No. 4-14-1054

In the Appellate Court of Illinois
Fourth District

Brenda J. Brown,
Plaintiff-Appellant,

v.

Jesse White, Secretary of State, State of Illinois,
Defendant-Appellee.

Appeal from the Circuit Court of Sangamon County, Illinois
Seventh Judicial Circuit, No. 2013-MR-548
The Honorable Rudolph M. Braud, Jr. Presiding.

Appellant's Opening Brief

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NATURE OF THE CASE

This action challenges as unconstitutional the Secretary of State's refusal to grant Plaintiff's faith-based request for a photo-less driver's license under a state regulation that provides a religious exception to the driver's license photo requirement. The Secretary interpreted the regulation to exclude independent believers like Plaintiff who are unaffiliated with a church or other organized religion. The circuit court affirmed the Secretary's denial. There was no jury. No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the Secretary's exclusion of independent religious believers (i.e., those unaffiliated with an organized religion) from a state regulation allowing for photo-less driver's licenses on religious grounds violates the rule of religious neutrality under the state and federal constitutions.

2. Assuming the Secretary's exclusion of independent religious believers is unconstitutional, whether an alternative interpretation of the regulation can preserve its viability in favor of Plaintiff's request for a photo-less license.

3. Whether a constitutional challenge to the Secretary's exclusion of independent believers can first be raised in court, where the Secretary did not reveal the challenged defect until the final agency ruling.

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment under Supreme Court Rule 301. The circuit court entered judgment for Defendant on November 10, 2014. (A1.) Plaintiff filed this appeal on December 5, 2014. (A10.)

FULL TEXT OF THE REGULATION AT ISSUE

Title 92, section 1030.90 of the Administrative Code reads:

Section 1030.90. Requirement for Photograph and Signature of Licensee on Driver's License

a) Application

Every driver's license issued pursuant to IVC [Illinois Vehicle Code] Section 6-110 shall include, as an integral part of the license, a head and shoulder, full-faced color photograph of the driver to whom the driver's license is being issued. A full-faced photograph must be taken without any obstruction of the applicant's facial features or any items covering any portion of the face. Prescription glasses and religious head dressings not covering any areas of the open face may be allowed. The driver's license shall be a photographically generated document that also includes the required information pertaining to the driver, the driver's signature, and other special security features to reduce the possibility of alteration and/or illegal reproduction. The driver's license must utilize a photograph taken of the driver at a Driver Services Facility that is produced by equipment specifically designed for this purpose.

b) Exceptions

Exceptions may be made in the best interest of individual Illinois drivers as follows:

1) Established Religious Convictions.

A) A driver will not be required to submit to a photograph if sufficient justification is provided by the driver to establish that a photograph would be in violation of or contradictory to the driver's religious convictions. If a driver declares that the

use of a photograph is against his/her religious convictions, the driver will be given an Affidavit to be completed. This Affidavit contains designated areas for a detailed written explanation of the reasons why a photograph is against the driver's religious convictions, a place for the driver's signature and date, the designation of the religious sect or denomination involved, space for a minister or other religious leader to apply his/her signature attesting to the explanation the driver has offered, along with the date and official title of the minister or religious leader.

B) The Affidavit shall be forwarded by the driver to the Driver Services Department Central Office in Springfield where a review and a decision will be made by the Director of the Driver Services Department relative to the issuance or non-issuance of a valid driver's license without photograph. To assist the Director in this decision, a committee of three administrative personnel will be appointed by the Director. Each Affidavit will be reviewed by each member of the committee, and each individual recommendation will be made to the Director for his final decision.

C) A non-photo temporary driver's license, not to exceed 90 days in duration, shall be issued to allow for driving privileges during the interim period while the Affidavit will be reviewed and a decision will be made by the Director.

D) Upon approval by the Director, a valid driver's license without a photograph will be issued from the Central Office utilizing an application signed by the driver. The driver's license will be mailed to the driver's home address.

2) Facial Disfigurements.

A) When a driver requests a driver's license without a photograph because the driver states that it is embarrassing or distasteful to submit to a photograph because of a facial disfigurement caused by disease, trauma or congenital condition, the requirement of a photograph may be waived. The Supervisor of the Driver Services Facility in which the driver appears shall make a decision, based upon the extent of the facial disfigurement, regarding the issuance of a driver's license without a photograph. Should the Supervisor approve the issuance of a driver's license without a

photograph, the driver's license will be issued from the Central Office utilizing an application signed by the driver. The driver's license will be mailed to the driver's home address.

B) Should the Supervisor not approve the issuance of a driver's license without a photograph, the Supervisor will forward a written statement from the driver, along with a statement from the Supervisor providing detailed information to the Director of the Driver Services Department regarding the extent of the disfigurement and the Supervisor's justification for disapproval. The Director of the Driver Services Department may obtain further information and/or professional opinions to support an objective decision regarding whether a valid driver's license without the photograph may be issued.

