

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

CASE NO. 2002-CA-2828

SULTAANA LAKIANA MYKE FREEMAN,

Plaintiff,

v.

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

Defendant,

ORDER FOLLOWING NON-JURY TRIAL

THIS MATTER comes before the Court after a non-jury trial held May 27-29, 2003. Plaintiff Sultaana Freeman filed suit on March 22, 2002, asking this Court to declare the revocation of Plaintiff's driver's license illegal and unconstitutional and to order the Defendant State of Florida, Department of Highway Safety and Motor Vehicles ("DHSMV" or "the State"), to reinstate her license. After considering the trial testimony, other record evidence, briefs submitted by the parties, and oral arguments, the Court finds that Plaintiff's prayer for relief must be denied.

The parties have stipulated to the following facts. Plaintiff is a Muslim woman who wears a niqab, or an affixed veil, which covers her entire face except for her eyes. Plaintiff wears the niqab in front of all strangers and unrelated Muslim men. Before moving to Florida, Plaintiff lived in Illinois, where, in 1997, she converted to Islam. Illinois subsequently issued her a driver's license with a photo of Plaintiff wearing a niqab. On February 21, 2001, after moving to Florida, Plaintiff applied for a driver's license. The State photographed Plaintiff wearing a niqab with her hijab (head scarf and full body covering), and issued her a driver's license similar to her Illinois license. Plaintiff's eyes were the only facial features visible in the photo image on the license. On November 28, 2001, and December 18, 2001, the State sent Plaintiff letters stating that the license would be revoked unless she reported to the DHSMV office to be photographed without the veil. Plaintiff refused to do so, and the State cancelled her driver's license. This suit followed.

Plaintiff's "Complaint for Violation of Chapter 761, Florida Statutes and Action for Declaratory Relief" made the following claims: that the State violated §§ 761.01-.05, Florida Statutes, the "Religious Freedom Restoration Act of 1998"; and that the State violated Plaintiff's rights, under Article 1 of the Florida constitution,¹ to religious freedom, freedom of speech, due process, equal protection, and right to privacy.

This Court has previously entered Orders granting partial summary judgment for the State on the freedom of speech, due process, and right to privacy claims, and dismissing the equal protection claim. Therefore, this decision addresses only the remaining issues, which are: whether the State has violated the Religious Freedom Restoration Act of 1998 (RFRA) by

¹The Florida constitution reflects the U.S. constitution's guarantee of the right to free exercise of religion.

requiring Plaintiff to be photographed without her veil in order to get a driver's license; and whether the State has violated Plaintiff's constitutional right to free exercise of religion.

§ 761.03, Florida Statutes, "Free exercise of religion protected," states:

- (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.

In addition, § 761.02, Florida States, defines "exercise of religion" as "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."

Initially, a plaintiff under the RFRA has the burden of showing that in acting or refusing to act she is "substantially motivated by a religious belief"; i.e., that she is sincere in claiming that unveiling for a driver's license photo is against her religious beliefs. She also bears the burden of proving that what the State is requesting of her is a substantial burden on her free exercise of religion.

If the plaintiff shows that a sincerely-held belief is being substantially burdened by the government, then the burden of proof shifts to the government to show that in applying the requirement to the individual, the government is both furthering a "compelling governmental interest," and it is imposing the requirement by the least restrictive means available short of jeopardizing the compelling governmental interest.

Section 322.14(1)(a), Florida Statutes, states in pertinent part:

The department shall, upon successful completion of all required examinations and payment of the required fee, issue to every applicant qualifying therefor, a driver's license as applied for, which license shall bear thereon a color photograph or digital image of the licensee. . . .

