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Reconciling Religious Free Exercise and National Security: Triumph of the Ultimate Compelling Governmental Interest

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RECONCILING RELIGIOUS FREE EXERCISE AND NATIONAL SECURITY: TRIUMPH OF THE ULTIMATE COMPELLING GOVERNMENTAL INTEREST

Three individuals approach the Rayburn House Office Building, one of three buildings occupied by the United States House of Representatives in Washington, D.C.[1] All three are dressed in Muslim *burqas* that cover the wearer's entire body and place mesh grilles over the eyes.[2] Before reaching the security-screening checkpoint, all three detonate explosives concealed under their religious garb, killing two Capitol Police Officers and eight visiting tourists. Identical suicide bombings occur later that day at federal buildings in Florida and Wisconsin.

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1. *Capitol Campus: Rayburn House Office Building*, ARCHITECT OF THE CAPITOL, http://www.aoc.gov/cc/cobs/rhob.cfm (last visited Feb. 13, 2012).

2. Nicole Atwill, *France: Highlights of Parliamentary Report on Wearing of Burqa in France*, GLOBAL LEGAL MONITOR (Feb. 17, 2010), http://www.loc.gov/lawweb/servlet/lloc_news?disp0_l205401815_searchD&8714992&0.

Burqa-wearing individuals also execute attacks similar to those perpetrated in 2008 in Mumbai, India, shooting civilians at Minneapolis's Mall of America and outside the New York Stock Exchange. Law enforcement and intelligence agencies quickly determine that those responsible for the suicide attacks are Caucasian-American adherents of now-deceased Anwar al-Awlaki.

In response to the wave of terrorist attacks by individuals concealing weapons and explosives under their *burqas*, bipartisan congressional leadership from both chambers propose legislation similar to a recent French law prohibiting individuals from wearing apparel that conceals the face, including the *burqa*, in public places.[3] Public outcry to the law's seeming infringement upon religious free exercise is immediately apparent both domestically and internationally.

Although the events just described have not yet occurred within American borders, the hypothetical's distressing tactic has already been used to cause devastation in other regions of the world, most recently against the American Embassy in Kabul, Afghanistan.[4] In 2009, male Taliban suicide bombers cloaked in "all-enveloping burqas" infiltrated Afghan government and security buildings, leading to twelve deaths and twenty-two injuries.[5] After engaging government security forces, the suicide bombers returned fire using Kalashnikov assault rifles concealed under their *burqas*.[6] Other Taliban fighters who actually breached the buildings finally detonated explosive vests that were hidden under their *burqas*.[7] Similarly, in 2008, a male suicide bomber in Iraq disguised in a woman's *abaya* (similar to the *burqa*), came incredibly close to fulfilling his assassination attempt of Raad Tamimi, the then-provincial governor of Iraq's Diyala province.[8] But for the quick actions of Iraqi soldiers who fired on the terrorist as he approached their vehicle convoy, the bomber would have been able to detonate his bomb in close proximity to the governor.[9] Even though

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3. *See French 'Burqa' Ban Passes Last Legal Hurdle*, FRANCE24.COM (Oct. 7, 2010), http://www.france24.com/en/20101007-french-burqa-ban-passes-last-legal-hurdle-constitutional-council-veil.

4. *See, e.g.*, Jack Healy & Alissa J. Rubin, *U.S. Blames Pakistan-Based Group for Attack on Embassy in Kabul*, N.Y. TIMES, Sept. 14, 2011, http://www.nytimes.com/2011/09/15/world/asia/us-blames-kabul-assault-on-pakistan-based-group.html?_r=1&pagewanted=all (indicating that *burqas* may have been used by the Haqqani network, an al-Qaeda ally, in attacks on the American Embassy in Kabul and NATO headquarters).

5. Kim Sengupta, *The Burqa-Clad Bombers Who Terrorise Afghanistan*, INDEPENDENT (London), July 22, 2009, http://www.independent.co.uk/news/world/asi/the-burqaclad-bombers-terrorise-afghanistan-1755887.html.

6. *Id.*

7. *Id.*

8. Tina Susman, *An Iraq Suicide Bomber Is a Man in Woman's Garb*, L.A. TIMES, Aug. 13, 2008, at A3.

9. *See id.*

the governor was unharmed, the soldiers' firing at the bomber nonetheless caused him to detonate his explosive vest, thereby killing one and injuring nine civilians.[10]

This Note discusses the Free Exercise issues raised by hypothetical public concealment legislation[11] in the United States, with a central focus on conflicts with religious free exercise under the First Amendment. Before delving into the constitutional analysis, Part I will provide the necessary background by, first, tracing the history of the *burqa* as a religious practice; second, examining France's relationship with the *burqa* and the *burqa*'s implications for women; and third, providing a brief history of Islam in America. Part II will establish the necessary standards for constitutional scrutiny of public facial concealment legislation by, first, establishing the applicable law of the Free Exercise Clause[12] and the Religious Freedom Restoration Act (RFRA);[13] second, examining the cautionary case of *Church of the Lukumi Babalu Aye v. City of Hialeh*; and third, discussing the government's compelling interest in national security. Part III provides the constitutional analysis by examining, first, potential *burqa* legislation through the *Lukumi* lens; second, the RFRA's substantial burden hurdle; and third, the potential arguments for the government's compelling interest. Under the governmental compelling interest section, the discussion will turn to, first, the specificity of the threat in question; second, the unviability of religious exemptions; third, a non-legal threat analysis; fourth, parallel state anti-mask laws; and fifth, a case study of *Freeman v. Florida*. Proceeding with Part III, the discussion turns to, fourth, the RFRA's second prong requiring the government to use the least restrictive means. Within the material detailing the RFRA's second prong is an examination of the scope of the proposed legislation and the final conclusion that the legislation would indeed pass constitutional muster. Part IV articulates the potential global consequences of the legislation before reaching the Note's conclusion.

Americans rightly pride themselves on the core traditions of religious tolerance and free exercise. Admittedly, the hypothetical legislation in question would necessarily limit religious free exercise for some. Nonetheless, delicate subjects which cause discomfort must not dissuade forthright public debate. Ultimately, revered individual

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10. *Id.*

11. Throughout this Note, I colloquially refer to the hypothetical legislation as "public facial concealment legislation," which would necessarily incorporate and proscribe all means of concealment, including the *burqa*.

12. U.S. CONST. amend. I.

13. 42 U.S.C. § 2000bb (2006).

religious exercise must be reconciled with the government's compelling national security interest in the real-time physical safety of its citizenry. This Note argues that considering our hypothetical, the national security and public safety interests of the whole must take precedence over individual free exercise, and that the proposed hypothetical legislation would pass the necessary hurdles of the RFRA analysis.[14]

I. BACKGROUND

A. The Burqa *as a Religious Practice*

The debate over the justifications of veiling Muslim women is intriguing and controversial. Like in many religious debates, adherents and scholars wrestle over interpretation and meaning of holy texts.[15] It is important initially to identify the terminology used in scholarship surrounding the veiling debate. Unfortunately, many writings use various classifications and veil types interchangeably, thus creating confusion when moving between texts.

The etymology of the term "*hijab*"—meaning "curtain" or "separation"—found in the Qur'an, is traceable to the word "*hajaba*," meaning "to hide from view."[16] While modern society may use "*hijab*" to describe specific ways Muslim women may cover themselves (hair, face, entire body, etc.), the term initially referred to the general practice of covering women.[17]

People may be surprised that the practice of veiling predates Islam, having been prominent in Syria and Iran as a status symbol.[18] Scripturally, the Qur'an's references to veiling established protocols to adhere to when interacting with Muhammad's wives. The Qur'an states: "Believers, do not enter the Prophet's house . . . unless asked. And if you are invited . . . do not linger. And when you ask something from the Prophet's wives, do so from behind a hijab. This will assure the purity of your hearts as well as theirs."[19]

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14. *But see* Christina A. Baker, *French Headscarves and the U.S. Constitution: Parents, Children, and Free Exercise of Religion*, 13 CARDOZO J.L. & GENDER 341, 355–56 (2007) (arguing that an RFRA analysis fails when examining an American head-scarf ban in schools).

15. *See* BRONWYN WINTER, HIJAB & THE REPUBLIC: UNCOVERING THE FRENCH HEADSCARF DEBATE 24–25 (2008).

16. *See id.* at 22 (stating the origins of the word "*hijab*").

17. *See id.*

18. *See* REZA ASLAN, NO GOD BUT GOD: THE ORIGINS, EVOLUTION, AND FUTURE OF ISLAM 65 (2005).

19. *Id.* (quoting AL-QUR'AN 33:53).

