Legal Analysis of Religious Exemptions for Photo Identification Requirements

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Summary

The 111th Congress has considered the issue of possible exemptions to federal photo identification requirements under the REAL ID Act of 2005 (P.L. 109-13). The REAL ID Act contains a number of provisions relating to improved security for driver's licenses and personal identification cards. The REAL ID Act also requires, without exemption, that a digital photograph appear on each document. Some have argued that an exemption should be provided for individuals with religious objections to the photograph requirement to comport with the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA, P.L. 103-141).

The Free Exercise Clause prohibits Congress from enacting any law that prohibits the free exercise of religion, guaranteeing individuals the right to practice their religious beliefs without government interference. To comport with the Free Exercise Clause, any neutral law of general applicability (*i.e.*, those that do not target religion or require individual assessments) must be rationally related to a legitimate government purpose. If a law with a photo requirement meets this standard of review, an exemption based on religion is not necessary under the federal constitution. Federal laws burdening religious exercise must also comport with RFRA, which provides a heightened level of review for such laws. Under RFRA, any federal law burdening religion generally must have a compelling governmental interest achieved by the least restrictive means possible. If the government can meet this standard of review, an exemption based on religion is not necessary under RFRA.

This report will analyze the legal issues associated with religious exemptions to photo identification laws. Although no lawsuits appear to have challenged federal laws with photo requirements, state photo identification laws have been challenged for several decades. After discussing the legal requirements of the Free Exercise Clause and RFRA, the report will explain the elements of analysis necessary for legal challenges involving religious objections to photo requirements. The report will also analyze lawsuits that have challenged state photo requirements, including significant factors of consideration in such cases. Finally, the report will analyze what factors may be relevant in future decisions that may arise related to federal photo identification requirements.

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Legal Protections for Religious Exercise

Free Exercise Clause

The First Amendment of the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.... "[1] These clauses are known respectively as the Establishment Clause and the Free Exercise Clause. Under the Free Exercise Clause, individuals are guaranteed the right to practice their religious beliefs without government interference. Historically, the U.S. Supreme Court applied a heightened standard of review to government actions that allegedly interfered with a person's free exercise of religion.[2] Under that heightened standard, the government could not interfere with a person's religious exercise if it did not have a compelling governmental interest.[3]

In 1990, the Court reinterpreted that standard in *Employment Division, Oregon Department of Human Resources v. Smith*, holding that the compelling interest was not necessary for governmental interference with religious exercise in all circumstances.[4] Since then, the Court has held that the Free Exercise Clause never "relieve[s] an individual of the obligation to comply with a valid and neutral law of general applicability."[5] Under this interpretation, the constitutional baseline of protection was lowered, meaning that laws that do not specifically target religion or do not allow for individualized assessments are not subject to heightened review under the

[1] U.S. CONST. Amend. I. For discussion of the constitutional and statutory standards of review used in relation to the free exercise clause, *see* CRS Report RS22833, *The Law of Church and State: General Principles and Current Interpretations*, by Cynthia Brougher.

[2] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

[3] *Id*.

[4] 494 U.S. 872 (1990).

[5] *Id*. at 879.

Constitution. Rather, these laws of general applicability are required only to be rationally related to a legitimate government purpose, the baseline of constitutional protection analysis often referred to as rational basis review.

Religious Freedom Restoration Act

Congress responded to the Court's holding in *Smith* by enacting the Religious Freedom Restoration Act (RFRA), which statutorily reinstated the standard of protection of heightened scrutiny for government actions interfering with a person's free exercise of religion.[6] When RFRA was originally enacted, it applied to federal, state, and local government actions, but the Supreme Court later ruled that its application to state and local governments was unconstitutional under principles of federalism.[7] Therefore, RFRA now applies only to federal actions. RFRA provides that a statute or regulation of general applicability may lawfully burden a person's exercise of religion only if it (1) furthers a compelling governmental interest and (2) uses the least restrictive means to further that interest.[8] This standard reflects the pre-*Smith* compelling interest requirement and is sometimes referred to as strict scrutiny analysis.