In addition, § 322.142, Florida Statutes, "**Colored photographic or digital imaged licenses**" (boldface in original), states in pertinent part:

(1) The department shall, upon receipt of the required fee, issue to each qualified applicant for an original driver's license a color photographic or digital imaged driver's license bearing a fullface photograph or digital image of the licensee

(2) The department shall, upon receipt of the required fee, issue to each qualified licensee applying for a renewal license . . . a color photographic or digital imaged license as provided for in subsection (1).^[2]

At trial, Plaintiff, her husband, and an expert witness testified to the sincerity of Plaintiff's religious beliefs. The State attempted to counter with an expert on Islamic law, who testified that most Muslims do not veil to the extent that Plaintiff does, and that she is in a small minority of Salafeeha Muslim women who refuse to remove their veils when they have their pictures taken for identification. The Court, however, finds it immaterial whether Plaintiff is in the majority or minority of any given sect of practicing Muslims. The Court will not choose between competing experts on Islam to determine whether Plaintiff's religious belief is justifiable or reasonable. This Court finds that *Plaintiff* is motivated by a sincerely-held religious belief to remain veiled.

Plaintiff also testified that it is against her and her family's religious beliefs to make or

²The parties sparred over what "fullface" means. Plaintiff claims that her picture in a veil is fullfaced, because she is looking directly at the camera. The State claims that the Legislature intended the term to mean as complete regarding facial features as possible.

display photos of any living beings, animals as well as humans, because they constitute graven images. She testified that there are no such pictures displayed in her home, and, in fact, she goes to great lengths to excise faces from cereal boxes and to give her young children toys that are faceless, because any image of facial characteristics is against their religious beliefs.

The testimony of record, however, reveals inconsistencies. As the State pointed out, Plaintiff has been willing to have her picture taken many times, albeit veiled, and eyes are facial characteristics of living beings. Further, Plaintiff's husband testified that they hold their beliefs as a family unit and yet he has not objected to being photographed for his own driver's licenses or throughout this televised trial. If photos of humans wearing veils are acceptable, then her argument that her religion prohibits all but faceless images of living beings must fail. Those facts alone undermine Plaintiff's claims that in her family's practice of religion, all images of living things are banned. The Court finds that Plaintiff lacks credibility with this argument. Therefore, the Court finds that a ban on all image-making of living things is not a sincerely held religious belief of the Plaintiff.

The next issue, whether Plaintiff has demonstrated why the requirement that she unveil for the purposes of a driver's license ID photo substantially burdens her exercise of religion, is even more problematic. *Plaintiff never clearly articulated just what the substantial burden is that she claims is being imposed.* The RFRA does not state that government may not place *any* restrictions whatsoever on religious practices, only that government shall not *substantially burden* the exercise of religious rights.

Further, the State apparently has a practice of accommodating Muslim women holding similar beliefs on veiling. A DHSMV manager testified that in several instances, upon

appointment, DHSMV employees have escorted women to a private room, with only a female license examiner present. No males were allowed, and the room had no windows through which anyone could see. The State argued that the “momentary” lifting of the veil in order to complete the digitalized image or photo, done in “private circumstances” as described, does not constitute a substantial burden on Plaintiff’s right to free exercise of religion. The State asserted that Plaintiff would be free to place the photo license in her pocket and never show it to anyone, except perhaps to law enforcement officers in specific situations.

The Court agrees, and finds that given Plaintiff’s own testimony plus the State’s willingness to accommodate Plaintiff to the degree stated, the momentary raising of her veil for the purpose of the ID photo does not constitute a “substantial burden” on her right to exercise her religion.

In as much as the Court finds that the ID photo requirement does not substantially burden Plaintiff’s religious practice, no further analysis is needed under the RFRA. Nevertheless, since Plaintiff also claims that her fundamental constitutional right to free exercise of religion has been impaired, the Court will utilize the “strict scrutiny” standard for analyzing alleged infringements to fundamental rights, under which the State must delineate a “compelling state interest” that justifies its restriction of a religious practice.