Given the many visitors who called on and stayed near Muhammad, one of the primary purposes behind requiring such separation was to secure and ensure the purity of Muhammad's wives.[20] Interestingly, the only appearance in the Qur'an of the term "*hijab*" is in relation to the wives of Muhammad, not a broad pronouncement aimed at all Muslim women.[21] Scholars have concluded that, despite the fact that the Qur'an does not overtly mandate the veiling of Muslim women, female adherents likely began embracing the practice after Muhammad's death in order to emulate the Prophet's wives.[22] As for when the veiling practice became mandatory for Muslim women, Reza Aslan hypothesizes that Muslim scriptural and legal scholars used their authority to assert their societal power and autonomy in the face of Muhammad's egalitarian reforms.[23]

Practicing Muslims seeking textual justification for the mandatory veiling of women may cite the following passage from the Qur'an: "And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; *that they should draw veils over their bosoms and not display their beauty* . . . ."[24] Another relevant passage states: "O Prophet, tell your wives and your daughters and the women of the believers to *draw their cloaks close round them*. That will be better, so that they may be recognized and not annoyed. . . ."[25]

To comply with the Qur'an's supposed mandates, observant Muslim females adhere to modest dress in a variety of ways. One may don the "*hijab*," which is a head-scarf covering the head and neck, but leaving the face uncovered, the "*niqab*," a facial veil leaving only a small slit for the eyes, a waist-length "*khimar*" (resembling a cape), which covers the hair, neck, and shoulders, or the most conservative option, the "*burqa*," which covers the entire face and body, leaving the wearer to look through a mesh screen.[26] Muslim females may ultimately choose to wear any of these coverings on account of "personal religious conviction, freedom of religion, acceptance as a good Muslim female, compliance with family values, neutralization

20. *See id.* at 65–66.
21. *Id.* at 66.
22. *Id.*
23. *Id.*
24. Aliah Abdo, Note, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441, 448 (2008) (emphasis added) (quoting AL-QUR'AN 24:31).
25. *Id.* at 449 (emphasis added) (quoting AL-QUR'AN 33:59).
26. *Belgian Lawmakers Pass Burka Ban*, BBC, http://news.bbc.co.uk/2/hi/europe/8652861.stm (last updated Apr. 30, 2010).

of sexuality and protection from harassment from Muslim males, and individual choice and religious/cultural identity."[27]

B. France, the Burqa *and Implications for Women*

On October 11, 2010, France passed Act No. 2010-1192, "prohibiting the concealing of the face in public."[28] Per the law's command, the legislation did not come into force until April 11, 2011 in order to provide the authorities with sufficient time to educate the French citizenry on the new prohibitions.[29]

Article 1 states that "[n]o one shall, in any public space, wear clothing designed to conceal the face."[30] The term "public space" is statutorily defined as "composed of the public highway and premises open to the public or used for the provision of a public service."[31] The French Ministry of Foreign and European Affairs has further clarified that "premises open to the public" are locations the public may freely access, even if access is contingent upon payment of a fee.[32] Violators of the facial concealment law may be assessed a fine of up to €150 and/or required to attend a citizenship course.[33] Despite the law's expansive scope, Article 2, Section II provides that the aforementioned proscriptions do not apply "if such clothing is prescribed or authorised by legislative or regulatory provisions, is authorised to protect the anonymity of the person concerned, is justified for health reasons or on professional grounds, or is part of sporting, artistic or traditional festivities or events."[34] The French law therefore does not seek to prohibit a patient's necessary breathing apparatus, a construction

27. Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 758 (2006).

28. Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010, Prohibiting the Concealment of the Face in Public], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, *translated in France Requires Faces to Remain Uncovered*, RÉPUBLIQUE FRANÇAISE: LE GOUVERNEMENT, http://www.diplomatie.gouv.fr/en/IMG/pdf/dissimultaion_visageENG.pdf (last visited Feb. 13, 2012)[hereinafter Law 2010-1192].

29. *Population and Society: Law Prohibiting the Concealment of the Face in Public*, FRANCE-DIPLOMATIE, http://www.diplomatie.gouv.fr/en/france/french-society/population-and-society/article/law-prohibiting-the-concealment-of (last visited Feb. 13, 2012).

30. Law 2010-1192, *supra* note 28.

31. *Id.*

32. *Act N° 2010-1192 of 11 October 2010 Prohibiting the Concealment of the Face in Public: Frequently Asked Questions*, RÉPUBLIQUE FRANÇAISE : LE GOUVERNEMENT, http://www.diplomatie.gouv.fr/en/IMG/pdf/Q_A-ENG_2_.pdf (last visited Feb. 13, 2012).

33. Molly Hofsommer, *France's Burqa Ban Passes Constitutional Muster*, HUM. RTS. BRIEF (Nov. 7, 2010), http://hrbrief.org/2010/11/france-burqa-ban-passes-constitutional-muster/.

34. Law 2010-1192, *supra* note 28.

foreman's protective breathing mask, nor the statutorily mandated safety helmet of a motorcyclist, all of which may obscure the identity of the wearer.[35]

In its ruling on October 7, 2010, the French Constitutional Council held that the facial concealment legislation was constitutional, albeit with one exception.[36] While acknowledging the drafters' response to the "danger to public security" from public facial concealment and their endeavor "to protect public order," the Constitutional Council held: "[T]he prohibition to cover one's face in public places could not, without violating article 10 of the 1789 Declaration, restrict the exercise of religious freedom in places of worship opened to the public . . . ."[37]

In issuing its ruling, the French Council also seemed concerned with the *burqa*'s perceived effects upon Muslim women. The final ruling found that legislators believed "that women hiding their faces, voluntarily or involuntarily, are placed in a situation of exclusion and inferiority that is manifestly incompatible with the constitutional principles of liberty and equality."[38] Furthermore, before the French ban was enacted, French President Nicolas Sarkozy declared, "[t]he burqa is not a sign of religion, it is a sign of subservience," and "[w]e cannot accept to have in our country women who are prisoners behind netting, cut off from all social life, deprived of identity."[39] In contrast, American President Barack Obama used a major speech at Cairo University to briefly address France's *burqa* ban by stating: "[I]t is important for Western countries to avoid impeding Muslim citizens from practicing religion as they see fit—for instance, by dictating what clothes a Muslim woman should wear. We can't disguise hostility towards any religion behind the pretence of liberalism."[40]

One critical response to President Sarkozy's comments came from Dr. Reefat Drabu, then–assistant secretary general of the Muslim Council of Britain, who commented that "[i]t is patronising and offensive to suggest that those Muslim women who wear the *burqa* do so because of pressure or oppression by their male partners

35. *See id.* (providing examples of activities still permitted under the law).

36. Nicole Atwill, *France: Law Prohibiting the Wearing of Clothing Concealing One's Face in Public Spaces Found Constitutional*, GLOBAL LEGAL MONITOR (Oct. 18, 2010), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205402319_text.

37. *Id.*

38. *Id.*

39. Murray Wardrop, *Muslim Leaders Condemn Sarkozy Over burqa Ban*, TELEGRAPH (London), June 24, 2009, http://www.telegraph.co.uk/news/religion/5616629/Muslim-leaders-condemn-Sarkozy-over-burqa-ban.html.

40. Press Release, President Barack Obama, Remarks by the President on a New Beginning at Cairo University (June 4, 2009), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-cairo-university-6-04-09.

or guardians."[41] Dr. Drabu, who spoke in his official capacity on behalf of more than five hundred Muslim organizations across the United Kingdom, accused President Sarkozy of "initiating a policy which is set to create fear and misunderstanding and may lead to Islamophobic reaction not just in France but in the rest of Europe too."[42]

While France's motivations for passing the *burqa* law allegedly included concern for Muslim women, the academic community is greatly conflicted on veiling's implications and effects. Some anthropological studies emphasize that the *burqa* has represented traditional segregation between men and women and the view by some that women should be relegated to the safe confines of purely domestic matters.[43] Yet, despite this apparent subjugation of Muslim women, other perspectives offer a silver lining for women who wear the *burqa*. To some Muslim women, the *burqa* empowers wearers to venture out into public environments traditionally off-limits for some Muslim women, while concurrently complying with an established moral norm that women should not associate with unrelated men.[44]

Irrespective of our preconceived notions on veiling, some scholars highlight the debate's further nuances. For example, Columbia University anthropology professor Lila Abu-Lughod states that she clearly did not support the Taliban's oppressive policies against Afghan women or the idea that outside observers should embrace the deference of a cultural relativist.[45] Rather, Abu-Lughod argues that Western commentators on the *burqa* should cautiously consider whether women abroad may have dissimilar motivations and perspectives on justice.[46] Additionally, Professors Kevin Ayotte and Mary Husain assert the argument that drawing the broad inference that veiling practices in Muslim countries represents "the universal oppression of women" is to engage "in exactly the paternalistic logic that underlies the neocolonial politics of U.S. efforts to 'liberate' Afghan women according to an explicitly Western model of liberal feminism."[47]

While this Note will focus primarily on the national security interest behind public facial concealment legislation, social, moral,

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41. Wardrop, *supra* note 39.