In 2006, the Supreme Court addressed the issue of whether religious exemptions were required from generally applicable laws under RFRA. In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, the Court held that the government must demonstrate a compelling interest to prohibit any exceptions for generally applicable laws to accommodate religious exercise.[9] Specifically, the Court stated that the government must "demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program."[10]

As a statutory enactment, rather than a constitutional standard, RFRA is not necessarily absolutely binding against all post-RFRA legislation. Rather, it is possible that future statutes may not be required to comply with RFRA. In other words, RFRA may be preempted by another federal law.[11] Congress may amend RFRA's scope of application generally or may provide specific exemptions from RFRA in future legislation.[12]

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[6] P.L. 103-141, 103d Cong., 1st Sess. (November 16, 1993); 42 U.S.C. § 2000bb *et seq.*

[7] City of Boerne v. Flores, 521 U.S. 407 (1997).

[8] 42 U.S.C. § 2000bb-1(b).

[9] 546 U.S. 418 (2006).

[10] *Id.* at 435-437.

[11] *See* S.Rept. 103-111, at 12-13 (1993) (stating that "nothing in this act shall be construed as affecting religious accommodation under title VII of the Civil Rights Act of 1964").

[12] Generally, under the legal principle of entrenchment, a legislative enactment cannot bind a future Congress. That is, Congress cannot entrench a legislative action by providing that it may not be repealed or altered. *See* Fletcher v. Peck, 10 U.S. 87, 135 (1810) (Chief Justice Marshall) ("The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted."). The U.S. Supreme Court has noted the long history of this rule. *See* United States v. Winstar Corp., 518 U.S. 839, 872-74 (1996).

Religious Objections to Photo Identification Requirements

Members of some religious groups may object to having their photograph taken as many identification laws require. The teachings of several religious groups may prohibit their members from being photographed in general or from revealing some parts of their body. For instance, some Christian groups, including the Amish, believe biblical readings prohibit photographs because a photograph creates a likeness of God's creation in violation of the Ten Commandments. Other religious groups, including certain Christian, Jewish, Muslim, and Sikh groups, believe that members must wear head coverings or veils for religious reasons. Identification laws that require individuals to be photographed or require individuals to be photographed without religious head covering may infringe upon these individuals' First Amendment right to freely exercise their religious beliefs, leading to potential legal challenges to determine whether the individuals' First Amendment right must be accommodated. The most common type of identification law to be challenged are state driver's license laws, but the legal issues may also apply in other cases with photograph requirements.

Elements of Analysis of Religious Objections to Photo Requirements

In challenges to legal requirements that may infringe on an individual's religious exercise, courts generally consider three questions: (1) Is the individual's religious belief sincerely held?; (2) Would the legal requirement impose a substantial burden on the individual's religious exercise?; and (3) Is the burden sufficient to overcome the government's interest in applying the requirement without an exemption?[13]

Sincerely Held Religious Beliefs

In order for an individual's religious beliefs to be protected by the Free Exercise Clause, the beliefs must be sincerely held. An individual's beliefs are not required to conform with the beliefs of other members of his or her religious group, nor is the individual required to be a member of a religious group at all.[14] Furthermore, the accuracy of an individual's religious belief need not be verified by factual findings. The U.S. Supreme Court has held that courts are not to judge the truth or falsity of religious beliefs.[15] Instead, courts generally examine whether the individual applies the belief consistently in his or her own practices.

Substantial Burdens on Religious Exercise

Even if an individual's belief is sincerely held, the government action that allegedly infringes on that belief must impose a substantial burden on the individual's religious exercise. A substantial

[13] *See* Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984), *aff'd by divided court*, 472 U.S. 478 (1985).

[14] *See* Thomas v. Review Board, 450 U.S. 707 (1981) ("The guarantee of free exercise is not limited to beliefs which are shared by all the members of a religious sect.").

[15] United States v. Ballard, 322 U.S. 78 (1944).

burden on religious exercise is one that puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs."[16] The Supreme Court has required evidence that the legal requirement in question violates the individual's sincerely held belief.[17] That is, if the legal requirement that the individual opposes does not actually interfere with the religious practice, the government may still require the individual to comply with the requirement. For example, a religious organization challenged the imposition of a sales tax on religious products that it sold, claiming the tax burdened the organization's religious exercise. The organization's religious doctrine did not include a belief that payment of taxes was forbidden, but rather claimed that the government was taking part of the money it raised as a part of its religious practice. The Supreme Court held that a sales tax applied generally to products distributed by religious and non-religious entities did not constitute a significant burden on religious exercise because the tax itself did not violate the religious entity's sincerely held beliefs.[18] Therefore, in the case of a religious organization's objections to paying sales tax on products it sells, the organization would be substantially burdened by the tax if its sincerely held beliefs prohibited the payment of taxes, because the tax requirement forces the organization to act in violation of its beliefs. However, because the action being regulated by the government was not one that directly affected the organization's sincerely held beliefs, the Court held that the burden did not implicate the organization's religious exercise.[19]