The State presented testimony to support its allegation that requiring fullface photo images on driver’s licenses and ID cards issued under § 322.051 is necessary to support the compelling state interests of promoting public safety and security, combatting crime and of protecting interstate commerce. The State argued that when religious practices collide with public safety, public safety must prevail, citing *State v. Board of Public Instruction for*

Hillsborough County, 190 So. 815 (Fla. 1939)(freedom of religion not absolute; if “inimical to the public welfare,” will not be permitted); and *State, Dept. of Legal Affairs v. Jackson*, 576 So. 2d 864, 866 (Fla. 5th DCA 1991)(free exercise of religion “not a bar to the enforcement of laws which are . . . justified by governmental interests in public health, safety and welfare”).

The State called an expert witness who has been employed in law enforcement for almost 40 years and is currently a consultant to DHSMV on security matters. He stated that a facial image is “absolutely essential” to law enforcement officers, because without it, officers conducting traffic stops are at risk during the extra time needed to check identities to “make sure that’s the person standing in front of them.” He emphasized that it is crucial to both criminal and intelligence investigators to be able to identify possible suspects (and victims of crimes or accidents) as quickly as possible, and that this ability has a significant impact on public safety.³ The witness stressed that currently-available alternatives to photo image identification such as fingerprint verification take too long. He testified that in this “changing world,” law enforcement needs to continue to develop tools to insure public safety. He discussed the DAVID (Driver And Vehicle Identification Database), which is the newest system used in many Florida Highway Patrol vehicles and by other agencies in major Florida cities. DAVID enables police officers to receive transmissions, over their patrol car laptop computers, which show an individual’s driver’s license photo image. The State is making this system fully available to law enforcement throughout the state.⁴

³Indeed, § 322.263, Florida Statutes, “Legislative Intent,” states: “It is declared to be the legislative intent to . . . [p]rovide *maximum safety* for all persons who travel or otherwise use the public highways of the state” (emphasis added).

⁴The State also submitted a videotaped deposition from a bank executive, who testified that photo IDs are essential to combat the problems of credit card fraud, check fraud, and identity theft today.

The State further argued that the Florida driver's license is intended to be not only a document evidencing competency to drive motor vehicles, but is also "an identity document for use by people in society at large" to cash checks, rent cars and clear airport security. The State acknowledged that this intent does not appear in the driver licensing statutes, but pointed to § 322.051, Florida Statutes, "Identification cards," which provides at subsection (7): "Any person accepting the Florida driver's license as proof of identification must accept a Florida identification card as proof of identification when the bearer of the identification card does not also have a driver's license." To obtain this identification card, the applicant must present a driver's license or another form of ID such as a passport. The State argued that the ID card statute, which does require a "color photograph or digital image of the applicant," shows that the driver's license is the primary form of official ID used in Florida, and that the ID card is meant for people who do not drive but nevertheless need to show official ID in order to negotiate everyday life.⁵

Plaintiff disputed that a driver's license is a state identification card, arguing instead that it is merely a certification of competence to drive. She complained that in requiring her to submit to an unveiled photograph, the State is forcing her to choose between observing her religion and driving. Plaintiff cited several cases in which other jurisdictions have permitted drivers to obtain licenses without photos for religious reasons. In *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984),⁶ the plaintiff, a Pentecostal Christian woman, refused to have her picture

⁵Plaintiff was offered an opportunity to apply for an ID card, but because it, too, required a photo and Plaintiff did, in fact, wish to drive, she turned down that opportunity.

⁶The judgment in this case was "affirmed by an equally divided Court" in *Jensen v. Quaring*, 472 U.S. 478 (1985).

taken for a Nebraska driver's license because she believed that it would constitute making a graven image. The court found that denying the woman her license did not serve a compelling state interest. Plaintiff stressed that the *Quaring* court did not differentiate between temporary and permanent licenses, and found it significant that out-of-state drivers could drive in Nebraska without photo licenses. An Indiana court ruled on similar facts in *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, 380 N.E.2d 1225 (Ind. 1978), and also found that "it is not likely that a ruling in the appellees' favor would result in widespread abuse." *Id.* at 1229; *see also Dennis v. Charnes*, 805 F.2d 339 (10th Cir. 1984).