C) A non-photo temporary driver's license, not to exceed 90 days in duration, shall be issued to allow driving privileges during the interim period while the driver's license is being issued, or the statements relating to disapproval are being reviewed and a decision is being made.

D) Upon approval by the Director, a valid driver's license without a photograph will be issued from the Central Office utilizing an application signed by the driver. The driver's license will be mailed to the driver's home address.

3) Out-of-State.

A) Drivers who are temporarily residing outside the State of Illinois and/or who are temporarily absent from the State at the expiration date of the driver's license may apply for a valid driver's license without photograph and signature because of their inability to appear at an Illinois Driver Services Facility. If an Illinois driver declares, in writing, that he/she is out-of-state at the time the driver's license must be renewed, and submits this information with the properly completed application and renewal fee, a driver's license may be issued without the driver's photograph and signature.

B) However, the driver will be informed that he/she must appear at a Driver Services Facility within 45 days upon

returning to Illinois and exchange this valid driver's license without photograph and signature for a driver's license containing the driver's photograph and signature. This replacement driver's license is issued without additional charge to the driver. If the driver does not return to Illinois and obtain a replacement driver's license with the photograph and signature, the driver's license without the photograph and signature may not be renewed upon expiration unless the driver submits an affidavit attesting to the fact that he/she has not returned to the State of Illinois during the term of the driver's license without the photograph and signature.

C) A non-photo temporary driver's license may be issued to those drivers who plan to return to Illinois within a 90-day period. If a driver's license renewal examination is required, this examination must be taken and will not be waived. In those cases in which reciprocal agreements exist with driver's licensing entities in other jurisdictions, the Illinois examination shall be administered by a qualified representative of the jurisdiction, and the results reported to and accepted by the Illinois Department.

c) TVDL applicants or holders are not eligible for an exception under subsection (b)(3).

d) Hearings

Should the Director deny the issuance of a driver's license without photograph and/or signature, the individual may appeal that decision by requesting in writing a hearing pursuant to IVC Section 2-118.

INTRODUCTION

This is a case about government discrimination against a religious minority. Plaintiff-appellant Brenda Brown has a deep, sincerely held religious belief that creating or possessing images of people violates God's law. Mrs. Brown came to this belief through independent prayer and study of the scriptures. She is not affiliated with an organized church.

Striving to live her life in accordance with her faith, Mrs. Brown applied for a photo-less driver's license under an Illinois law that provides a religious exception to the requirement that all driver's licenses have a photograph. The application form has a field for a minister or other religious leader to attest to the driver's explanation of belief. Because she is not a member of any broader church, Mrs. Brown signed as minister. Her application was rejected.

After an administrative hearing—where Mrs. Brown represented herself *pro se* and provided undisputed evidence of the nature and sincerity of her beliefs—the Secretary of State affirmed the license denial based on a previously unmentioned "policy." In short, the Secretary interpreted the state photo-less driver's license regulation to not extend its protection to individual applicants who are not following the teachings of an organized religion.

But the Secretary's interpretation of the regulation unconstitutionally discriminates on the basis of religion—i.e., against those who hold individual rather than group beliefs—and therefore it cannot stand. Rather, this Court should, if at all possible, interpret the regulation in a way that is

denominationally neutral. A denominationally neutral reading of the regulation is consistent with the language and purpose of the regulation. Under such a reading Mrs. Brown is entitled to a photo-less license.

STATEMENT OF FACTS

A. Brenda Brown professes a personal religious belief that the Bible forbids photographs of people, including on driver's licenses.

For most of her life, Brenda Brown was a conventional religious believer who had no religious objection to photographs of any kind. (See A28, A39.) She worshipped with mainstream congregations and cherished pictures of her family and friends. (See A28, A61.) In 2012, however, Mrs. Brown had a religious conversion that changed her beliefs and life in fundamental and unique ways. (A39.)

Several years ago, Mrs. Brown began to study the Bible in its original Greek and Hebrew. (A28-29.) Having done so, she concluded the mainstream churches she had attended were wrong about many things and promptly left them to worship her God independently. (*Id.*) Specifically, she came to believe taking or possessing photographs of living things violates the Second Commandment: "Thou shall 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 under the earth." (A30 (*citing Exodus* 20:4)). Mrs. Brown believes violating this commandment would "corrupt" her, and jeopardize her soul. (A33, A59-63.)

After changing her religious views on photographs, Mrs. Brown faced new dilemmas, including what to do with her existing pictures. (See A53.) She did not want to let them go because of the memories they held. (See A57.) But she decided there was no way around the commandment and, in accordance with her beliefs, discarded all her photographs of people and animals, including wedding photos and baby pictures. (A53, A61.)