42. *Id.*

43. *See* Lila Abu-Lughod, *Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others*, 104 AM. ANTHROPOLOGIST 783, 785 (2002).

44. *See id.*

45. *Id.* at 787.

46. *Id.* at 787–88.

47. Kevin J. Ayotte & Mary E. Husain, *Securing Afghan Women: Neocolonialism, Epistemic Violence, and the Rhetoric of the Veil*, 17 NAT'L WOMEN'S STUD. ASS'N J. 112, 117 (2005).

and political issues concerning women—on which there is little consensus—clearly factor into the debate as well.

C. America and Islam

The Muslim narrative in America is both extensive and, at times, quite contentious. During the era of Christopher Columbus's explorations, Western and Northern African Muslims were conscripted involuntarily as servants to voyaging Europeans.[48] In Antebellum America, most Muslims arrived as part of the slave trade from North and West Africa.[49] In fact, scholarship has revealed that African Muslims played a central role in the slave trade as traffickers in the late eighteenth and early nineteenth centuries.[50] Interestingly, during their jihads against non-Muslims, some Muslims sold captured enemies into American slavery while simultaneously expanding the reach of Islam and challenging native West African religions.[51]

The number of Muslim immigrants in the United States dramatically increased in the mid-twentieth century on account of The Immigration and Nationality Act of 1965[52] (INA).[53] By removing a quota system that limited the number of immigrants from Muslim-majority countries to 100 individuals per year,[54] the INA allowed increased numbers of Muslims to begin new lives in the United States. Bureau of Census figures reveal that "the number of immigrants from Muslim-majority parts of the world rose from 134,615 in 1960 to 871,582 in 1990."[55] Current analyses place the number of Muslims currently living in the United States at seven million.[56]

While contemporary American public perception of Islam has certainly been shaped by the tragic events of September 11, 2001, and the subsequent wars in Iraq and Afghanistan, American public opinion in the early twentieth century was based on relatively pleasant relations with Arab nations.[57] Despite these initial halcyon days, the

48. KAMBIZ GHANEABASSIRI, A HISTORY OF ISLAM IN AMERICA: FROM THE NEW WORLD TO THE NEW WORLD ORDER 10 (2010).

49. *Id.* at 15.

50. *Id.* at 17.

51. *Id.*

52. 8 U.S.C. § 1151 (1965).

53. GHANEABASSIRI, *supra* note 48, at 292–93.

54. *Id.* at 292.

55. *Id.* at 293.

56. *About Islam and American Muslims*, COUNCIL ON AM.-ISLAMIC REL., http://www.cair.com/AboutIslam/IslamBasics.aspx (last visited Feb. 13, 2012).

57. Fawaz A. Gerges, *Islam and Muslims in the Mind of America*, 588 ANNALS AM. ACAD. POL. & SOC. SCI. 73, 74 (2003) (discussing how America's lack of Middle Eastern colonial expansion and bloody conflict allowed Arabs and Muslims to view the United States as "progressive" compared to its European cousins).

United States after World War II became concerned with the rise of active "secular Arab nationalism" and its threat to friendly "pro-Western, conservative monarchies" that stood in opposition to Soviet influence.[58] Even in view of such concerns by American foreign policy leaders, "American policy was driven by Cold War considerations and strategic calculations, *not* by history, culture, or any intrinsic fear or hatred of Islam."[59]

The Middle Eastern tumult of the 1970s changed American perception. Events like the Yom Kippur War, the subsequent oil embargo against the United States by OPEC (a consequence of American support for Israel), the Iranian revolution, and the American hostage crisis with Iran were catalysts for the transformation of opinion that held Islam as antithetical to American and Western interests.[60] When America found itself the target of terrorism in the 1993 World Trade Center bombing, the resulting fatalities and destruction further established the view of many Americans that "Muslims 'are representative of a fanatic and terroristic culture that cannot be tolerated or reasoned with.'"[61] Immediately after the 1993 bombing, a domestic survey revealed that more than fifty percent of participants indicated "that 'Muslims are anti-Western and anti-American,'"[62] and when asked to rate religious groups, respondents indicated Muslims as the least favorable.[63]

In the time predating America's founding, Islam and its adherents had already reached our shores. Any discussion of America's relationship with its fellow Muslim citizens, and Muslims worldwide, must unfortunately, but necessarily, acknowledge the existence of ignorant strains of thought that uncritically equate Islam with terrorism. With these intellectual hazards in mind, we move forward to examine rationally the legal issues, while hopefully taking note of cultural, political, and moral sensitivities.

II. CONSTITUTIONAL SCRUTINY

To return to our hypothetical, in the wake of domestic terrorist attacks carried out by *burqa*-clad men appropriating the most conservative dress of Muslim women, Congress has proposed legislation that would ban the wearing of the *burqa* in public places out of concern for national security. Given the disputatious nature of the

58. *Id.* at 75.
59. *Id.* (emphasis added).
60. *Id.* at 76.
61. *Id.* at 79 (citation omitted) (quoting Professor Richard Bulliet of Columbia University).
62. *Id.* (citation omitted).
63. Gerges, *supra* note 57, at 79.

public facial concealment law and its likely subsequent legal challenges, analyses of the law's constitutionality would no doubt be conducted. This section will lay the groundwork and establish the applicable law for such a constitutional analysis, limiting itself to the Free Exercise Clause.

A. The Free Exercise Clause and the Religious Freedom Restoration Act (RFRA)

The First Amendment to the U.S. Constitution asserts: "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . ."[64] The Supreme Court's initial exegesis of the free exercise clause occurred in *Reynolds v. United States*.[65] In *Reynolds*, the already-married plaintiff was convicted of bigamy after marrying a second woman.[66] At this time in American history, Utah was referred to as the "Territory of Utah" and was governed by the Revised Statutes of the United States, a predecessor to the United States Code.[67] The plaintiff argued that his practice of polygamy was a religious belief and/or duty compelled by his membership in the Church of Jesus Christ of Latter-Day Saints.[68] The plaintiff also tried to establish that Latter-Day Saints members found scriptural support for polygamy in their sacred books and that he had even received approval from elder church authorities to continue his practice.[69]

Ultimately, the Court was faced with determining the contours of the Free Exercise Clause's guarantee for "genuine believers" like the plaintiff in *Reynolds*.[70] After exploring religious exercise predating the establishment of the Free Exercise Clause and analyzing the Founders' reluctance to establish a religious status quo, the Court held that the plaintiff was not entitled to practice bigamy (in clear violation of the statute), irrespective of his religious beliefs.[71] Writing for the majority, Chief Justice Waite 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*."[72] Chief Justice Waite expanded on his pronouncement by proposing hypotheticals

64. U.S. CONST. amend. I (emphasis added).
65. 98 U.S. 145 (1878).
66. *Id.* at 145, 168.
67. *Id.* at 154.
68. *Id.* at 161.
69. *Id.* (asserting that textual sources stated male members who refused to practice polygamy may be punished "and that the penalty for such failure and refusal would be damnation in the life to come").
70. *Id.* at 162.
71. *Reynolds*, 98 U.S. at 166–67.
72. *Id.* at 166 (emphasis added).

suggesting a world where individuals were free to act as they please, so long as they claimed that they were doing so in furtherance of religious belief.[73] Fearing the consequences of such unbridled liberty, Chief Justice Waite commented that "the professed doctrines of religious belief" would become "superior to the law of the land" and make the individual citizen "a law unto himself."[74]

Today, the statutory authority for determining a law's compliance with the Free Exercise Clause is the Religious Freedom Restoration Act (RFRA).[75] Passed in response to the Court's decision in *Employment Division v. Smith*,[76] which abandoned the compelling interest test in favor of the rational relationship test,[77] the RFRA's purpose was to reestablish the compelling interest test as the standard when considering the suitability of governmental burdens on religious exercise.[78]

The RFRA asserts that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[79] The RFRA also states, however, that the government "*may* substantially burden a person's exercise of religion"[80] when it can establish that the burden to the individual: "(1) is in furtherance of a *compelling governmental interest*; and (2) is the *least restrictive means* of furthering that compelling governmental interest."[81]

B. A Cautionary Tale: Church of the Lukumi Babalu Aye v. City of Hialeah

Assuredly, the RFRA is the ruling statute that will determine whether our hypothetical legislation encumbers religious free

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73. *Id.* at 166–67.

74. *Id.* at 167.

75. 42 U.S.C. § 2000bb (2006) (applying, after the case of *Boerne v. Flores*, 521 U.S. 507 (1997), only to federal matters and not to the individual states).

76. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 885 (1990) (finding that the compelling interest test "contradict[ed] both constitutional tradition and common sense").

77. RELIGIOUS FREEDOM RESTORATION ACT OF 1993, H.R. REP. NO. 103-88, at 4 (1993) (stating that the *Smith* "'rational relationship test' only requires that a law must be rationally related to a legitimate state interest").

