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Constitutional Law-Free Exercise of Religion-State May Require a Photograph on a Drivers License Though the Licensee's Religious Beliefs Prohibits Photographs of Any Type--Johnson v. Motor Vehicle Division, 593 P.2d 1363 (Colo. 1979)

Constitutional Law—FREE EXERCISE OF RELIGION—STATE MAY REQUIRE A PHOTOGRAPH ON A DRIVERS LICENSE THOUGH THE LICENSEE'S RELIGIOUS BELIEFS PROHIBIT PHOTOGRAPHS OF ANY TYPE—*Johnson v. Motor Vehicle Division*, 593 P.2d 1363 (Colo. 1979).

The plaintiffs in *Johnson v. Motor Vehicle Division*[1] were members of the Assembly of YHWHHOSHUA, a small religious group located in Pueblo, Colorado. Their religion teaches that photographs are graven images and therefore forbids the taking of photographs.[2] As a result, when the plaintiffs applied for Colorado driving permits they refused to allow their photographs to be taken.[3] Since the state statute required a photograph on each driving permit,[4] the Motor Vehicle Division refused to issue permits to them.[5] In *Johnson*, Assembly members attacked the state's application of the photograph requirement to them as a violation of their constitutional right to the free exercise of religion.[6]

I. BACKGROUND

The first amendment of the United States Constitution states that "Congress shall make no law . . . prohibiting the free exercise" of religion.[7] In *Reynolds v. United States*,[8] the Supreme Court first announced that *beliefs* but not *actions* were

1. 593 P.2d 1363 (Colo. 1979).

2. *Id.* at 1363. The Assembly of YHWHHOSHUA derives this doctrine from a literal interpretation of *Exodus* 20:4 that states: "Thou shalt 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 water under the earth." *See also Deuteronomy* 5:8.

3. 593 P.2d at 1364.

4. "Every application for a driver's, minor driver's, or provisional driver's license, and the license issued as a result of said application, shall also contain the photograph of the applicant or licensee. Such photograph shall be taken and processed with equipment leased or owned by the department." COLO. REV. STAT. § 42-2-106(3) (1973).

5. 593 P.2d at 1364.

6. Assembly members claimed that the photograph requirement violates their right to the free exercise of religion as guaranteed by both the first amendment of the United States Constitution and article II, section 4 of the Colorado Constitution. *Id.*

7. U.S. CONST. amend. I. The free exercise clause of the first amendment was made wholly applicable to the states through the fourteenth amendment in Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

8. 98 U.S. 145 (1878).

protected by the free exercise clause.[9] Later, in *Cantwell v. Connecticut,*[10] the Court again considered the scope of the free exercise clause and concluded that religious conduct as well as belief may be protected in appropriate circumstances.[11]

Since *Cantwell,* courts have struggled with the question of when religiously motivated conduct can be circumscribed by the government and have necessarily resorted to a balancing test.[12] Two important Supreme Court decisions, *Sherbert v. Verner*[13] and *Braunfeld v. Brown,*[14] illustrate the difficulty in applying a balancing test to delicate free exercise clause issues.

A. The Sherbert *Test*

A particularly difficult issue to resolve arises when a government regulation does not require an individual to act contrary to his religious belief but conditions the receipt of benefits on such conduct. In *Sherbert,* a South Carolina statute provided that an unemployed person's failure to accept suitable work rendered the claimant ineligible for unemployment benefits.[15] The state Employment Security Commission determined that Sherbert's refusal to work Saturdays, even though motivated by religious beliefs, placed her within the disqualifying provision.[16]

In determining whether the imposition of such a burden on religious beliefs violated the free exercise clause, the United States Supreme Court enunciated a two-part test. In order to justify the burden placed on Sherbert, the state had to show (1) that the compelling state interests served by the regulation outweighed the burden imposed, and (2) that no less burdensome alternative forms of regulation existed to achieve the state interests.[17] In applying this two-pronged test, the Court determined

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9. The Court affirmed a bigamy conviction of a Mormon despite his claim that the practice of plural marriage constituted a basic tenet of his faith. The Court stated that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166.

10. 310 U.S. 296 (1940).

11. *Id.* at 303-04.

12. For an examination of the balancing test as applied by the courts in weighing religious liberty claims against various governmental regulations that promote health, safety, morals, or welfare, see Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development,* 80 HARV. L. REV. 1381 (1967).

13. 374 U.S. 398 (1963).

14. 366 U.S. 599 (1961).