B. Based on her religious beliefs, Mrs. Brown applies for a photo-less driver's license under a state regulation that allows such licenses.

At the time her beliefs changed, Mrs. Brown had a driver's license with her picture. (A14.) She discovered, however, that Illinois allows drivers to obtain photo-less licenses "if sufficient justification is provided . . . that a photograph would be in violation of or contradictory to the driver's religious convictions." Ill. Admin. Code tit. 92, § 1030.90(b)(1)(A). Mrs. Brown therefore completed an application for such a license on October 13, 2012. (A16.)

On the application form, Mrs. Brown indicated that "according to scripture," a photograph of herself on her license would be "a sin of 'idolatry.' " (*Id.*) The form also asked for the attesting signature, denomination, and address of a "religious leader or minister." (*Id.*) Because she worships apart from a church—at times sharing her faith with others but only at her home—Mrs. Brown signed as "minister," said she was "non-denominational," and used her own address. (A16, A29.)

C. The Secretary of State's local agent denies Mrs. Brown's request.

On October 22, 2012, the Director of Downstate Driver Services denied Mrs. Brown's application for a photo-less license, because she: (1) failed to cite "a particular passage" of "Scripture;" and (2) "self-certified as a minister of a nondenominational organization" using her home address. (A17.)

D. The Secretary affirms on appeal, announcing he does not offer photo-less licenses to unaffiliated believers like Mrs. Brown.

Mrs. Brown appealed the local agent's refusal to grant her application for a photo-less driver's license, asking for an administrative hearing. (A18.) The Secretary's hearing officer presided over the hearing, while a government lawyer representing the Secretary appeared in defense of the local agent's action. (A23.) Mrs. Brown appeared *pro se*. (A24.)

Because the Director of Downstate Driver Services had focused on Mrs. Brown's failure to cite specific passages of scripture and her self-certification as a "minister" at her home, she focused on those issues at the hearing. (See A28.) On the former point, Mrs. Brown offered eighty-four pages of Bible verses and commentary. (See A69-152.) On the latter point, Mrs. Brown explained how her newly discovered religious beliefs compelled her to leave the church and worship at home. (A28-29.) She added as a further reason for signing as a minister at her home that she occasionally shares her beliefs with others there. (A29-30.)

At no point did the hearing officer or government lawyer question Mrs. Brown's sincerity. (See A37-66.) The lawyer, however, referenced a Bible

verse he thought might temper her position: "The Lord said . . . render unto Caesar what is Caesar's . . . . Caesar says you have to have a picture on your driver's license, should that not apply?" (A54.) Elsewhere, he said, "I disagree with you that anywhere in [the Bible] it says you can't have your picture taken." (A42.) And the hearing officer asked Mrs. Brown whether God would deny her heaven for having a picture on her driver's license if she "lived a good life and did everything else right." (A62-63.) When she responded affirmatively, he replied, "Do you really think it would bother Him that much?" (A63.)

Mrs. Brown explained, "it's okay if you don't agree with me. . . . I'm just saying that this is my religious conviction, and I'm not trying to push it on anybody else. . . . I would just like the liberty of living my religious conviction that way." (A42-43.)

After the hearing concluded and the record closed, the hearing officer recommended the Secretary deny Mrs. Brown's appeal under the photo-less driver's license regulation. (A9.) In so doing, he announced a previously-unmentioned "policy" of the Secretary that "individual exemptions are not allowed under the [regulation]" and the religious exception is unavailable "to individuals [whose] personal religious conviction is that allowing a photograph to be taken of them and displayed on a driver's license is a form of idolatry and sinful." (A8-9.)

On June 10, 2013, the Secretary adopted in full the hearing officer's findings of fact, conclusions of law, and recommendation. (A3-4.)

E. The circuit court affirms the Secretary's decision.

Mrs. Brown appealed the Secretary's administrative ruling to the circuit court. (A10.) On November 10, 2014, the court affirmed in a one-page order, finding, *inter alia*, that Mrs. Brown had forfeited her constitutional arguments by failing to raise them before the agency. (A1.)

SUMMARY OF ARGUMENT

Both the Illinois and United States constitutions forbid the government from discriminating between religious traditions. These protections extend to individuals with unique beliefs just as much as they apply to members of a larger religious group; indeed, just a few months ago the Supreme Court unanimously reaffirmed the rule that "idiosyncratic" religious beliefs are just as constitutionally valid as group ones. *Holt v. Hobbs*, 135 S. Ct. 853, 862-63 (2015). An interpretation of a regulation by an administrative agency that results in faith-based discrimination by affording government benefits to members of some religions but not others violates this black-letter principle. To survive, any such faith-based distinctions must satisfy strict scrutiny.

