IN THE FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

SULTAANA LAKIANA MYKE FREEMAN,

Plaintiff/Appellant

v.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Defendant/Appellee.

5TH DCA CASE NO.: **5D03-2296**
L.T. CASE NO. CIO-02-2828
L.T. CASE NO.: CIO-03-CA-727

On appeal from the Circuit Court of the
Ninth Judicial Circuit, in and for
Orange County, Florida
Case No. CIO-02-2828
Case No. CIO-03-CA-727
The Honorable Janet C. Thorpe, presiding

APPELLANT'S INITIAL BRIEF

HOWARD S. MARKS, ESQ.
Florida Bar No. 0750085
KEVIN SCOTT MILLER, ESQ.
Florida Bar No. 0484245
Cooperating Attorney for the
ACLU Foundation of Florida, Inc.
Central Florida Chapter
369 N. New York Ave. (32789)
P.O. Box 1690
Winter Park, FL 32790
Telephone: (407) 647-4455
Facsimile: (407) 740-7063

RANDALL C. MARSHALL, ESQ.
LEGAL DIRECTOR
Florida Bar No.: 0181765
ACLU Foundation of Florida, Inc.
4500 Biscayne Blvd., Suite 340
Miami, FL 33137-3227
Telephone: (305) 576-2337
Facsimile: (305) 576-1106

TABLE OF CONTENTS

Page No.

TABLE OF CITATIONS II

PRELIMINARY STATEMENT IX

I. STATEMENT OF THE CASE 1

II. STIPULATED FACTS 2

III. JUDICIAL NOTICE 3

IV. TRIAL TESTIMONY 3

V. SUMMARY OF ARGUMENT 20

VI. ARGUMENT 20

A. THE REVOCATION OF APPELLANT'S DRIVER'S LICENSE VIOLATES FLORIDA'S RELIGIOUS FREEDOM RESTORATION ACT AND VIOLATES APPELLANT'S RIGHT TO THE 3FREE EXERCISE OF RELIGION FOUND IN THE CONSTITUTION OF THE STATE OF FLORIDA 20

B. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S INVOLUNTARY DISMISSAL REGARDING EQUAL PROTECTION AT THE END OF APPELLANT'S CASE IN CHIEF 38

C. THE TRIAL COURT ABUSED ITS DISCRETION AND MISAPPLIED THE LAW IN GRANTING APPELLEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT. 40

D. THE TRIAL COURT ERRED AND MISAPPLIED THE LAW IN REFUSING TO ISSUE AN ORDER REGARDING ONE OF THE PILLARS OF APPELLANT'S ARGUMENTS, STATUTORY CONSTRUCTION 46

VII. CONCLUSION 49

VIII. CERTIFICATE OF COMPLIANCE 50

IX. CERTIFICATE OF SERVICE 50

TABLE OF CITATIONS

Page No.

Cases

Alvarez v. State,
800 So.2d 237 (Fla. 3rd DCA 2001),
rev. den. 823 So.2d 122 (Fla. 2003) 49

Atlantic Coast Line Railroad Company v. Boyd,
102 So.2d 709 (Fla. 1958) 49

Barnes v. Glen Theatre, Inc.,
501 U.S. 560 (1991) 43

Bass v. City of Albany,
968 F.2d 1067 (11th Cir. 1992) 28

Bell v. Burson,
402 US 535 (1971) 23

Beyel Brothers Crane & Rigging Co. of South Florida v. ACE Trans Inc.,
664 So.2d 62 (Fla. 4th DCA 1995).....48

Board of County Commissioners of Palm Beach County v. D.B.,
784 So.2d 585 (Fla. 4th DCA 2001).....44

Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.,
380 N.E.2d 1225 (Ind. 1978)..... 25, 29, 30, 36

Callahan v. Woods,
736 F.2d 1269 (9th Cir. 1981).....31

Cedars Healthcare Group, Ltd. v. Freeman,
829 So.2d 390 (Fla. 3d DCA 2002).....46

Chaffee v. Miami Transfer Company, Inc.,
288 So.2d 209 (Fla. 1974) 49

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 33, 34

TABLE OF CITATIONS CONT.

City of Boerne v. Flores,
521 U.S. 507 (1997) 22

Cleburne v. Cleburne Living Center,
473 U.S. 432 (1995) 28, 39

Cox v. CSX Intermodal, Inc.,
732 So.2d 1092 (Fla. 1st DCA 1999).....41

Dennis v. Charnes,
646 F.Supp. 158 (D.Col. 1986) 25, 27, 30, 36, 38

Doe v. Univision Television Group, Inc.,
717 So.2d 63 (Fla. 3d DCA 1998).....46

Employment Division D.P.H.R. of Oregon v. Smith,
494 U.S. 872 (1990) 21, 22

Fisel v. Wynns,
667 So.2d 761 (Fla. 1996) 40

Florida Convalescent Centers v. Somberg,
2003 WL 252155 (Fla. 2003) 46

Fraternal Order of Police v. City of Newark,
170 F.3d 359 (3d Cir.),
cert. denied, 120 S. Ct. 56 (1999)..... 22, 33, 34

Hayes v. State of Florida,
750 So.2d 1 (Fla. 1999) 48

Hernandez v. Commissioner,
490 U.S. 680 (1989) 37

Hobbie v. Unemployment Appeals Commission of Florida,
480 U.S. 136, 148 (1987) 33

Holl v. Talcott,
191 So.2d 40 (Fla. 1966) 41

TABLE OF CITATIONS CONT.

Horizons Rehabilitation, Inc. v. Health Care and Retirement Corp.,
810 So.2d 958 (Fla. 5th DCA 2002)
rev.den. 832 So.2d 104 (Fla. 2002) 41

Horning-Keating v. State,
777 So.2d 438 (Fla. 5th DCA 2001).....45

Investment and Income and Realty, Inc. v. Bentley,
480 So.2d 219 (Fla. 5th DCA 1985).....44

Jackson v. State,
833 So.2d 243 (Fla. 4th DCA 2002).....45

Joseph v. State,
642 So.2d 613 (Fla. 4th DCA 1994).....41

Katz v. United States,
389 U.S. 347 (1967) 45

Keeler v. Mayor of Cumberland,
940 F. Supp. 879 (D. Md. 1996).....33

L.B. v. State,
700 So.2d 370 (Fla. 1997) 49

Lawrence v. Pep Boys-Manny, Moe & Jack, Inc.,
2003 WL 1889166.....41

Ledford v. State,
652 So.2d 1254 (Fla. 2nd DCA 1995) 41

Lyng v. Automobile Workers,
485 U.S. 360 (1988) 40

Markowitz v. Helen Homes of Kendall Corp.,
826 So.2d 256 (Fla. 2002) 40

Michigan v. Swartzentruber,
429 N.W.2d 225 (Mich. App. 1988) 37

TABLE OF CITATIONS CONT.

Moonlit Waters Apartments, Inc. v. Cauley,
666 So.2d 898 (Fla. 1996) 48

Palmore v. Sidot,
466 U.S. 429 (1984) 28

Quaring v. Peterson,
728 F.2d 1121 (8th Cir. 1984)
aff.'d sub nom, Jensen v. Quaring,
472 U.S. 478 (1985), 105 S.Ct. 3492 (1985)..... 24, 25, 27, 30, 32, 35, 36

R.A.V. v. City of St. Paul,
505 US 377 (1992) 41, 42

Rader v. Johnston,
924 F. Supp. 1540 (D. Neb. 1996) 33

Reyes v. State of Florida,
28 Fla. L. Weekly D2131 (September 10, 2003 Fla. 4th DCA 2003).....44

RNR Investments Limited Partnership v. Peoples First Community Bank,
812 So.2d 561 (Fla. 1st DCA 2002).....41

Sherbert v. Verner,
374 US 398 (1963) 21, 23, 25, 26, 27, 39

Spence v Washington,
418 U.S. 405 (1974) 43

State ex rel. Burrell-El v. Autrey,
752 S.W.2d 895 (E.D. Mo. Ct. App. 1988).....42

State v. Conforti,
688 So.2d 350 (Fla. 4th DCA 1997).....43

State v. Globe Communications Corporation,
622 So.2d 1066 (Fla. 4th DCA 1993).....41

State v. Hershberger,
462 N.W.2d 393 (Minn. 1990) 37

TABLE OF CITATIONS CONT.

State v. Lampley,
817 So.2d 989 (Fla. 4th DCA 2002).....45

State v. Miller,
538 N.W.2d 573 (Wis. 1995) 37

State v. Russell,
814 So.2d 483 (Fla. 5th DCA 2002).....45

State v. T.B.D.,
656 So.2d 479 (Fla. 1995) 42

Terrinoni v. Westward Ho!,
418 So.2d 1143 (Fla. 1st DCA 1982).....48

Thomas v. Review Board,
450 U.S. 707 (1981) 21, 22, 24, 35

Tinker v. Des Moines Independent Community School Dist.,
393 US 503(1969) 42

Turner Broadcasting System, Inc. v. F.C.C., 5
12 U.S. 622 (1994) 42

U.S. v. DBB, Inc.,
180 F.3d 1277 (11th Cir. Fla. 1999).....48

United States v. Lichtenstein,
610 F.2d 1272 (5th Cir. 1980) 28

Village of Willowbrook v. Olech,
120 S.Ct. 1073 (2000) 38

Weber v. City of Ft. Lauderdale,
675 So.2d 696 (Fla. 4th DCA 1996).....48

Widmar v. Vincent,
454 US 263 (1981) 41

Wisconsin v. Yoder,
406 U.S. 205 (1972) 21

TABLE OF CITATIONS CONT.

Young v. Progressive Southeastern Insurance Company,
753 So.2d 80 (Fla. 2000) 47

Zopf v. Singletary,
686 So.2d 680 (Fla. 1st DCA 1997) 47

Statutes

§ 322.031, Florida Statutes 30

§ 322.05, Florida Statutes 31, 46

§ 322.14(1)(a), Florida Statutes 47, 48

§ 322.14, Florida Statutes 47, 48

§ 322.142, Florida Statutes 47, 48

§ 322.15, Florida Statutes 32

§ 322.251(2), Florida Statutes.....43

§ 322.263, Florida Statutes 28

§ 761.01, Florida Statutes 23

§ 761.02(3), Florida Statutes..... 23, 24, 25

§ 761.03(1), Florida Statutes.....26

§ 761.03(b), Florida Statutes.....31

42 U.S.C. § 2000bb.....22

Other Authorities

§ 15A-1.0012(7), Florida Administrative Code.....31

§ 15A-1.0012, Florida Administrative Code 46

Rule 1.090(e), Florida Rules of Civil Procedure 44

The Random House College Dictionary, revised addition 1975 49

TABLE OF CITATIONS CONT.

Webster's New World Dictionary of American English, Third College Edition, revised 1988.....49

PRELIMINARY STATEMENT

Appellant, SULTAANA LAKIANA MYKE FREEMAN, will be referred to herein as "Appellant," or if necessary, individually as Mrs. Freeman. Appellee, STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, will be referred to herein as the "Appellee" or the "Department." A niquab will be referred to herein as a "niquab" or a "veil."

