IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

SULTAANA LAKIANA MYKE FREEMAN,

Plaintiff,

CASE NO.: CIO-02-2828
DIVISION: 40

v.

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

Defendant.
_____/

**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS**

Plaintiff, SULTAANA LAKIANA MYKE FREEMAN (hereinafter referred to as "Plaintiff"), by and through her undersigned counsel, respectfully files this response to Defendant, STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES (hereinafter referred to as "Defendant"), Motion to Dismiss and states as follows:

**I. STANDARD OF REVIEW.**

A Motion to Dismiss must be denied unless it appears beyond all doubt that Plaintiff can prove no set of facts in support of her claims. A court must accept the facts alleged in the Complaint as true. *See, Alexander Hamilton Corp. v. Leeson*, 508 So.2d 513 (Fla. 4th DCA 1987); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). All reasonable references must be drawn in favor of the Plaintiff and the entire Complaint must be reviewed in the light most favorable to Plaintiff. *See, Higgs v. Florida Department of Corrections,* 647 So.2d 962, 964 (Fla. 1st DCA 1994). The issue in a motion to dismiss is not whether Plaintiff will prevail, but whether Plaintiff is entitled to offer evidence in support of her claims. *See, His Hon v. King & Spaulding*, 467 U.S. 69 (1984); *Brad Berry v. Pinellas County,* 789 F.2d 1517 (11th Cir. 1986). Defendant

has even a greater difficulty in meeting the standard to dismiss a complaint when a claim is brought under the Florida's Religious Freedom Restoration Act of 1988 (hereinafter "RFRA"). The RFRA statute specifically sets forth that it is Defendant's burden and Defendant must demonstrate that its statute is in furtherance of a compelling state interest and it is the least restrictive means of furthering the compelling state interest. *See,* Chapter 761, Florida Statutes (2001). Defendant simply cannot meet this burden on a Motion to Dismiss.

**II. FACTS.**

Plaintiff is a woman of the Muslim faith. *See* Appendix I. Plaintiff was issued a driver's license by the State of Florida on February 21, 2002. *See* Appendix I and II. Plaintiff is an American citizen, born and raised in the United States and has never lived outside of the United States. Plaintiff's ancestors have lived in the United States for over one hundred (100) years. *See* Appendix I. Prior to Plaintiff's move to the state of Florida, she lived in the state of Illinois. Plaintiff was issued a driver's license by the state of Illinois. Plaintiff was not required to unveil in the state of Illinois and the state of Illinois allowed her photograph to be taken with her veil as an accommodation to her religious beliefs. *See* Appendix I. The wearing of a veil reflects a tenet, practice and tradition of Plaintiff's religion. *See* Appendix I. Plaintiff holds a sincere religious belief that her religion requires her to veil in front of strangers and unrelated males. *See* Appendix I. Having a photograph taken without her veil and having that photograph displayed to strangers and/or unrelated males, would violate a tenet, practice and custom of Plaintiff's religion. *See* Appendix I. On February 21, 2001, Plaintiff was issued a driver's license by the State of Florida. *See* Appendix I. The driver's license contained a color photograph of Plaintiff wearing a veil as required by her religion. *See* Appendix I. Plaintiff was told she met all requirements of Florida law to obtain a Florida driver's license. *See* Appendix I. Plaintiff paid all appropriate fees and provided proof of identification as was requested. *See* Appendix I. Pursuant to the driver's license issued, it was not to expire until November 22, 2007. *See* 3ED3D7E6-6042-18183D.doc

Appendix II. On December 18, 2001, the State of Florida issued a letter stating that Plaintiff's driver's license would be revoked and/or canceled unless she reported to an office in Winter Park, Florida to have her photograph taken without her veil. *See* Appendix I, II and III. Plaintiff could not comply with the request of October 18, 2001, as it would violate her religious beliefs. *See* Appendix I. Requiring Plaintiff to undergo a photograph of herself without a veil would substantially burden Plaintiff's religious beliefs and her free exercise of religion. *See* Appendix I and VII-A. Plaintiff has offered to provide finger prints, signature, Social Security card and/or any other reasonable form of identification as a substitute for a photograph without her veil. Defendant has rejected all such alternatives. *See* Appendix I. Plaintiff has never committed any act that would justify the revocation or cancellation of her driver's license. Plaintiff has not even received a traffic ticket in the state of Florida. *See* Appendix I. Defendant's cancellation of Plaintiff's driver's license unduly burdens her religion which requires her to make a choice of following an important fundamental tenet of her religion or foregoing that right to obtain and maintain a Florida driver's license. *See* Appendix I. Having the ability to drive is important to Plaintiff and her family. *See* Appendix I. Plaintiff is the parent of an infant and must be able to care for that infant. Not only must Plaintiff care for her numerous daily activities that necessitate driving, such as taking her to the doctor and grocery shopping, but if an emergency arises it is important that she has the ability to drive if other members of the family are not available to do so. *See* Appendix I.

## III FLORIDA LAW DOES NOT REQUIRE THAT PLAINTIFF PROVIDE A FULLFACE PHOTOGRAPH TO BE ISSUED A CLASS E DRIVER'S LICENSE.

§ 322.08, Fla. Stat., sets forth what an individual must provide in his/her application for a Florida driver's license. The application should include name, Social Security number, residence and mailing address. Further, an applicant must provide proof of date of birth satisfactory to the department. The type of proof satisfactory to the department includes a United States birth

certificate. The statute does not have a requirement that the document provided for proof have a photograph, let alone a fullface photograph of the applicant. In addition, pursuant to Florida Administrative Code, 15A-1.0012, the Defendant will accept identification including school records, baptismal certificates, marriage certificates, family bible records, birth announcements, voter registration cards and out of state driver's licenses. Again, the documentation required to be submitted for an application for a license does not require the documentation have a photograph of the applicant. Pursuant to § 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. It is undisputed in this case that Plaintiff has completed all required applications and has paid all required fees for obtaining a Florida driver's license. In fact, § 322.14, Fla. Stat., specifically holds that the individuals that must appear for a color photograph or digital image, are driver's that are to receive a Class A, Class B, or Class C driver's license. § 322.14(1)(a), Fla. Stat., in part states 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.

Plaintiff does not now hold, has never held, and has never requested to hold, a Class A, Class B, or Class C driver's license. Class A, Class B, and Class C driver's licenses are designated as a commercial driver's license under Florida law. *See* § 322.01(7). A careful reading of the Florida law shows that Florida law does not require the holder of a Class E driver's license to provide a fullface photograph.[1] § 322.142, Fla. Stat., upon which Defendant relies, appears to only require a fullface photograph for holders of commercial driver's licenses. Under the principle of

[1]It is interesting to note that the Florida Supreme Court has struck down as unconstitutional a Florida law that prohibited a person wearing a mask, hood or device whereby his identity is concealed. *See Robinson v. State*, 393 So.2d 1076 (Fla. 1980). A driver with a license that contained a photograph without a veil is constitutionally permitted to drive in Florida wearing a veil.

*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).