The Secretary has interpreted title 92, section 1030.90(b) of the Administrative Code to deny the religious exception to the photo requirement to individuals who are unaffiliated with an organized religious sect. This is overt religious discrimination. And the Secretary's distinction is not grounded

in any compelling state interest, nor is it narrowly tailored to any he might claim. The Secretary's interpretation is therefore unconstitutional and, absent a saving construction, the regulation would fail.

Fortunately, the Secretary's interpretation is not the end of the story. As written, the regulation can be reasonably interpreted as consistent with the state and federal constitutions. That is, it can be interpreted to apply equally to believers of all faiths—even those, like Mrs. Brown, who are unaffiliated with an organized religion.

The Secretary says Mrs. Brown waived the above constitutional challenge, because she did not present it until she went to court. But a litigant cannot forfeit her arguments where, as here, the agency did not make the challenged interpretation until its final order. In any event, Mrs. Brown's *pro se* status counsels against letting the Secretary off the hook.

STANDARD OF REVIEW

This court reviews the administrative agency's decision and not the circuit court's determination. *Kelley v. Sheriff's Merit Comm'n*, 372 Ill. App. 3d 931, 932 (2007). In so doing, the standard of review is as follows.

The interpretation of an agency regulation is a pure question of law subject to *de novo* review. *People ex rel. Madigan v. Ill. Commerce Comm'n*, 231 Ill. 2d 370, 380 (2008). And although courts generally defer to an agency's reasonable interpretation of a regulation under the agency's purview, *Portman v. Dep't of Human Servs.*, 393 Ill. App. 3d 1084, 1088 (2009), they

give no such deference when determining whether that interpretation is constitutional, see *Mefford v. White*, 331 Ill. App. 3d 167, 173 (2002) (applying *de novo* review to constitutional challenge to an administrative rule); see also *Garrido v. Cook Cnty. Sheriff's Merit Bd.*, 349 Ill. App. 3d 68, 76 (2004) (same). In short, court deference ends where the agency's interpretation conflicts with the state or federal constitution. See *Passalino v. City of Zion*, 237 Ill. 2d 118, 126 (2009) (applying principle in statutory context); *Madigan*, 231 Ill. 2d at 380 (rules and statutes construed under same standards).

The Secretary argued in the circuit court that this case presents a mixed question of law and fact, reviewable under a "clearly erroneous" standard. (A155-57.) But Mrs. Brown is challenging the Secretary's interpretation of a regulation—a pure question of law subject to *de novo* review. See *Madigan*, 231 Ill. 2d at 380. And where, as here, the interpretation of a regulation raises constitutional questions, *de novo* review is particularly appropriate because it is a court's "highest duty and most sacred function" "to protect and enforce the constitution." See *Dolose v. Pierce*, 124 Ill. 140, 149 (1888).

Finally, whether a party has forfeited an argument on appeal by failing to raise it below is a question of law subject to *de novo* review. *People v. Denson*, 2014 IL 116231, ¶ 8.

ARGUMENT

I. The Secretary's interpretation violates constitutional mandates of religious neutrality.

A. The Illinois and U.S. constitutions prohibit state agencies from preferring some religions to others, including religions of one.

"The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief." (Internal quotation marks omitted.) *Larson v. Valente*, 456 U.S. 228, 246 (1982). And it makes no difference whether those religious beliefs are shared or "idiosyncratic." *Holt*, 135 S. Ct. at 862-63.

The Illinois Constitution provides: "no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions. . . . [N]or shall any preference be given by law to any religious denomination or mode of worship." Ill. Const. 1970, art. I, § 3. As the Illinois Supreme Court made clear almost a century ago, "no discrimination, in law, can be made between different religious creeds or forms of worship." *Dunn v. Chi. Indus. Sch.*, 280 Ill. 613, 618 (1917).[1]

Likewise, the First Amendment's prohibition against an "establishment of religion," U.S. Const. amend. I, forbids government from "prefer[ring] one religion over another." *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947); see also, *e.g.*, *Bd. of Educ. v. Grumet*, 512 U.S. 687, 707 (1994) ("[I]t is clear that neutrality as among religions must be honored."); *Larson*, 456 U.S. at 246

[1] The non-establishment provisions of the state and federal constitutions are coterminous. *People v. Falbe*, 189 Ill. 2d 635, 645 (2000).

(collecting cases). "Neutrality is essential to the validity of an accommodation." *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 872 (7th Cir. 2014). The Illinois Supreme Court has similarly interpreted the First Amendment to bar government from "favoring the tenets or adherents of any religion." (Internal quotation marks omitted.) *People v. Falbe*, 189 Ill. 2d 635, 645 (2000).