78. *See* 42 U.S.C. § 2000bb(b)(1); RELIGIOUS FREEDOM RESTORATION ACT OF 1993, S. REP. NO. 103-111, at 2 (1993).

79. 42 U.S.C. § 2000bb-1(a).

80. *Id.* § 2000bb-1(b) (emphasis added). Disagreement exists about whether judges may properly assess burdens to individual religious free exercise, but should rather focus on institutions. *See* 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 206 (2006) (arguing that the proper perspective for judicial review should be that of "religious entities rather than individuals" because judges do not have the omniscience to assess individual convictions and potential plaintiffs may be untruthful in professing personal religious beliefs).

81. 42 U.S.C. § 2000bb-1(b) (emphasis added).

exercise. Nonetheless, before examining the RFRA standards, the government should heed the available warnings from the case of *Church of the Lukumi Babalu Aye v. City of Hialeah*.[82] Notably, *Lukumi* was decided before the RFRA's passage and was thus subject to a different standard. At the time of *Lukumi*, the free exercise standard stated that if a law was demonstrated to be neutral and "of general applicability," then it need not pass strict scrutiny.[83] Strict scrutiny was reserved for those laws unable to demonstrate the aforementioned twin qualities.[84] Ultimately, the Court found that the city's law was neither neutral, nor of general applicability, and was therefore subject to strict scrutiny.[85] The true lesson from *Lukumi* lies in the Court's determination of whether the city's law was neutral and of general applicability. For our purposes, any negative answer to these inquiries is clearly detrimental to the government's ability to establish its compelling interest, and thus endangers the overall case for constitutionality.

In *Lukumi*, the petitioners alleged violations of their rights under the Free Exercise Clause, seeking declaratory, injunctive, and monetary relief after the City of Hialeah, Florida, passed ordinances proscribing the Church's religious practices, specifically the practice of animal sacrifice.[86]

As part of the Santeria religion, adherents believe that animal sacrifice is one of the primary ways to foster personal relationships with important spirits.[87] After Santeria adherents took the initial steps to establish a Santeria church in Hialeah, community members became alarmed at the prospect of animal sacrifices, ultimately culminating in an emergency public session of the city council.[88] As a result of this session, the council passed several ordinances forbidding animal sacrifice based on the sentiment that the practice was antithetical to "public health, safety, welfare and morals of the community."[89]

The Court first sought to determine whether the ordinances were neutral. In evaluating petitioners' challenge, the Court emphasized that, irrespective of community members' unease with the Church's religious practices, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First

82. 508 U.S. 520 (1993), *superceded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb).
83. *Id.* at 531.
84. *Id.* at 531–32.
85. *Id.*
86. *Id.* at 528.
87. *Id.* at 524.
88. *Church of the Lukumi Babalu Aye*, 508 U.S. at 526.
89. *Id.* at 528.

Amendment protection."[90] In determining whether the purpose of the ordinances was to suppress the Santeria religion or the practice thereof, the Court looked initially to the text of the city's provisions to determine if it was facially discriminatory.[91] After finding the text did not demonstrate overt suppression, the Court proceeded to examine the adverse impact of the law.[92] Importantly, the Court clarified that adverse impact alone is not indicative of "impermissible targeting" and further acknowledged that the government did possess "multiple concerns unrelated to religious animosity."[93] The Court ultimately found that the effect of the city's ordinances fell disproportionately on adherents of the Santeria religion.[94] For example, Ordinance 87-71 prohibited animal sacrifice, but "define[d] sacrifice as 'to unnecessarily kill . . . an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.'"[95] Thus, under this ordinance, a citizen could unnecessarily kill an animal so long as its purpose was not for religious rituals or ceremonies.

The Court also drew from Equal Protection analysis and looked to legislative intent to determine the object and purpose of the city's ordinances. By examining the circumstances leading up to passage of the ordinances,[96] the Court easily concluded that the restrictions on animal sacrifice were passed "'*because of*,' not merely 'in spite of,' their suppression of Santeria religious practice."[97] Namely, the public record and audio tapes from the city council meetings revealed the overt hostility of both council members and the public towards the Santeria religion.[98]

The Court also found that the city ordinances failed to qualify as laws of general applicability. While the City asserted the twin interests of public health and preventing animal cruelty, the Court noted that the ordinances were under-inclusive, given that comparable non-religious conduct implicating both such interests went unregulated.[99]

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90. *Id.* at 531 (internal quotation marks omitted).

91. *Id.* at 533–34.

92. *Id.* at 534 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt.").

93. *Id.* at 535.

94. *Church of the Lukumi Babalu Aye*, 508 U.S. at 535–36.

95. *Id.* (internal quotation marks omitted).

96. *Id.* at 540 ("Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.").

97. *Id.* (emphasis added) (internal quotation marks omitted).

98. *Id.* at 541.

99. *Id.* at 543.

In reversing and holding for the Church, the Court concluded that "[l]egislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void."[100]

Lukumi is an example of how simple statutory drafting and legislative history can sink an otherwise facially neutral statute passed in furtherance of a compelling governmental interest. Part III of this Note will further discuss *Lukumi* and apply its parameters to the constitutional analysis of hypothetical public facial concealment legislation.

C. The Government and Its Compelling Interest

To justify the alleged substantial burden that public facial concealment legislation would impose, the government will need to persuasively argue that it possesses a compelling interest in the uniform application of public facial concealment legislation. Unfortunately for legislative and judicial observers, the RFRA does not clarify what interest qualifies as "compelling." In hindsight, it appears that those whipping potential congressional votes deliberately left RFRA terms unclear in order to preserve an already precarious voting bloc alliance.[101] Clarification of the compelling interest standard may be found, however, in the congressional statement of purpose that sought to re-establish orthodoxies articulated in *Sherbert v. Verner*[102] and *Wisconsin v. Yoder*,[103] prior decisions of the Court.[104] For example, "*Yoder* subordinates religious liberty only to 'interests of the highest order,'" while *Sherbert* authorizes such subordination "only to avoid 'the gravest abuses, endangering paramount interests.'"[105]

Still, there are other perspectives that attempt to articulate the compelling governmental interest standard. Professor Michael McConnell has argued "that a believer has no license to invade the private rights of others or to disturb public peace and order,"[106] while Professor Stephen Pepper articulates the standard as: "[I]s

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100. *Church of the Lukumi Babalu Aye*, 508 U.S. at 547.

101. Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 21 (1994).

102. 374 U.S. 398 (1963).

103. 406 U.S. 205 (1972).

104. Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 224 (1994).

105. *Id.* (quoting *Yoder*, 406 U.S. at 215; *Sherbert*, 374 U.S. at 406).

106. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1464 (1990).

there a real, tangible (palpable, concrete, measurable) non-speculative, non-trivial injury to a legitimate, substantial state interest[?]"[107]

Congress also stated that, in order to prove its compelling interest, the government "must do more than simply offer conclusory statements that a limitation on religious freedom is required for *security*, *health* [*or*] *safety*."[108] Furthermore, the Court has declared that hypothetical fears will not be sufficient to properly articulate a compelling interest.[109] For example, in *Yoder*, Wisconsin asserted that its interest in a compulsory education system for children was so compelling that it ultimately trumped the religious considerations of the state's separatist Amish.[110] Wisconsin also argued that, if children were not compelled to obey state law mandating school attendance until the age of sixteen, any child who subsequently left the community would "not be in the position of making their way in the world without the education available in the one or two additional years the State requires."[111]

The Court acknowledged Wisconsin's basic "duty to protect children from ignorance."[112] However, due to a lack of tangible evidence that Amish children, who "possess[ed] such valuable vocational skills and habits [were] doomed to become burdens on society should they determine to leave the Amish faith,"[113] the Court rejected such ominous assumptions and ruled for the Amish defendant.[114]

Additionally, in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, the Court ruled against the Government on the grounds that it failed to articulate a compelling interest in the uniform application of the Controlled Substances Act ("The Act") to justify the significant burden placed on the respondent church.[115] In *Gonzales*, the respondent was a small American sect of the Brazilian-based Christian Spiritist religion, O Centro Espirita Beneficente Uniao do Vegetal (UDV).[116] The government fully acknowledged[117] that a central

107. GREENAWALT, *supra* note 80, at 216 (alternation in original) (quoting Stephen L. Pepper, *The Conundrum of the Free Exercise Clause—Some Reflections on Recent Cases*, 9 N. KY. L. REV. 265, 289 (1982)).

108. RELIGIOUS FREEDOM RESTORATION ACT OF 1993, S. REP. NO. 103-111, at 10 (1993) (emphasis added).

109. Laycock & Thomas, *supra* note 104, at 225.

110. *Yoder*, 406 U.S. at 221.

111. *Id.* at 224.

112. *Id.* at 222.

113. *Id.* at 225.

114. *Id.*

115. 546 U.S. 418, 439 (2006).

116. *Id.* at 425.