Plaintiff further asserted that photo IDs are largely flawed and can easily be thwarted by people who change their hair, cover their foreheads and ears, wear large glasses,⁷ shave their heads, grow their beards, or alter their appearance by other means, including contact lenses and plastic surgery. She stressed that some people have aged years since their license photo was taken and for that reason alone look different from the image on the license.

Plaintiff also claimed that religious hairstyles and headwear are permitted for persons of other faiths, and suggested that she is being singled out because she is Muslim.

The State countered with witnesses who testified that some facial features do not change, despite changes in the individual's style or age, and that photographic images of drivers evidencing some differences are still of greater value than an image with facial features completely blocked by a mask or a veil.

Plaintiff argued that the Florida Administrative Code does not "even remotely hint that

⁷Plaintiff did not dispute that DHSMV prohibits applicants from wearing *sunglasses* in driver's license photos.

Plaintiff must provide a fullface photograph in order to obtain a driver's license," and that under the Florida Administrative Code, the State will accept a variety of foundation documents to support applications for driver's licenses, including birth certificates, marriage certificates and school records, none of which usually have photographs. She asserted that she could carry such documents with her while driving and that they would be as useful to law enforcement officers as a photo ID.

The State admitted that anything which aids identification is helpful, but maintained that for computer investigation or when identification must be ascertained or confirmed immediately, the foundation documents are no substitute. Even Plaintiff's rebuttal witness agreed with the State on that point, and so does this Court. The mere fact that an applicant does not produce a fullface photograph when applying for a license, and may submit various documents to prove her birth date and place, immigration status, etc., does not mean that she is not subject to the *additional* requirement of having her photo taken to complete her application. Plaintiff's foundation documents argument overlooks law enforcement's need to maintain the image database to further its compelling state interest in public safety.

Plaintiff strenuously argued that more than 4,000 people have been issued photo-less driver's licenses in Florida, and that due to tourism, tens of thousands more drive in Florida using out-of-state licenses, many of which are not required to contain photos. Plaintiff argued that since Florida law enforcement officers have no photos with which to identify a significant number of drivers on Florida roads, the State cannot claim that it has a compelling interest in requiring photo ID driver's licenses. Plaintiff asserted that if any exceptions are given, then religious exceptions must be given, and claimed that with so many "exceptions" driving around,

the public welfare is not threatened by Plaintiff carrying a license showing her face veiled.

Plaintiff asked this Court to conclude that her license was revoked on December 18, 2001, simply because of the September 11, 2001, attacks, and that she was singled out because she is Muslim.

The Court cannot reach that conclusion. The photo-less “licenses” to which Plaintiff has referred are temporary driving permits, not permanent driver’s licenses, and Plaintiff seeks a permanent driver’s license. The Florida Administrative Code contemplates many situations in which temporary permits are issued, including when the individual’s license is suspended due to a DUI arrest; when an applicant is referred for medical evaluation and the application remains pending; and when renewals are needed for people who are temporarily out of state. The duration of the temporary license varies depending on the reason for its issuance. *See, e.g.*, Rules 15A-1.020; 15A-1.0051, Fla. Admin. Code. In all such instances, however, when the temporary period is up, the individual must obtain a photo ID license or his/her driving privileges will be cancelled. Of the nearly 15 million licensed drivers in Florida, those who are allowed to obtain replacement (permanent) driver’s licenses without photos are primarily active-duty military personnel who are serving out of the country or out of state--and even they are required to obtain a photo license upon their return to Florida.⁸ Such temporary permits, therefore, are not intended to be used as ID like a permanent driver’s license.