The First Amendment protects all religious believers who are sincere, whether or not they identify or affiliate with an established faith. *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 834 (1989); see also *Holt*, 135 S. Ct. at 862-63. Indeed, the U.S. Supreme Court has held that *both* Religion Clauses are intertwined in this regard. That is, the "constitutional prohibition of denominational preferences" mandated by the First Amendment's Establishment Clause is "inextricably connected" with the Amendment's co-guarantee of free religious exercise. *Larson*, 456 U.S. at 245. Thus, free exercise is honored "only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Id.*; see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs . . . .").

The reinforcing interplay between free exercise and non-establishment principles is also recognized in the Illinois Constitution, which guarantees

the "free exercise and enjoyment" of religion "without discrimination"; and further, forbids granting or refusing any "civil or political right, privilege or capacity, on account of [one's] religious opinions." Ill. Const. 1970, art. I, § 3.

The U.S. Supreme Court's decision in *Frazee v. Illinois Department of Employment Security* is particularly significant to this case. There, a nondenominational believer applied for Illinois unemployment benefits after having turned down work that would have required him to work his chosen Sabbath. *Frazee*, 489 U.S. at 830. Under state law, Mr. Frazee's benefits would be denied absent "good cause" for refusing work. *Id.* Mr. Frazee explained that although he belonged to no particular religious sect, it was his independent religious belief that he could not work "on the Lord's day." *Id.* at 830-31.

The state agency denied Mr. Frazee's application for benefits. It interpreted its unemployment regulation to allow a faith-based work refusal, but only if the refusal was linked to the beliefs of an organized religious group: "the refusal [to work] must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination, and such a refusal based solely on an individual's personal belief is personal and noncompelling and does not render the work unsuitable." *Id.* at 830. Mr. Frazee appealed on First Amendment grounds, all the way to the U.S. Supreme Court. *Id.* at 830-32.

The Court reversed unanimously, holding the Illinois agency violated the First Amendment by favoring group beliefs over individual ones. See *id.* at 834-35. The Court recognized states may inquire whether a belief is religious or sincere, but held they cannot exclude independent believers:

> Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. *Id.* at 834.

This focus on *individual* belief applies even for those who identify with an established sect. That is, the First Amendment protects the sincerely held religious beliefs of a person who belongs to an organized faith even when fellow believers do not share the claimant's beliefs. *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981) (First Amendment protection is "not limited to beliefs which are shared by all members of a religious sect. . . . [I]t is not within the judicial function and judicial competence to inquire whether [one adherent or another] more correctly perceived the commands of their common faith."); see also *Holt*, 135 S. Ct. at 862-63 (*citing Thomas*).

This principle applies equally under the Establishment Clause. For example, when a federal agency interpreted its own regulations to allow religious exceptions only for those whose objections were grounded in the teachings of a recognized religion, the U.S. Court of Appeals for the Third Circuit held that such an interpretation violated the Establishment Clause. *Lewis v. Califano*, 616 F.2d 73, 78-81 (3d Cir. 1980); see also *Davis v. State*,

451 A.2d 107, 113-14 (Md. 1982) (religious exception that was available only to members of a recognized religious denomination violated Establishment Clause); *Dalli v. Bd. of Educ.*, 267 N.E.2d 219, 222-23 (Mass. 1971) (same).

B. The Secretary's interpretation unconstitutionally favors established faiths.

The Secretary interpreted the photo-less driver's license regulation to disfavor independent believers like Mrs. Brown. (A4-9.) Mrs. Brown does not dispute the Secretary's findings that her religious conviction stems from her personal study and is not grounded in the tenets of an organized faith. (See A29.) But the Secretary's reliance on these findings discriminates on the basis of religious belief in violation of the state and federal constitutions.

The Secretary's interpretation is not neutral toward all religious sects and adherents because it disfavors nondenominational believers. It thus violates the touchstone of constitutional religious protection—the "principle of denominational neutrality." *Larson*, 456 U.S. at 246. For example, in *Larson*, a financial reporting law was not neutral because it "ma[de] explicit and deliberate distinctions between different religious organizations" based on how they were funded. *Id.* at 246 n.23. It "effectively distinguishe[d] between well-established churches," on the one hand, and "churches which are new and lacking in a constituency," on the other. (Internal quotation marks omitted.) *Id.*

Furthermore, the Secretary's approach here is almost identical to the one the U.S. Supreme Court unanimously rejected in *Frazee*. Like Mr. Frazee,

Mrs. Brown has a sincerely held religious belief that compelled her to seek a state-conferred benefit. See *Frazee*, 489 U.S. at 833. And like Mr. Frazee, she was denied because she follows her own personal creed rather than the "tenet or dogma of an established religious sect." See *id.* at 834-35.