15. 374 U.S. at 400-01.

16. *Id.* at 401.

17. *Id.* at 406-07.

that even if compelling state interests were found, the state had failed to satisfy the second prong of its burden.[18] Focusing on whether an acceptable alternative form of regulation existed, the Court decided that granting an exemption to Sherbert constituted an adequate alternative since an exemption would not interfere with the state interests served by the unemployment statute.[19] Consequently, to condition the availability of unemployment benefits upon Sherbert's willingness to violate a cardinal principle of her religious faith violated the free exercise clause.[20]

In *Braunfeld v. Brown,* a case similar to *Sherbert* but decided two years earlier, the Court applied the same test to reach a different result. Orthodox Jews claimed that compliance with Pennsylvania's Sunday closing law placed them at an economic disadvantage because their religious beliefs required them to also close on Saturday, their Sabbath.[21] Although the Court recognized the economic burden on the Jewish merchants because of their religious beliefs, it upheld the validity of the statute.[22] The state satisfactorily met its two-pronged burden by demonstrating that the statute furthered the important secular goal of one uniform day of rest and that this goal could not be achieved by less burdensome means.[23]

Recognizing the apparent inconsistency between its decision in *Braunfeld* and its decision in *Sherbert,* the *Sherbert* Court attempted to distinguish the two cases. First, it examined the nature of the burden imposed on the Sabbatarians by the respective regulatory schemes.[24] In *Braunfeld,* the Sunday closing law imposed a lesser burden upon religious practice in that observance of the Jewish Sabbath only resulted in one extra day of lost profits.[25] In *Sherbert,* however, the burden resulted in the termination of Sherbert's sole source of income during her unemployment.

Although this distinction focusing on the extent of the religious burden imposed cannot be overlooked, perhaps the greatest difference between *Sherbert* and *Braunfeld* concerns the

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18. *Id.* at 407-09.
19. *Id.*
20. *Id.* at 410.
21. 366 U.S. at 601.
22. *Id.* at 609.
23. *Id.* at 608.
24. 374 U.S. at 408.
25. *See id.*

presence or absence of less burdensome alternatives.[26] The statutes in neither case would constitute a religious burden when applied to the vast majority of people. Consequently, in determining whether adequate alternatives existed, the Court considered whether providing an exemption for Sabbatarians constituted an alternative. In making this inquiry the Court focused on the impact an exemption would have on the overall statutory scheme.[27]

In *Braunfeld,* the Court determined that the state's interest in providing one uniform day of rest could only be achieved by declaring Sunday to be that day of rest.[28] To grant an exemption to Sabbatarians "appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable."[29]

In *Sherbert,* on the other hand, the Court decided that the state did not establish that an exemption would undermine the purposes of the statute.[30] In support of its decision, the Court observed that the statutory scheme automatically exempted those whose religious views prohibited Sunday work.[31] The Court also noted that other states granted unemployment benefits to persons unable to find suitable employment because of a religious prohibition against Saturday work.[32] Therefore, an exemption for Sherbert provided an acceptable alternative.

B. Bureau of Motor Vehicles v. Pentecostal House of Prayer

In *Bureau of Motor Vehicles v. Pentecostal House of*

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26. That there was disagreement among the Justices concerning which statutory scheme imposed a greater burden on the respective Sabbatarians suggests that other factors may have been more pivotal in distinguishing *Sherbert* from *Braunfeld.* In the dissenting opinion in *Sherbert,* Justices Harlan and White stated that

> [f]orcing a store owner to close his business on Sunday may well have the effect of depriving him of a satisfactory livelihood if his religious convictions require him to close on Saturday as well. Here we are dealing only with temporary benefits, amounting to a fraction of regular weekly wages and running for not more that 22 weeks.

Id. at 421.

27. 374 U.S. at 408-09.

28. *Id.* at 408.

29. *Id.* at 408-09 (footnote omitted).

30. *Id.* at 409.

31. *Id.* at 406.

32. *Id.* at 407 n.7.