It also is important to note that although Florida law purports to require a license be carried and exhibited upon demand, it also provides, in § 322.15(2), that if a person fails to display a driver's license as required, a law enforcement officer shall require the person to imprint his or her fingerprint upon any citation issued by the officer for identification purposes. Accordingly, Plaintiff has always asserted and asserts herein, that she will provide fingerprints or other documents for proper identification purposes. Clearly, Florida law recognizes that fingerprint identification is, at minimum, a sufficient substitute for the display of a driver's license.

Although § 322.142 does reference a "fullface photograph"[2], it only does so in the context of the *department's* obligations. A plain reading of the statute shows that it is *the department* which shall be required to provide certain items to the Applicant. However, there is no correlating obligation on the part of the Applicant to provide anything to the department.[3] Pursuant to the case law put forth by Defendant, there can be no possibility of an assumed obligation by the Applicant, as one must look to the plain language of the statute to derive legislative intent. *Hayes v. State*, 750 So.2d 1 (Fla. 1999).[4] However, a plain reading of the

[2]It is important to note that the modifier "fullface" is used only in reference to the photograph, and not in reference to the alternative "digital image" which may be provided instead of the photograph.

[3]Pursuant to § 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.

[4]Under the long standing principle of *Expressio Unius Est Exclusio Alterius*, as the above referenced Statute separates the obligations of the Department from those of the Applicant, where the Department is

differing obligations of the Department versus the Applicant as described above, helps keep § 322.142 much more consistent with § 322.14(1)(a), than Defendant's interpretation if the statute. Just as Defendant selectively ignored part of the language in § 322.142 in order to advance its misinterpretation of the law, Defendant ignored those parts of the statute which are inconvenient with regard to § 322.14(1)(a).

Unlike § 322.142, § 322.14(1)(a) does place a requirement upon some Applicants. However, § 322.14, Fla. Stat., specifically holds that the only individuals that must appear for a color photograph or digital image, are those driver's that are to receive a Class A, Class B, or Class C driver's license. Petitioner does not now hold, has never held, and has never requested to hold, a Class A, Class B, or Class C driver's license. Class A, Class B, and Class C driver's licenses are designated as a commercial driver's license under Florida law. *See* § 322.01(7). A careful reading of the plain language of § 322.14 shows that Florida law does not require the holder of a Class E driver's license to provide a fullface photograph. § 322.142, Fla. Stat., only requires a fullface photograph for holders of commercial driver's licenses.

Any attempt to interpret § 322.142 or § 322.14(1)(a) in order to support that position advanced by Defendant would require this court to selectively read the statutes in such a way as to ignore the plain meaning of the text and to strike through certain provisions while adding others.[5] Despite Defendant's position that Florida law plainly requires the driver's fullface

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the only entity obligated to do something, the obligation necessarily is not placed upon the Applicant. *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).

[5]A different interpretation would also require this court to also re-write § 322.08, Fla. Stat., which sets forth what an individual must provide in his/her application for a Florida driver's license. Pursuant to § 322.08, the application should include name, Social Security number, residence and mailing address. An applicant must provide proof of date of birth, said proof includes a United States birth certificate. The statute does not have a requirement that the document provided have a photograph, let alone a full face photograph of the applicant. In addition, pursuant to Florida Administrative Code, 15A-1.0012, the Respondent will accept identification including school records, baptismal certificates, marriage certificates, family bible records, birth announcements, voter registration cards and out of state driver's

photograph on the license, there is no evidence to support this assertion. To the contrary, the above referenced statutes differentiate between the obligations of the Department and the obligations of the Applicant. The above referenced statutes differentiate between commercial driver's licenses and Class E licenses. Therefore, the Defendant's cancellation for Applicant's failure to do something with regard to her Class E license, which she is not obligated, necessarily violates Florida Law.

Defendant's interpretation of Florida Statutes § 322.14(1)(a) and § 322.142, would render certain provisions of the statutes meaningless, unnecessary and superfluous. Defendant has no explanation and has provided no explanation, for the language in § 322.14(1)(a) that provides that only applicants for Class A, Class B and Class C licenses must appear for a photograph pursuant to § 322.142.

If Defendant's interpretation of the statute was accepted by this Court, it would have to rule that the language contained in § 322.14(1)(a) was meaningless. Statutory language is not to be assumed to be superfluous. A statute must be construed so as to give meaning to all words and phrases contained within the statue. *See 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). This basic tenet of statutory construction requires this Court not ignore language contained in the statute and not to add language not contained in the statute. 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 Co. 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).

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licenses. Again, the documentation required to be submitted for an application for a license does not require the documentation have a photograph of the applicant.

Finally, whether the word "shall" contained in § 322.142 is mandatory or directory is an issue that this Court may need to address. Defendant has argued that since § 322.142 says that the "Department shall" that it is absolutely required to only issue licenses with a color photograph or digital image of the license holder. Nevertheless, Florida law is clear that the word "shall" as it appears in legislation, is not always to be given mandatory connotation. *See Reid v. Southern Development Co.*, 42 So. 206, 208 (Fla. 1906). The Florida Supreme Court noted that "where the directions of a statute are given with a view to the proper, orderly, and prompt conduct of business merely, the provision may generally be regarded as directory."

In *The City of Orlando v. County of Orange*, 264 So.2d 844 (Fla. 4th DCA 1972), the Fourth District Court of Appeals held that a statute which stated "the commissioners shall levy a tax" was merely directory. Courts should look to determine whether shall is mandatory or directory depending upon the context in which it is used. *See Allied Fidelity Insurance Co. v. State,* 415 So.2d 109 (Fla. 3d DCA 1982). When statutes use the word "shall" to designate requirements to be performed by governmental entities, as is the case here, courts have often found that the "shall" is nothing more than directory. *See City of Orlando, infra*, and *City of Waldo v Alachua County*, 239 So.2d 63 (Fla. 1st DCA 1970), *approved,* 249 So.2d 419 (Fla. 1971).

## IV. ASSUMING THAT FLORIDA STATUTES REQUIRE PLAINTIFF TO TAKE A FULLFACE PHOTOGRAPH, SHE DID.

Assuming arguendo that Plaintiff is required to take a fullface photograph, she did so. Defendant makes much of the argument that legislative intent is derived from a statute's plain language. *See* Defendant's Motion to Dismiss at 2. Defendant argues that "fullface" is clear and unambiguous. Defendant suggests to look at the dictionary definition of "fullface," which courts can do to determine what the legislature meant by use of the word. *See L.B. v. State*, 700 So.2d 370 (Fla. 1997). Defendant, however, is disingenuous when, although its cites to a dictionary

definition, it does not cite to the definition of "fullface." Defendant only provides a dictionary definition of "full." The word, "fullface" is defined in dictionaries, and its definition, as one would expect, is quite different than the word "full." *The Random House College Dictionary*, revised addition 1975, and *Webster's New World Dictionary of American English*, Third College Edition, revised 1988, 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." *See* Composite Exhibit "A" attached hereto.