For purposes of this brief, the following abbreviations have the following meanings:

T = Trial transcript

R = Record on appeal

Jt.Ex. = Joint exhibit in evidence

Pltf.Ex. = Appellant's exhibit in evidence

Def.Ex. = Appellee's exhibit in evidence

Depo. = Deposition

I. STATEMENT OF THE CASE

On January 21, 2002, Appellant filed a Complaint in the Circuit Court for the Ninth Judicial Circuit, in and for Orange County, Florida, Case No. CI-02-2828, against Appellee. (R1-7). The Complaint challenged the revocation and/or cancellation of her Florida driver's license. On or about January 22, 2003, Appellant filed a second action in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida, Case No. 03-CA-727. (R1127-1130). The second Complaint challenged Appellee's refusal issue her an identification card pursuant to § 322.051, Florida Statutes. These two cases were consolidated and otherwise have the identical procedural history. (R1137).

Appellant asserts that Appellee's actions violated Chapter 761, Florida Statues, Florida's Religious Freedom Restoration Act of 1988 (hereinafter referred to as "RFRA"). Appellant also challenges Appellee's actions as violating Article I, Section 2 (Equal Protection), Section 3 (Religious Freedom), Section 4 (Freedom of Speech), Section 9 (Due Process) and Section 23 (Right of Privacy), of the Declaration of Rights Contained in Article I of the Constitution of the State of Florida. (R1-7).

Appellee filed a Motion for Partial Summary Judgment and the trial court granted in part this motion as to Appellant's claims of violation of Article 1, Section 4 (Freedom of Speech), and Section 9 (Due Process), and Section 23 (Right to Privacy). (R1071-73). On May 27, 2003, the consolidated cases proceeded to trial on the claims for violation of RFRA and violation of Florida's constitutional rights of equal protection and free exercise of religion.

At the end of Appellant's case in chief, Appellee moved for involuntary dismissal of Appellant's claims. The trial court denied Appellee's motion for involuntary dismissal as to the RFRA claim and the free exercise claim, but dismissed the equal protection claim. (T291). On June 6, 2003, the trial court entered an Order Following Non-Jury Trial, which denied Appellant's remaining claims. (T1055-70).

On July 3, 2003, Appellant filed her Notice of Appeal as to the consolidated cases and appealed the trial court's Order Following Non-Jury Trial and Order Granting Partial Summary Judgment. (T1074-94).

On August 1, 2003, this Court entered an Order giving Appellant until September 2, 2003, to file a certified copy of a final appealable order that disposes of all claims. On August 18, 2003, the trial court entered a final appealable order, which was filed in this Court on or about August 28, 2003. (R1106-26). Appellant has timely perfected her appellate rights.

II. STIPULATED FACTS

Appellant is a member of the religion of Islam, and prior to moving to Florida, she was able to obtain an Illinois driver's license issued with a photograph of her veiled. (T6). Subsequent to moving to Florida, Appellant was issued a Florida driver's license with a photograph of her veiled. (T6; Pltf.Ex. 1). Appellant's driver's license was issued on February 21, 2001, and was not to expire until November 22, 2007. (Pltf.Ex. 1).

On December 18, 2001, the Appellee sent a letter to Appellant requiring her to present herself for a photograph without her veil or her driver's license would be

cancelled. (T6). In September 2002, Appellant also attempted to secure a Florida State Identification Card. (T6). Appellee refused to issue her an identification card unless she submitted to a photograph without her veil. (T6).

III. JUDICIAL NOTICE

The trial court took judicial notice of certain case law and statutes. (T8; Plaintiff's Request for Judicial Notice; R383-85). The trial court took judicial notice that the states of Arkansas, Iowa, Kansas, Louisiana, Minnesota, Missouri, North Carolina, Oregon, South Carolina, Wisconsin, Idaho, Vermont and Indiana either have specific religious exceptions for photographs on driver's licenses or do not require photographs on driver's licenses.

IV. TRIAL TESTIMONY

a. Abdul Malik Freeman

Appellant married her husband, Mark Freeman, also known as Abdul Malik Freeman, on October 14, 1997, in Champaign County, Illinois. (T48; Pltf.Ex. 5). Appellant's husband grew up in Winter Park, Florida and has resided in that community for over thirty (30) years. (T48). Mr. Freeman works in the local community and is a business owner. (T48). Appellant's family owns a Ford Minivan registered in Appellant's name and which has been licensed in the State of Florida since September 2001. (T49; 128).

Mr. Freeman is a member of the Islamic religion and converted to Islam in 1988. (T48). Appellant observes the requirements of the Islamic religion and has followed the requirements of the Islamic religion since 1997. (T50). Appellant and her husband practice their religion on a daily basis. (T48). Mr. Freeman believes

one of the requirements of the Islamic religion is for women to veil. (T50). Appellant and her husband practice daily prayers as part of their religion and based on their understanding of the Qur'an and the Sunnah, believe veiling is a requirement of their religion. (T51). Appellant and her husband have two (2) children, a two-year old daughter and a six-month old son. (T51)

b. Sultaana Lakiana Myke Freeman

Appellant was born Sandra Michele Keller on August 4, 1967, in Washington, DC. (T109; Pltf.Ex. 3).[1] Appellant was raised in a Christian household and converted to the Islamic religion in January of 1997. (T49, 111, 128). Appellant converted after independently studying the Qur'an and Sunnah and came to the conclusion that the Qur'an was literally the words of Allah. (T111). In approximately November 1997, she began regularly veiling her face as part of her religious belief. (T111).[2]

---

[1] Appellant presently resides in Winter Park, Florida, with her husband and has resided there for approximately three (3) years. (T109). Prior to living in Florida, Appellant resided in Decatur, Illinois. (T109). She attended public schools in Illinois and ultimately graduated from Milliken University in Decatur, Illinois in 1989, with a major in music and minor in business administration. (T110). After petitioning the Sixth Judicial Circuit in Macon County, Illinois, Appellant received an Order for Name Change from Sandra Michele Keller to Sultaana Lakiana Myke. (Pltf.Ex. 4). Since her marriage to Mr. Freeman, Appellant has been known Sultaana Lakiana Myke Freeman. (T109).

[2] At that time she was working as an engineering representative for Illinois Power and had been employed there approximately eight (8) years. (T112). Appellant was able to wear her veil (or niquab) at work and it presented no problems for her employer. (T111). Appellant was issued a driver's license by the State of Illinois in December 1997, with the name Sultaana Lakiana Myke Freeman. (T112; Pltf.Ex. 22). The photograph on the Illinois driver's license is a photograph of Appellant veiled. (T112; Pltf.Ex. 4).

Soon after marrying Mr. Freeman in 1997, Appellant moved to Florida, as this is her husband's home. (T113). After moving to Florida and deciding to become a permanent resident of Florida, she applied for a Florida driver's license. (T114-15). On February 21, 2001, Appellant went to the Winter Park Driver's License Office. (T115). Appellant presented her Illinois driver's license and a copy of her social security card. (T129, 130; Pltf.Ex. 10). Appellant provided all information to the driver's license office that they requested. (T115-16). The individuals at the driver's license office saw Appellant wearing a niquab and, after she provided all requested and necessary information requested, she was issued a driver's license with a photograph of her wearing a niquab. (T116; Pltf.Ex. 1).[3]

On December 18, 2001, Appellee sent a letter to Appellant, signed by Sandra C. Lambert, Director of the Division of Driver's Licenses, stating that, if Appellant failed to report to the driver's license office to obtain a new photograph, without her veil, her previously issued driver's license would be revoked, suspended or cancelled effective January 7, 2002. (T118; Pltf.Ex. 6). When Appellant received the letter she was distressed. (T119). Appellant's testimony was that she could not appear to have a photograph taken without her veil, because

[3] Appellant needs a car to get around and specifically testified that driving a car is the safest way for her to travel being a Muslim woman. (T117). Appellant's needs to drive to assist in the care of her children and uses a car to go to the grocery store, post office, Mosque and to the doctor. (T116-17). The loss of her Florida driver's license puts a great deal and stress upon Appellant and she feels like a prisoner in her own home. (T118).

it was not an option under her religion. (T119).[4] Prior to this driver's license issue, Appellant authored a brochure, "Why I Veil," because of questions people would ask her and she believed it would be easier to hand them written materials on her beliefs. (T124; Pltf.Ex. 8).

Appellant specifically testified that she could not unveil for a photograph on her driver's license because it would be disobeying her Lord. (T119, 120). In addition, she testified that it is Haram to have a photograph taken of the human face. (T130).[5] While Appellant was allowed to drive in Florida, she drove with her niquab, the same dress that she wore when she attended trial. (T130-31).

---

[4] Appellant believes that Islam mandates that she wear a niquab in situations such as this. (T119). Appellant testified that the state was requiring her to choose between violating a religious tenet or sacrifice her driver's license. (T120). She believes veiling is mandated for Muslim women and that it is legislation from Allah that she is to cover her face. (T120). Appellant testified that she studied the Qur'an and the Sunnah in great detail before making her decision. (T120). Appellant testified that there are certain verses and chapters of the Noble Qur'an that she relies upon for her belief on the requirement to veil. (T121). Appellant testified specifically it is her belief that the Qur'an, Chapter 24, Verse 31, and Chapter 33, Verse 29, mandate that a veil be worn by Muslim women. (T121- 23; Pltf.Ex. 7). Appellant testified that she reads the Qur'an and the Sunnah together and that the Sunnah is the traditions and the rules of the Prophet Mohammed and that to understand statements made by Allah in the Qur'an, you must refer to the Sunnah. (T124).

[5] Appellant testified that photographs are Haram, which means they are prohibited. Appellant believes that pictures of the human face or animals are prohibited, and that pictures of things with a soul are prohibited. (T128). Appellant does not allow photographs of faces in her home. (T128). Appellant does not allow her daughter to play with dolls that have faces depicted on them and orders dolls from a Muslim catalog, which has dolls that have no faces and are simple rag dolls. (T129). When she purchases items from the grocery store, such as a box of cereal, she brings it home and covers any faces with magic markers before allowing her daughter to look at them. (T129).

Appellant testified that she would be willing to provide fingerprints if requested or provide other forms of identification. (T131).

In 2002, Appellant also was denied an identification card, because Appellee required her to have her a photograph taken without a veil. (T131). Appellant testified that the doctrine of necessity that may be found in Islamic law only applies to life, death, and medical emergency and not for removing a veil for a driver's license photograph. (T142-43).

c. Saif Ul-Islam

Saif Ul-Islam is a Professor at the University of Central Florida and was qualified as an expert witness at trial.[6] He testified that, in his opinion, it is mandatory for Muslim women to wear the veil and that there are numerous passages in the Qur'an and the Sunnah which refer to the veiling of Muslim women that would require a Muslim woman to veil. (T71-74).