Prayer,[33] the Indiana Supreme Court employed the *Sherbert* test and the impact-of-an-exemption form of analysis to determine whether the photograph requirement for driving permits unconstitutionally infringed upon the applicant's free exercise of religion.[34] Members of the Pentecostal House of Prayer, believing photographs to be graven images,[35] refused to be photographed when they applied for driving licenses and therefore were not issued permits.[36] The court found that enforcement of the state's photograph requirement infringed upon the free exercise of the Pentecostals' religious beliefs since it forced them to choose between an important religious principle and their right to drive.[37]

In defense of its photograph requirement, the state advanced two interests served by its practice: (1) the state's interest in assuring the competency of Indiana drivers is achieved by constantly checking each driver's knowledge, ability and obedience, and (2) the photograph requirement gives the state a means of rapid, positive identification in furthering highway safety.[38]

Although the court agreed that the state has a strong interest in assuring driver competence, it stressed that having one's photograph on a drivers license does not in any way affect driving competence.[39] An individual must satisfy the same standards of competence to receive a drivers license regardless of whether the license includes a photograph.

The court found the interest in speedy identification to be more persuasive but nevertheless granted relief to the Pentecostal members since the state had not shown the absence of less

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33. 269 Ind. 361, 380 N.E.2d 1225 (1978).

34. *Id.* at 362-63, 380 N.E.2d at 1226.

35. *Id.* The Pentecostal House of Prayer follows a literal interpretation of *Deuteronomy* 5:8 which provides: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water beneath the earth." *See also Exodus* 20:4.

36. 269 Ind. at 362-63, 380 N.E.2d at 1226.

> Every such permit or license shall bear thereon the distinguishing number assigned to the permittee or licensee and shall contain the name, age, residence address, a brief description, and, with the exception of a learner's permit, a photograph of such person for the purpose of identification, and such additional information as the commissioner shall deem necessary, also a space for the signature of the permittee or licensee.

IND. CODE § 9-1-4-37(b) (1976).

37. 269 Ind. at 367, 380 N.E.2d at 1228.

38. *Id.* at 368-69, 380 N.E.2d at 1229.

39. *Id.*

burdensome alternatives.[40] The court emphasized that "[t]he 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 fulfill its important duties."[41] The court further stressed that few people would find it advantageous to seek an exemption in the first place since a photograph on a license is desirable for various business transactions such as cashing checks.[42] Accordingly, an exemption for Pentecostal members provided an acceptable alternative since it would not undermine the asserted state interests.[43]

II. INSTANT CASE

The *Johnson* court declined to follow *Pentecostal House of Prayer* and held that the photograph requirement for Colorado drivers licenses was not unconstitutional as applied to Assembly members. The court acknowledged the sincerity and religious nature of the Assembly members' belief and agreed that the photograph requirement imposed a burden on their free exercise of religion.[44] Nonetheless, the court held that the state satisfied the requirements of the *Sherbert* test by demonstrating that compelling state interests were served by the photograph requirement and that no less burdensome alternative forms of regulation were available. Specifically, the Colorado Supreme Court concluded that an exemption for Assembly members would undermine the essential purposes of the photograph requirement.[45]

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40. *Id.* at 369, 380 N.E.2d at 1229.

41. *Id.*

42. *Id.*

43. *Id.* To illustrate the difficulties encountered by the Indiana Supreme Court in applying the *Sherbert* test to free exercise claims, compare Thomas v. Review Bd. of Ind. Employment Sec. Div., 391 N.E.2d 1127 (Ind. 1979). The court held that the state's denial of unemployment compensation to a Jehovah's Witness who refused to work in an armaments plant for religious reasons did not violate the free exercise clause. The majority opinion attempted to distinguish *Thomas* from *Pentecostal House of Prayer* by stating that a literal reading of the Bible prompted the Pentecostal belief, but it was unclear what prompted the Jehovah's Witness belief. *Id.* at 1133. Two justices dissented, contending that *Sherbert* required that the withholding of unemployment benefits from Thomas be declared unconstitutional. The dissent relied on Lincoln v. True, 408 F. Supp. 22 (W.D. Ky. 1975), which involved a fact situation similar to *Thomas*, as a proper interpretation of *Sherbert*. 391 N.E.2d at 1135 (Hunter, J., dissenting).

44. 593 P.2d at 1364-65.

45. *Id.* at 1365.

III. ANALYSIS

This analysis of the court's application of the *Sherbert* test to the facts in *Johnson* considers (1) the nature of the burden imposed on the Assembly members, and (2) the state's attempt to justify that burden. Special consideration will be given to the impact that an exemption for Assembly members would have on the state interests involved.