Clearly, under a dictionary definition of "fullface," Plaintiff has complied with § 322.142, Florida Statutes, even assuming it applies to Plaintiff. The driver's license issued to Plaintiff does in fact have a "fullface" color photograph of Plaintiff. Plaintiff is looking squarely towards the camera, *i.e.,* the spectator. Nowhere in Florida Statutes does it state that Plaintiff cannot be wearing a veil or in anyway have her face covered. Defendant is now asking this Court 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). Presumably, had the legislature wanted to ensure that no one would wear a religious veil when taking a fullface photograph it could have done so. Since the legislature failed to do so, this Court cannot now add additional words that the legislature failed to add.

## V. FLORIDA'S RELIGIOUS FREEDOM RESTORATION ACT IS CONSTITUTIONAL.

It is unusual for the Attorney General of the State of Florida to be arguing that a state statute is unconstitutional. Obviously, Defendant believes that if this Court were to apply RFRA to this case it would lose because it could not meet the burden required by RFRA. In order to avoid having to meet its burden Defendant argues that the Florida RFRA violates Article I, Section 3, of the Florida Constitution. Defendant is simply wrong. RFRA itself notes that as to

a free exercise claim the act should be construed with Article I, Section 3, of the Florida Constitution. There is nothing inconsistent with RFRA and Article I, Section 3 of the Florida Constitution. RFRA only requires that the government show a compelling state interest and use the lease restrictive means before it burdens a person's free exercise of religion.

In support of Defendant's argument of the unconstitutionality of RFRA, Defendant on page 9 of its Motion to Dismiss cites the case of *State v. Board of Public Instruction for Hillsborough County,* 190 So. 815, 816 (Fla. 1935). In the *Hillsborough County* case the School Board attempted to force Jehovah's Witnesses to salute the flag. The Florida Supreme Court's opinion upholding the School Board's position is filled with comments to the effect that the sect's religious position that saluting the flag violated its religious belief was "too far fetched" to be given credence. The Court does not make reference to Article I, Section 3, of the Florida Constitution and for good reason, that provision of the State Constitution had not been enacted in its present form. However, a much more important issue is that Defendant has failed to tell this Court, as most of us learned in law school, that the *Hillsborough County* case was effectively reversed by the United States Supreme Court several years later. In *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943); the United States Supreme Court specifically held that Jehovah Witness students could not be compelled to salute the flag against their religious beliefs.

The two other cases cited by Defendants are clearly distinguishable from the present case. The case of *Hermanson v. State,* 570 So.2d 322 (Fla. 2d DCA 1990) concurred felony child abuse charges for a failing to provide medical treatment of a minor child. The other case, *State Department of Legal Affairs v. Jackson,* 576 So. 2d 864 (Fla. 5th DCA 1991) concerned a criminal investigation for the issuance of a subpoena for a lottery scheme where contributors would send in money to obtain winning lottery numbers from God. Clearly these cases are not relevant to the analysis of the issues presented to this Court.

The wearing of a veil by Plaintiff is clearly legal in the State of Florida and is clearly protected under the Florida Constitution. More than twenty years ago the Florida Supreme Court struck down as unconstitutional a Florida law that prohibited a person wearing a mask, hood or device whereby their identity is concealed. *See, Robinson v. State,* 393 So.2d 1076 (Fla. 1980). A driver with a license containing a photograph without a veil is constitutionally permitted to walk in public and drive in public wearing a veil. Defendant cannot argue otherwise.

Plaintiff has never taken the position that her religious practice is an absolute right that must always prevail against governmental intrusion. Plaintiff, however, does take the position that is consistent with the Florida Constitution and RFRA that before the government can force her to violate a fundamental tenet of her religion by unveiling (when veiling is something she has an undisputed constitutional right to do), that the government comply with the dictates of RFRA and prove a compelling state interest and prove that requiring her to unveil to receive a license is the government's least restrictive way to meet its compelling state interest.

## VI. CASE LAW IN OTHER STATES SUPPORT THE POSITION THAT A STATE CANNOT COMPEL A PHOTOGRAPH OF AN INDIVIDUAL ON A DRIVER'S LICENSE.

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

In *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), 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. Quaring's refusal to allow herself to photographed was a response to a literal interpretation of the Second Commandment. The court noted that Quaring's beliefs were religious in nature, though unusual in the twentieth century. The Eighth Circuit found that Quaring's beliefs were sincerely held religious beliefs which were in fact burdened by the Nebraska state law. 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. The court required Nebraska to issue Quaring a driver's license. The court in *Quaring* noted that the Second Commandment remains a fundamental tenet of both the Jewish and Christian faith and that interpretation and commentary on the Second Commandment lends support to Quaring's personal interpretation. 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.

The court in *Quaring* had no difficulty in finding that refusing to issue *Quaring* a driver's license unless Quaring would allow her photograph to appear on her license, a condition that would violate a fundamental tenet of her religion, is a burden on Quaring's religion. The *Quaring* court noted that in refusing to issue a driver's license, the state withheld an important benefit. The court took, in essence, judicial notice of the numerous daily activities that necessitate the driving of a motor vehicle. The court noted that the state unduly burdens Quaring's religion when it requires her to make a choice of following an important tenet of her

religion or foregoing the right to driving a car. 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. 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.

In *Dennis v. Charnes*, 571 F.Supp. 462 (D. Colo. 1983), Mr. Dennis brought a claim against the state of Colorado challenging Colorado's requirement of his picture on his driver's license. Mr. Dennis was a member of a religious group known as The Assembly of YHWHHOSHUA. Among the group's belief was the interpretation that the Second Commandment prohibited its members from having photographs taken of them. The district court initially dismissed the complaint. Mr. Dennis appealed and the Tenth Circuit Court of Appeal reversed. *See Dennis v. Charnes*, 805 F.2d 339 (10th Cir. 1984). On remand, the district court held that the photograph requirement was void as to Mr. Dennis, since it abridged his religious beliefs. The court found that the state's interest was not so compelling as to prohibit selective exemptions to the photograph requirement. 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. 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 *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, 380 N.E.2d 1225 (Ind. 1978), 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 thus entered judgment declaring the statute to be unconstitutional as applied to the group. The court enjoined the state of Indiana from requiring properly certified members of the religious organization to have

photographs on their driver's licenses. In *Pentecostal House of Prayer*, plaintiffs were members of a religious organization whose religious beliefs were derived from a literal reading from the Bible. Much like the plaintiffs in *Quaring*, the plaintiffs believed relied on the Second Commandment, which states:

> Thou shall not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the waters beneath the earth.

Plaintiffs believed that this specific commandment prohibits them from owning, posing for, or otherwise participating in any form of photograph, painting, and/or sculpture. Again, the court deferred to this fundamental precept and held that the Indiana statute's photograph requirement was unconstitutional if it required members of certain religious organizations to choose between surrendering their driving privileges and violating a fundamental tenet of their religion. The state countered that it had a compelling interest to insure the competency of Indiana drivers. 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.[6]

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[6] The court further stated:

> The *Bureau's* argument that the photograph requirement gives it a means of speedy, positive identification, thus aiding the Bureau in the performance of its duty to insure safe roads in Indiana, is more compelling. Normally, we would not question the State's need for administrative efficiency in an area as broad and complex as is involved in the licensing of all Indiana drivers. However, we feel that there are other alternatives available to the Bureau which would satisfy this purpose without impinging on the rights of these appellees. For example, statistics which are traditionally included on a driver's license such as license number, height, weight, eye and hair color, have long proven adequate to enable the Bureau to fill its important duties. Furthermore, we feel that it is much to a driver's advantage to have a photo-license as it is to the state. Having a photo-license goes a long way to easing the problems which arise when cashing checks and transacting other non-cash business. Since a photo-license is arguably an advantage to license-holders, it follows that the exemption sought by

In *People 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. The court ruled in favor of the Amish. *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 that have grappled with the identical issue before this Court and have ruled that the states' 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.