117. *Id.* at 428 ("[T]he Government conceded the UDV's prima facie case under RFRA. . . . [A]pplication of the Controlled Substances Act would (1) substantially burden (2) a sincere (3) religious exercise[.]").

practice of the UDV religion involved taking communion with the sacramental tea "hoasca," containing plants carrying dimethyltryptamine (DMT), a hallucinogen proscribed by the Act.[118] UDV sought relief under the RFRA[119] by filing a declaratory judgment and injunction against the Attorney General, arguing that applying the Act to UDV's practice of ingesting hoasca was a violation of the RFRA.[120]

The government argued that, despite the genuine belief that hoasca ingestion was necessary to religious observance, the Act did not allow for the individualized exemptions that the UDV requested.[121] Despite the government's argument, the Court emphasized the exacting inquiry essential to the RFRA, stating that the "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law '*to the person*'—the particular claimant whose sincere exercise of religion is being substantially burdened."[122] Importantly, the Court reiterated that while the government may indeed possess an interest of the utmost importance, the government must nonetheless "show with more particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption."[123]

The Court did not ultimately accept the government's position that varying application of The Act would seriously "undercut" the law's effectiveness.[124] By portraying the government position as essentially "if I make an exception for you, I'll have to make one for everybody,"[125] the Court articulated two points for consideration: 1) sizeable exemptions were already made for Native Americans' use of peyote,[126] a substance with an identical classification under The Act; and 2) the RFRA's drafters envisioned exemptions to "rule[s] of general applicability," such as The Act.[127]

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118. *Id.* at 425.

119. *See id.* at 424 n.1 (stating the RFRA only applies to the Federal Government because of a previous Court decision holding that any application to the States would surpass Congressional authority).

120. *Id.* at 425.

121. *Gonzales*, 546 U.S. at 430 (indicating that the Government argued that the Act "cannot function with its necessary rigor and comprehensiveness if subjected to judicial exemptions").

122. *Id.* at 430–31 (emphasis added) (quoting 42 U.S.C. § 2000bb-1(b) (2006)). Note that the text of 42 U.S.C. § 2000bb-1 proscribes Government from burdening the individual person's exercise of religion, even with "rule[s] of general applicability." *Id.* at 436.

123. *Id.* at 431 (quoting Wisconsin v. Yoder, 406 U.S. 205, 236 (1972)) (internal quotation marks omitted).

124. *Id.* at 435 (internal quotation marks omitted).

125. *Id.* at 421 (internal quotation marks omitted).

126. *Id.* at 433.

127. *Gonzales*. 546 U.S. at 436 (alteration in original) (quoting 42 U.S.C. § 2000bb-1(a)) (internal quotation marks omitted).

Importantly, the Court did, however, recognize that the government may sometimes possess legitimate interests that do not allow for individual exemptions.[128] The Court cited *United States v. Lee*[129] to illustrate such an instance.[130] In *Lee*, a proposed exemption for a religious belief that precluded followers from paying Social Security taxes was dismissed.[131] In ruling against the exemption, the Court in *Lee* held that "mandatory participation is indispensable to the fiscal vitality of the social security system."[132] Despite the government's attempt to analogize its purported legitimate interest to that found in *Lee*, the *Gonzales* Court did not view a UDV exemption to The Act as unreasonable.[133] Furthermore, the Court refused to equate any UDV exemption with the considerable systemic harm that the Court recognized in *Lee*.[134]

While the *Lukumi* factors may seem benign when compared to the RFRA's formal mandates, legislative drafters must necessarily heed the lessons learned with the knowledge that a reviewing court may utilize the factors when determining a law's constitutionality. The RFRA has clarified that the government may substantially burden an individual's religious exercise so long as it can establish that the burden is in furtherance of a compelling governmental interest, and that the least restrictive means of furthering that compelling interest is utilized.

III. ANALYSIS

Part III will apply the above constitutional framework to hypothetical public facial concealment legislation, beginning with an analysis of the *Lukumi* case and its instructions regarding statutory drafting of laws that potentially infringe upon free exercise, and proceeding with an analysis of public facial concealment legislation under the RFRA.

A. A Word of Caution to Legislators: Lukumi

Pursuant to the holding in *Lukumi*, in assessing the constitutionality of public facial concealment legislation, it is imperative first to determine whether the legislation is neutral by examining the

128. *Id.* at 435.
129. 455 U.S. 252 (1982).
130. *Gonzales*, 546 U.S. at 435.
131. *Lee*, 455 U.S. at 260.
132. *Id.* at 258.
133. *Gonzales*, 546 U.S. at 436–37.
134. *Id.* at 437.

text of the statute. If legislators crafted language specifically enumerating the *burqa* as forbidden, the legislation would not clear *Lukumi*'s hurdle proscribing the restriction of practices *because of* religious beliefs or practices.[135] Opponents of the legislation would likely argue the legislation is discriminatory given that facial coverings for religious reasons are prohibited, whereas coverings for secular reasons are exempt.[136] Any carefully drafted statute would thus need to refrain from using facially discriminatory language by stating something comparable to: "All facial coverings and impediments to ascertaining the identity of an individual in public are hereby prohibited."

The *Lukumi* decision also obliges legislators to consider the real effect of the law.[137] As articulated in *Lukumi*, however, the existence of adverse impact does not necessarily imply impermissible targeting.[138] Public facial concealment legislation would surely impact some Muslim women who either choose or feel compelled to wear the *burqa*. *Lukumi*, however, reminds us that the government may indeed have legitimate concerns that transcend religious animosity.[139] Far from solely affecting Muslim women, the proposed legislation would proscribe the public wearing of ski masks, balaclavas, or stockings, to achieve the legitimate object of public safety and national security.

Borrowing from the *Lukumi* neutrality analysis, legislative and/or administrative history would yield valuable information for a reviewing court.[140] House and Senate committee transcripts including contemporaneous statements by members of Congress emphasizing the dangers posed by Muslims wearing *burqas* would likely fail the test for a neutral objective. Moreover, the Court would examine the history and sequence of events leading up to the provision's enactment. Admittedly, this analysis would be a hurdle for the public facial concealment legislation.

In our hypothetical, those wearing *burqas* perpetrated the series of terrorist attacks. Thus, despite the statute's facial neutrality, events preceding the legislation paint the legislation as largely reactionary. Although legislative and/or administrative history may indeed help an opponent's critique of the legislation's object, to carry this investigatory tactic to its logical conclusion seems naive and detrimental to legitimate governmental interests. Under this reasoning, if the government suffers harm or loss on account of a religious practice,

135. Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 547 (1993).
136. *See id.* at 537 (identifying a requirement for facial neutrality).
137. *Id.* at 535.
138. *Id.* at 531.
139. *See id.* at 529–30.
140. *Id.* at 540.

it subsequently would not be allowed to proscribe conduct related to the religious practice. Furthermore, the hypothetical legislation was not enacted in response to legitimate religious exercise, but rather the exploitation of religious garb for nefarious purposes.

Along with determining neutrality, a reviewing court would seek to determine whether the legislation was a law of general applicability. With the public facial concealment legislation, the government's asserted interests are, generally, national security, and, specifically, the need to identify individuals quickly and positively and to safeguard public spaces. Unlike the ordinance in *Lukumi*, our hypothetical legislation is not under-inclusive in that it also proscribes nonreligious garb that obstructs the wearer's facial identity. Therefore, the government's interests are not achieved by solely imposing burdens on religious conduct, but also by burdening and inconveniencing secular conduct.

Considering these perceived weaknesses in arguments supporting the legislation, the situation contains a further nuance. Unlike the council acting in *Lukumi*, Congress would not be making value judgments with respect to whether the *burqa* is "acceptable, logical, consistent, or comprehensible."[141] Rather, the statute's aim would be to foil efforts by extremist individuals to exploit the *burqa* and harm American citizens. Nonetheless, even if the proposed legislative language were to pass the initial hurdle of facial neutrality consistent with the standards for statutory drafting and legislative intent in *Lukumi*, it is by no means the end of the inquiry.

B. RFRA Framework: RFRA's Substantial Burden Hurdle

The RFRA states that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest."[142]

While the *Gonzales* Court found that the government had not sufficiently articulated a compelling interest,[143] there are distinct factors in our hypothetical that may buttress the public facial concealment legislation. First, the government in *Gonzales* did not contest the UDV's prima facie RFRA case that enforcing "the Controlled

141. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531.

142. 42 U.S.C. § 2000bb-1(b) (2006).

143. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 439 (2006).