A. The Burden on the Individual

The *Johnson* court recognized that the photograph requirement imposed a burden on the Assembly member's free exercise of religion.[46] However, the court attempted to distinguish the nature of the burden imposed by the regulatory program in *Johnson* from that imposed in *Sherbert*.[47] This distinction was apparently drawn to demonstrate why the burden in *Johnson* should be given less weight in balancing it against the state interests, thereby enabling the state interests to outweigh the individual's interest in the free exercise of religion. The statute in *Sherbert* granted an automatic exemption where religious beliefs precluded work on Sunday, whereas no such exemption was extended to Sabbatarians. The photograph requirement in *Johnson* involved no discrimination based on religion—every regular driving permit had to include the photograph of the licensee.[48]

The distinction drawn by the *Johnson* court is superficial at best. The court should have looked more closely at the degree to which the photograph requirement interfered with the Assembly members' free exercise of religion rights. Had the court done so, it may well have decided that the burden was not only comparable to the burden in *Sherbert*, but in some respects more onerous. Similar to *Sherbert*, *Johnson* involved the deprivation of a government benefit because of the Assembly members' refusal to comply with the photograph requirement.[49] Unlike the denial of

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46. *Id.*
47. *See id.* at 1366.
48. *Id.*
49. *Id.* at 1364. The Colorado Supreme Court has stated that
> [e]very citizen has an inalienable right to make use of the public highways of the state; every citizen has full freedom to travel from place to place in the enjoyment of life and liberty. The limitations which may be placed upon this inherent right of the citizen must be based upon a proper exercise of the police power of the state in the protection of the public health, safety and welfare. Any unreasonable restraint upon the freedom of the individual to make use of

unemployment benefits in *Sherbert*, which is *temporary*, the refusal to issue Assembly members driving permits results in a *permanent* handicap of their mobility that could hinder both their employment opportunities and the fulfillment of their church duties. Because of this substantial infringement on the Assembly members' free exercise of religion, rather than minimizing the severity of the burden on the individual, the court should have placed a heavier burden on the state to satisfy its requirements under the *Sherbert* test.

B. The Compelling State Interest/Least Restrictive Alternative Test

The *Johnson* court discussed three interests presented by the state that the photograph requirement served: (1) a photograph on a license facilitates the enforcement of highway safety by providing police officers with a ready means of verifying that the license belongs to the person presenting it, (2) negatives from the photos are filed by the Motor Vehicle Department and used in police photographic lineups and in identifying victims of natural disaster and traffic accidents, and (3) the state statutorily exempts from liability those who rely on drivers licenses for identification; the presence of a photograph on the drivers license makes such reliance more dependable. The court found these interests to be compelling.[50]

In light of the significant burden imposed on Assembly members, it is arguable that these state interests do not outweigh the burden or are not compelling.[51] However, regardless of whether the state satisfies the first prong of its burden under the *Sherbert* test, the court should have held for the Assembly members because a less burdensome alternative exists.

Sherbert demonstrates that an exemption to accommodate certain religious beliefs may be an adequate alternative when this accommodation does not prevent the state from substan-

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the public highways cannot be sustained.

People v. Nothaus, 147 Colo. 210, 214, 363 P.2d 180, 182 (1961).

50. 593 P.2d at 1365-66.

51. In *Sherbert*, the Court stated: "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' " 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)). Although the asserted state interests "rationally relate" to the photograph requirement, it is debatable just how "paramount" these interests are when weighed against the onerous burden imposed on Assembly members.

tially achieving its purposes.[52] In holding that an exemption was not an adequate alternative to the photograph requirement, the *Johnson* court attempted to distinguish the impact that an exemption had on the state interests in *Sherbert* from the impact that it would have in *Johnson*. To allow Sherbert to receive unemployment benefits did not conflict with the underlying purpose of the statute which was to provide temporary relief for the involuntarily unemployed.[53] Presumably Sherbert would eventually find suitable work that did not require working on Saturdays. In contrast, the court found that "photographic identification is an indispensable underpinning of the purposes underlying the state's interest in issuing drivers licenses. To provide exemptions would undermine its essential purposes."[54]

Unfortunately, the court failed to explain why an exemption would undermine the statute's essential purposes. Perhaps a closer scrutiny of the state interests involved would have found an exemption to be an adequate alternative. Indeed, the granting of an exemption from the photograph requirement to Assembly members would only minimally affect those interests asserted by the state.

1. The state interest in enforcing highway safety

The specific state interest served by the photograph requirement, which is to provide a means of ready identification of those who operate motor vehicles, is at most indirectly related to the enforcement of highway safety.[55] As elucidated in *Pentecostal House of Prayer,* the presence of a photograph on a drivers

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52. 374 U.S. at 408-09.