He acknowledged that there are differences between Muslims, including Shiites and Sunnites, but that under the branch of the Muslim religion that Appellant belongs, it is a requirement that women veil. (T75). He testified

[6] Professor Ul-Islam has been a practicing Muslim for twenty-seven (27) years and has studied the Qur'an, the Sunnah and other religious texts and gives religious sermons and is a local religious leader and an Imam in the community. He also leads prayers on the traditional prayer day for Muslims. (T61-63). He teaches Muslims in the local community and teaches the Qur'an, the Sunnah and other religious texts and teaches local Muslims how to follow Muslim practices. (T63).

specifically that in his opinion, requiring Appellant to unveil for a photograph would violate her religious beliefs and practices. (T75).[7]

d. William Sheppard

William Sheppard was the office manager for the Winter Park Driver's License Office in February 2001. (T96). He supervised Mrs. Nola Williams and Mrs. Jacqueline Case, who issued Appellant's driver's license. (T96-97).

At the time that Appellant came to the driver's license office, she was wearing a veil and Mr. Sheppard saw her wearing the veil. (T97). Even after seeing Appellant he instructed Mrs. Case to take her photograph wearing her veil. (T98). Mr. Sheppard testified that Appellant brought an out-of-state driver's license and a social security card to the driver's license office. (T100-01).

He agreed that, pursuant to Florida Examiners Manual, which was entered into evidence as Plaintiff's Exhibit 2, Appellant brought all necessary identification to obtain a Florida driver's license. (T101). Mr. Sheppard admitted that there is no requirement in Florida for identification with a photograph to be displayed to the department in order to obtain a driver's license. (T102; Pltf.Ex. 2).[8]

---

[7] Professor Ul-Isam did not believe the doctrine of necessity that may be found in Islamic law would apply to the unveiling for a photograph. (T79). He testified that it is a Muslim belief to prohibit the taking of pictures. (T91-92). No one would come into his home and find any pictures on the wall of himself, his wife or children, it just would not happen. (T93). The unveiling for a photograph is a practice that the Prophet would not condone. (T93).

[8] Mr. Sheppard admitted that documents that could be brought for identification include a birth certificate, school record, transcript of birth, baptismal certificate, military identification, out-of-state driver's license, Social Security Card, and up to twenty-one (21) potential forms of identification. He admitted that

e. Nola Williams

Ms. Williams testified that she has been employed by the Department for twelve (12) years and that in February 2001, she was an Examiner and was present when Appellant came in to obtain her driver's license. Mrs. Williams testified that Appellant was wearing her niquab, which appears as the same form of dress she was wearing at trial. (T155). Mrs. Williams testified that she issued Appellant a driver's license with a photograph showing Appellant wearing her niquab. (T156).

Mrs. Williams also testified that she issues temporary licenses that do not have photographs on them. (T156). She testified that she issues motorcycle permits, commercial driver's licenses, and Florida driver's licenses with no photographs on those licenses. (T157). Mrs. Williams also testified that she issues driver's licenses to foreign nationals without photographs on them. (T159).

f. Jacqueline K. Case

Ms. Case testified that Appellant presented all necessary forms of identification to obtain a driver's license. (T162-63). Ms. Case testified that she is permitted and does take pictures of individuals wearing beards, wearing hats,

---

out all of the documents that could be brought for identification purposes only two (2) would potentially have a photograph on them. (T103). Mr. Sheppard testified that you have to have a primary identification and a secondary identification. (T103). A primary form of identification can include not only a driver's license without a photograph but a birth certificate without a photograph. (T103-04). Further, the secondary form of identification does not require a photograph.

wearing glasses, and wearing any type of makeup. (T163).[9] She also testified that she is allowed to take photographs of nuns wearing a habit. (T165).

g. Sandra Lambert

Ms. Lambert has been the Director of Division of Driver's Licenses since 1995. (T182). Ms. Lambert admitted at trial there were 4,361 driver's licenses issued in Florida during the past five (5) years that did not have any photograph on them. (T186; Pltf.Ex. 13). Ms. Lambert testified that temporary driving permits that are issued in Florida do not have a photograph on them. (T187).[10] She testified that during the last five (5) years there were over 800,000 driving permits issued in Florida that did not have a photograph on them. (T190). Ms. Lambert admitted that there are more than twenty (20) different reasons why Appellee would provide an individual a permit and these reasons include individuals who have had their licenses suspended as a result of a DUI. (T188).

Ms. Lambert admitted that, of the over 800,000 permits which have been issued and of the 4,361 driver's licenses which have been issued without a photograph, these individuals are legally allowed to drive in Florida. (T190). Ms.

[9] Ms. Case testified that there is no regulation as to how big a beard can be or how much sideburns someone can have. (T164). Ms. Case testified that there is no regulation or rule that prohibits a person from wearing bangs that hang down to the eyes, or prohibiting people from wearing hair that goes down to their collar. (T164). She testified that there is no regulation requiring ears to be shown. (T165).

[10] Ms. Lambert stated that when licenses are issued to individuals who are out of state, they are not temporary but are valid permanent Florida driver's licenses. (T264). She also acknowledged that there is no enforcement mechanism in Florida that insures when these individuals return to Florida they report to have a photograph taken. (T264).

Lambert also agreed that people from other states who drive in Florida and do not have photographs on their licenses are permitted to drive on the roads in Florida.[11] (T190). These would include people from Illinois, North Carolina, South Carolina, Georgia, Vermont and other states. (T190). Ms. Lambert admitted that students who live in Florida that have a valid driver's license from another state without a photograph are permitted to drive freely in Florida. (T190, 191).

Ms. Lambert admitted that Appellant submitted proper identification to obtain a Florida driver's license and even admitted that Plaintiff's Trial Exhibit 4, the Illinois driver's license, and Plaintiff's Trial Exhibit 3, a certified copy of Appellant's birth certificate, would be sufficient to obtain a Florida driver's

[11] Ms. Lambert admitted that as of January 27, 2003, the State of Florida accepted an Arkansas driver's license as a primary form of identification. Arkansas law allows a license to be valid without a photograph if the photograph is objectionable on the grounds of religious belief or if the licensee is unavailable to have a photograph taken. (T255). Ms. Lambert admitted that Florida recognizes a Kansas driver's license as a primary source of identification. (T255). Kansas law permits any person belonging to a religious organization that has a basic objection to having their picture taken to sign a statement to that affect and such person shall then be exempt from the photograph requirements under Kansas law. (T251). Ms. Lambert admitted that Missouri driver's licenses are accepted as a primary form of identification. (T256). Missouri law allows an applicant that is a member of a specified religious denomination that prohibits photographs of members as being contrary to its religious tenets to obtain a driver's license without a photograph. (T256). Ms. Lambert testified that a South Carolina driver's license is accepted as a primary form of identification. (T257). South Carolina law allows a driver's license to be issued without a photograph if at the time of soliciting such driver's license an affidavit is executed stating that the photograph violated the tenets and beliefs of the religion or sect for which the applicant is a participating member. (T257). Ms. Lambert testified that members of other of states where photographs are not required on a driver's license such as Arkansas, Kansas, Missouri, and South Carolina are allowed to drive in Florida without a photographic driver's license. (T258).

license, under current law. (T194). She also admitted that Plaintiff's Trial Exhibit 5, her marriage license, Plaintiff's Trial Exhibit 9, a Court Order, and Plaintiff's Trial Exhibit 10, her social security card, would all be sufficient secondary forms of identification to receive a Florida driver's license. (T194). Ms. Lambert admitted that none of the identification admitted into evidence at trial, all sufficient to obtain a Florida driver's license, had a photograph on them. (T195).

Ms. Lambert stated that she has never been able to look up "fullface" in the dictionary. (T196).[12] Ms. Lambert testified that photographs can be taken with individuals that wear beards and that photographs can be eighteen (18) years old before they are required to be renewed. (T197). Ms. Lambert testified that photographs are now permitted with religious head gear, with ears covered, with your hair down around the eyes, with as much lipstick and makeup as you want and with big oversize glasses. (T197).[13] Further, individuals are allowed to have

[12] Ms. Lambert was asked whether the forehead was part of the face that could not be covered and her response was that it was within the discretion of the examiner at the time of the taking of the photograph. Appellee allows examiners to use discretion to determine whether a photograph is "fullface." (T215).

[13] Ms Lambert admitted to sending a memorandum dated May 20, 2002, to all Driver's Licenses offices throughout Florida advising that it was permissible to take pictures of people without their showing their ears. (T209-10). She stated that she was interpreting Florida Statutes regarding the showing of ears in a photograph and that she made that decision by herself or maybe one other individual. (T210). The memorandum states that for religious reasons you can wear head covering. (T210-11; Pltf.Ex. 12). Ms. Lambert testified that she has hair down on her forehead and her ears covered, yet her driver's license photograph is permitted. (T251). She admitted that Appellee has not attempted to revoke her license because a "fullface" photo was not on her license. (T252). She admits that you can have hair all the way down to your eyes and covering your forehead or be wearing a full-length beard. (T252). In fact, she testified that the only thing that has to be

facial cosmetic surgery and not get a new photograph on their driver's license. (T198). In fact, Ms. Lambert admitted that there is nothing in Florida law that a photograph even has to look like the individual. (T197-99). Ms. Lambert also candidly admitted that Florida Statutes for Florida State Identification Cards does not require an individual to give a "fullface" photograph. (T199).

Ms. Lambert acknowledged that Appellant's record does not show that she had any stops or traffic citations. (T205). Ms. Lambert admitted the only reason that Appellant's driver's license was either revoked or cancelled was because she would not submit to a photograph without her veil. (T208). Ms. Lambert stated that she has no knowledge of whether Appellant is exercising her sincerely held religious belief when she refuses to unveil for a photograph. (T208). Ms. Lambert acknowledges that Appellant may wear a veil while walking in the public streets, wear a veil to the courthouse to testify, and drive a car while wearing her veil. (T263-64).

Ms. Lambert acknowledged that the State Legislature now has given Appellee statutory authority to take fingerprints and/or maintain fingerprints of drivers license applicants. (T210). Ms. Lambert was also aware of the law that if an individual does not have a driver's license with them when stopped, a police officer can fingerprint that individual. (T212). Ms. Lambert admitted that all temporary and learner's permits are issued without photographs in Florida. (T215).

---

showing and, it is left in the discretion of the individual examiner, is the eyes and nose. She all but admitted that an individual looking like Santa Clause could have his photograph taken. (T253-54). Ms. Lambert testified that a man or woman is allowed to wear a wig for a photograph for a driver's license. (T258-59).

In addition, an individual can obtain a commercial vehicle permit without a photograph. (T215-16).

Ms. Lambert admitted that Appellee either has the ability to maintain or does maintain certain statistics of individuals including height, Social Security numbers through the driver's license records. (T204). Ms. Lambert testified that there is a DAVID system being put in place and Appellee has the ability to scan in all identification/foundation documents. Accordingly, all documents an individual submits to Appellee in order to obtain a driver's license can be scanned in and put into the DAVID system. (T218).[14] Ms. Lambert says she knows of no difficulties of identifying these individuals if they are stopped in Florida because they do not have photographs on their licenses. (T258). She is unaware of any problems created for Florida to allow these individuals to drive in Florida with driver's licenses without photographs. (T258).

Ms. Lambert testified that it is possible for the State of Florida to issue driver's licenses that has printed on the license "not for ID purposes." (T263). Ms. Lambert testified that they could issue a Florida driver's license that provides "valid but ask for additional information including a marriage certificate, social security card, order of name change" or other document scanned into the system. (T269).