Finally, in his order denying Mrs. Brown's application the Secretary made several factual findings that are contrary to *Thomas*'s command that it is an *individual's* sincerity that counts; differences in opinion among fellow believers are immaterial. See *Thomas*, 450 U.S. at 715-16. For example, the Secretary found "that [Mrs. Brown's] husband, with whom she worships, currently has a photograph on his driver's license, and that she does not know whether the other people with whom she worships have their photograph on their driver's licenses." (A8.) "In other words," the Secretary held, "it is not a condition of worshipping with her to share her belief that photographs are sinful and forbidden by scripture." (*Id.*) Mrs. Brown does not dispute these findings. But under *Thomas* they are an impermissible basis on which to deny her application. See also *Holt*, 132 S. Ct. at 832-33 (relying on *Thomas* to protect arguably "idiosyncratic" religious beliefs).

In sum, the Secretary's interpretation violates constitutional neutrality.

C. The Secretary's interpretation fails strict scrutiny.

Government action evincing "denominational preference" is inherently suspect and subject to strict scrutiny. *Larson*, 456 U.S. at 246-47. To survive such scrutiny, the government must show its action is narrowly tailored to

achieve a compelling state interest. *Id.* at 247. A compelling interest is "an interest of the highest order." (Internal quotation marks omitted.) *Lukumi*, 508 U.S. at 546. "The regulated conduct must 'pose some substantial threat to public safety, peace, or order.' " *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013) (internal brackets omitted) (*quoting Sherbert v. Verner*, 374 U.S. 398, 403 (1963)). Moreover, the government's interest must be specific to the claimant; generalized fears of harm will not do. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006).

In establishing a compelling interest, underinclusiveness is fatal. "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* (citation and internal punctuation omitted); see also *Holt*, 135 S. Ct. at 866 (state's asserted interest undermined where it was not pursued as to analogous nonreligious conduct).

And even where there is a compelling interest, the law must be narrowly tailored so as to avoid unnecessary burdens on religion. See *Larson*, 456 U.S. at 247; *Lukumi*, 508 U.S. at 546. A narrowly tailored law is one that does no more (and no less) than necessary to advance the interest at stake. See *Lukumi*, 508 U.S. at 546 (laws that are overbroad or underinclusive are not narrowly tailored). In particular, a law is not narrowly tailored if it permits analogous conduct that causes the same harm the law is meant to address. *Id.*

The Secretary's interpretation of the photo-less driver's license regulation fails strict scrutiny. There is no compelling reason to discriminate against nondenominational believers in administering the exception for license photographs. Whatever the reasons for requiring pictures on driver's licenses generally, discriminating against nondenominational believers is an underinclusive means of advancing those interests. Under the Secretary's interpretation, religious objectors who belong to an organized religious sect get a photo-less license while independent believers are out of luck. Yet both harbor the same belief that photographs are against their religious convictions. See Ill. Admin. Code. tit. 92, § 1030.90(b)(1).

Moreover, drivers with facial disfigurements and drivers who reside out-of-state are also eligible for photo-less licenses. Ill. Admin. Code. tit. 92, § 1030.90(b)(2) and (b)(3). The total effect of these recognized exceptions—for drivers with facial disfigurements, for out-of-state drivers, and for believers who belong to an organized religion—does "appreciable damage" to whatever interests the government may assert in denying the exception to nondenominational believers like Mrs. Brown. See *Lukumi*, 508 U.S. at 547. Accordingly, those interests cannot be "compelling." See *id.*; *Holt*, 135 S. Ct. at 866.

Nor is the Secretary's distinction narrowly tailored. There is no connection between independent nondenominational believers and the preservation of "public safety, peace, or order," (internal punctuation omitted) see *Korte*, 735

F.3d at 686—particularly where, as here, the exception is available to others, see *Holt*, 135 S. Ct. at 865-66.

The Secretary may be concerned that unaffiliated believers will falsify a religious belief. But categorically excluding all such believers is not a narrowly tailored approach. The Secretary can verify an applicant's sincerity through the hearing process established in the regulation. See Ill. Admin. Code tit. 92, § 1030.90(d). What the Secretary may not do is require membership in an established religious sect as a proxy for sincerity. See *Frazee*, 489 U.S. at 834.

The Secretary cannot constitutionally justify its interpretation.

II. This Court can and should apply the regulation to protect individual believers like Mrs. Brown.

A. An administrative regulation must be interpreted in a way that preserves its constitutionality, if it can reasonably be done.

"Courts have a duty in construing rules to interpret [them] in such a way as to avoid any construction that would raise doubts of the rule's validity." *Schmidt v. Pers. Bd.*, 89 Ill. App. 3d 434, 437 (1980). Statutes and regulations are construed under the same standards. *Madigan*, 231 Ill. 2d at 380. They carry a strong presumption of constitutionality, *Mefford*, 331 Ill. App. 3d at 173, and should be upheld if reasonably possible, *Maddux v. Blagojevich*, 233 Ill. 2d 508, 528 (2009).