53. 593 P.2d at 1365.

54. *Id.*

55. The major purpose of driver licensing regulations is to further highway safety by promoting driver competence. The Colorado statutes provide:

> (1) No person, except those expressly exempted in section 42-2-102, shall drive any motor vehicle upon a highway in this state unless such person has a valid license prepared and issued by the department under this article. . . . (2) The department upon issuing a driver's license shall indicate thereon the type or general class of vehicles the licensee may drive. The department shall establish such qualifications as it deems reasonably necessary for the safe operation of the various types, sizes, or combinations of vehicles and shall appropriately examine each applicant to determine his qualifications, according to the type or general class of license for which he has applied.

COLO. REV. STAT. § 42-2-101 (1973). The prohibition against driving without a license and the issuance of various types of operator's licenses conditioned upon compliance with certain qualifications tends to restrict the use of the highways to competent drivers.

license is wholly unrelated to driving competence.[56] After competence is established and a drivers license is issued, the actual enforcement of driving safety arises only as violations occur.[57] Police officers may stop traffic violators regardless of whether a photograph is on a license.

Although Assembly members were willing to have their fingerprints and a complete physical description on their licenses, the court determined that "the exigencies of law enforcement cannot brook the delay inherent in other means of identification."[58] However, just what exigencies require a photograph as opposed to these other means of identification is unclear since the court failed to define "exigencies of law enforcement."

That certain classes of driving permits do not require photographs indicates that to allow Assembly members to use permits without photographs would not significantly hinder the enforcement of highway safety. Colorado driving licenses that do not require photographs on them include temporary and probationary licenses.[59] Also, temporary drivers of road machines or implements of husbandry need not obtain drivers licenses. Military personnel and nonresidents with valid drivers licenses from other states need not obtain Colorado drivers licenses, regardless of whether their out-of-state permits include photographs.[60] If these exceptions to the photograph requirement do not render the statutory scheme unworkable, it is difficult to understand how an exemption for Assembly members, a small religious group, would. The sounder view, stressed in *Pentecostal House of Prayer*, is that the physical characteristics traditionally described on a drivers license should be more than adequate to enable the state to fulfill its interest in promoting highway safety through identification of those who operate motor

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56. 269 Ind. at 368-69, 380 N.E.2d at 1229.

57. The Colorado Supreme Court held that a police officer can only demand the license of a driver whose vehicle has been stopped for otherwise valid purposes. Police officers do not have unlimited authority to stop any automobile at any time for any reason to request the display of a drivers license. People v. McPherson, 191 Colo. 81, 550 P.2d 311 (1976).

58. 593 P.2d at 1365.

59. In response to the Assembly members' request for admissions, the Motor Vehicle Department admitted that licenses issued pursuant to sections 42-2-105 (temporary) and 42-2-123(11) (probationary) of the Colorado Revised Statutes do not require the licensee's photograph. Answer to Plaintiffs' Request for Admissions, Johnson v. Motor Vehicle Division, 593 P.2d 1363 (Colo. 1979).

60. *See* COLO. REV. STAT. § 42-2-102 (1973).

vehicles.[61]

2. The state interest in the negatives

The state interests served by the negatives obtained in taking photographs for driving permits involve two aspects: (1) use in criminal identification procedures, and (2) identification of traffic accident and natural disaster victims.[62] However, the Motor Vehicle Division's refusal to issue a drivers license to an Assembly member because of his failure to comply with the photograph requirement does not provide an alternate means of obtaining the Assembly member's negative. The state's interests are frustrated, regardless of whether an Assembly member is permitted to receive a drivers license without submitting to the photograph requirement. Either way the state is not going to have the use of photographs of Assembly members. Thus, the state interest in using the negatives will not be furthered by refusing to issue drivers licenses without photographs to Assembly members.[63]

Even if the Assembly members had succumbed to the state's desires and complied with the photograph requirement in order to obtain driving permits, these state interests would only be minimally enhanced. Police photographic lineups can be effectively administered without using any photographs of Assembly members. The negatives provided by other applicants for driving permits produce a sufficient pool from which to draw photographs for comparison with a criminal suspect's photograph. Also, if an Assembly member is a criminal suspect and has a prior record, his photograph is probably already on file and available for comparison in a photographic lineup. Should there be no photograph of a suspected Assembly member, the state could employ the same procedures used with certain other suspects for whom the state does not have a photograph, such as nonresidents or nondrivers. Procedures such as a police station showup can accomplish the same objectives as a photographic

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61. *See* 269 Ind. at 369, 380 N.E.2d at 1229.