[14] Ms. Lambert testified Appellant has produced the requisite documents, both primary and secondary, to be afforded a driver's license in. (T267-68). Ms. Lambert also testified that you can take the documents that were introduced into evidence at trial or produced to obtain her driver's license and scan them into their computer database. (T268-69). The scanned documents would be available to law enforcement officers in the field. (T269).

h. Dr. Yudit Greenberg

Appellant proffered the testimony of Dr. Yudit Greenberg. Dr. Greenberg is a Doctor of Philosophy of Religion and understands pluralism and understands religious beliefs of all sects and understands the clothing requirements for many religions including Judaism, Christian sects and Muslim sects and that these clothing requirements are very important to religious beliefs. (T271-72). The trial judge did not permit Dr. Greenberg to testify. (T274-76).

i. Billy Dickson

Mr. Dickson is the law enforcement liaison and expert for Appellee. (Depo-Dickson, p.3). He admits that an applicant for a driver's license in Florida does not have to show a form of identification with a photograph. (Depo-Dickson, p.6). He states that the purpose for a driver's license in Florida is to make sure those licensed are competent to drive and that they do not have a bad driving record in another jurisdiction, because highway safety is the focus of licensing. (Depo-Dickson, p.8).

Mr. Dickson admits that Appellant must have submitted sufficient information to the Department to verify that she was, in fact, who she said she was to receive her driver's license. (Depo-Dickson, p.11). He agreed that Appellant was issued a license and complied with the requirements in place at the time to obtain the license. (Depo-Dickson, p.11).

Mr. Dickson admits that Appellant has a constitutional right to wear a veil and that she can wear her veil while she is driving. Mr. Dickson stated that he understands that people convicted of DUI are issued driving permits without a

photograph. (Depo-Dickson, p.25). He also agrees that Florida law has exceptions for driver's licenses to be issued without a photograph. (Depo-Dickson, p.29).

Mr. Dickson admits that a fingerprint would be a valuable resource in issuing a driver's license. (Depo-Dickson, p12). He testified that there is statutory authority for Appellee to take fingerprints of individuals when they request a driver's license, as of October 2002. (Depo-Dickson, p.37). Mr. Dickson admits that it is better to have some information on Appellant than no information on her. (T439). Yet, he is not an advocate of fingerprinting and photographing every citizen in the State of Florida and does not think it is necessary. (T440).

j. Khaled Abou El Fadl

Over objection of Appellant, the trial judge permitted the testimony of Dr. Khaled Abou El Fadl. Dr. Fadl testified that he never met Appellant. (T3 and T17). Dr. Fadl stated he couldn't answer "yes" or "no" to the question of whether or not Islamic law would allow Appellant to remove her veil for the purpose of taking a photograph for her driver's license. (T323-25).[15]

On cross examination, Dr. Fadl admitted that, under Muslim law, individuals can study, research and make their own determination on certain issues. (T345).

[15] Dr. Fadl said that, depending upon Appellant's religious belief, it may be prohibited to show her face, however, he states that he believes Islamic law has some exceptions for example when a woman has reached the age of seniority or if the woman is in the process of marrying and needs to show her face to a possible suitor. (T327-28) Dr. Fadl disagreed with Professor Ul-Islam and believes the doctrine of necessity would allow Appellant to take a photograph without a veil. This testimony was elicited over objection of Appellant. (T332). Again over objection of Appellant, Dr. Fadl testified that in certain Muslim countries sometimes women are made to unveil in front of other Muslim woman. (T337).

Dr. Fadl admitted he does not know the religious beliefs of Appellant, and that he has never talked to Appellant. (T346).[16] He had no opinion on whether or not Appellant was exercising her religious beliefs when she veils. (T347). He does not dispute that Appellant's action is substantially motivated by her religious belief when she refuses to take off her veil for a driver's license photograph. (T348).

Dr. Fadl does not dispute that there are Muslim women who believe they are required to veil. (T348). In fact, Dr. Fadl agrees some Muslims feel they have a religious obligation to veil. (T348). He also acknowledges some Muslims believe that it is mandated by the religious text. (T248). Dr. Fadl does not dispute that many Muslim women believe that wearing the niquab is practice of their religion. (T348-49). He admits that there is a dress code for Muslim men and women. (T354-55). Dr. Fadl testified in at least two other cases that Muslim women who veil were motivated by their sincere religious beliefs that they had to veil. (T349).

k. Richard Fields

Over objection of Appellant, the trial judge permitted the videotape deposition of Richard Fields played into evidence. (T462). Mr. Fields is employed by the Bank of America. Bank of America visa cards are sent out by mail and do not have photographs on them unless they are requested by the account holder.

---

[16] Dr. Fadl testified that Muslim men and Muslim women can adopt various schools of thought (T342) and that he has not done any research into the beliefs of the school of thought of Appellant. (T352). He acknowledged that in the Muslim religion, as others, individuals can be more or less observant. (T342). Dr. Fadl even acknowledges that he wears a beard and that, for Muslim men, it is considered a recommended act. (T352-53). He testifies that the wearing of his beard is a practice of his religion. (T353).

(Depo-Fields, p.24). He admits that the Bank of America keeps signatures of all account holders and signature cards can be used to insure that the signature is the same on the checks that go through the Bank of America system. (Depo-Fields, p.25). Mr. Fields admits that the Bank of America ATM cards do not have a photograph, unless requested by the cardholder, and that anyone can withdraw significant money from their ATM card without any form of identification as long as they have a pin number. (Depo-Fields, p.26). The Bank of America also issues debit cards, which do not have photographs unless requested by the customer.

Mr. Fields is unfamiliar with remote counter-top machines and is unfamiliar if people are asked for identification when using these machines. (Depo-Fields, p.27). He admits that Bank of America checks do not have photographs on them and that it is not an option that they allow their account holders. (Depo-Fields, p.28). Mr. Fields admits that they have internet banking at Bank of America and that people can open up accounts without ever setting foot in the bank. (Depo-Fields, p.28).

Although fake IDs may be a serious problem, usually the fake ID has a picture of the person trying to defraud on the ID itself. (Depo-Fields, p.29). Mr. Fields does not know how the picture of an individual on identification would help to stop fraud, because the document itself is only as good as the underlying documents used to obtain the identification and that would include a Florida driver's license. (Depo-Fields, p.29).[17]

[17] Mr. Fields stated that Bank of America has offices in South Carolina, North Carolina and Georgia, but he does not know how his banks in these states

Mr. Fields states that bearded individuals or persons who wear religious dress can open bank accounts and that Bank of America does not discriminate against its customers on the basis of the customer's religion. (Depo-Fields, p.44). Further, he would not refuse to open an account for an individual if the individual was dressed in a way to exercise her religions beliefs. (Depo-Fields, p.44). In fact, he would attempt to work with that person on alternative ways to identify the individual. (Depo-Fields, p.44). He further admits that, if a Muslim woman came to the Bank of America, she would be able to open a bank account and have dealings with the Bank of America, even if she were wearing the dress she believes is required by her religious convictions. (Depo-Fields, p.44).

l. Robert Lacey

Mr. Robert Lacy testified at trial as Appellant's rebuttal witness and was accepted as an expert in law enforcement and concerning procedures for traffic stops. (T514). He testified that it is not essential to the State of Florida that there be no exceptions for photographs on driver's licenses. (T521). Mr. Lacey also

---

deal with individuals that do not have photographs on their driver's licenses. (Depo-Fields, p.30-31. He was not aware that you could obtain a Florida driver's license without a photographic identification. (Depo-Fields, p.31). Mr. Fields admits that, on any given day an individual can open her mail, get a new credit card application, fill it out, send the application back to the Bank of America, and receive a credit card. (Depo-Fields, p.33). He stated that these people are identified before they get a credit card, but it is not done through the use of a photograph. (Depo-Fields, p.33-34). Mr. Fields admits that hundreds of thousands of credit cards are issued every single year and that no photographic identification is required to obtain a credit card. (Depo-Fields, p.34). He admits that Bank of America opens bank accounts for individuals without a driver's license or state identification card and it opens bank accounts for people under eighteen years (18) of age. (Depo-Fields, p.39).

testified that, during a traffic stop, a law enforcement officer cannot require Appellant to unveil. (T522). He testified that many smaller departments do not have the equipment or do not have access to a DAVID system. (T530). Mr. Lacey testified that there are ways to identify individuals other than using a photograph. (T533-34).

V. SUMMARY OF ARGUMENT

The Department's revocation of Appellant's driver's license violates Florida's Religious Freedom Restoration Act of 1988, and is in violation of Article I, Sections 2, 3, 4, 9, and 23 of the Declaration of Rights contained in the Constitution of the State of Florida. Accordingly, this Honorable Court must reverse the Order Granting Summary Judgment, rendered by the trial court below, dismissing Appellant's claims for freedom of speech, due process rights, and right to privacy. Further, this Honorable Court must reverse the trial court's order dismissing Appellant's equal protection claim and its Order Following Non-Jury Trial denying Appellant's remaining claims in the consolidated cases below

VI. ARGUMENT

a. The Revocation of Appellant's Driver's License Violates Florida's Religious Freedom Restoration Act And Violates Appellant's Right To The Free Exercise Of Religion Found In The Constitution Of The State Of Florida

1. Florida's Religious Freedom Restoration Act.

The Florida Religious Freedom Restoration Act of 1998 (hereinafter referred to as "RFRA") was enacted as law in the State of Florida in 1998 as the result of two United States Supreme Court decisions. Prior to the decision in *Employment*

Division D.P.H.R. of Oregon v. Smith, 494 U.S. 872 (1990), the free exercise rights protected by the First Amendment could not be infringed by a governmental entity unless the governmental entity met the "compelling state interest test." The compelling state interest test required that the state (a) prove it had a compelling state interest to infringe upon the individual's religious beliefs, and (b) show that it was acting in the "least restrictive means." *Thomas v. Review Board*, 450 U.S. 707, 718-19 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).[18]

[18] For example, in *Sherbert*, 374 U.S. at 404, a seventh day adventist who believed that work on Saturdays, her Sabbath, was unbiblical, was refused unemployment benefits. She challenged the denial under free exercise rights. The United States Supreme Court analyzed the case under the compelling state interest test and concluded as follows:

> For "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." [citation omitted] Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

In *Yoder*, 406 U.S. at 205, a generally applicable state law required all children attend school until sixteen (16). This requirement conflicted with the beliefs of the Amish that children should not attend public schools before the eighth grade less they adopt "worldly ways" at variance with their own religious beliefs. The United States Supreme Court found that the state's interest in forcing mandatory schooling law was not so compelling as to abridge the beliefs of the Amish. In *Thomas*, 450

Thus, until 1990, a neutral rule of general applicability that substantially burdens an individual's religion would run afoul of the free exercise clause, unless narrowly tailored to achieve a compelling state interest.