Substances Act would (1) substantially burden (2) a sincere (3) religious exercise."[144]

Although the proposed public facial concealment legislation would potentially inconvenience and burden Muslim women, the government may argue that the ban does not *substantially* burden a Muslim woman's religious exercise. Much like the French *burqa* ban legislation, under the proposed hypothetical legislation, *burqas* may still be worn in houses of worship and in the privacy of the home. The only sphere that would proscribe the *burqa* is that of the public. In fact, the proposed legislation is much more accommodating compared to that sought by the government in *Gonzales*, in which the government asserted that there were no situations in which hallucinogen-containing hoasca was acceptable for use.[145]

Second, the government may argue that unlike the UDV's ingestion of hoasca in *Gonzales*, the wearing of a *burqa* is not a religious practice, but a nonobligatory, cultural choice, and thus not protected under the RFRA.[146] For example, French President Nicolas Sarkozy has asserted that "[t]he *burqa* is not a religious sign," but actually represents "a sign of subservience, a sign of debasement."[147] Rector of the Paris Mosque, Dalil Boubakeur, went further, saying that "neither the burqa, nor the niqab, nor any all-over veil, are religious prescriptions of Islam,"[148] while Mohammed Moussaoui, head of the government-sponsored French Council of the Muslim Faith (CFCM), has said that "no Koranic text prescribes the wearing of the burqa or niqab."[149] Nonetheless, the government would be wise not to advance this argument because the Court has stated on numerous occasions that it will not venture into determining the validity and genuineness of religious convictions.[150]

Finally, although a statute may substantially burden individual free exercise rights, it may redeem itself if it furthers a compelling governmental interest and is the least restrictive means of furthering that interest. The next two sections will analyze the hypothetical legislation on those two prongs.

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144. *Id.* at 428.

145. *Id.* at 419.

146. *See supra* note 21–22 and accompanying text.

147. *France's Ban on the Burqa: The War of French Dressing*, ECONOMIST, Jan. 14, 2010, http://www.economist.com/node/15270861/ (internal quotation marks omitted).

148. *Id.* (internal quotation marks omitted).

149. *Women and Veils: Running for Cover*, ECONOMIST, May 13, 2010, http://www.economist.com/node/16113091 (internal quotation marks omitted).

150. *See, e.g.*, United States v. Lee, 455 U.S. 252, 257 (1982) (alteration in original) ("It is not within 'the judicial function and judicial competence,' however, to determine whether appellee or the Government has the proper interpretation of the Amish faith; '[c]ourts are not arbiters of scriptural interpretation.'" (quoting Thomas v. Review Bd. of Ind. Employ't Sec. Div., 450 U.S. 707, 716 (1981))).

C. RFRA Framework: Compelling Governmental Interest

Additionally, in considering the constitutionality of public facial concealment legislation, the Court would no doubt consider the government's assertion of a compelling interest in support of the proposed law, consistent with the test codified by the RFRA. First and foremost, the government would highlight its compelling interest in furthering national security.[151] The government would emphasize the need for law enforcement to identify persons and monitor erratic behavior in public spaces quickly, especially given the nature of the hypothetical's terrorist attacks.

1. Specificity of the Threat

With the proposed legislation, the government would not simply assert the broad mantle of national security as a compelling interest.[152] The government "must do more than simply offer conclusory statements that a limitation on religious freedom is required for security, health [or] safety."[153] Considering the Court's pronouncement, the government must forcefully argue that in the wake of audacious terrorist attacks, it faces not an abstract threat, but specific, identifiable danger in the form of public facial concealment. Preventing the commission of further terrorist attacks by the deft misuse of *burqas* and other religious garb is exactly the type of interest representing "the highest order"[154] and also an attempt to avoid "the gravest abuses, endangering paramount interests."[155]

Considering that our hypothetical involves the abuse of the *burqa* in perpetrating terrorist attacks, the government could justifiably argue that it has a specific compelling interest in maintaining public safety through being able to quickly and positively identify individuals in the public sphere. One need only perform a cursory internet search to find numerous international terrorist attacks, often exploiting the anonymity of the *burqa*, that target public spaces.[156]

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151. *See, e.g.*, Haig v. Agee, 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." (quoting Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964))).

152. *See, e.g.*, *id.* (explaining that "national security" is the highest of government interests).

153. RELIGIOUS FREEDOM RESTORATION ACT OF 1993, S. REP. NO. 103-111, at 10 (1993) (internal quotation marks omitted).

154. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

155. Sherbert v. Verner, 374 U.S. 398, 406 (1963) (internal quotation marks omitted).

156. *See, e.g.*, Rob Crilly, *Burka-Clad Female Suicide Bomber Detonates in Pakistan*, TELEGRAPH (London), Aug. 11, 2011, http://www.telegraph.co.uk/news/worldnews/asia/pakistan/8694814/Burka-clad-female-suicide-bomber-detonates-in-Pakistan.html (detailing a suicide bombing by a *burqa*-clad woman at the scene of an earlier bombing,

Terrorist groups have also used the *burqa* in attempts to move freely in public and cross international borders.[157] Given the strong potential for future targeting of public spaces, the public's dependence on such spaces, and the increasing use of *burqas* to facilitate these attacks, the government must argue that their interest in ensuring the safety and stability of such spaces is indeed compelling.

2. Unviability of Religious Exemptions

As is evident from *Gonzales*, the Court has recognized that the RFRA was designed to consider religious exemptions in cases of burdening religious exercise.[158] While acknowledging the unprecedented nature of this hypothetical legislation, in order to advance the paramount compelling interest of national security, the law must be enforced uniformly.

Thanks to *Gonzales*, the government knows it must demonstrate "with more particularity how its" compelling interest would be jeopardized by any potential exemption.[159] With our hypothetical legislation, the government's compelling interest is in allowing law enforcement to make real-time threat assessments, thwarting additional terrorist attacks, and securing public spaces and, in a broader sense, national security. Alas, when courts begin making individual exemptions, they have effectively negated the government's compelling interests. Rather than simply making an exemption for law-abiding citizens, the Court has just allowed a means of facial concealment to move freely about public places with next to absolute anonymity, thereby eliminating any security initially gained. Surely, if RFRA

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leaving at least seven people dead); Declan Walsh, *Taliban Use Girl, 8, as Bomb Mule in Attack on Afghanistan Police Post*, GUARDIAN (London) (June 26, 2011), http://www.guardian.co.uk/world/2011/jun/26/afghanistan-taliban-girl-bomb-police (detailing attack by two *burqa*-clad Pakistani Taliban terrorists, ultimately leaving 10 people dead); *Female Suicide Bomber Targets US Forces, Kills Afghan Translator*, MONSTERS & CRITICS (June 4, 2011, 2:25 PM), http://www.monstersandcritics.com/news/southasia/news/article_1643502.php/Female-suicide-bomber-targets-US-forces-kills-Afghan-translator (detailing suicide bombing on an American military convoy by a *burqa*-clad female).

157. *See, e.g.*, *Afghan Police Detain Seven Burqa-Clad Insurgents*, TIMES OF INDIA, July 4, 2011, http://timesofindia.indiatimes.com/world/south-asia/Afghan-police-detain-seven-burqa-clad-insurgents/articleshow/9099450.cms (detailing an arrest by Afghan police of seven armed men, all disguised in *burqas*); *Al-Qaeda Militant Leader Captured Dressed as Woman*, USA TODAY, June 28, 2011, http://www.usatoday.com/news/world/afghanistan/2011-06-28-Afghanistan-captured-leader-al-qaida_n.htm (detailing the arrest of a senior leader from an al-Qaeda–linked terrorist group, disguised in a *burqa*).

158. *See* Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418, 434 (2006) ("RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.").

159. *See id.* at 431 (quoting Wisconsin v. Yoder, 406 U.S. 205, 236 (1972)) (internal quotation marks omitted).

exemptions are recognized for some, terrorist operatives may still disguise themselves as exempt individuals, thereby exploiting the RFRA's provisions and potentially executing further attacks.

In this instance, the government is not advancing the faulty argument it did in *Gonzales* that granting one exemption would require exemptions for all.[160] Rather, it is the concealing nature of the *burqa* that makes it a unique threat to the public safety and national security interests thus mentioned.

Despite any desire by the government to grant individual exemptions to law-abiding citizens, the proposed public facial concealment legislation would effectively become impotent if subjected to numerous exemptions. Although this assertion doomed the government in *Gonzales*,[161] here, the government could confidently assert that the unique nature of the *burqa*, coupled with its critical compelling interest, places the legislation beyond the reach of judicial exemptions.