Comparison of Individual Burden and Governmental Interest

Once a court has determined that a substantial burden has been imposed on a sincerely held belief, it must balance that burden on the individual's religious exercise with the governmental interest associated with it. That is, the right to religious exercise is not absolute. Burdens on religious exercise may be constitutionally permissible if the appropriate legal standard is met. The standard that this balance must meet is determined by the applicable law protecting religious exercise. For cases brought under the Free Exercise Clause of the U.S. Constitution, the governmental interest generally may be deemed to outweigh the burden on religious exercise if the governmental action is rationally related to a legitimate government purpose – the minimum constitutional standard of review sometimes referred to as rational basis review. For cases brought under the heightened statutory standard provided by RFRA, the governmental interest outweighs the burden on religious exercise if the government has a compelling interest that is achieved by the least restrictive means to meet that end – the strict scrutiny standard of review. Cases may also be brought under state constitutional or statutory provisions relating to free exercise, which may impose either of these standards.

Judicial Considerations in State Driver's License Exemption Claims

Over the past several decades, lawsuits challenging state photo identification laws, particularly driver's license photo requirements, have been filed in federal and state courts. The U.S. Supreme Court has never ruled on the issue of religious exemptions to photo identification requirements. One driver's license photo case made its way to the Court, *Jensen v. Quaring*, but because one Justice did not participate in the case and the other Justices split evenly in the decision, the Court

[16] *See* Thomas v. Review Board, 450 U.S. at 717-18.

[17] Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990).

[18] *Id.* at 391-92.

[19] *Id.*

issued no opinion, resulting in the automatic affirmance of the decision of the Court of Appeals for the 8th Circuit.[20] The 8th Circuit's decision required state officials to issue a driver's license without a photograph.[21]

A review of the decisions concerning whether exemptions are required for individuals with religious objections to photograph requirements for driver's licenses indicates a few common considerations by courts in such cases. Among the factors addressed by courts hearing such challenges were (1) the demonstration of the sincerity of the individual's religious belief; (2) the nature of the burden imposed by the photo requirement; (3) the strictness of the underlying religious doctrine; (4) whether the state offered exemptions to the photo requirement in other instances; and (5) the purpose of the identification card. The outcome of these cases also appears to have depended on the timing of the case, whether it was decided under the pre-*Smith* heightened constitutional standard or decided after the heightened security concerns existing after 9/11.

Sincerity of Religious Beliefs

Courts consistently address the sincerity of the beliefs that allegedly forbid individuals from complying with legal photo requirements. Without comparing the individual's beliefs to those of other members of the same religious sect or considering the veracity of the beliefs, courts examine the individual's beliefs to determine whether the belief is sincerely held or being used as a false claim to avoid compliance with governmental regulation.[22]

In several cases challenging photograph requirements, courts have considered evidence that the individual consistently opposes photographs or revealing parts of the body. In cases where the individual challenging the photograph requirement does so because of a belief that photographs are prohibited by biblical teachings, several courts have noted that the individual does not display photographs, videos, or artwork at home and removes pictures from books and other products purchased from stores.[23] The 8th Circuit summarized its finding that the individual's belief was sincerely held, recognizing that the individual could

> support her interpretation of the Bible, based on her knowledge of several portions of the Old Testament. In addition, her behavior in every way conforms to the prohibition as she understands it. ... Because [her] beliefs are based on a passage from scripture, receive some support from historical and biblical tradition, and play a central role in her daily life, they must be characterized as sincerely held religious beliefs.[24]

Nature of the Burden Imposed

Courts have also considered the nature of the burden imposed by the photo requirement on the individual seeking exemption. If the individual relies heavily on the use of his or her driver's license in daily life, courts have recognized a significant burden imposed by the photograph

[20] 472 U.S. 478 (1985).