In 1990, the United States Supreme Court appeared to change its longstanding precedent. In *Smith,*[19] a case involving a native American who used peyote in religious rituals contrary to state law, the court found that the right to free exercise did not relieve an individual of the obligation to comply with a valid and neutral law of general applicability. *Smith*, 494 U.S. at 889. As a result of *Smith*, religious leaders from across the country were outraged and lobbied congress for a law that would reestablish the compelling state interest test established prior to *Smith*. Congress passed the Religious Freedom Restoration Act of 1993 (hereinafter referred to as the "Federal RFRA"). 42 U.S.C. § 2000bb, *et seq.*

After four (4) years, the United States Supreme Court in *The City of Boerne v. Flores*, 521 U.S. 507 (1997), declared the Federal RFRA unconstitutional as applied to states. The Supreme Court determined Congress exceeded its authority under the Fourteenth Amendment. *Id*. In direct response to the Supreme Court's decision in *Boerne*, religious leaders urged their state legislatures to pass state RFRA laws. In 1998, the Florida Legislature passed the Florida RFRA. § 761.01,

---

U.S. 718-19, the United States Supreme Court held that a state may only justify intruding into religious liberty if it showed that it is the least restrictive means of achieving some compelling state interest.

[19]*Smith* has subsequently been limited to its facts and distinguished by other courts. *See*: *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3rd Cir.), *cert. denied,* 120 S.Ct. 56 (1999); *see also*: Section V, below.

Fla. Stat. It is the express intent of the Legislature of the State of Florida to reestablish the compelling state interest test as set forth in the seminal decision in *Sherbert*, 374 U.S. at 398.

Accordingly, the trial court was bound, in the analysis of this case, to apply Florida RFRA and to use strict scrutiny and the compelling state interest test. If the trial court below had properly analyzed this case using Florida RFRA, Appellee could not have prevailed.

Under the Florida RFRA, Appellee was required to demonstrate with evidence that its revocation or cancellation of Appellant's driver's license was in furtherance of a compelling state interest and is the least restrictive means of furthering the compelling state interest.[20]

A. Appellant is engaging in the free exercise of religion.

Appellant is engaging in the "exercise of religion." Pursuant to Section 761.02(3), Fla. Stat., the exercise of religion "means an act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief." Appellant refused to remove her veil for her driver's license because of religious belief.

Florida RFRA's express provision, that the practice need not be "compulsory or central to a larger system of religious belief" to fall within RFRA's

[20] Once licenses are issued, their continued possession becomes essential and suspension of issued licenses impacts important interests of the licensees. The legal analysis is no different whether the license is viewed as a right or privilege. *See Bell v. Burson*, 402 US 535 (1971). *See also*, *Sherbert*, 374 U.S. at 404("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.")

meaning, is a clear articulation of the intent of Florida's Legislature to give the greatest protection to religious practices. § 761.02(3), Fla. Stat. The fact that some Muslims may not agree with Appellant's interpretation of the Qur'an, or her interpretation of other religious scriptures which she believes requires her to not expose her face, is of no import.[21] All that is necessary is a sincerely held religious belief, even if members of her faith do not share her belief. *Thomas*, 450 U.S. at 715-16, and *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff.'d sub nom, Jensen v. Quaring*, 472 U.S. 478 (1985), 105 S.Ct. 3492 (1985)

There can be little doubt Appellant holds a sincerely held religious belief supported by many members of the Muslim faith. To the extent the trial court looked to objective support for Appellant's beliefs, Appellant's belief in veiling is supported by religious doctrine of her faith. The Holy Qur'an states:

> "O Prophet! Tell your wives and your daughters and the women of the believers to draw their jalabib over their bodies. That will be better, that they should be know so as not to be annoyed.

See Surah 33:59 in the Holy Qur'an.

The Holy Qur'an 24:30-31 commands:

> "And tell the believing woman to lower their gaze, and protect their private parts, and not to show off their adornment except only that which is apparent (like palms of hands or one eye or both eye for necessity to see the way, or outer dress like veil, gloves, head-cover, apron, etc.) and to draw their veils over Juyubihinna (i.e. their bodies, faces, necks and bosoms, etc.) and not to reveal their adornment except to their husbands, their fathers, their husband's fathers, their sons, their husband's sons, their brothers or

[21] Although only a minority of Christians believe a reading of the Second Commandment prohibits photographs, this belief is constitutionally protected.

> their brother's sons, or their sister's sons or their Muslim women (i.e. their sisters in Islam), or the (female) slaves whom their right hands possess, or old male servants who lack vigour or small children who have no sense of the shame of sex.
>
> And let them not stamp their feet so as to reveal what they hide of their adornment. And all of you beg Allâh to forgive you all, O believers, that you may be successful.

Clearly, there is no dispute Appellant is exercising her religion within the context of Florida's RFRA. § 761.02(3), Fla. Stat.

B. The revocation of her driver's license substantially burdens Appellant's exercise of religion.

Appellee's revocation of Appellant's driver's license, substantially burdens her constitutional rights to the free exercise of religion. It was an abuse of discretion and a misconstruction of the strict scrutiny standard that lead the trial court to hold otherwise.[22] *Quaring*, 728 F.2d at 1121; *Dennis v. Charnes*, 646 F.Supp. 158 (D. Colo. 1986); *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, 380 N.E.2d 1225 (Ind. 1978). Requiring Appellant to comply with a photograph requirement places an undue burden upon the exercise of her religious beliefs. *Id*. The burden is indistinguishable from the burden placed upon a Sabbatarian by the state in the *Sherbert* case, where the United States Supreme Court ruled as follows:

> The [denial] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one's precepts of her religion [not working on Saturdays] in order to accept work,

[22] In the *Quaring, Charnes* and *Pentecostal House of Prayer* cases, each court addressed the religious exception for photographs on driver's licenses and held that the photograph requirement could not survive a constitutional challenge.

> on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship. *Sherbert*, 374 U.S. at 404.

Appellant clearly met the standard for substantial burden as set forth in Florida's RFRA. *See* § 761.03(1), Fla. Stat. Appellant testified without contradiction by any party that she believed it would violate her religion to: (a) allow pictures of an uncovered face, and (b) that she could not unveil for Appellee. (T119, 121, 128, 129). Since the Department compelled both for Appellant to maintain her driver's license, this substantially burdened Appellant's religion. *Id*.

Yet, the trial court below inexplicably held it is <u>not</u> a burden for Appellant to be photographed, because if "photos of humans wearing veils are acceptable, then her argument that her religion prohibits all but faceless images of living beings must fail." (R1116). The trial court ignored the effect of Appellant wearing a veil, which converts her face into a faceless image. Although the trial court ignores the purpose of a veil, it would be fundamental error for this Court to do likewise.[23]

Regarding the second issue raised by the trial court below that Appellant never articulated a substantial burden, Appellant testified at length regarding the burden to her and her family that would arise without a license. (T116-118). It was

[23] The effect of a veil is so one does not see the face. Therefore, although Appellant's religion allows a photograph of a human wearing a veil, Appellant is not permitting photographs of the face, as the face is covered by the veil. Therefore, it was not only an error of law, but an error of logic, for the trial court to hold Appellant loses her rights because her religion allows photographs of humans wearing a veil but does not allow photographs of anything but faceless images. The veil is what keeps the image faceless. This is consistent with Appellant's testimony that you can black out a picture of a human face with a magic marker, as she does with her children, such that the face now has a covering to it. (T129).

therefore an error of the trial court to rule there was no articulated justification of the burden. In identical cases, courts have held the loss of a driver's license is a burden for the exact reasons asserted in this case. *Quaring*, 728 F.2d at 1121; *Sherbert*, 374 U.S. at 404; *Charnes*, 646 F.Supp. at 163.

The Department offers, as an "alternative," for a lifting of the veil to complete the digitalized image or photograph. This is not a valid alternative, because even a "momentary" lifting of the veil would violate Appellant's religious convictions. Regardless of the trial court's view below, there are no "momentary" exceptions to beliefs. This is not a legitimate alternative and would directly violate Appellant's religious beliefs prohibiting a photograph taken of an uncovered face.

Secondly, although Appellant controls the photograph she is provided, Appellee controls the photograph in their system. Since Appellee controls the photograph in their system, the likelihood that Appellant's photograph will be seen by someone other than a Muslim woman violates Appellant's religious beliefs.[24] Even if Appellee provided a photograph which would only be in the possession of Appellant, Appellant testified this would violate her sincere religious beliefs, thus it is a substantial burden and it was fundamental error of the trial court to hold that there was no substantial burden of Appellant's religious beliefs.

[24] This is of additional concern, as any officer could pull Appellant's photograph at any time under the capabilities of the DAVID system and thereby violate Appellant's religious observance. This is of particular concern, beyond chance viewing, because in this case Appellee's have shown a disregard for Appellant. In violation of a court order and to humiliate Appellant, Appellee distributed photographs of Appellant's face taken in another context, thus demonstrating why Appellant could not trust Appellee with a photograph.

Finally, Appellee issued Appellant a Florida driver's license prior to September 11, 2001, and it was not until shortly after September 11, 2001, that Appellee made the decision to revoke Appellant's license. The law had not changed in the interim, only the Department's attitude and fears had changed. As noted in *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1995)(*citing Palmore v. Sidot*, 466 U.S. 429 (1984)), negative attitudes and fears are not sufficient basis for treating individuals differently. While private biases and prejudices may be outside the reach of the law, the law cannot directly or indirectly give them affect. If individuals are treated differently based upon constitutionally impermissible considerations, such as race or religion, an equal protection claim exists. *United States v. Lichtenstein*, 610 F.2d 1272 (5th Cir. 1980); *Bass v. City of Albany*, 968 F.2d 1067, 1070 (11th Cir. 1992).

It was a fundamental abuse of discretion for the trial court to choose to ignore case law, while supposedly applying the strict scrutiny standard, because of September 11, 2001. In its written opinion, the trial court below expressly notes that it is ignoring precedent because of September 11, 2001, even though the law has not changed.

C. There is no compelling state interest in putting appellant's uncovered face on a driver's license.

As defined by Section 322.263, Fla. Stat., the state's interest in the driver's license is to provide "maximum safety" for individuals who travel or otherwise use public highways and to deny the privilege of operating a vehicle to persons whose

conduct have demonstrated indifference for the safety and welfare of others and to discourage criminal actions by individuals against the state.

Although these are lofty goals, the state's demand for an unveiled photograph does little to support these stated governmental interests. There has been no contention that Appellant violated criminal laws or that Appellant by her conduct has demonstrated an indifference for the safety of others. There is no evidence Appellant ever received a traffic ticket. The Department simply and baldly asserts that an unveiled photograph is an absolute necessity for "maximum safety" for all persons who travel or otherwise use the public highways.

