How State Photo Identification Standards Can be Used to Undermine Religious Freedom

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INTRODUCTION

The purpose of this essay is to highlight a latent threat to religious freedom in the post-9/11 environment. In the absence of state laws that track the language of the Religious Freedom Restoration Act of 1993, state legislatures motivated by anti-Muslim bias can harm religious minorities by enacting facially neutral and generally applicable laws that forbid headcoverings in driver license photographs. If such laws are enacted, individuals who wear religious headcoverings can be forced to choose between religious freedom and valid identification cards, without which travel and economic transactions become exceedingly difficult. As a safeguard against this deprivation of religious freedom, this essay argues for more robust civil rights protections at all levels of American government, including wider adoption of state versions of the Religious Freedom Restoration Act.

I. THE POST 9/11 ENVIRONMENT

In the decade following the terrorist attacks of September 11, 2001, Muslims and individuals perceived to be Muslim—including Sikhs, Arabs, and South Asians—have experienced high levels of backlash

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discrimination and even violence in the United States. According to the U.S. Department of Justice, the federal government has formally investigated over 800 incidents of post-9/11 backlash violence, threats, vandalism and arson against Arab, Muslim, Sikh, and South Asian Americans and other individuals perceived to be of Middle Eastern origin. According to the U.S. Equal Employment Opportunity Commission, in the months after 9/11, the agency witnessed a 250% increase in the number of religious discrimination complaints involving Muslims and has since processed more than 1000 such complaints. Communities impacted by post-9/11 bias have asserted that they are routinely subjected to racial and religious profiling by law enforcement officers. Even children are not spared from discrimination in the post-9/11 environment; according to a September 2011 report published by the U.S. Commission on Civil Rights, Muslim and Sikh students in American public schools experience bias-based bullying, harassment, and violence because of their religion, with rates of anti-Sikh bullying ranging from “roughly half to over three-quarters.”

Hate crimes, workplace discrimination, racial and religious profiling, and school bullying in the post-9/11 environment do not occur in a vacuum. Recent surveys indicate that large segments of American society harbor negative attitudes toward Muslims. For example, according to a Gallup report published in 2010, more than 40% of survey respondents admitted feeling prejudice against Muslims. In a 2006 Gallup survey, almost 40% of survey respondents supported a draconian requirement that American Muslims carry special identification cards. According to the Pew Forum on Religion & Public Life, over a three year period between 2008 and 2011, thirty-seven proposed mosque and Islamic center construction

projects around the United States encountered resistance from non-Muslims; some communities explicitly oppose such projects because of fears about Islam.\textsuperscript{7}

American politicians and lawmakers have also championed bigoted attitudes. According to a 2010 report by South Asian Americans Leading Together (SAALT), numerous politicians and lawmakers in the United States have made statements that paint Muslims, Arabs, Sikhs, and South Asians as national security threats or perpetual foreigners,\textsuperscript{8} sometimes to the extent of calling members of these communities “ragheads”\textsuperscript{9} and openly supporting profiling of Muslims in the United States.\textsuperscript{10}

The foregoing summary of the post-9/11 environment suggests that there is widespread bigotry and insensitivity toward Muslims and those perceived to be Muslim in the United States, even among politicians and lawmakers. Although bigotry and insensitivity are themselves lamentable and harmful to society, a greater challenge emerges when bigotry and insensitivity find their way into the legislative process, and when laws are proposed that undermine religious freedom. The following section of this Essay argues that this is not merely a theoretical concern.