## VII. NUMEROUS STATES MAKE EXCEPTIONS TO PHOTOGRAPH REQUIREMENTS ON DRIVER'S LICENSES FOR THOSE OBJECTING ON GROUNDS OF RELIGIOUS BELIEF. [7]

Numerous states throughout the United States provide religious exceptions from a photo requirement on a driver's license. These states have accommodated an individual's First Amendment rights and have not found that the state's interest is so compelling as to require an individual to choose between violating a fundamental religious tenet or surrendering their driver's license. Plaintiff is aware of the following states:

i. In Arkansas, a driver's license may be valid without a photograph of the licensee when the commissioner is advised that the requirement of the photograph is either objectionable on the grounds of religious belief or the licensee is unavailable to have a photograph taken. *See* Arkansas Statute Section 27-16-801(b)(2) and Appendix V. - A.

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> appellees will to some degree, work a disadvantage upon them. Thus, it is not likely that a ruling in appellees' favor will result in wide spread abuse. In sum, we agree with the trial court's finding that the state's interest in the photograph requirement, such as it is, is not so compelling that it may be allowed to infringe upon appellees' fundamental right to freely exercise their religious beliefs.

[7]Petitioner is still undergoing research into other states and believes that many other states not mentioned in this section either have no photograph requirement or permit a religious exception to a photograph.

ii. In Iowa, issuance of a driver's license may not be denied a person solely on the ground that he/she refuses to have a photograph taken, when that refusal is based upon his/her religious beliefs. *See* Op.Atty.Gen. (Preisser) October 26, 1976, and Appendix V. - B.

iii. In Kansas, a driver's license which does not contain a color photograph of the licensee as required may be issued to persons exempted from such requirement. Any such person belonging to a religious organization which has a basic objection to having their photograph taken may sign a statement to that effect and such person shall then be exempt from the picture requirements of this section. *See* Kansas Statute Section 8-243(a) and Appendix V. - C.

iv. In Louisiana, applicants will not be photographed with head coverings such as hats, scarves or other adornments. The only exception to this will be any religious sect requiring head covering or any other attire. *See* Louisiana Department of Public Safety, Office of Motor Vehicles, Section I, Issuance of Driver's Licenses, No. 14.00 and Appendix V. - D.

v. In Minnesota, the Commissioner of Public Safety may adopt rules to permit identification on a driver's license or Minnesota identification card in lieu of a photograph or electronically produced image, where the Commissioner finds that the licensee has religious objections to the use of a photograph or electronically produced image. *See* Minnesota Statute, Section 171.071 and Appendix V. - E.

vi. In Missouri, the Director of Revenue shall issue a license without a photograph to an applicant therefor who is otherwise qualified to be licensed, upon presentation to the Director of a statement on forms prescribed and made available by the Department of Revenue which states that the applicant is a member of a specified religious denomination, which prohibits photographs of members as being contrary to its religious tenets. The licence shall state thereon that no photograph is required because of the religious affiliation of the licensee. The Director of Revenue shall establish guidelines and furnish to each circuit court

such forms as the Director deems necessary to comply with this subsection. The circuit court shall not charge or receive any fee or court cost for the performance of any duty or act pursuant to this section. *See* Missouri Statute Section 302.181(5) and Appendix V. - F.

vii. In North Carolina, the Commissioner may waive the requirements of a color photograph on a license if the license holder proves to the satisfaction to the Commissioner, that taking the photograph would violate the license holder's religious convictions. *See* North Carolina General Statute Section 20-7(n) and Appendix V. - G.

viii. In Oregon, the Director of Transportation, by rule, may provide for the issuance of a valid license without a photograph if the applicant shows good cause. The Director shall include religious preferences as good cause for issuance of a license without a photograph but shall not limit good cause to religious grounds. Further, the standards state that one who is a member of a religious denomination that prohibits photographing of its members because it is contrary to its religious tenets, constitutes good cause. *See* Oregon Statutes Section 1.110 and Standards for Issuance of a Driver's License 735-062-0120 and Appendix V. - H.

ix. In South Carolina, notwithstanding any other provision of law, a person shall not be required to have his/her picture taken or placed upon a South Carolina driver's license if he/she shall sign a sworn affidavit at the time of securing such driver's license that taking of such picture would violate the tenets and beliefs of the religion or sect of which he/she is an active participating member. *See* South Carolina Statutes Section 56-1-150 and Appendix V. - I.

x. In Wisconsin, a photograph requirement on a driver's license is exempted for persons who claim a sincere religious belief that prohibits their image from appearing on a license document. *See* Docket No. NHTSA-98-3945-1070 July 31, 1998, and Appendix V. - J.

xi. In Idaho, the Department of Motor Vehicles has recently recognized the constitutional right of a Christian woman to a religious head covering for a driver's license photograph. *See* Appendix V. - K.

xii. Even in Canada, our friendly neighbor of the north, one can apply to become a Canadian citizen without showing a photograph if it violates a tenet of his/her religion. *See* Appendix V. - L.

## VIII. THE DEFENDANT'S ACTION IN CANCELING PLAINTIFF'S DRIVER'S LICENSE FOR REFUSAL TO SUBMIT TO A PHOTOGRAPH IN VIOLATION OF HER SINCERELY HELD RELIGIOUS BELIEFS VIOLATES FLORIDA'S RELIGIOUS FREEDOM RESTORATION ACT OF 1998.

The Florida Religious Restoration Act of 1998 (hereinafter referred to as "RFRA") states as follows:

**761.01 Short title.--**

This act may be cited as the "Religious Freedom Restoration Act of 1998."

History.--s. 1, ch. 98-412.

**761.02 Definitions.**--As used in this act:

(1) "Government" or "state" includes any branch, department, agency, instrumentality, or official or other person acting under color of law of the state, a county, special district, municipality, or any other subdivision of the state.

(2) "Demonstrates" means to meet the burden of going forward with the evidence and of persuasion.

(3) "Exercise of religion" means an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.

History.--s. 2, ch. 98-412.

**761.03 Free exercise of religion protected.--**

(1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that

government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

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

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

(2) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

History.--s. 3, ch. 98-412.

**761.04 Attorney's fees and costs.--**

The prevailing plaintiff in any action or proceeding to enforce a provision of this act is entitled to reasonable attorney's fees and costs to be paid by the government.

History.--s. 4, ch. 98-412.

**761.05 Applicability; construction.---**

(1) This act applies to all state law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this act.

(2) State law adopted after the date of the enactment of this act is subject to this act unless such law explicitly excludes such application by reference to this act.