[21] Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984).

[22] *See id.*

[23] *See, e.g.*, Quaring v. Peterson, 728 F.2d at 1125; Dennis v. Charnes, 646 F. Supp. 158, 159-60 (D. Colo. 1986), *remanded from*, 805 F.2d 339 (10th Cir. 1984).

[24] Quaring v. Peterson, 728 F.2d at 1125.

requirement. For instance, courts have noted that individuals whose jobs require them to maintain a valid driver's license for transportation and specific job duties, such as a self-employed house painter who must transport supplies to various locations or a farm manager who must have access to the entire farm operation, face a severe burden if they do not comply with the photo requirement.[25]

Strictness of the Underlying Religious Doctrine

Although courts generally avoid inquiries regarding the factual veracity of religious beliefs, at least one court has considered the strictness religious belief that the individual claims would be violated by the photo requirement. In that case, a woman sought an exemption to a requirement that licensees' full face be photographed, without any covering including a veil that was part of her traditional Muslim headdress. A state court held that the woman's religion was not burdened by the full face photo requirement. The court, interpreting a state religious exercise protection statute, relied on the state supreme court's definition of a substantial burden as "one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that that his religion requires."[26] Noting that expert testimony indicated that Islamic law permitted exceptions to its veiling requirements, the court held that the woman had not demonstrated the requisite substantial burden, including for photo identification cards.[27] Because the state was willing to accommodate the woman's beliefs when taking the photograph (*e.g.*, having a female photographer take the picture privately), the court held that the state had not placed an impermissible burden on the woman's religious exercise by requiring her to have a photo driver's license.[28]

Availability of Other Exemptions or Alternative Methods of Identification

One of the most common factors considered by courts in these cases is the existence of alternative methods of identification or other exemptions to the photo requirement. The 8th Circuit noted that "the state [Nebraska] already allows numerous exemptions to the photograph requirement," including "learner's permits, school permits issued to farmers' children, farm machinery permits, special permits for those with restricted or minimal driving ability, or temporary licenses for individuals outside the state whose old licenses have expired."[29] Because the state provided such a wide variety of exemptions, the court held that the state could not claim the requisite compelling state interest in denying an exemption based on religion.[30]

Other courts have used the same reasoning in other states that permitted exemptions. For example, a federal district court held that because Colorado issues special licenses without photographs in certain circumstances, the state violated an individual's religious exercise by not

[25] *See id.*; Dennis v. Charnes, 646 F. Supp. at 160; Bureau of Motor Vehicles v. Pentecostal House of Prayer, 269 Ind. 361 (Ind. 1978).

[26] Freeman v. Dep't of Highway Safety and Motor Vehicles, 924 So.2d 48, 55 (Fla. Dist. Ct. App. 2006) (internal quotation omitted).

[27] *Id.* at 56.

[28] *Id.*

[29] Quaring v. Peterson, 728 F.2d at 1126-27.

[30] *Id.*

permitting a religious exemption.[31] The Colorado Supreme Court had previously held that exemptions were not required because any exemption would undermine the central purpose of the photo requirement law.[32] However, the U.S. Court of Appeals for the 10th Circuit, when remanding the case to the district court, held that if the state issued some driver's licenses without photographs, the state interest found to be compelling by the Colorado Supreme Court would be undermined and an exemption based on religion would be required.[33]

Some courts have also been persuaded by the existence of alternative methods of identification. The Indiana Supreme Court held that while "the state has a strong interest in insuring driver competency, the idea that the photograph requirement is necessary to that interest is patently absurd."[34] The court held that "there are other alternatives available ... which would satisfy this purpose without impinging on the rights" of individuals with religious objections.[35] The court stated that "the statistics which are traditionally included on a driver's licenses, such as license number, height, weight, eye and hair color, have long proven adequate to enable the Bureau to fulfill its important duties."[36]

Purpose of the Identification Photo

In cases challenging photo requirements for identification, the arguments to prohibit exemptions generally include (1) reliable and efficient identification by law enforcement officials; (2) facilitation of identification for private activities, *e.g.*, financial transactions or identity theft; and (3) prevention of administrative burdens on the state posed by applications for exemption.[37] Courts have reached differing outcomes in cases involving these arguments, depending on the specific facts of the cases before them.