Moreover, Plaintiff’s argument about the temporary permits ignores the crucial distinction that all temporary and replacement (permanent) licenses in Florida are issued to

⁸Although the Florida statutes use the term “driving privileges,” this does not mean that driving is a “privilege” rather than a “right.” The Court recognizes that in *Sherbert v. Verner*, 374 U.S. 398 (1963), the U.S. Supreme Court stated that the distinction between privilege and right is not meaningful when the benefit in question, i.e., being able to drive a car and thereby conduct normal life activities, is the same. So even if driving is a “privilege,” the government may not deny Plaintiff that benefit without showing that there is a compelling state interest that overrides her right to free exercise of religion.

people who previously had permanent licenses with photos.⁹ Therefore, DHSMV already has photo images of these permit holders in its databanks that are available to field officers who need to confirm identification. Contrary to Plaintiff's argument, these are not "exceptions," and the Court finds Plaintiff's attempt to equate her situation with that of the thousands of drivers with temporary permits unpersuasive.¹⁰

Plaintiff made other arguments, including that the State's commerce protection argument is a red herring; and that Plaintiff should be able to obtain a driver's license with her photo as veiled because there is no law against driving while veiled. The Court rejects those arguments as well. The Court finds that protecting interstate commerce from widespread identity theft and fraud is also a compelling state interest. Its relevance here is that it supports the State's contention that driver's licenses, or, in lieu of licenses, Florida identity cards, are the primary means of identification in Florida.¹¹ Plaintiff certainly has the right in America to wear her niqab and hijab in public and even while driving, but that is not the same thing as presenting a masked photo for ID purposes.

The State has always had a compelling interest in promoting public safety. That interest

⁹Also, DHSMV requires that foreign nationals have their passports (and therefore their passport photos) scanned into the DAVID system in order to obtain a temporary Florida driving permit.

¹⁰Florida has no control over other states, their laws, or their residents. Florida accepts photo-less out-of-state licenses due to interstate compacts on driver's licenses and the full faith and credit given to laws of other states. Florida may, however, control the rules for Florida residents.

¹¹The Court reading more than one statute must interpret them not only to give each its plain and obvious meaning, but also to reconcile or "harmonize" them. *See, e.g., Woodgate Devel. Corp. v. Hamilton Inv. Trust*, 351 So. 2d 14 (Fla. 1977). Looking at §§ 322.14(1)(a) and 322.142, the driver's license statutes, it is obvious that the Legislature intended that driver's licenses be the primary form of identification for all important societal transactions. It is equally obvious that § 322.051, the photo ID card statute, was created so that people who choose not to drive or who may be incapable of obtaining driver's licenses may still have the benefits that come from an official identification document, such as being able to cash a check.

is served by having the means to accurately and swiftly determine identities in given circumstances. In the past 25 years, identification technology has advanced greatly and continues to improve. It remains incumbent upon the State that it seek to protect its citizens with the best available technology. The evidence presented shows that photographs and digital images, although not perfect, are still the best available means to make crucial identifications in the shortest possible time. The Court rejects Plaintiff's argument that law enforcement should be required to use archaic technology just because it worked in 1978 and 1984, when the cases upon which Plaintiff relies were decided.

The Court agrees with the State that today it is a different world than it was 20-25 years ago. It would be foolish not to recognize that there are new threats to public safety, including both foreign and domestic terrorism, and increased potential for "widespread abuse" that did not exist in 1978, when the *Pentecostal House of Prayer* opinion was issued.¹² In sum, utilizing systems such as DAVID, which, it should be noted, was already being developed before the September 11, 2001, attacks, is essential to enable law enforcement to continue to meet the compelling state interest in public safety. Plaintiff's attorneys' insistence that 1978 methods are sufficiently useful is patently unreasonable.¹³

¹²Even the *Quaring* court went on to say that "[n]ot all burdens upon religion violate the free exercise clause. The state may justify a limitation on religious liberty by showing that is is the least restrictive means of achieving a compelling state interest." *Quaring*, 728 F.2d at 1126 (internal citations omitted). And the *Pentecostal House of Prayer* court recognized that "the government will ordinarily have a more compelling interest in legislation designed to promote public safety, peace and order. Thus, where considerations of public welfare are involved, there is a greater probability that the balancing of interests will tip in the state's favor." *Id.*, 380 N.E.2d at 1228. Recognizing that this is not 1978, the balancing tests contained in Plaintiff's cited cases might very well "tip in the state's favor" if identical cases arise today.