*****

Florida RFRA was enacted as law in the state of Florida in 1998. Florida RFRA was enacted as a result of two United States Supreme Court decisions. Prior to the United States Supreme Court decision in *Employment Division D.P.H.R. of Oregon v. Smith*, 494 U.S. 872 (1990), the law in this country was that free exercise rights protected by the First Amendment could not be infringed upon by a governmental entity unless that governmental entity met the

"compelling state interest test." The compelling state interest test required not only the state to prove that it had a compelling state interest to infringe upon the individual's religious beliefs, but requires the state to show that it was acting in the "least restrictive means." For example, in *Sherbert v. Verner*, 374 U.S. 398 (1963), a Seventh Day Adventist who believed that work on Saturdays, her Sabbath, was unbiblical, was refused unemployment benefits. She challenged the denial under the free exercise rights protected by the First Amendment. The 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." [cite omitted] Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of 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 *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a generally applicable state law required all children attend school until the age of 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 v. Review Board*, 450 U.S. 707 (1981), the 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.

Until 1990, the law in the United States was absolutely clear that a neutral rule of general applicability that substantially burdens an individual's religious practices would run afoul of the free exercise clause unless it was narrowly tailored to achieve a compelling state interest.

In 1990, although not professing to do so, the United States Supreme Court reversed its longstanding prior precedent. In *Smith*, 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. As a result of the Supreme Court's decision in *Smith*, religious leaders from across the country were outraged and lobbied congress for a law that would in affect reestablish the compelling state interest test established by the Supreme Court prior to *Smith*. Congress eventually passed the Religious Freedom Restoration Act of 1993 (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 that Congress had exceeded its authority under Section 5 of the Fourteenth Amendment. In direct response to the Supreme Court's decision in *Boerne*, religious leaders across the United States urged their state legislatures to pass state RFRA laws. In 1998, the Florida Legislature passed the Florida RFRA. 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 v. Verner*, 374 U.S. 398 (1963).

Accordingly, this Court is bound, in the analysis of this case, to apply Florida RFRA and to use strict scrutiny and the compelling state interest test. If the Court analyzes this case using Florida RFRA, Defendant simply cannot prevail.

Under the Florida RFRA statute, Defendant is required to demonstrate by going forward with evidence and of persuasion, that its revocation or cancellation of Plaintiff's driver's license

is in furtherance of a compelling state interest and is the least restrictive means of furthering the compelling state interest.

1. Plaintiff is Engaging in the Free Exercise of Religion.

Plaintiff is engaging in the "exercise of religion." Pursuant to § 761.02(3), Fla. Stat., 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." Plaintiff has refused to have a full-face photograph taken for her driver's license as a result of her religious belief. The Florida RFRA's express statement that the practice need not be "compulsory or central to a larger system of religious belief," in order to fall within RFRA's meaning is a clear expression by the Florida legislature to give the greatest protection to religious practices. The fact that some Muslims may not agree with Plaintiff's interpretation of the Qur'an or interpretation of her other religious scriptures in which she believes requires her not to expose her face to strangers or others is of no import.[8] All that is necessary is a sincerely held religious belief even if other members of her Muslim faith do not share her belief in the literal interpretation of the Qur'an. *See Thomas v. Review Board*, 450 U.S. at 715-16 and *Quaring v. Peterson*, 728 F.2d at 1124-25.

There can be little doubt and it has not been challenged that Plaintiff does not have a sincerely held religious belief that is supported by many members of the Muslim faith. Plaintiff's belief in veiling is clearly supported by religious doctrine of her faith. *See* Exhibit VII to Appendix wherein it is stated:

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

> "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. And Allah is Ever Oft-Forgiving, Most Merciful.

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

Finally, 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 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 can be no dispute that Plaintiff is exercising her religion within the context of Florida's RFRA.

2. Substantially Burdens Plaintiff's Exercise of Religion.

Defendant's cancellation and/or revocation of Plaintiff's driver's license, substantially burdens her free exercise of her religion. This was the exact issue decided in *Quaring, Charnes* and *Pentecostal House of Prayer, Inc*. Requiring the Plaintiff to comply with a photograph requirement places an unmistakable burden upon her exercise of her religious beliefs. The burden is indistinguishable from the burden placed upon a Sabbatarian by the state in *Sherbert v. Verner*. Assessing the burden of the denial of benefits in *Sherbert*, the United States Supreme Court stated 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, on the other hand. *Sherbert*, 374 U.S. at 404.

Plaintiff clearly meets the standard for substantial burden as set forth in Florida's RFRA. *See* § 761.03(1). Defendant must then demonstrate through evidence as set forth in § 761.02, that there is a compelling state interest.

3. Is There a Compelling State Interest?

Without any evidence or demonstration Defendant asserts on Page 8 of its Motion to Dismiss that Florida a compelling interest. As defined by § 322.263, Fla. Stat., the state's interest in the driver's license statute is to provide "maximum safety" for individuals who travel or otherwise use public highways and to deny the privilege of operating a motor vehicle to certain persons by their conduct and record have demonstrated their indifference for the safety and welfare of others and to discourage repetition of criminal actions by individuals against the peace and dignity of the state.

Although these are lofty goals the interest of the government requiring a "full-face" photograph does little to support these stated governmental interests. There has been no contention that Plaintiff has violated any criminal laws or that Plaintiff by her conduct and record has demonstrated an indifference for the safety or welfare of others. There is no evidence that Plaintiff has ever received a traffic ticket The only argument left for Defendant is that a full-face photograph of Plaintiff 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. It is not the state identification card. We do not in the state of Florida or in the United States, as yet, have a mandatory identification card. A driver's license merely purports to certify that the individual

holding the license has met the necessary requirements to drive in the state of Florida and has passed all necessary tests and paid all necessary 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 or state identification card. As noted by the court in *Bureau of Motor Vehicles v 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 an absolutely mandatory and necessary for a photograph to be on a driver's license.

Further, 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, as to individuals with sincerely held religious beliefs, works against any compelling state interest that Florida may have. In addition, Plaintiff has already noted at least eleven (11) states as referenced above, have specific exceptions built into their law relating to exempting photographs based upon religious beliefs on driver's licenses. These court decisions and state statutes virtually eliminate Florida's alleged compelling state interest to require Plaintiff to submit to a photograph in violation of her religious beliefs. Individuals from the states of Indiana, Arkansas, Iowa, Kansas, Louisiana, Minnesota, Missouri, North Carolina, Oregon, South Carolina, Wisconsin, and Idaho are free to travel throughout the state of Florida without obtaining a Florida driver's license. *See* § 322.031, Fla. Stat. Plaintiff could live in any of the above referenced states, have a driver's license issued in a state without a photograph and then travel freely throughout the state of Florida without the necessity of obtaining a Florida driver's license. In fact, Plaintiff had previously held an Illinois driver's license without the necessity of a full-face photograph. Pursuant to § 322.031, Fla. Stat., a nonresident who is domiciled in another state is free to commute in this state 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 such enrollment. Accordingly, if Florida allows citizens from states all around this country to travel in its state and to live in its state, without the necessity of obtaining a Florida driver's license with a "mandatory" photograph, how can the state assert that it has a compelling state interest to require Plaintiff to submit to a full-face photograph in order to maintain her driver's license.

