarding an airplane, due to religious objections to the use of "graven images." It is this Author's opinion that courts will follow much the same analysis as that used for cases addressing the photograph requirement. Namely, courts will emphasize the government's interest in the prevention of future terrorist attacks.

255. See *Valov v. Dep't of Motor Vehicles*, 34 Cal. Rptr. 3d 174, 183, 187-88 (Cal. Ct. App. 2005); *Freeman v. State*, 2002-CA-2828, 2003 WL 21338619, at *7 (Fla. Cir. Ct. June 6, 2003), *aff'd sub nom. Freeman v. Dep't of Highway Safety & Motor Vehicles*, 924 So. 2d 48 (Fla. Dist. Ct. App. 2006).

256. 34 Cal. Rptr. 3d 174 (Cal. Ct. App. 2005).

257. *Id.* at 187-88.

assertion in *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*²⁵⁸ that statistics concerning a licensee's physical appearance, which are usually included on a driver's license, would suffice.²⁵⁹

As a result, it seems as though few exceptions to the photograph requirement, if any, will be granted to plaintiffs seeking them in the future on religious grounds. There appears to be a prevailing trend of the government's interest in the benefits of the photograph requirement outweighing the intrusion into the plaintiff's free exercise of religion. This trend will likely be upset only if the context in which these cases are decided also changes. It seems unimaginable that there will be many events that will have as significant of an impact on the American people—and the American courts—as that of September 11, 2001.

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258. 380 N.E.2d 1225 (Ind. 1978).

259. *Valov*, 34 Cal. Rptr. 3d at 187 (citing *Pentecostal House of Prayer, Inc.*, 380 N.E.2d at 1229).