When faced with an unconstitutional interpretation of a regulation, the court should nevertheless save the regulation if it is reasonably possible to do

so. See *People v. Pomykala*, 203 Ill. 2d 198, 202 (2003). That is, if a regulation is susceptible to more than one interpretation, one of which preserves the constitutionality of the regulation, the court must preserve the regulation by adopting the constitutional interpretation. See *People ex rel. Mathews v. Bd. of Educ.*, 349 Ill. 390, 400 (1932) ("[I]t is the duty of the court before which the question of [a statute's] constitutionality is raised to so construe the section as to uphold its constitutionality and validity if the same can be done by any legitimate rule of construction . . . .").

B. Mrs. Brown qualifies for the photo-less driver's license exception under an alternative, reasonable interpretation of the regulation that preserves its constitutionality.

The text of the regulation is amenable to an interpretation that preserves its constitutionality. The regulation allows a photo-less driver's license if the driver provides "sufficient justification" of her religious conviction, supported by an explanation of her beliefs, and attested to by a "minister." Ill. Admin. Code. tit. 92, § 1030.90(b)(1)(A). These requirements can reasonably be read to include individuals, like Mrs. Brown, who do not affiliate with an organized religion.

The regulation text can be divided into two parts: first, the basic requirement of a sincere religious conviction that is in conflict with the photo requirement; and second, an "Affidavit." Examining each in turn, the regulation can reasonably apply equally to all sincere religious objectors, regardless their affiliation with a larger religious group.

The first half of the text reads: "A driver will not be required to submit to a photograph if sufficient justification is provided by the driver to establish that a photograph would be in violation of or contradictory to the driver's religious convictions." Ill. Admin. Code tit. 92, § 1030.90(b)(1)(A). The text makes no group-based distinction. Rather, the text requires "the driver" to establish a sincere religious objection to the photograph requirement. *Id.* As discussed above, this requirement is constitutionally permissible because it treats all believers equally. And in the present case, the Secretary has never disputed that Mrs. Brown has a sincere religious objection to a driver's license photograph.

The second half of the text reads:

> If a driver declares that the use of a photograph is against his/her religious convictions, the driver will be given an Affidavit to be completed. This Affidavit contains designated areas for a detailed written explanation of the reasons why a photograph is against the driver's religious convictions, a place for the driver's signature and date, the designation of the religious sect or denomination involved, space for a minister or other religious leader to apply his/her signature attesting to the explanation the driver has offered, along with the date and official title of the minister or religious leader. Ill. Admin. Code. tit. 92, § 1030.90(b)(1)(A).

Although the regulation speaks of a "minister" and of the "denomination involved," it does not mandate that every applicant be part of an organized, established religion. It is therefore reasonable to read the language as allowing drivers who are unaffiliated with an organized religion to indicate they are "non-denominational," as Mrs. Brown did here. Furthermore, the

text of the regulation does not preclude someone who worships alone from acting has her own "minister."

A prior regulatory scheme in this same area lends support to this interpretation. For a time, religious objectors in Illinois were exempted from the general requirement that every driver must provide a social security number. Notably, that exception applied only to "members of religious groups." Ill. Admin. Code. tit. 92, § 1030.63(a), *repealed at* 36 Ill. Reg. 3924 (Feb. 27, 2012). And further, the Secretary was *required*, by statute, to "determine which religious orders or sects have such bona fide religious convictions." 625 Ill. Comp. Stat. 5/6–106(b), *repealed at* 2011 Ill. Laws 263 (Lexis); see also *Mefford v. White*, 331 Ill. App. 3d 167, 172 (2002) (discussing religious exception to social security requirement). In short, when the State meant to limit its protection only to group belief, it did so explicitly.

Unlike the social security exception—which, in express terms, applied only to "members of religious groups"—the photograph exception here is available to any driver who is able to "establish that a photograph would be in violation of or contradictory to *the driver's* religious convictions." (Emphasis added.) Ill. Admin. Code. tit. 92, § 1030.90(b). This understanding of the regulation is buttressed, too, by the individualized language of the preface immediately preceding the analyzed text: "Exceptions may be made in the best interest of *individual* Illinois drivers as follows . . . ." (Emphasis added.) *Id.*

Perhaps most importantly, an interpretation that treats all religious believers on equal terms without regard to membership in an organized religion conforms to the neutrality required by constitutional law. Under this reading, nondenominational believers are on equal footing with believers who associate with an organized religion, as they must be. *Frazee*, 489 U.S. at 834. And where, as in Mrs. Brown's case, the applicant worships alone, she is necessarily her own "minister"; to conclude otherwise conditions a public benefit on one's "religious opinions" or "mode of worship." Ill. Const. 1970, art. I, § 3; see also *Thomas*, 450 U.S. at 714 (protecting individualized beliefs); *cf. Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 706 (2012) (stressing that the First Amendment forbids the state from "imposing an unwanted minister" on a religious group).