The state's purpose for issuing a driver's license is not for identification. We do not in the State of Florida have a mandatory identification card. A driver's license merely purports to certify that the individual holding the license has met the requirements to drive and has passed all tests and paid all fees to show that they are a competent driver. The purpose of a driver's license is not for use as a type of national identification card. As noted by the court in *Pentecostal House of Prayer*, 380 N.E.2d at 368-69, although the state may have a strong interest in a photograph requirement, it is patently absurd to argue that it is absolutely mandatory and necessary for a photograph to be on a driver's license.[25]

The fact that the Eighth Circuit Court of Appeal, the Tenth Circuit Court of Appeal and the Supreme Court of Indiana have all struck down photographic requirements on a driver's license for individuals with sincerely held religious

[25] Appellee's witnesses and the Bank of America witness testified that there are numerous alternative ways to identify an individual, and it is done all the time. (Depo-Fields, p.33-34)

beliefs, weakens any compelling interest Florida may have. *Quaring*, 728 F.2d at 1121, *Charnes*, 646 F.Supp. at 163, and *Pentecostal House of Prayer*, 380 N.E.2d at 1224. At least eleven (11) states have specific exceptions built into their laws removing photographs from driver's licenses based upon religious beliefs. (T8; R383-385). These court decisions and state statutes eliminate Florida's alleged compelling interest to require Appellant to submit to an unveiled photograph in violation of her religious beliefs. Individuals from Indiana, Arkansas, Iowa, Kansas, Louisiana, Minnesota, Missouri, North Carolina, Oregon, South Carolina, Vermont, Wisconsin, and Idaho are free to travel throughout Florida without obtaining a Florida driver's license. (T190). Appellant could live in any of the those states, have a driver's license issued without a photograph, and then travel throughout Florida without obtaining a Florida driver's license. (T190).

In fact, Appellant previously held an Illinois driver's license without the necessity of an unveiled photograph. Pursuant to Section 322.031, Fla. Stat., a nonresident domiciled in another state is free to commute in order to work and is not required to obtain a Florida driver's license. In addition, any person who is enrolled as a student in a college or university as a full-time student is exempt from the requirement of obtaining a Florida driver's license for the duration of enrollment. Accordingly, Florida allows citizens from all around this country to travel and live in this state, without the necessity of obtaining a Florida driver's license with a "mandatory" photograph. Thus, Appellee has no compelling state interest to require Appellant to submit to an unveiled photograph in order to maintain her driver's license. As individuals can drive in Florida without a

photograph, under strict scrutiny, the trial court could not have legitimately placed a higher burden on Appellant.

The Florida Administrative Code permits numerous instances where licenses can be issued without a photograph. Further, pursuant to Section 15A-1.0012(7), Fla. Admin. Code, applicants for Florida driver's licenses shall be denied said license only for the reasons set forth in Section 322.05, Fla. Stat. There is no provision in Section 322.05, Fla. Stat., that prohibits Appellant from receiving a Florida driver's license or permitting the revocation or cancellation of her license. Appellee cannot set forth a sufficient compelling governmental interest to comply with Florida RFRA.

D. Appellee cannot meet the least restrictive means test.

Assuming arguendo Appellee can meet the compelling state interest test, it is still required under Florida RFRA to demonstrate that the requirement of an unveiled photograph on a Florida driver's license is the least restrictive means of furthering such compelling state interest.[26] § 761.03(b), Fla. Stat.

[26] The least restrictive means test has been defined as follows:

> It is therefore the least restrictive means of inquiry which is the critical aspect of the free exercise analysis. This prong forces us to measure the importance of a regulation by ascertaining the marginal benefit of applying it to all individuals, rather than to all individuals except those holding a conflicting religious conviction. If the compelling state goal can be accomplished despite the exemption of a particular individual, then a regulation which denies an exemption is not the least restrictive means of furthering the state interest. *See Callahan v. Woods*, 736 F.2d 1269, 1272-73 (9th Cir. 1981).

It is unlikely that a great many people in Florida will assert a religious exemption to the photograph on their driver's license. It is unlikely to be a burden upon the state. Further, Appellant has asserted that she is willing to provide other evidence of identity. Florida law provides that, if an individual does not have a copy of a driver's license, they must provide a fingerprint. *See* § 322.15, Fla. Stat.

As noted in *Quaring*, 728 F.2d at 1126, n.5, New York, the most populous state in the nation, does not require photographs on all drivers' licenses. Since (a) Florida permits individuals from other states to drive in this state without requiring photographic identification, (b) Florida exempts numerous motorists from having a photograph on their license, (c) people from other states drive through Florida or go to school in Florida; and (d) you can obtain a Florida driver's license without showing photographic identification, there can be no credible argument that requiring Appellant to have a photograph would be the least restrictive means of serving the state interest.[27] Appellee cannot meet the least restrictive means test.

[27] Appellant has offered numerous alternatives that would accomplish any purpose Appellee can justify. For instance, Appellant has offered to (a) be fingerprinted, (b) have her driver's licenses restricted in such a way that it not be used for identification purposes, (c) have documents scanned into the DAVID system, (d) carry those documents on her at all times, and (e) is willing to carry copies of the primary documents which allow the Appellee to identify Appellant. The only value of a driver's license as identification stems from tying the underlying documents to the individual on the license. It is the underlying document which allows Appellee to identify the person being issued the license, as the license is merely a summary of the underlying documentation. As a result, it is only logical that one who is willing to carry the underlying documentation is in fact carrying a better identification source, especially if they are scanned into the DAVID system such that they can be compared with police copies.

2. Free Exercise Clause.

The requirements of the Free Exercise Clause are set out in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Judicial review is deferential if a law is "neutral" and "generally applicable." *Id*. at 531. But "a law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id*. at 531-32, 546.

General applicability is not a motive test; it is a test of objectively "unequal treatment." *Id*. at 542, (*quoting Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring)). If a law allows secular exemptions, government must have a compelling reason for refusing religious exemptions. *Lukumi*, 508 U.S. at 537.[28]

Lukumi held that, if a regulation applies to religious conduct and does not apply to secular conduct, this discrimination requires compelling justification. *Lukumi* 508 U.S. at 535-38, 543-45. Even if the unregulated secular conduct is different from the religious conduct, the law requires compelling justification if the

[28] Thus, where a rule requiring police officers to be clean-shaven had an exception for medically motivated beards, *Lukumi* required an exception for religiously motivated beards. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir.), *cert. denied*, 120 S. Ct. 56 (1999). Where a rule requiring college freshmen to live in the dormitory had a variety of formal and informal exceptions, *Lukumi* required an exception for freshmen who wish to live in a religious community. *Rader v. Johnston*, 924 F. Supp. 1540, 1553 (D. Neb. 1996). And where a zoning ordinance had exceptions for financial hardship and projects favored by the city, *Lukumi* required an exception when buildings were demolished for religious use. *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 886-87 (D. Md. 1996).

unregulated secular conduct and the regulated religious conduct cause analogous harms.[29] See *Id.* at 543.

The Department's rules in this instance are narrowly applied and riddled with exceptions, as outlined above. Appellee has no generally applicable rule applying to driver's license photographs. Its rules are not generally applied, given the numerous exceptions made by Appellee regarding licenses. Appellee has created a preferred class that retains the right to observe its religious practice, and a dispreferred class that has forever lost that right, since Appellee has altered the application of the full-face photograph requirement such that those religions requiring less severe head coverings are permitted, but devout Muslims are banned. The exceptions also create a second preferred class of those who wish to cover up through a series of more western devices (wig, beard, eyeglasses, habit) while not allowing a devout Muslim to cover-up.[30] The exceptions further allow a preferred

---

[29] "The ordinances . . . fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree." *Id.* at 538-39, 544-45 (noting that disposal by restaurants and other sources of organic garbage created the same problems as animal sacrifice). The holding is that the ordinances were invalid, because they gave more favorable treatment to secular killings of animals, and to secular sources of organic garbage, than to religious killings of animals. *Id.*

[30] This link between exceptions and the compelling interest test highlights an important function of the general applicability requirement: it is a proxy for a law's importance. When the legislature applies a rule to the whole population and refuses to make <u>any</u> exception (temporary or otherwise), that suggests that the legislature considers the rule more important than any competing interests. But when a rule applies only some of the time, to only some of the people or some of the situations, that alone is conclusive evidence that the rule does not require uniform enforcement. *Fraternal Order of Police*, 170 F.3d at 359. Appellee attempts to assert some sort of public safety link to supercede the free exercise

class of drivers who obtain a license out-of-state, since they are permitted to drive in Florida without a photograph on their license.

The issue presented before this Court is one of first impression in Florida. Nevertheless, other courts have directly dealt with this issue and uniformly held that refusing to issue a driver's license without a photograph violated constitutional rights of the applicant. These courts required the state to issue a driver's license without a photograph as a reasonable accommodation of religious beliefs.[31]

---

claim, but Appellee's argument has no merit. People have been identified for hundreds of years without the necessity of a photograph. Appellee had no trouble identifying Appellant when she obtained her license and had no trouble identifying Appellant when it revoked her driver's license.

[31] In *Quaring*, 728 F.2d at 1121, a Nebraska driver's license applicant brought an action against Nebraska officials seeking to compel them to issue a driver's license, notwithstanding the applicant's refusal to be photographed. Quaring was a member of the Christian religion. Quaring's belief is that the Second Commandment expressly forbids the making of "any graven image or likeness" of anything in creation. Exodus 20:4; Deuteronomy 5:8. The Eighth Circuit Court of Appeal found that Quaring's beliefs were sincerely held religious beliefs which were in fact burdened by the Nebraska state law. *Id*. at 1125.

Weighing the Nebraska state law against the First Amendment claims of Quaring, the court determined that the state interests were not so compelling that Quaring's beliefs could not be accommodated. *Id*. at 1126. The Court noted that although the position and current practice is in the minority, that Quaring was still entitled to protection. In fact, the *Quaring* court *(citing Thomas v. Review Board*, 450 U.S. 707, 715-16 (1981)) stated as follows:

> "[T]he guaranty of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and competence to inquire whether the petitioner or his fellow [adherent] more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Quaring, 728 F.2d at 1121; *Charnes*, 646 F.Supp. at 158; *Pentecostal House of Prayer*, 380 N.E.2d at 1225.

The court in *Quaring* had no difficulty finding that refusing to issue *Quaring* a driver's license unless Quaring allowed her photograph to appear on her license, is a burden on Quaring's religion. *Id*. at 1127 The *Quaring* court noted that in refusing to issue a driver's license, the state withheld an important benefit. The court held that the state unduly burdens Quaring's religion when it requires her to make a choice of following her religion or foregoing the right to driving a car. *Id*. The *Quaring* court also rejected Nebraska's argument that the quick and accurate identification of motorists is compelling enough to prohibit exemptions to the photograph requirement. *Id*. The court noted that Nebraska law, much like the law in the instant case, already exempts numerous motorists from having a personal photograph on their license. *Id*. at 1126-27.

In *Charnes*, 646 F.Supp. at 158, Mr. Dennis brought a claim against the state of Colorado challenging Colorado's requirement of his picture on his driver's license. The *Charnes* Court held that the photograph requirement was void as to Mr. Dennis, since it abridged his religious beliefs. *Id*. at 162-63. The court found the state's interest was not so compelling as to prohibit selective exemptions to the photograph requirement. *Id*. The court noted people seeking an exemption from the photograph requirement on religious grounds were few enough in number that the Colorado officials could not demonstrate that allowing a religious exemption would present an administrative or overwhelming problem. *Id*. The court stated, "I conclude that the path of judicious prudence coincides my inclination that the higher values of the First Amendment should prevail over the state's concerns about bureaucratic inconvenience." *Id.* at 164.