3. Threat Analysis

Drawing from non-legal disciplines is helpful when analyzing the magnitude and nature of the threat of terrorist attacks using the *burqa*. National security professionals analyzing potential threats to the United States may use the following model: first, ascertain the nature of the threat and, second, determine whether the threat is real or perceived.[162] Third, it is imperative to determine exactly when the threat will be executed.[163]

According to Amos Guiora, the four types of threat classifications are imminent, foreseeable, long-range, and uncertain.[164] Imminent threats are classified as those to be executed shortly,[165] such as information from a human intelligence source that a pipe bomb will be detonated at Yankee Stadium during game one of the World Series. Foreseeable threats are threats that will materialize within one year, like the threat that domestic militia groups will attack federal courthouses in the very near future.[166] Guiora classifies long-range threats as threats that have an undetermined execution time, like al-Qaeda operatives within the country with no specified mission.[167] Lastly,

160. *Id.* at 421.
161. *Id.*
162. AMOS N. GUIORA, FREEDOM FROM RELIGION: RIGHTS AND NATIONAL SECURITY 96 (2009).
163. *Id.*
164. *Id.* at 96–97.
165. *Id.* at 96.
166. *Id.* at 97.
167. *Id.*

uncertain threats are those threats "that invoke general fears of insecurity,"[168] like al-Qaeda's targeting elected officials in the United Kingdom,[169] which have created similar fears within American law enforcement and intelligence communities.[170]

The nature of the threat discussed in this Note consists of terrorists seeking to wear the *burqa* not for religious observation, but rather to conceal their identity and carry out devastating attacks. Although this phenomenon has yet to be employed domestically, the threat of such attacks is quite real and far from imaginary. The imminence of further attacks by individuals exploiting the *burqa* is foreseeable, given the tactic's increasing popularity amongst terrorists.[171]

As for a real-time assessment, the nature of the threat remains at an uncertain level. The difficulty with real-time analysis lies in the lack of specific threats, and thus, the threat remains uncertain. Any prohibition on public facial concealment today would be preemptive. Yet, working within the confines of the hypothetical, any subsequent legislation would be justified by pointing to the nature of the continuing threat.

Irrespective of the threat's perceived status and imminence, terrorists are continually probing our national security resources for weakness. For example, prior to the tragic events of September 11, 2001, al-Qaeda hijackers trained extensively in the United States, with particular terrorist operatives taking cross-country surveillance flights.[172] During one such surveillance flight, the tactical leader of the 9/11 plot, Mohammed Atta, was able to determine that hijackers would likely face no difficulty in carrying box cutters onto flights and pinpointing the optimal time to storm a cockpit.[173] Recent foiled terror plots to detonate explosives concealed in printer cartridges bound for the United States have revealed al Qaeda affiliates in Yemen likely conducted initial shipments of innocuous materials to serve as "dry run[s]" before the actual attack.[174] Similarly, terrorist operatives seeking to exploit the advantages of wearing a *burqa* would likely probe the security of public spaces to determine optimal targets.

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168. GUIORA, *supra* note 162, at 97.

169. Oliver Holmes, *Foreigners and Locals in the Crosshairs of Yemen's al-Qaedas*, TIME, Oct. 8, 2010, http://www.time.com/time/world/article/0,8599,2024430,00.html.

170. *US Issues Travel Alert for Americans in Europe*, BBC (Oct. 3, 2010, 1:52 PM), http://www.bbc.co.uk/news/world-us-canada-11460335.

171. Walsh, *supra* note 156.

172. THE NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 242 (2004) (describing how hijackers Atta, Shehhi, and Jarrah took cross-country surveillance flights in the summer of 2001).

173. *Id.* at 245.

174. *Parcel Bomb Plotters 'Used Dry Run', Say US Officials*, BBC (Nov. 2, 2010, 6:22 AM), http://www.bbc.co.uk/news/world-us-canada-11671377.

Whereas undoubtedly different from traditional legal analysis, non-legal frameworks can be instructive tools for assessing the magnitude of a potential threat and establishing the compelling governmental interest.

4. Parallel State Laws

The matter of compelling government interest in national security has been discussed in legislation and scholarship focusing on state anti-mask bans. For example, the Virginia Code forbids any public covering of the face by an individual over sixteen years old with the intent to conceal the wearer's identity.[175] It also prohibits face covering on another's private property without first obtaining the written consent of the owner or tenant.[176] The statute enumerates exemptions for face coverings involved in wearing holiday costumes, those engaged in employment requiring protective gear, individuals involved in a "theatrical production or masquerade ball," or those who cover their faces "for bona fide medical reasons."[177] While Virginia's highest court may have either performed an analytical blunder or simply punted on this statute's implications for religious garb such as the *burqa*,[178] the Court justified the statute in that it aims to "prevent[] . . . violence, crime and disorder by the unmasking of potential criminals."[179]

Similarly, California has proscribed the wearing of a "mask . . . for the purpose of: One—Evading or escaping discovery, recognition, or identification in the commission of any public offense. Two—Concealment, flight, or escape, when charged with, arrested for, or convicted of, any public offense."[180] As many anti-mask statutes have their origin in combating crime and terror at the hands of the nefarious Ku Klux Klan,[181] and are inapposite to most Muslims' motivations

175. VA. CODE ANN. § 18.2-422 (West 2011) ("It shall be unlawful for any person over sixteen years of age while wearing any mask, hood or other device whereby a substantial portion of the face is hidden or covered *so as to conceal the identity of the wearer*, to be or appear in any public place . . . ." (emphasis added)).

176. *Id.* (proscribing facial coverings to be worn on "any private property in this Commonwealth without first having obtained from the owner or tenant thereof consent to do so in writing").

177. *Id.*

178. Hernandez v. Virginia, 406 S.E.2d 398, 399–400 (Va. Ct. App. 1991) (taking the questionable step of dismissing an argument that the statute would prevent "Muslim women from wearing traditional outfits covering their faces" by asserting that the statute is only violated when she *intends* to conceal her identity (*burqa*-wearing Muslims presumably wear such garb for exactly that reason), and thus, wearing for religious practice is not prohibited).

179. *Id.* at 401.

180. CAL. PENAL CODE § 185 (West 2011).

181. *See Hernandez*, 406 S.E.2d at 401 (acknowledging that the anti-mask statute was initially written to "unmask the Klan" (internal quotation marks omitted)).

for wearing the *burqa*, these statutes nonetheless share legitimate justifications and compelling governmental interests in preventing misconduct and quickly and positively identifying individuals.

5. Case Study: Freeman v. Florida

Just as state legislatures have acknowledged the importance of the national security interests in their anti-mask laws, a state supreme court has ruled in favor of the government in an RFRA-like inquiry on grounds of public safety and security.

A case using a similar analytical framework to the federal RFRA statute is the illuminating Florida case of *Freeman v. Florida*.[182] In *Freeman*, the plaintiff, Sultaana Lakiana Myke Freeman (Freeman), appealed the revocation of her Florida driver's license on the grounds that such action violated Florida's Religious Restoration Act of 1998 ("The FL RFRA").[183] Controversy arose when Freeman refused to have an identification picture taken without a *niqab* that covered her entire face, thereby violating Florida statutes requiring that said picture be "a fullface photograph."[184]

Freeman's primary claim was that such a revocation violated the FL RFRA, which happened to closely parallel the federal RFRA statute.[185] Though the Florida Circuit Court recognized that Freeman wore the *niqab* on account of her religious convictions, it ultimately found that the Florida statute requiring Freeman to momentarily lift her *niqab* for a photograph did not constitute a "substantial burden" to her exercise of religion.[186] Freeman could not meet the requirement of "substantial burden," and, thus, the court had no need to analyze the photograph requirement under the FL RFRA .[187] Nonetheless, because Freeman's claim involved the free exercise of religion, the court proceeded to determine whether Florida had "a compelling state interest" in taking Freeman's photograph unobstructed.[188]

The court ultimately answered their inquiry in the affirmative by finding that requiring a full-face photograph did indeed constitute a compelling state interest on grounds of promoting public safety and

182. Freeman v. Florida, No. 2002-CA-2828, 2003 WL 21338619, at *7 (Fla. Cir. Ct. June 6, 2003).

183. *Id.* at *1.

184. *Id.* at *2–3.

185. *Id.* at *1–2 (allowing, like the federal RFRA, the Government to "substantially burden . . . [the] exercise of religion" when it demonstrated that application of burden to the person: 1) was "in furtherance of a compelling governmental interest; and" 2) was "the least restrictive means of furthering that compelling governmental interest").

186. *Id.* at *3 (internal quotation marks omitted).

187. *Id.* at *2–3 (internal quotation marks omitted).