The 8th Circuit, in a pre-*Smith* decision, did not agree that any of these arguments met the requisite compelling interest standard. The court noted that many individuals did not have photographs on their licenses or did not have licenses at all, undermining the first two arguments. The court also held that there was no evidence to show "that allowing religious exemptions to the photograph requirement will jeopardize the state's interest in administrative efficiency."[38]

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[31] Dennis v. Charnes, 646 F. Supp. 158 (D. Colo. 1986), remanded from, 805 F.2d 339 (10th Cir. 1984).

[32] Johnson v. Motor Vehicles Dep't, 197 Colo. 455 (Colo. 1979) ("only a photograph can provide a police officer who makes a traffic stop with a ready and instantaneous means of determining that the person tendering the driver's license is indeed the person to whom the license is issued. The exigencies of law enforcement cannot brook the delay inherent in other means of identification." (citations omitted)). *See also* State v. Arnold, 379 N.W.2d 322 (S.D. 1986) ("We find the state driving licensure requirement to achieve the compelling state interests of maintaining, protecting, and regulating the public safety, the use of its public thoroughfares, and those who drive thereon, and to be the least restrictive means for so doing. The driver's licensure requirement is not a limitation on Arnold's religious freedom." (citations omitted)).

[33] Dennis v. Charnes, 805 F.2d 339, 340 (10th Cir. 1984).

[34] Bureau of Motor Vehicles v. Pentecostal House of Prayer, 269 Ind. at 368-69.

[35] *Id.* at 369.

[36] *Id.*

[37] *See, e.g.*, Quaring v. Peterson, 728 F.2d 1121.

[38] Quaring v. Peterson, 728 F.2d at 1127 ("Persons seeking an exemption from the photograph requirement on religious grounds are likely to be few in number. Indeed, few persons will be able to demonstrate the sincerity of their religious beliefs by showing that they possess no photographs or pictures.").

A California state appellate court, using a lower standard of review in a post-*Smith* decision for the federal Free Exercise claim, reached a different outcome in these arguments. The court held that no exemption was required for individual religious objections to the state's photograph requirement because the law "is a neutral, generally applicable requirement that is rationally related to achieving the legitimate interests of promoting highway safety, discouraging fraud, and deterring identity theft."[39] When the court applied strict scrutiny review under the state's constitutional free exercise protection provision, it reached the same outcome, permitting the state to refuse to grant an exemption to the photo requirement. The court explained that driving on the state's roads is a privilege rather than a right, and that the state's interest in enforcing traffic laws and ensuring public safety justified a policy prohibiting exemptions because "unchallenged evidence showed that a driver's license photograph is the most reliable, accurate, and timely means of identifying persons while on the public roadways."[40] The court also agreed with a Maryland state opinion that justified the photo requirement as a tool in protecting individuals against victimization.[41]

Although most challenges to photo requirements arise in the context of driver's license laws, some individuals have challenged photo requirements for other identification laws.[42] For example, while the 8th Circuit initially held that an exemption was required for a driver's license photo requirement, it later held that an exemption was not required for a law that mandated individuals charged with federal felonies be photographed. In such cases, the court held that the government had a compelling interest in having a photograph of defendants and parolees to aid in identifying and apprehending such individuals if necessary.[43]

Is an Exemption Required for Federal Identification Requirements?

Congress has considered the issue of possible exemptions to federal photo identification requirements under the REAL ID Act of 2005.[44] The REAL ID Act contains a number of provisions relating to improved security for driver's licenses and personal identification cards, as well as instructions for states that do not comply with its provisions.[45] The REAL ID Act requires, without exemption, that a digital photograph appear on each document. Some have argued that an exemption must be provided for individuals with religious objections to the photograph requirements to comport with Free Exercise requirements and RFRA. Congress may consider

[39] Valov v. Dep't of Motor Vehicles, 132 Cal. App. 4th 1113, 1125 (Cal. Ct. App. 2005).

[40] *Id*. at 1127-28.

[41] *Id.* at 1128-29 (citation omitted).

[42] *See* United States v. Slabaugh, 852 F.2d 1081 (8th Cir. 1988). *See also* Green v. City of Philadelphia, 2004 U.S. Dist. LEXIS 9687 (E.D. Pa. 2004) (state photo requirement for gun licenses is permissible under federal Free Exercise protection because it is rationally related to a legitimate governmental purpose).