In *Pentecostal House of Prayer,* 380 N.E.2d at 1225, the court found that the state's interest in a photograph requirement was not so compelling as to counterbalance the infringement on a religious group's rights and declared the statute to be unconstitutional. The court held Indiana statute's photograph requirement unconstitutional if it required members of religious organizations to choose between surrendering their driving privileges and violating a fundamental tenet of their religion. *Id*. Although the court agreed that there was a strong, if not compelling interest, the court stated, "the idea that the photograph requirement is necessary to that interest is patently absurd." *Id*. at 368-69. The court enjoined the Indiana from requiring properly certified members of the religious organization to have photographs on their driver's licenses. *Id*. at 369.

In *Michigan v. Swartzentruber*, 429 N.W.2d 225 (Mich. App. 1988), the court struck down a state law which required, as a safety precaution, orange reflectors be placed on buggies traveling on public highways. Amish individuals were prosecuted for violating the law and they raised free exercise objections to it. *Id*. The court ruled in favor of the Amish. *Id*. at 229-29. *See also*, *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990), and *State v. Miller*, 538 N.W.2d 573 (Wis. 1995).

As the cases referenced above demonstrate, courts have grappled with the identical issue and have always ruled the state's interest was not sufficient to infringe upon the First Amendment rights of an individual seeking a driver's license who refuses to provide a photograph on the grounds of sincerely held religious beliefs. *Quaring*, 728 F.2d at 1121; *Charnes*, 646 F.Supp. at 158; *Pentecostal House of Prayer*, 380 N.E.2d at 1225. It is not up to this Court to question the beliefs of Appellant upon which her claim is based. "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989).

Based upon the foregoing, the Department's rules requiring Appellant to remove her veil in order to obtain a driver's license cannot be maintained in the face of the Free Exercise Clause because the rules are not generally applicable, are narrowly applied and riddled with exceptions.

b. The Trial Court Erred In Granting Appellee's Involuntary Dismissal Regarding Equal Protection At The End Of Appellant's Case In Chief.

The Department admittedly treats similarly situated people materially different than it treats Appellant.[32] Appellee consistently stated a photograph is required on every license as a matter of public safety, yet Appellee has issued more than Eight Hundred Thousand (800,000) licenses without photographs in the past five (5) years. (T190). Temporary driving permits are issued without photographs.[33] (T156).

Appellee admits to more than 20 photograph exceptions. (T188). Appellee admits to exceptions for other religions. (T197, 209-11, 252-54). Appellee has numerous exceptions to the photograph requirement, but now seeks to tailor it against Appellant, despite previously issuing her a license without removing her veil. (T186, 187, 190). Appellee allows individuals to cover themselves, yet Appellant's veil is impermissible. (T197).

The Department allows applicants to wear wigs, turbans, habits, hats, and long bangs, to cover the top and side of their head to the eyes, as well as the ears and when combined with the equally permissible mustache, beard, sideburns,

---

[32] The United States Supreme Court has long recognized that an equal protection claim need only consist of a class of one. *Village of Willowbrook v. Olech*, 120 S.Ct. 1073 (2000). Accordingly, it is of no importance that Appellant may be one of only a few individuals that seeks to have a driver's license issued with a veil. Appellant has an equal protection claim because Appellee's actions infringe upon Appellant's fundamental right of religious liberty.

[33] Temporary exceptions demonstrate Appellee is not using least restrictive means to meet religious concerns. *Charnes*, 646 F.Supp. at 158.

excessive makeup and glasses, it creates the same effect as a veil. (T164, 165, 197, 198, 252-54). It is inappropriate that some extreme combinations are permissible, but Appellant's veil, which does not cover her eyes, is impermissible. The trial court notes that the entire head can be covered, as long as sunglasses are not worn, just not Appellant's veil.[34] By allowing the same result by different means, but only for secular purposes and for non-Muslims, Appellee violated Appellant's right to equal protection. Therefore, Appellee has a discriminatory policy.

Where a governmental agency has a law that provides individualized exemptions; it may not refuse to extend that system to cases of religious hardship without compelling reason. *Sherbert*, 374 U.S. at 398. There can be no compelling reason, because Appellee allows (a) more than 800,000 people without photographs, (b) more than 4,000 people permanently without photographs, (c) an indefinite number of people without photographs from other states, (d) millions of people without photographs within Florida who do not have a license or State ID, and (e) millions of people who can cover themselves in secular accoutrement to the extent Appellant wishes.

Therefore, as Appellee is treating Appellant materially different than Appellee has treated others the trial court was required to analyze this case under the strict scrutiny standard.[35] *Cleburne*, 473 U.S. at 432. The regulation burdens a

[34] Appellee's witness also acknowledged individuals can have cosmetic surgery, have eighteen year old licenses and there is no requirement that a photograph on a driver's license look like the holder. (T196-99).

[35] Although Appellee has carved out a religious exception for some, it will not apply the exception to Appellant. Although Appellee has created an exception allowing some individuals to avoid photographs, it will not apply the exception to

fundamental right of Appellant and can only be sustained if it is narrowly tailored to serve a compelling state interest. *Lyng v. Automobile Workers*, 485 U.S. 360 (1988). It is clear Appellee cannot meet the substantial burden to pass the compelling state interest test. *Id*. Although the trial court admitted strict scrutiny was the standard, it abused its discretion by not actually applying the strict scrutiny standard.

Regardless of parsing by the trial court, Appellee's actions fail the strict scrutiny analysis, since exceptions were made for others but not for an observant Muslim woman.

c. The Trial Court Abused Its Discretion and Misapplied the Law in Granting Appellee's Motion for Partial Summary Judgment

Appellee was unable to bear its heavy burden of proof showing that there are no issues of material fact in dispute in this litigation.[36] *RNR Investments Limited*

Appellant. Although Appellee has created an exception that allows some individuals to cover themselves in a manner that creates a similar effect as Appellant's veil through use of hats, beards, religious scarves, religious habits, etc., it will not apply the exception to Appellant. Although Appellee allows eighteen years to elapse between photographs making the photographs useless, it will not apply an exception to Appellant. Although Appellee will issue licenses that are for driving purposes only that cannot be used for identification for some, it will not to the same for Appellant. As a result of the foregoing, Appellant has been treated differently than people similarly situated.

[36] "A trial court may grant a Motion for Summary Judgment only 'if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Markowitz v. Helen Homes of Kendall Corp.*, 826 So.2d 256 (Fla. 2002); *Fisel v. Wynns*, 667 So.2d 761 (Fla. 1996). "In reviewing a summary judgment, every possible inference must be drawn from the record in a light and most favorable to

Partnership v. Peoples First Community Bank, 812 So.2d 561 (Fla. 1st DCA 2002) "If the record reflects even the possibility of a material issue of fact, or if different inferences can be drawn reasonably from the facts, the doubt must be resolved against the moving party and summary judgment must be denied." *Id.*; *Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092 (Fla. 1st DCA 1999); *Lawrence v. Pep Boys-Manny, Moe & Jack, Inc.*, 2003 WL 1889166 (if the slightest doubt exists, summary judgment must be reversed).

1. The Trial Court Erred In Granting Summary Judgment On Appellant's Free Speech Claim.

To limit free speech rights of Appellant, Appellee's actions must meet the strict scrutiny standard. Appellee must show the following: (a) the regulation was narrowly drawn to achieve compelling governmental interest; (b) the regulation is reasonable; and (c) it is viewpoint neutral. *Ledford v. State*, 652 So.2d 1254 (Fla. 2nd DCA 1995); *State v. Globe Communications Corporation*, 622 So.2d 1066 (Fla. 4th DCA 1993).

Religious speech or expressive conduct is shielded by Florida's Constitution. *Widmar v. Vincent*, 454 US 263 (1981); *R.A.V. v. City of St. Paul*, 505 US 377 (1992). Wearing a veil for religious purpose is thus protected by the Florida Constitution. In *Joseph v. State*, 642 So.2d 613 (Fla. 4th DCA 1994), the court examined how religious garb relates to First Amendment protections. In holding that freedom of religion was a fundamental right that constituted a "preferred

---

the nonmoving party." *Horizons Rehabilitation, Inc. v. Health Care and Retirement Corp.*, 810 So.2d 958 (Fla. 5th DCA 2002) *rev.den.* 832 So.2d 104 (Fla. 2002); *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966).

position in the constitutional hierarchy," the *Joseph* Court held that religious attire is entitled to First Amendment protection. *Id.*; *State ex rel. Burrell-El v. Autrey*, 752 S.W.2d 895 (E.D. Mo. Ct. App. 1988). Thus the trial court erred in granting summary judgment without considering the protections afforded religious garb.

The trial court also erred in granting summary judgment solely upon Appellant's remark that she was not intending to make a statement by wearing her religious garb. (R1072) There is no requirement one must intend to exercise a constitutional right to be afforded its security. Under the trial court's improper analysis, one loses constitutional protections if not consciously choosing to exercise rights. Taking away guaranteed rights not being exercised with aforethought is erroneous, could not be, and is not, a legitimate standard.[37]

The fundamental flaw in the trial court's analysis stems from the court's creation of a category of speech "demonstrative speech." It has been held that intent is not a proper determining factor because actions cannot be characterized as speech based upon intent to express an idea. *State v. Conforti*, 688 So.2d 350 (Fla.

[37]Although Appellee will not allow Appellant to maintain her driver's license while wearing a veil, Appellee allows other protected speech (the use of religious turbans, habits, religious scarves, religious sideburns, beards, mustaches, etc.). It is thus impermissibly seeking to regulate the content of Appellant's speech. *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622 (1994) (A regulation of speech which distinguishes favored speech from disfavored speech on the basis of ideas or viewpoints is content based). Content-based restrictions are presumptively invalid. *State v. T.B.D.*, 656 So.2d 479 (Fla. 1995), certiorari denied 516 U.S. 1145; *R.A.V. v. St. Paul*, 505 US 377 (1992). *Tinker v. Des Moines Independent Community School Dist.*, 393 US 503(1969).

4th DCA 1997) (*citing Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). Therefore, if intent cannot create speech, lack of intent cannot destroy speech.

In this instance, as in the instance of donating money or engaging in expressive dancing, it is Appellant's conduct, wearing a veil, which constitutes the expressive action protected by the Florida Constitution regardless of aforethought. Expressive conduct is protected. *State v. Conforti*, 688 So.2d 350 (Fla. 4th DCA 1997), *citing Spence v Washington*, 418 U.S. 405 (1974).

Finally, to the extent the trial court required some level of intent as a sub-part of its new theory, it was inappropriate for the trial court to base its entire decision on an answer to a question in a deposition where the deponent had earlier expressed an inability to understand the question and where the underlying question was the subject of an objection. It is clear that the trial court did not take the facts in the light most favorable to the non-moving party.

2. <u>The Trial Court Erred In Granting Summary Judgment on Appellant's Due Process Claim</u>.

Assuming arguendo that Appellee had authority to cancel, revoke, or suspend Appellant's driver's license, it did not do so in accordance with Florida law. Pursuant to Section 322.251(2), Fla. Stat., notice of cancellation, suspension or revocation must be sent and cannot be effective until the "expiration" of twenty (20) days.