Additionally, the Florida Administrative Code permits numerous instances where licenses can be issued without a photograph. For example, Florida Administrative Code 15A-1.0051 states that a resident can renew a driver's license while temporarily out of state upon request and shall be issued a driver's license without a signature or photograph. Further, Florida Administrative Code 15A-1.0012(6) specifically states that "under the authority of Chapter 322, Fla. Stat., the Department of Highway Safety and Motor Vehicles, Division of Driver's Licenses is solely responsible for issuing driver's licenses to applicants whose driving privilege is in good standing, who have demonstrated the required knowledge to operate a motor vehicle safely, and have presented identification documents in compliance with the rules set forth herein. Accordingly, all employees of the department, unless otherwise required, shall refrain from requiring any applicant for a driver's license to additionally show proof of immigration status. The identification required in that administrative code is identification that does not require a photographic identification. Further, pursuant to 15A-1.0012(7), applicants for Florida driver's licenses shall be denied said license only for the reasons set forth in § 322.05, Fla. Stat. There is no provision in § 322.05, Fla. Stat. that would prohibit Plaintiff from receiving a Florida driver's license or permitting the revocation or cancellation of her license. Defendant simply cannot set forth a sufficient compelling governmental interest to comply with Florida RFRA.

4. Defendant Cannot Meet the Least Restrictive Means Test.

Even assuming arguendo that Defendant can meet the compelling state interest test, it is still required under Florida RFRA to demonstrate that the requirement of a full-face photograph

on a Florida driver's license is the least restrictive means of furthering that compelling state interest. *See* § 761.03(b), Fla. Stat. Obviously, other states as referenced above, have been able to deal with individuals who have asserted religious exceptions to photographs on licenses. The least restrictive means test has been defined as follows:

> It is therefore the least restrictive means inquiry which is the critical aspect of the free exercise analysis. This prong forces us to measure the importance of a regulation by ascertaining the marginal benefit of applying it to all individuals, rather than to all individuals except those holding a conflicting religious conviction. 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 the state of Florida will assert a religious exemption to the photograph on their driver's license. Pointedly, it is unlikely to be much of a burden upon the state. Further, Plaintiff has asserted that she is willing to provide other evidence of identity. In fact, even Florida Statutes acknowledge that if an individual does not have a copy of a driver's license that they must provide a fingerprint. *See* § 322.15, Fla. Stat. Accordingly, law enforcement officers already must have some procedure set up for identification without a photograph. As noted in *Quaring*, 728 F.2d 1126, n.5, New York, the most popular state in the nation does not require photographs on driver's licenses. The fact that Florida permits individuals from other states to drive in this state without requiring photographic identification; the fact that Florida law exempts numerous motorists from having a photograph on their license; and the fact that people from other states actually drive through Florida on occasion or go to school full time in Florida; and the fact you can obtain a Florida driver's license without showing a photographic identification, destroys any argument that requiring Plaintiff to have a photograph would be the least restrictive means of serving the state interest. Defendant simply cannot meet the least restrictive means test.

## IX. PLAINTIFF HAS A DUE PROCESS CLAIM.

Defendant attempts to make the argument that holding a driver's license is not a right. Defendant argues that holding a Florida Driver's License is a privilege. However, whether you define the continued possession of a driver's license as a privilege or a property right, this does not change the ultimate legal analysis of this case.

The United States Supreme Court in *Bell v. Burson,* 402 U.S. 535 (1971) directly addressed this issue. In *Bell*, a clergyman was involved in an accident. The state of Georgia permitted an administrative hearing but refused to allow the clergyman to offer any evidence of fault or responsibility for the accident. The United States Supreme Court ruled that the state of Geogia had violated the clergyman's procedural due process rights. The *Bell* court stated:

> Once licenses are issued, as in Plaintiff's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases, the licenses are not to be taken away without procedural due process required by the Fourteenth Amendment. *Sniadach v. Family Finance Corp.*, 295 U.S. 337 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970) This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege." *Id.* at 539.

The *Bell* court further noted that a due process hearing must be meaningful and appropriate to the nature of the case. *See also Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

In *Smith v. Department of Highway Safety and Motor Vehicles*, 310 So2.d 314 (Fla. 1st DCA 1975), the court acknowledged the precedent of *Bell* and held that a person whose driver's license has been suspended for being a habitual traffic offender was entitled to a hearing to present his case either before or after the license revocation.

Defendant's argument that driving is a privilege and that Plaintiff has no "right to drive in this state" simply has no import in the legal analysis of this case. The United States Supreme

Court in *Sherbert v. Verner*, 374 U.S. 398 404 (1963), clearly rejected this privilege versus right analysis. The court stated as follows:

> Nor may the South Carolina court's construction of a statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's right but merely a privilege. It is too late in the date to doubt that the liberties of religion and expression may be infringed by denial of or placing of conditions upon a benefit or privilege.

In Plaintiff's case, she was issued a Florida driver's license pursuant to Florida law and Defendant's interpretation of Florida law prior to September 11, 2001. Plaintiff was issued this Florida driver's license on February 21, 2001. Plaintiff, upon the issuance of the driver's license, had met all requirements under Florida law for its issuance. Thereafter, as a result of the terrorist events of September 11, 2001, Defendant, without providing Plaintiff a hearing or providing Plaintiff the ability to provide evidence or argument, canceled and revoked her driver's license. This revocation and cancellation must be overturned.

a. Defendant's Cancellation of Plaintiff's Drivers Licence Was Not Done in Compliance with its Own Rules and Regulations.

Florida law is clear that an agency cannot take action against a Plaintiff unless it is "done in a manner consistent with adopted rules and relevant statutory scheme." *See In re Matter of W.A.N., III v. School Board of Polk County*, 504 So.2d 529, 530-31 (Fla. 2d DCA 1987). It is well established, and in fact elementary, that an agency may not ignore its own rules and if an agency goes beyond the scope of its own procedural rules, it is a violation of due process rights. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 274 (1954); *Service v. Dulles*, 354 U.S. 363 (1957); *Vitarelli v. Seaton*, 359 U.S. 535 (1929); *Ziegler v. Department of Health and Rehabilitative Services*, 601 So.2d 1280 (Fla. 1st DCA 1992) and *Phibro Resources Corp. v. State Department of Environmental Regulation*, 579 So.2d 118 (Fla. 1st DCA 1991).

Since Defendant's actions in this case did not even comply with its own rules and statutory scheme, Defendant necessarily violated Plaintiff's due process rights in the cancellation of Plaintiff's driver's license.

b. Defendant's Cancellation of Plaintiff's License Was Not Done in Accordance with Florida Law.

Assuming Defendant had authority to cancel, revoke or suspend Plaintiff's license, it did not do so in accordance with Florida law. Pursuant to § 322.251(2), Fla. Stat., notice of cancellation, suspension or revocation must be sent and cannot be effective until twenty (20) days after deposit into the U.S. Mail. Defendant's notice in this case is dated December 18, 2001, and cancels Plaintiff's license on January 7, 2002. Therefore, Defendant did not even bother to provide Plaintiff the mandatory twenty (20) days, as required under Florida law.

c. Defendant Did Not Have The Authority to Revoke, Suspend, or Cancel Plaintiff's Driver's License.