¹³Plaintiff attempted to link Florida's requirement for photo images on driver's licenses with a requirement for a national ID card, which does not yet exist. However, this Court rules only on the questions before it. It is beyond dispute that Florida requires photo IDs for driving and other transactions. The question of whether and under what conditions a police officer may demand that anyone unveil at the scene of a traffic stop is not before the

The dispositive question here is whether fullface masked images prevent identifications when it is often essential to make them in the shortest possible time. The answer is, unescapably, yes. Plaintiff is not being singled out because she is Muslim. This Court would rule the same way for anyone--Christian, Jew, Buddhist, Atheist--who wished to have his or her driver's license identification photo taken while wearing anything--ski mask, costume mask, religious veil, hood--which cloaks all facial features except the eyes. Plaintiff's veiling practices must be subordinated to society's need to identify people as quickly as possible in situations in which safety and security of others could be at risk.

Although the Court acknowledges that Plaintiff herself most likely poses no threat to national security, there likely are people who would be willing to use a ruling permitting the wearing of fullface cloaks in driver's license photos by pretending to ascribe to religious beliefs in order to carry out activities that would threaten lives. Lines between freedom and prohibition must be drawn carefully, but in this case, the line drawn by the State is more than reasonable. This is especially so since DHSMV is willing to accommodate Plaintiff's religious sensibilities to the extent of permitting her to be photographed in a room with only one other person, a female, present. The Court finds that in so doing, the State would be satisfying its compelling interest in public safety via the least restrictive means available.¹⁴

Court, and neither is the question of the merits of national ID cards.

¹⁴The Court suggests that DHSMV could inquire among its personnel whether in any of their offices, there is a Muslim woman employee available to take Plaintiff's picture, since Plaintiff testified that she finds it less objectionable to unveil herself to a female stranger if that woman is also Muslim. If there is such an employee, it would not be an unreasonable accommodation to allow Plaintiff (or any other woman in her situation) to make a special appointment to have her unveiled photo taken by that employee.

In sum, the Court makes the following findings of fact and conclusions of law:

1. Plaintiff holds a sincere religious belief that she should wear the niqab in front of all strangers and unrelated Muslim men.
2. Plaintiff has not, however, met her burden of showing that the photo requirement itself substantially burdens her right to free exercise of religion.
3. Plaintiff also has not met her burden of showing that DHSMV's request that she "momentarily" lift the veil in a private room in front of only one, female person, places a substantial burden on her exercise of religion.
4. Therefore, Plaintiff's claim under the Religious Freedom Restoration Act of 1998 must fail.
5. The State has met its burden of showing that it has a compelling interest in protecting the public from criminal activities and security threats, and that having access to photo image identification is essential to promote that interest.
6. The State's need to be able to immediately identify subjects of investigative traffic stops and criminal and intelligence investigations outweighs anyone's need to pose for a driver's license photo wearing any garb that cloaks all facial features except the eyes.
7. Therefore, the requirement that all potential drivers have their driver's license photos taken unveiled, uncloaked, and unmasked does not unconstitutionally burden the free exercise of religion.
8. The State has made a reasonable effort to satisfy its interest in safety and security in the least restrictive manner in this case.

Accordingly, it is hereby

ORDERED and **ADJUDGED** that Plaintiff's Complaint and request for declaratory relief are **DENIED**. Judgment shall be entered for Defendant.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 6th day of June, 2003.

/s/ Janet C. Thorpe
JANET C. THORPE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail on this 6th day of June, 2003, to **Jason Vail, Esq.**, Assistant Attorney General, PL-01, The Capitol, Tallahassee, FL 32399; **Howard Marks, Esq.**, P.O. Drawer 1690, Winter Park, FL 32790-1690; and to **Randall Marshall, Esq.**, 4500 Biscayne Blvd., Ste 340, Miami, FL 33137-2337.

Judicial Assistant