II. OKLAHOMA AND MINNESOTA

In March 2009, by a vote of eighty-eight to eight, the Oklahoma House of Representatives passed a bill\textsuperscript{11} that sought to ban the wearing of “[h]ats, head scarves, head garments, bandanas, prescription or non-prescription glasses or sunglasses, masks or costumes that cover or partially cover the head or shoulders” in state driver licenses and identification cards.\textsuperscript{12} Although Representative Rex Duncan, a bill sponsor, denied that the measure had anything to do with religion, an Oklahoma newspaper noted that Duncan wrote the bill after a Muslim woman was permitted to wear a hijab (headscarf) when she was photographed for her driver license.\textsuperscript{13} Another bill sponsor—Representative Wade Rousselet—explained to local media that the bill was intended to ensure uniformity in identification photographs but also added that “[i]f I went to another country and I did not abide by their rules . . . I


\textsuperscript{9} Id. at 7, 19.

\textsuperscript{10} See id. at 10-13.


\textsuperscript{12} H.R. 1645, 52nd Leg., 1st Sess. (Okla. 2009).

\textsuperscript{13} See McNutt, supra note 11.
would not get the privilege of a driver’s license in that country . . . ."14

The bill elicited objections from civil rights groups because it jeopardized the right of individuals to wear religious headcoverings in identification photographs, and because it appeared to have been motivated by anti-Muslim bias.15 Ultimately, the bill lost momentum in the Oklahoma Senate and failed to progress. Its previous Senate sponsor, Senator Roger Ballenger, withdrew his support after noting that the state’s Department of Public Safety was satisfied with existing facial identification rules for driver license photographs; in addition, in the face of growing opposition to the bill from civil rights organizations, Sen. Ballenger asserted that the restrictive bill sought by his colleagues in the Oklahoma House of Representatives was “a solution looking for a problem.”16

Around the same time, in February 2009, a similar bill17 was introduced in the Minnesota House of Representatives to amend photo identification standards for state driver licenses, specifically by requiring that such licenses show “the full head and face” of a person.18 The measure drew objections from civil rights groups when originally proposed because it did not explicitly allow individuals to wear religious headcoverings in identification photographs.19 Ultimately, Representative Steve Gottwalt—the bill’s main sponsor—issued a press release announcing an amendment to the bill that would allow religious headcoverings.20 The press release claimed that the bill was originally proposed in response to law enforcement concerns about a growing number of driver license photos that contained obscuring items, “including baseball caps, cowboy hats, hoods, masks, ear muff s, scarves, and more.”21

Although there was no obvious bias motivation behind the Minnesota bill, the failure of its authors to allow religious headcoverings in the first instance suggests, at the very least, that the rights of religious minorities were not a high priority.22 In Oklahoma, on the other hand, the effort to ban headcoverings in driver license photographs was punctuated by xenophobic innuendo and only began after a Muslim woman was allowed

15. See McNutt, supra note 11.
16. McNutt, supra note 11.
17. See H.R. 989, 2009 Leg., 86th Sess. (Minn. 2009).
19. See id.
21. Id.
to wear a *hijab* in her driver license photograph. Regardless of the underlying motives in these cases, in the post-9/11 environment, there is no reason to doubt that similar legislation may be introduced in other states. The following section of this essay argues that the possibility of such legislation constitutes a latent threat to religious freedom in the United States, especially in states where laws guaranteeing the free exercise of religion are narrowly interpreted.

## III. Latent Threats

The Religious Freedom Restoration Act of 1993 (RFRA) sought to invalidate any state or federal law that substantially burdens an individual’s exercise of religion unless such a law furthers a compelling governmental interest by the least restrictive means. RFRA was enacted in response to the U.S. Supreme Court’s decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which held that “generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest . . . ” Prior to the *Smith* decision, the compelling interest test was an established means of resolving federal cases involving religious liberty and competing governmental interests. RFRA sought to overturn *Smith* by codifying the compelling interest test and explicitly applying it to laws of general applicability. In 1997, however, the U.S. Supreme Court in *City of Boerne v. Flores* 521 U.S. 507 (1997) concluded that RFRA cannot constitutionally apply to the states.