Appellee's notice in this case is dated December 18, 2001, and cancels Appellant's license on January 7, 2002. Appellant's license could not be revoked until the "expiration" of twenty (20) days, which would be January 8, 2002.

Appellee did not provide the mandatory twenty (20) days as required by Florida law. § 322.251(2), Fla. Stat.

In addition, Appellee failed to provide time for mailing, as required. *See* Rule 1.090(e), Fla. R. Civ. P. In *Investment and Income and Realty, Inc. v. Bentley*, 480 So.2d 219 (Fla. 5th DCA 1985), this Court ruled that a three (3) day notice, if sent by mail, was required to add an additional five (5) days. Appellee in this matter failed to provide additional time to comply with the mailing requirements of Florida law.

Accordingly, Appellant's procedural due process rights have been denied and the trial court misapplied the law by holding otherwise.

3. The Trial Court Erred In Granting Summary Judgment on Appellant's Privacy Claim.

The trial court applied an incorrect test as to Appellants' privacy interests. The trial court stated that it would examine privacy only as measured objectively with no reference to the subjective beliefs of Appellant. (R1072). Since the trial court based its reasoning only on an objective principle, while specifically excluding Appellant's subjective beliefs, the trial court departed from clearly established law.[38]

[38] Whether a statute violates the right to privacy requires an evaluation under a compelling state interest standard. *See Reyes v. State of Florida*, 28 Fla. L. Weekly D2131 (September 10, 2003, Fla. 4th DCA 2003); *Board of County Commissioners of Palm Beach County v. D.B.*, 784 So.2d 585 (Fla. 4th DCA 2001). The trial court further erred by not applying this standard to Appellant's privacy claim.

In a recent case in front of this Court, this Court examined right to privacy by probing the reasonable subjective expectation united with societal limitations. *State v. Russell*, 814 So.2d 483 (Fla. 5th DCA 2002). This standard has been applied to privacy in a number of contexts and it has been crucial to focus upon those subjective expectations that society will recognize as reasonable. *State v. Lampley*, 817 So.2d 989 (Fla. 4th DCA 2002); *Jackson v. State*, 833 So.2d 243 (Fla. 4th DCA 2002).

A consistent test was set forth by the United States Supreme Court, adopted by this Court, and apparently rejected by the trial court, which refused to consider Appellant's subjective beliefs. This two-part test states: (a) a person must have a subjective expectation of privacy, and (b) the expectation must be one that society recognizes as reasonable. *Horning-Keating v. State*, 777 So.2d 438 (Fla. 5th DCA 2001) (*citing Katz v. United States*, 389 U.S. 347 (1967). It was therefore imperative that the trial court first examine Appellant's subjective beliefs and then the trial court was required to determine whether society recognizes those beliefs. By cutting the subjective and only looking at objective, the trial court misapplied the law and contradicted established case law.

Although this misapplication of the law is enough to overturn the ruling, even using its own test the decision was inappropriate. In a summary judgment context, the court is to analyze the facts in a light favorable to Appellant. It was therefore inappropriate to hold one cannot have a reasonable expectation of privacy to their facial appearance, when this is contrary to established case law.

In *Doe v. Univision Television Group, Inc.*, 717 So.2d 63 (Fla. 3d DCA 1998), the *Doe* court held it was inappropriate to grant summary judgment when a viable invasion of privacy claim was made based upon the showing of a face. Similarly, in *Cedars Healthcare Group, Ltd. v. Freeman*, 829 So.2d 390 (Fla. 3d DCA 2002), the *Cedars* court held there are instances where people have privacy rights regarding appearance, and the court ruled disclosure of photographs or identities would not be permitted as it would constitute an invasion of privacy.

Not only did the trial court misapply the law, but in applying the law in the manner set forth, the trial court could not have granted summary judgment, as one can have a right to privacy protection as to their facial appearance.

d. The Trial Court Erred and Misapplied the Law In Refusing To Issue An Order Regarding One Of The Pillars Of Appellant's Arguments, Statutory Construction

The trial court erred by not ruling on the argument that Appellant fulfilled all obligations under applicable statutes and codes. This was raised throughout the litigation and the trial court's refusal to rule was a departure from jurisprudence.

To begin with, Appellee did not have authority to revoke Appellant's license. Pursuant to Section 15A-1.0012, Florida Administrative Code, "Florida Applicants shall be denied said license **only** for the reasons set forth in Section 322.05, F.S." (emphasis added).[39] A review of Section 322.05 demonstrates Appellant cannot be denied a license in the State of Florida as she does not even

---

39 "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning . . . the statute must be given its plain and obvious meaning." *Florida Convalescent Centers v. Somberg*, 2003 WL 252155 (Fla. 2003) (citations omitted).

remotely fall into any of the enumerated categories found within Section 322.05, Fla. Stat.

Next, pursuant to Section 322.14, Fla. Stat., Appellee, upon Appellant's successful completion of required examinations and payment of fees, shall issue a license to Appellant. It is undisputed Appellant completed all required applications and paid all required fees for obtaining a driver's license. It was error to hold that Appellant had to do anything additional to obtain a driver's license.

This is consistent with the remainder of Section 322.14, Fla. Stat., that clarifies that only drivers receiving commercial licenses, Class A, Class B, or Class C driver's licenses, must appear for a color photograph or digital image. Section 322.14(1)(a), Fla. Stat., provides as follows:

> Applicants qualifying to receive a Class A, Class B, or Class C driver's license must appear in person within the state for issuance of a color photographic or digital image driver's license pursuant to §322.142.

Appellant does not hold, has never held, and has never requested a commercial driver's license. Florida does not require the holder of a Class E license to provide a photograph. Under the commonly used statutory construction principle of *Expressio Unius Est Exclusio Alterius*, as the statute expressly requires certain classes to appear for a color photograph, it necessarily excludes others. *Zopf v. Singletary*, 686 So.2d 680, 681-82 (Fla. 1st DCA 1997); *see also Young v. Progressive Southeastern Insurance Company*, 753 So.2d 80, 85 (Fla. 2000).[40]

[40] If Appellee's interpretation of the statute was accepted, language would be meaningless. Statutory language is not superfluous. A statute must be construed so as to give meaning to all words and phrases contained within the statue. *See*

To the extent Section 322.142 references a "fullface photograph"[41] obligation, it only does so in the context of the *Department's* obligations. However, there is no correlating obligation on the part of the Appellant to provide anything to the department.[42] There can be no assumed obligation by the applicant, as one looks to the plain language of the statute to derive legislative intent. *Hayes v. State of Florida*, 750 So.2d 1 (Fla. 1999).[43] A plain reading of the differing obligations of the Department versus the applicant, keeps Section 322.142, Fla. Stat., consistent with Section 322.14(1)(a), Fla. Stat..

Terrinoni v. Westward Ho!, 418 So.2d 1143 (Fla. 1st DCA 1982); *U.S. v. DBB, Inc.*, 180 F.3d 1277 (11th Cir. Fla. 1999). Any statutory construction must be done to effectuate all provisions and all language contained in the statute. Courts cannot construe statutory language to render it meaningless. *See Beyel Brothers Crane & Rigging Company. of South Florida v. ACE Trans Inc.*, 664 So.2d 62 (Fla. 4th DCA 1995) and *Weber v. City of Ft. Lauderdale*, 675 So.2d 696 (Fla. 4th DCA 1996).

[41]It is important to note that the modifier "fullface" is used only as to photograph and not to the alternate "digital image" which may be provided instead.

[42] Pursuant to Section 322.14, Fla. Stat., the department, upon successful completion of all required examinations and payment of required fees, shall issue a license to the applicant. There is no requirement of the Applicant beyond the examination and the payment of fees for a Class E license and it is undisputed in this case that Petitioner has completed all required applications and has paid all required fees for obtaining a Florida driver's license.

[43] Therefore when the Court construes a statute, the court is to look at the statute's plain meaning, in this instance, the statute separates the obligations of the Department from those of the Applicant. *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So.2d 898 (Fla. 1996).

Assuming arguendo Appellant was required to take a fullface photograph, she did so. The word, "fullface" is defined in dictionaries.[44] Dictionaries define "fullface" as "facing squarely towards the spectator or in a given direction," or "with the face turned directly toward the spectator or in a specified direction."[45]

Under the dictionary definition of "fullface," Appellant complied with Florida Statutes. The driver's license originally issued to Appellant had a "fullface" color photograph of Appellant looking squarely towards the camera, *i.e.*, the spectator. Nowhere in Florida Statutes does it state that Appellant cannot be wearing a veil or in anyway have her face covered. Appellee is asking to add additional words to a statute that are not present. A court in construing a statue cannot add words to the statute not placed there by the legislature. *See Chaffee v. Miami Transfer Company, Inc.*, 288 So.2d 209 (Fla. 1974); *Atlantic Coast Line Railroad Company v. Boyd*, 102 So.2d 709 (Fla. 1958). By finding for Appellee, the trial court inappropriately reconstructed the statutes away from plain meaning.

VII. CONCLUSION

For the foregoing reasons, the decisions of the trial court below delineated herein must be reversed and this consolidated action remanded to the trial court with instructions to enter final judgment in favor of Appellant.

---

[44] Courts can determine legislative intent by use of the word in a dictionary. *See L.B. v. State*, 700 So.2d 370 (Fla. 1997); *Alvarez v. State*, 800 So.2d 237 (Fla. 3rd DCA 2001), *rev. den.* 823 So.2d 122 (Fla. 2003) (when a word is not defined by the statute, the court uses a standard dictionary to look up the word).

[45] *The Random House College Dictionary*, revised addition 1975, and *Webster's New World Dictionary of American English*, Third College Edition, revised 1988; Dictionary.com defines "fullface" as "looking forward."

VIII. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements (Times New Roman, 14 pt.) of Rule 9.100(1), Florida Rules of Appellate Procedure.

IX. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to: **E. JASON VAIL, ESQUIRE**, Office of the Attorney General - State of Florida, 400 S. Monroe Street, #PL-01, Tallahassee, FL 32399-6536 and to **WILLIAM C. VOSE, ESQUIRE,** Chief Assistant State Attorney, 415 N. Orange Avenue, Orlando, FL 32801**,** this _____ day of _____, 200_.

_____

HOWARD S. MARKS, ESQUIRE
Florida Bar No. 0750085
KEVIN SCOTT MILLER, ESQUIRE
Florida Bar No. 0484245
Cooperating Attorney for the ACLU Foundation of Florida, Inc., Central Florida Chapter
369 N. New York Avenue, 3rd Floor (32789)
P.O. Box 1690
Winter Park, FL 32790
Telephone: (407) 647-4455
Facsimile: (407) 740-7063

RANDALL C. MARSHALL, LEGAL DIRECTOR
Florida Bar No.: 0181765
ACLU Foundation of Florida, Inc.
4500 Biscayne Blvd., Suite 340
Miami, FL 33137-3227
Telephone: (305) 576-2337
Facsimile: (305) 576-1106

Attorneys for Appellant, SULTAANA LAKIANA MYKE FREEMAN