[43] United States v. Slabaugh, 852 F.2d at 1082-83.

[44] *See* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, P.L. 109-13, §§ 201-07, 119 Stat. 231, 312-16 (2005).

[45] For more general legal analysis of the REAL ID Act, *see* CRS Report RL34430, *The REAL ID Act of 2005: Legal, Regulatory, and Implementation Issues*, by Todd B. Tatelman.

amending the REAL ID Act, including providing an religious exemption to the photograph requirement.[46]

Although it is unclear because courts have not considered federal photo requirements under RFRA, it appears likely that a religious exemption would not be required under either the Free Exercise Clause or RFRA. Based on considerations of lawsuits involving state law requirements, it appears that the government could provide a strong argument that uniform application of a federal photo identification law would meet even RFRA's heightened standard requiring a compelling interest, depending on the purpose and actual application of the law. Again, Congress also has authority to exempt statutes from complying with RFRA, and may choose to do so if it believes a statute may not meet the strict scrutiny review that RFRA would otherwise require.

Lawsuits Challenging Photo Requirements Under Pre-*Smith* Strict Scrutiny

Many of the lawsuits requiring exemptions for individuals with religious objections to photo requirements occurred prior to the U.S. Supreme Court's decision in *Smith*, which lowered the constitutional standard used to protect religious exercise for laws of general applicability. Before *Smith*, the government had to demonstrate a compelling interest in requiring photographs without exemptions for religious objectors. But after *Smith*, the government only needed to demonstrate that the generally applicable requirement was rationally related to a legitimate government purpose. The pre-*Smith* standard used to review the exemption cases was therefore much more difficult to meet, leading to numerous courts requiring the states to allow exemptions to photo requirements, particularly if other exemptions or alternatives were available.[47]

Even under the strict scrutiny standard, courts have been willing to recognize photo identification as a compelling purpose under strict scrutiny, provided the photo requirement was applied uniformly and without exemption.[48] Courts have also been more likely to find a compelling interest and hold that an exemption was not required in cases in which the identification was not specifically a license to drive, but rather an identification card for some other purpose.[49]

Lawsuits Challenging Photo Requirements Post-9/11

In cases brought after *Smith*, photo requirements have generally been held to withstand rational basis review under constitutional Free Exercise claims, with courts finding that a mandatory photograph is rationally related to the legitimate governmental purpose of identification of citizens using its highways or engaging in commerce. The enactment of RFRA after *Smith* means

[46] For proposed legislation related to federal photo identification requirements, *see* H.R. 140 (111th Cong.); H.R. 994 (111th Cong.).

[47] *See* Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984); Dennis v. Charnes, 646 F.Supp. 158 (D. Colo. 1986), remanded from, 805 F.2d 339 (10th Cir. 1984); Bureau of Motor Vehicles v. Pentecostal House of Prayer, 269 Ind. 361, 368-69 (Ind. 1978).

[48] *See* Johnson v. Motor Vehicle Dep't, 197 Colo. 455 (Colo. 1979); State v. Arnold, 379 N.W.2d 322 (S.D. 1986). *Cf.* Valov v. Dep't of Motor Vehicles, 132 Cal. App. 4th 1113 (Cal. Ct. App. 2005) (applying strict scrutiny under the California Constitution).

[49] *See* United States v. Slabaugh, 852 F.2d 1081 (8th Cir. 1988). *See also* Green v. City of Philadelphia, 2004 U.S. Dist. LEXIS 9687 (E.D. Pa 2004).

that in addition to meeting the constitutional requirements for religious exercise, federal actions must also meet the statutory requirements for religious exercise. At this time, however, it appears that no lawsuits have challenged federal photo requirements under the statutory strict scrutiny standard provided by RFRA.