Despite the *Boerne* decision, some states—including Oklahoma and Minnesota—have either adopted state versions of RFRA or interpreted their constitutions in ways that are more protective of religious freedom than the U.S. Constitution after *Smith*. In these states, even without evidence of religious bias, efforts to categorically ban headcoverings in driver license photographs would likely be defeated in state court under the compelling interest standard. If a state government asserts that it has a compelling interest in verifying the identity of any of its residents through photographic identification, proponents of categorical headcovering bans

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would have difficulty arguing that categorical bans are the least restrictive means of facilitating identification. A headcovering worn daily by an individual in accordance with religious requirements is an integral and inseparable constituent of their identity. Removing it would actually undermine the state’s interest in creating accurate depictions of its residents. This might explain why the U.S. Department of State permits religious headcoverings in passport photographs 30—a fact that counts as evidence that categorical headcovering bans are not the least restrictive means of facilitating accurate identification.

It is an open question whether categorical headcovering bans can withstand legal challenges in states that have failed to enact state RFRAs or where state free exercise clauses are interpreted according to Smith. In such states, if a legislature enacted a facially neutral, generally applicable law that categorically prohibited headcoverings in state identification photographs, such a law could withstand legal challenge under rational basis review. The consequences of such a law for religious minorities would be severe. Muslims who wear hijabs and Sikhs who wear dastaars (turbans), for example, would not be permitted to wear their religiously-mandated headcoverings in driver license or other state identification photographs. Without a valid driver license or other state identification photograph, impacted individuals would face constraints on their ability to drive a car (to their place of employment, for example) or engage in transactions for which a valid state identification photograph is required. The specter of such limitations would ultimately force Muslims and Sikhs to make a difficult choice between observing the requirements of their religion and being able to travel and transact freely in their home states.

The possibility of such disruptions occurring in the lives of religious minorities constitutes a latent threat to religious freedom in the United States. The act of redefining photo identification standards through legislation in a way that ignores religious minorities not only has socio-economic consequences, but is also dehumanizing. For individuals of faith, religious headcoverings can be integral and inseparable components of their identities as human beings, as well as a source of self-definition and strength. In the post-9/11 environment, given the penchant of some lawmakers to oppose religious freedom for Muslims and express hostility toward religious minorities more generally, bigots in state legislatures can use carefully worded, facially neutral, generally applicable photo identification laws to target communities for degradation, while publicly disclaiming any bias motivation. Concerned Americans should take note of this latent threat and vigorously pursue preemptive solutions.

IV. SOLUTIONS

To limit the threat of impaired religious freedom through facially neutral, generally applicable state photo identification laws, a number of corrective steps can be taken:

(1) State photo identification standards should explicitly allow individuals to wear religious headcoverings in state identification photographs, including driver licenses; if no such allowances are currently made, concerned Americans can pursue corrective amendments.

(2) To eliminate uncertainty about the scope and interpretation of religious freedom under state constitutions, concerned Americans should pursue enactment of state RFRAs so that the compelling interest standard is universally operative throughout the United States.

(3) Existing and proposed federal laws and rules governing photo identification standards—such as State Department passport requirements, and the REAL ID Act of 2005 and its implementing regulations—should be monitored to ensure that they preserve the right of individuals to wear religious headcoverings in identification photographs.

(4) Communities impacted by post-9/11 backlash discrimination should continue to combat bigotry and stereotypes through constructive engagement with government officials, media outlets, and grassroots community organizations.

CONCLUSION

In the absence of state laws that track the language of the Religious Freedom Restoration Act of 1993, state legislatures motivated by anti-Muslim bias can harm religious minorities by enacting facially neutral and generally applicable laws that forbid headcoverings in driver license photographs. If such laws are enacted, individuals who wear religious headcoverings can be forced to choose between religious freedom and valid identification cards, which afford individuals the ability to travel freely and engage in economic transactions. In this context, to safeguard against the deprivation of civil rights, concerned Americans should pursue more robust civil rights protections through law and policy at all levels of American government.

31. See id.