This is not to imply the Secretary must grant a photo-less driver's license whenever a driver says a photograph is against her religion. To the contrary, appropriate sincerity testing is contemplated. See Ill. Admin. Code tit. 92, § 1030.90(b) (exception is for those who can "establish" their religious conviction). And if a driver signs as the minister of her individual faith, the Secretary may hold a hearing to determine sincerity. See Ill. Admin. Code tit. 92, § 1030.90(d). But it cannot categorically deny, as it did here, "individuals [whose] personal religious conviction is that allowing a photograph to be taken of them and displayed on a driver's license is a form of idolatry and sinful." (A9.)

III. Mrs. Brown can raise her constitutional arguments because she presented them at her first opportunity after the Secretary announced his unconstitutional interpretation.

Although a litigant raising constitutional arguments against agency action is advised to first raise the matter before the agency, the admonition is inapplicable where the agency did not commit the challenged constitutional error until its final ruling. See *Bd. of Educ., Joliet Twp. High Sch. Dist. No. 204 v. Bd. of Educ., Lincoln Way Cmty. High Sch. Dist. No. 210*, 231 Ill. 2d 184, 205 (2008) (describing exception to "ordinary forfeiture rules" where "there was no opportunity to present the issue"). Moreover, forfeiture rules are relaxed in constitutional challenges to agency action where the litigant had proceeded without a lawyer. See *Dombrowski v. City of Chicago*, 363 Ill. App. 3d 420, 425 (2005) (no forfeiture where litigant alleged unconstitutional agency proceedings and had appeared before the agency *pro se*).

First, the forfeiture admonition does not (and cannot) apply because Mrs. Brown could not have raised her constitutional arguments before the agency. "[T]here can be no forfeiture" where "there was no opportunity to present the issue." *Joliet*, 231 Ill. 2d at 205. Parties must have had a chance to raise their arguments before they can "forfeit" them, and if they did not get that chance, "[i]n essence, there was no 'first opportunity.' " *Id*.

Mrs. Brown argues that the Secretary's interpretation is unconstitutional. But the Secretary did not make that interpretation until he released his final order on June 10, 2013—i.e., after agency proceedings had concluded. Mrs.

Brown challenged the Secretary's interpretation in the circuit court, which was her "first opportunity" to do so. *Id.* Accordingly, she could not have forfeited her arguments. *Id.*

Moreover, Mrs. Brown's *pro se* status counsels in favor of hearing her constitutional challenge. When applying the forfeiture doctrine, courts give *pro se* parties more leeway than represented parties. *Dombrowski*, 363 Ill. App. 3d at 425; *Jackson v. City of Chicago*, 2012 IL App (1st) 111044, ¶ 22. This case is an ideal candidate for leniency: Mrs. Brown went to her administrative hearing to clear up what she thought was a simple misunderstanding—she thought she merely had not provided enough evidence of why her beliefs prevented her from having a license photo and why she signed as her own minister. (A28.) She made a good-faith attempt to demonstrate her sincerity, testifying at length about the nature of her faith and religious practices and providing extensive documentation. (A21-67.). She even apologized for requesting the hearing. (A28.) But rather than merely assessing her sincerity, the agency grilled Mrs. Brown on the validity of her faith. (See, *e.g.*, A63 (Hearing officer: "Do you really think it would bother Him that much?").) This Court should exercise its discretion and hear her case.

CONCLUSION

The Secretary's interpretation of the rule violates the constitutional mandate of denominational neutrality. Therefore, Mrs. Brown prays that this

Court (1) adopt an alternative interpretation of the rule that is reasonable and constitutional; (2) reverse the Secretary's denial of her application for a driver's license without a photograph; (3) order the Secretary to grant her application and issue her a license without a photograph; and (4) issue any other relief this Court deems just and proper.[2]

Dated this 19th day of March, 2015.

Respectfully submitted,

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[2] Special thanks to Stanford Law School students Andria Montoya, Andrew Pike, and Shae McPhee, who helped prepare this brief.

Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 29 pages.

Executed this ____ day of March 2015.

_____

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Certificate of Service

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that he caused the foregoing Appellant's Opening Brief to be delivered to counsel for Defendant-Appellee, Linda Boachie-Ansah, at the address indicated below, by depositing three copies of the same for overnight delivery, at Stanford, California, on March _____, 2015, at approximately _____. The proper delivery charge was prepaid. The undersigned certifies that the above statements are true and correct.

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