62. 593 P.2d at 1365.

63. It is also arguable that the interests served by the negatives are not so compelling as to outweigh the religious burden imposed by the photograph requirement. If negatives of Assembly members were essential for the accomplishment of these state interests, the state should require everyone to have their photographs taken whether they are applying for drivers licenses or not. Of course, such a proposition is ridiculous. *See* note 51 *supra*.

lineup without greatly burdening law enforcement resources.[64]

Regarding the state interest in identifying traffic accident or natural disaster victims, the state is not concerned with a means of immediate identification so much as it is with a reliable method of identification.[65] Consequently, for the limited purposes asserted by the state, a complete physical description and fingerprint should suffice in most instances,[66] and could be even more trustworthy in some circumstances.[67]

3. The state interest in protecting those who rely on the license

The statutory exemption from liability for reliance on drivers licenses[68] applies to any license issued pursuant to article 2 of the Motor Licensing Regulations, including licenses that require no photograph. By analogy, an exemption from the photograph requirement for Assembly members should not detract from this state interest. Indeed, parties could rely on an Assembly member's license in the same manner that they presently rely on other article 2 licenses that bear no photograph.

Furthermore, no one is required to actually rely on any license. If someone refused to rely on an Assembly member's li-

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64. A station showup may be more time consuming than a photographic lineup; therefore, it will normally be used only in those rare instances in which no photograph exists for the suspected Assembly member. An Assembly member suspected of criminal conduct can be subjected to a police station showup without invoking any formal indictment procedures. Also, an accused is not entitled to representation of counsel under the sixth amendment if the showup takes place at a police station before the accused has been indicted or otherwise formally charged with any criminal offense. Kirby v. Illinois, 406 U.S. 682 (1972).

65. Brief for Appellee at 7, Johnson v. Motor Vehicle Division, 593 P.2d 1363 (Colo. 1979). The state did not assert that it had an interest in the negatives in order to make immediate identifications of traffic accident and natural disaster victims. Even if the state had asserted this interest, an exemption for Assembly members would not hamper the state's use of the negatives in immediately identifying the vast majority of victims. In the rare situation where an Assembly member was a victim, his identity could be determined by using the same procedures that the state employs to identify other victims for whom the state does not have a photograph. Furthermore, the Assembly member who may be subject to a delay in his identification would rather be confronted with this possibility than have his picture taken.

66. For information on the reliability of fingerprinting, see A. MOENSSENS, FINGERPRINTS AND THE LAW 108-203 (1969). *See generally* R. FOOTE, FINGERPRINT IDENTIFICATION: A SURVEY OF PRESENT TECHNOLOGY, AUTOMATED APPLICATION AND POTENTIAL FOR FUTURE DEVELOPMENT (Criminal Justice Monograph Vol. V, No. 2, 1974).

67. *See* State v. Mares, 113 Utah 225, 192 P.2d 861 (1948) (decomposed corpse identified solely through use of fingerprints).

68. COLO. REV. STAT. § 42-2-112(5) (1973).

cense because it bore no photograph, the only person injured would be the Assembly member. As emphasized in *Pentecostal House of Prayer,* it is to a person's advantage to possess a license with a photograph for business transactions such as cashing checks.[69] Therefore, unlike *Braunfeld* where an exemption could possibly have encouraged others to seek exempted status,[70] few persons would desire to seek an exemption from the photograph requirement unless for bona fide religious reasons.

The asserted state interest in protecting those relying on licenses, like the other interests previously discussed, can be sufficiently safeguarded while granting a religious exemption to Assembly members. Consequently, the court should not have found that the state met the second prong of its burden under the *Sherbert* test which requires a showing that there is no alternative that is less restrictive of the free exercise of religion.

IV. Conclusion

In *Johnson,* the Colorado Supreme Court correctly recognized that the photograph requirement for drivers licenses infringed upon the Assembly members' free exercise of religion. However, the court erroneously concluded that the state satisfied its two-pronged burden under the *Sherbert* test. Since an exemption from the photograph requirement for Assembly members would be an acceptable less-burdensome alternative, the court should have found the application of the photograph requirement to Assembly members to be an unconstitutional violation of the free exercise of religion clause.

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69. 269 Ind. at 369, 380 N.E.2d at 1229.
70. Braunfeld v. Brown, 366 U.S. at 609.