§322.27, Fla. Stat., gives Defendant the authority to suspend or revoke a driver's license. The statute states that the holder of a driver's license must have committed an offense for which mandatory revocation is required, that the holder of the license be convicted of some offense requiring suspension of the driver's license or that the licensee accumulate a certain amount of points within a 12-month period before Defendant can act. There is no authority given in § 322.27, Fla. Stat., for the department to suspend or revoke a license that was properly issued when the holder of the license has not violated some specific provision set forth in § 322.27, Fla. Stat. There is no argument that Plaintiff violated any provision of § 322.27, Fla. Stat., which would justify the suspension or revocation of her driver's license. In fact, there is no argument that Plaintiff had violated any provision of § 322.27, Fla. Stat.

Under § 322.22, Fla. Stat., the Defendant has the authority to cancel a license if it is determined the licensee is not entitled to issuance thereof or that the licensee failed to give the

required or correct information in his/her application, or committed a fraud in making an application, or if the licensee has two or more licenses on file with the department, each in a different name. Further, the Defendant is given authority to cancel a driver's license if a licensee fails to pay the correct fee. Plaintiff has complied with all requirements of § 322.22, Fla. Stat. Plaintiff has done nothing that would give the Defendant the authority to cancel her driver's license. Although Defendant might now argue that it wishes it never had issued Plaintiff a driver's license, this in and of itself is not sufficient to trigger the authority to cancel under § 322.22, Fla. Stat. Plaintiff did everything she was required to do in order to obtain a Florida driver's license. She showed appropriate identification to the satisfaction of Defendant, she paid the appropriate fee, she filled out the appropriate application and fully complied with Florida law. Pursuant to the Defendant's own interpretation of Florida law, Plaintiff was issued a Florida driver's license on February 21, 2001. The driver's license has a fullface photograph of Plaintiff wearing her veil. Plaintiff holds a sincere religious belief that her Muslim religion requires her to wear a veil in front of strangers and unrelated males and not to expose her face to others. The wearing of a veil reflects a tenet, practice and custom of Plaintiff's religion and is set forth in numerous passages of the Qur'an. The tragic events of September 11, 2001, do not change the fact that Plaintiff was properly issued a Florida's driver's license under Florida law and does not justify Defendant's improper cancellation. Plaintiff is an American citizen, born and raised in the United States. Plaintiff is entitled to exercise her freedom of religion as is any other American citizen.

Defendant has cited to no evidence that would support that Plaintiff was not entitled to have her license issued. Presumably, Defendant argues it did not do its job in getting a photograph of Plaintiff without a veil. This alleged failure on its part cannot be cause for cancellation of Plaintiff's license because she was clearly "entitled to issuance" of a license. It is important to note that in its Notice of Cancellation, Defendant states "Failed to report to the

Driver's License office to obtain a no-fee duplicate Driver's License without your veil." Defendant did not cancel Plaintiff's driver's license for her failure to have a "fullface" photograph since Plaintiff's license, as argued above, has a fullface photograph. Although Defendant may now be red-faced over the issuance of Plaintiff's fullface license, this cannot justify a cancellation of a duly issued license. Further, other states do not have this requirement, yet do not suffer from a rampaging shortfall in public safety.

d. Defendant's Own Interpretation of the Statute Has Been Inconsistent.

Defendant must acknowledge that its own interpretation of the statute prior to September 11, 2001, was that Plaintiff's fullface photograph, with a veil, complied fully with Florida law. The license that was issued to Plaintiff was not issued by mistake but issued pursuant to the policy of Defendant. This policy was consistent with Florida law. Apparently, after September 11, 2001, Defendant changed its position or construction of Florida Statutes. However, instead of attempting to apply this new construction prospectively, Defendant applied it retroactively. As a general rule, legislation is presumed to operate prospectively. *See State ex rel v. Bayless*, 23 So.2d 575 (Fla. 1945). Clearly, it is improper to retroactively apply Defendant's new statutory construction. Can we all say *"ex post facto*?"

Plaintiff has stated a claim for violation of due process.

**X. PLAINTIFF HAS AN EQUAL PROTECTION CLAIM**

If, as Plaintiff has alleged, she must unveil or have her Driver's License previously issued by Defendant revoked or canceled it infringes upon Plaintiff's fundamental right to freely practice her religion. Therefore, this Court must analyze this case under the strict scrutiny standard. *See City of Cleburne Texas v. Cleburne Living Center,* 473 U.S. 432 (1985). When a statute burdens a fundamental right, the statute in question will only be sustained if it is narrowly tailored to serve a compelling state interest. *See, Lyng v. Automobile Workers,* 485 U.S. 360 (1988).

Prior to September 11, 2001, Defendant interpreted its statute to allow the covering of a face for a fullface photograph for religious reasons. Defendant had interpreted the state statute consistent with religion freedom. Since September 11, 2001, however, Defendant has targeted individuals like Plaintiff solely because she happens to follow a tenet of her religion. If Defendant is to now treat Plaintiff differently then she was previously treated, under the same law, Defendant must meet the compelling state interest test expressed above.

Clearly other individuals are allowed to drive in the State of Florida without a photograph license. Further, Defendant has admitted that some classes of individuals are issued licenses in Florida without photographs.

As noted in *Cleburne* at 448 (citing to *Palmore v. Sidot,* 416 U.S. 429 (1984)),, unsubstantiated negative attitudes or fear is 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 effect. Plaintiff has an equal protection claim.

**XI. PLAINTIFF HAS A FREE SPEECH CLAIM AND FREE EXERCISE CLAIM.**

Religious speech or any type of expressive conduct is unquestionably protected by the First Amendment to the United States Constitution as well as the Florida Constitution. *Widmar v. Vincent,* 454 U.S. 263 (1981); *R. A. v. City of St. Paul Minnesota,* 112 S.Ct. 2538 (1992).

If nude dancing is entitled to First Amendment protection than the religious expression of wearing a religious veil has First Amendment protection. *See. Barnes v. Glen Theaters, Inc.*, 501 U.S. 560 (1991); *Redner v. Dean*, 29 F.3d 1495, 1499 (11th Cir. 1994).

To determine whether a given regulation that potentially limits speech is content-- based or content--neutral courts look to the governmental purpose. If a statute or ordinance is unrelated to the suppression of free expression that statute is content - neutral speech regulation. *See, City of Renton v. Playtime Theater, Inc.*, 975 U.S. 41, 47 (1986). A content - neutral statute still must serve a substantial government interest and be narrowly tailored to serve that interest. *See, Ward*

*v. Rock Against Racism,* 491 U.S. 781, 791 (1989). The fact that Defendant asserts the Florida Statute at issue is neutral on its face does not mean it meets the constitutional requirement if it is unduly burdensome to the free exercise of religion. Governmental regulations which infringe on protected religious practices are prescribed by the free exercise clause unless the government can demonstrate that the regulation is the least restrictive alternative to meet the compelling state interest. *See Wisconsin v. Yoder*, 406 U.S. 205 (1992); *Sherbert v. Verner,* 374 U.S. 398 (1963). As Plaintiff has noted above it is Defendant's burden to meet.