188. *Freeman*, 2003 WL 21338619, at *3–4 (internal quotation marks omitted).

security.[189] The State highlighted the correlation between Florida's identification requirement and public safety by calling a senior law enforcement official to testify about the vital need to quickly ascertain identities.[190] The law enforcement official also emphasized that a full-face photograph is central to criminal and intelligence professionals in identifying potential suspects.[191]

The most interesting section of the opinion relates to the central issue discussed in this Note. Acknowledging that the State has a compelling interest in public safety and security in "accurately and swiftly determin[ing] identities," the court underscored that the international climate has changed in the past twenty to twenty-five years.[192]

> Although the Court acknowledges that Plaintiff herself most likely poses no threat to national security, there likely are people who would be willing to use a ruling permitting the wearing of fullface cloaks in driver's license photos by pretending to ascribe to religious beliefs in order to carry out activities that would threaten lives.[193]

Moreover, the court recognized that Florida had allowed for observant Muslim women with similar beliefs about veiling to have full-face photographs taken in an enclosed private room by a female state employee.[194] With this type of accommodation, the female in question would never have to display the photograph depicting her face, absent situations that involved law enforcement officials.[195] In weighing the various interests, the court stated, the "[p]laintiff's veiling practices must be *subordinated* to society's need to identify people as quickly as possible in situations in which safety and security of others could be at risk."[196]

When validating a law under the RFRA, the government must establish a compelling interest. As discussed in this section, the great specificity of the threat from public concealment makes religious exemptions pragmatically implausible. Furthermore, engaging in a brief non-legal threat analysis helps further clarify the threat behind the government's compelling interest. A brief analysis of state anti-mask bans reveals the shared justifications with our public facial

189. *Id.* at *8.
190. *Id.* at *4.
191. *Id.*
192. *Id.* at *7 (citing new threats to public safety, including foreign and domestic terrorism).
193. *Id.*
194. *Freeman*, 2003 WL 21338619, at *3.
195. *Id.*
196. *Id.* at *7 (emphasis added).

concealment legislation. In conclusion, the Florida case of *Freeman* provides us with a prime example of individual religious exercise being subordinated to the state's compelling interest in national security and public safety. The next section will briefly discuss the least restrictive means prong of the RFRA framework.

D. RFRA Framework: Least Restrictive Means

The second RFRA prong requiring the government to use the least restrictive means is a difficult hurdle to clear.[197] In fact, the Court has been candid in observing that "[c]laims that a law substantially burdens someone's exercise of religion will often be difficult to contest."[198] Still, the inquiry must focus on the scope of the legislation.

1. Scope of Proposed Legislation

Much like its French counterpart, the proposed legislation would forbid any concealment of the face while in public. As previously addressed, opponents of this legislation will argue that its scope greatly interferes with female Muslims and their ability to freely practice their religion. An initial analysis of the legislation may seem to validate this point, but a closer examination of its impact reveals an array of situations in which the *burqa*, as a religious practice, may flourish.

Under our hypothetical legislation, Muslim women are free to wear the *burqa* in private. The government has no conceivable compelling interest in regulating the wearing of *burqas* in the privacy of one's own home. When at home, the *burqa*-clad woman's anonymity does not pose an immediate threat to other members of the public. Moreover, the legislation would allow women to wear *burqas* in Mosques and other houses of worship that grant such permission. This is yet another example of the legislation's seeking to balance the government's compelling interest with the citizen's interest in allowing robust religious practice.

As demonstrated, the hypothetical public facial concealment legislation must go through a rigorous analysis under the RFRA. Before reaching the RFRA's two-pronged analysis, the government should make the legitimate argument that the RFRA is not even triggered due to the lack of a true substantial burden on religious free exercise. The government should then articulate its paramount compelling

197. *See* City of Boerne v. Flores, 521 U.S. 507, 534 (1997) (stating that requiring the Government to show both a compelling interest and that it has used the least restricting means available "is the most demanding test known to constitutional law").

198. *See id.* (articulating the difficult standard the government must meet).

interest in making real-time threat assessments of individuals, securing public spaces, and general national security. Furthermore, the government should emphatically argue that the legislation be enforced uniformly so as not to undermine the compelling interest, namely, counterterrorism interests. Whereas the RFRA's demanding standards are difficult to overcome, the government should argue that, given the scope of the hypothetical legislation, it still satisfies the least restrictive means prong. Given the hypothetical confines of this Note and the recommended legislation and government arguments, when analyzed under the RFRA, the legislation constitutionally comports with religious free exercise.

Opponents of this legislation would likely argue that the burden is indeed significant, and furthermore, that it would force some pious Muslim women to choose between religious observance and the need and desire to carry on a normal public life. This point is inevitably one of the more troubling realities, for the idea of de facto relegation of some Muslim women to a life of confinement seems untenable. Nonetheless, given the hypothetical situation, the Court must necessarily balance the compelling governmental interest with consideration of the many private arenas in which the *burqa* may flourish.

IV. GLOBAL CONSEQUENCES

Given the above analysis, the public facial concealment legislation is constitutional in regards to the Free Exercise Clause. Of course, the mere fact that legislation is constitutional does not make it prudent, nor dampen its global unpopularity. Whether faced with long-range or uncertain threats, any legislation banning the wearing of the *burqa* will likely provoke international outrage and encourage terrorist attacks from Islamic extremists. Furthermore, some may argue that such legislation will hinder American efforts to bolster international diplomacy and disseminate American democratic ideals. These conclusions are valid in light of the fallout from France's passage and affirmation of Act No. 2010-1192.

After France's 2004 legislation banning Islamic head-scarves in state schools, principal deputy to Osama bin Laden, Dr. Ayman al-Zawahiri, criticized France, stating "France, the country of liberty, . . . defends only the liberty of nudity, debauchery and decay, while fighting chastity and modesty."[199] Al-Zawahiri further asserted that "[t]he decision of the French president [Jacques Chirac] to issue a law to prevent Muslim girls from covering their heads

199. Neil MacFarquhar, *A Top Bin Laden Aide Threatens New Attacks Against the U.S.*, N.Y. TIMES, Feb. 25, 2004, at A8 (internal quotation marks omitted).

in schools is another example of the Crusader and envy that the Westerners have against Muslims."[200]

At the highest levels of al-Qaeda, now-deceased Osama bin Laden weighed in via a videotape that surfaced on October 27, 2010.[201] Bin Laden reacted to France's finalizing *burqa* legislation with the following statement: "Since you have acted tyrannically, believing that you have the right to prevent free-born women from wearing the veil, don't we have the right to expel your invading men by slicing their necks?"[202] Some critics of this Note's proposed legislation may argue that it abandons the American tradition of vibrant religious exercise, and ultimately provides fuel for such extremist tirades—precisely what President Obama and his national security team hoped to avoid, as articulated in the President's 2010 *National Security Strategy*.[203] Along with recognizing the need for an active national security apparatus, President Obama articulated the Nation's commitment to recognizing civil liberties.[204] Furthermore, the President's strategy emphasizes diversity and inclusion as a means to combat extremist ideologies both domestically and internationally.[205]

The vast array of considerations are overwhelming, but the consequences of inaction would include further carnage and terror. Despite the likely domestic and international furor that would result from the hypothetical legislation, the government may be confident in its utmost compelling interest and that it achieves said

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200. *Probable Al Qaeda Tapes Warn of More Attacks*, CNN.COM (Feb. 25, 2004, 6:58 PM), http://www.cnn.com/2004/WORLD/meast/02/24/qaeda.tapes/ (alterations in original) (internal quotation marks omitted).

201. Jonathan Laurence & Justin Vaïsse, *Bin Laden's Backfire*, FOREIGN POL'Y (Nov. 1, 2010), http://www.foreignpolicy.com/articles/2010/11/01/bin_laden_s_backfire.

202. *Id.* (internal quotation marks omitted).

203. *See* THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 36 (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

> [T]he power of America's example has helped spread freedom and democracy abroad. That is why we must always seek to uphold these values not just when it is easy, but when it is hard. Advancing our interests may involve new arrangements to confront threats like terrorism, *but these practices and structures must always be in line with our Constitution, preserve our people's privacy and civil liberties*, and withstand the checks and balances that have served us so well.

Id. (emphasis added).

204. *Id.* at 37 ("Protecting civil liberties and privacy are integral to the vibrancy of our democracy and the exercise of freedom. We are balancing our solemn commitments to these virtues with the mandate to provide security for the American people.").

205. *Id.* ("Within our own communities, those who seek to recruit and radicalize individuals will often try to prey upon isolation and alienation. Our own commitment to extending the promise of America will both draw a contrast with those who try to drive people apart, while countering attempts to enlist individuals in ideological, religious, or ethnic extremism.").

interest in the least restrictive means. If America were to successfully convince the international community of the legislation's legal soundness, it may be best to articulate the government's case within the RFRA's confines—namely, that the law is necessary in the face of a grave threat and that the law is pursued through the least restrictive means. In addition, resources should be allocated to mount a vast public education campaign to clarify that, first, wearing a *burqa* as religious exercise can still flourish in houses of worship and the private sphere; second, the legislation is not a war on Islam; and third, the threat surely does not solely originate from adherents of Islam.

CONCLUSION

The proposals presented in this Note call for difficult choices and sacrifices by the government, the judiciary, and most importantly, the American people. Even discussing many of these issues seems antithetical to the values of inclusiveness and freedom to which we cling. Nonetheless, the government's interest in protecting its citizens and maintaining its own existence *is* the ultimate compelling interest. Considering the merits of the government's compelling interest in national security, the ability of the *burqa* to flourish in private and religious spaces, and the *burqa*'s functional inability to defer to the government's interest, the proposed legislation, as an unlikely current prospect, is a viable constitutional measure should such a grisly hypothetical come to fruition within our borders.

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