Because RFRA applies the standard that was used pre-*Smith*, it might appear that the pre-*Smith* cases would indicate the likely outcome of courts considering legal questions regarding federal photo requirements. However, the events of September 11, 2001 have resulted in heightened security standards and given new context to legal identification requirements. In post-9/11 cases, courts have not required exemptions for photo requirements in identification laws.[50] Even in cases where exemptions were allowed prior to 9/11, courts have held that refusal of applications for exemption since then is permissible.[51] One state appellate court held that a prohibition on exemptions for the photo requirement in state identification laws survived rational basis review under the federal Free Exercise Clause and strict scrutiny review under the relevant state constitutional protection for religious exercise.[52] The court held that, as a result of public safety concerns, "the DMV was justified in revoking a religious exemption that would provide a ready means for criminal offenders and potential terrorists to conceal their identities, obtain fraudulent driver's licenses, and frustrate airport security."[53]

Considerations for Potential Exemptions to Federal Photo Requirements

Under the analysis used in photo identification cases, if a legal requirement for a photograph infringes on an individual's sincerely held religious beliefs, the government must prove that the individual's religious exercise is not substantially burdened by the requirement or that the state's interest outweighs the burden under the standard imposed by the relevant law under which the photo requirement is challenged. Particularly after 9/11, courts appear more likely to apply the photo requirement strictly, without exemption, if the government's compelling interest is directly related to security concerns.[54] However, although the events of 9/11 have created heightened security concerns that have been used to justify a prohibition on exemptions to photo requirements in several cases, courts have not summarily dismissed the possibility of exemptions.

Accordingly, it is important to remember that evidentiary concerns are very significant in this context. That is, these cases are very fact-specific and the outcome may depend on nuanced details of the individual's religious beliefs or the government's specific purposes. A federal district court required one individual to be photographed because it found that her religion permitted her to be photographed under certain circumstances and the woman did not provide evidence to refute those findings.[55] The court held that the woman was not substantially burdened and never reached the question of whether the government's interest was justified under the

[50] Valov v. Dep't of Motor Vehicles, 132 Cal. App. 4th 1113 (Cal. Ct. App. 2005); Freeman v. Dep't of Highway Safety and Motor Vehicles, 924 So.2d 48 (Fla. Dist. Ct. App. 2006).

[51] *See* Valov v. Dep't of Motor Vehicles, 132 Cal. App. 4th 1113 (Cal. Ct. App. 2005).

[52] *Id*.

[53] *Id*. at 1129.

[54] Valov v. Dep't of Motor Vehicles, 132 Cal. App. 4th 1113 (Cal. Ct. App. 2005); Johnson v. Motor Vehicle Dep't, 197 Colo. 455 (Colo. 1979)

[55] *See* Freeman v. Dep't of Highway Safety and Motor Vehicles, 924 So.2d 48 (Fla. Dist. Ct. App. 2006).

relevant standard of review.[56] Had the woman demonstrated a personal belief that conflicted with the official teachings of her religion, the court may have held otherwise.

Another important consideration in determining whether an exemption should be provided for federal photo identification laws is the uniformity of application of the photo requirement. Courts are more likely to require a religious exemption if other alternatives are available.[57] Thus, if Congress includes, or courts require, other exemptions to the federal photo identification requirements, it is more likely that a religious exemption would also be required.

If Congress does provide an exemption based on religion, it is unlikely that such an exemption would be considered a violation of the Establishment Clause. The Establishment Clause prohibits preferential treatment of one religion over another or preferential treatment of religion generally over nonreligion.[58] Some argue that providing some individuals an exemption from a legal requirement because of their religion provides special treatment based on religion, in violation of the Establishment Clause. However, the Supreme Court has upheld religious exemptions for government programs, where the exemptions were enacted to prevent government interference with religious exercise.[59]

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[56] *Id.*

[57] Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984); Dennis v. Charnes, 646 F. Supp. 158 (D. Colo. 1986), *remanded from*, 805 F.2d 339 (10th Cir. 1984); Bureau of Motor Vehicles v. Pentecostal House of Prayer, 269 Ind. 361, 368-69 (Ind. 1978).

[58] Epperson v. Arksansas, 393 U.S. 97, 103-04 (1968).

[59] *See* Thomas v. Review Board, 450 U.S. at 719-20. The Court in *Locke v. Davey*, 540 U.S. 712 (2004), recognized that some government actions that allow free exercise consequently raise questions of establishment, noting that there was room for "play in the joints" in this intersection of the religion clauses. For a legal analysis of religious exemptions under the Establishment Clause, *see* CRS Report RL34708, *Religious Exemptions for Mandatory Healthcare Programs: A Legal Analysis*, by Cynthia Brougher.