**XII. PLAINTIFF HAS A PRIVACY CLAIM.**

"State constitutions were the initial and prime characters of individual rights throughout most of our nation's existence." *Traylor v. State,* 596 So.2d 957, 961 (Fla. 1992). Because our federal system of government is based on the principle of sovereign immunity, state constitutions limit the power of the state to impose upon its citizens' fundamental rights. *Id.* at 961-962. Our federalist system of government permits states to place more rigorous controls on governmental intrusion into the lives of its citizens than does the Federal Constitution; however, states may not place more restrictions upon the fundamental rights of their citizens than permitted by the Federal Constitution. *See, PruneYard Shopping Ctr. v. Robins,* 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). In any given state, the Federal Constitution provisions thus represent the floor for basic freedoms; the state constitution represents the ceiling. *See, Traylor*, 596 So.2d at 962-963:

> When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to every phrase and clause contained therein. We are similarly bound under our Declaration of Rights to construe each provision freely in order to achieve the primary goal of individual freedom and autonomy.

(footnote omitted). Thus, state courts and constitutions have traditionally served as the prime protectors of their citizens' basic freedoms.

In examining the constitutionality of a statute requiring a pregnant teenager to obtain parental consent before choosing to have an abortion the Florida Supreme Court stated:

> To be held constitutional, the instant statute must pass muster under both the federal and state constitutions. ... [W]e opt to examine the statute first under the Florida Constitution. If it fails here, then no further analysis under federal law is required.

*In re: T.W.,* 551 So.2d 1186, 1190 (Fla. 1989).

*Olmstead v. United States,* 277 U.S. 438, 478, 48 S.Ct. 564, 572 (1928) (authored by Louis D. Brandeis):

> They [the makers of the Constitution] conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.

Our state's constitution begins with a Declaration of Rights - a series of rights considered so basic, the framers of Florida's constitution accorded them a place of special privilege. *Traylor*, 596 So.2d at 963. "It is significant that our Constitution thus commences by specifying those things which the state government must not do, before specifying certain things that it may do." *State ex rel. Davis v. City of Stuart,* 97 Fla. 69, 102-103, 120 So. 335, 347 (1929).

The Declaration of Rights outlines the fundamental constitutional rights of Florida's citizens, regardless of race, religion, economic status, character or age. In *Traylor*, 596 So.2d at 963, the Supreme Court of Florida eloquently explained the scope of the freedoms accorded to citizens of Florida under the Declaration of Rights:

> The text of our Florida Constitution begins with a Declaration of Rights–a series of rights so basic that the framers of our Constitution accorded them a place of special privilege. These rights embrace a broad spectrum of enumerated and implied liberties that conjoin to forms a single overarching freedom: They protect each individual within our borders from the unjust encroachment of state authority–from whatever official source–into his or her life. Each right is, in fact, a distinct freedom

> guaranteed to each Floridian against government, intrusion. Each right operates in favor of the individual against the government.
>
> Under our Declaration of Rights, each basic liberty and each individual citizen has long been upheld to be on an equal footing with every other:
>
> > Every particular section of the Declaration of Rights stands on an equal footing with every other section. They recognize no distinction between citizens. Under them, every citizen, the good and the bad, the just and the unjust, the rich and the poor, the saints and the sinner, the believer and the infidel, [the adult and the juvenile] have equal rights before the law.
> >
> > *Boynton v. State*, 64 So.2d 536, 552-53 (Fla. 1953). Each right and each citizen, regardless of position, is protected with identical vigor from government overreaching, no matter what the source.

The United States Supreme Court has decreed protection of privacy is committed to the discretion of the individual states. *See, Winfield v. Div. Of Pari-Mutual Wagering,* 477 So.2d 544, 547 (Fla. 1985). Article I, Section 23 of the Florida Constitution contains Florida's fundamental right of privacy and provides:

> Every natural person has the right to be let along and free from governmental intrusion into his private life except as otherwise provided herein.

It is the most expansive of the rights under Article I.

In *Winfield*, 477 So.2d at 547-48, our Supreme Court elaborated on how seriously Florida took the responsibility of protecting its citizens' right to privacy:

> [T]he United States Supreme Court has ... made it absolutely clear that the states, not the federal government, are responsible for the protection of personal privacy: "the protection of a person's general right to privacy – his right to be let alone by other people – is, like protection of his property and of his very life, left largely to the law of the individual States." Katz v. United States, 389 U.S. 347, 350-351, 88 S.Ct. 507, 511 19 L.Ed.2d 576 (1967).

* * *

> "The citizens of Florida opted for more protection from governmental intrusion [than that afforded by the United States Constitution] when they approved Article I, Section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, Section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the word "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

Thus, Florida's right of privacy is more extensive than the right of privacy afforded to citizens of this country at large.

In *Mozo v. State,* 632 So.2d 623 (Fla. 4th DCA 1994), the Fourth District Court reaffirmed Florida's Constitution "embraces more privacy interests, and extends more protection to the individual in those interests, than does the Federal Constitution." The *Mozo* court held private conversations over cordless telephones are protected under Article I, Section 23 of the Florida Constitution because the right of privacy under the state constitution was intended to protect an individual's expectation of privacy whether or not society recognized that expectation as reasonable. *Id.* at 145-146. Thus, the zones of privacy covered by Article I, Section 23, are determined by reference to the expectations of each individual, and the expectations are protected provided they are not spurious or false. *Id.* at 145. Thus, under *Mozo*, any margin of error regarding interpreting the right of privacy under the Florida Constitution should be in favor of the individual. *Id.* at D145. This right of privacy logically extends to individuals practicing their religious beliefs. It is not a spurious or false expectation of privacy; it is legitimate.

Citizens in Florida have the privacy right to practice and follow their religious beliefs. So long as that state cannot show a compelling state interest and that the infringement of this privacy interest is the least restrictive means to further the compelling state interest.

Even the cases cited by Defendant from other jurisdictions acknowledge that if a fundamental right is being infringed upon, such as First Amendment rights, the governmental intrusion can only be justified upon a showing of a compelling state interest and a demonstration that the compelling state interest is met in the least restrictive manner. *See, Stacker v. Department of Motor Vehicles,* 164 Cal.Rptr. 203 (Cal. 3rd Dist. 1980) (citing to *Ghafari v. Municipal Court*, 150 Cal.Rptr. 813 (Cal. 1st Dist. 1978)) The *Ghafari* Court struck down a statute and the arrest of Iranian nationals who covered their faces in public. Plaintiff in this case clearly has a privacy claim.

**XIII. CONCLUSION.**

Plaintiff has stated a cause of action and Defendant's Motion to Dismiss should be denied. At best Defendant raises issues in its Motion to Dismiss that are affirmative defenses to Plaintiff's claims.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to: **JASON VAIL, ESQUIRE,** Assistant Attorney General, Office of The of The Attorney General**,** PL-01, The Capitol, Tallahassee, Florida 32399; this 25th day of June, 2002.


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