

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1944

TITLE HOLLY JENSEN, ETC., ET AL., Petitioners v.
FRANCES J. QUARING

PLACE Washington, D. C.

DATE January 7, 1985

PAGES 1-47



ALDERSON REPORTING

(202) 628-9300

200 F STREET, N.W.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

-----x
HOLLY JENSEN, ETC., ET AL., :
Petitioners, :
V. : No. 83-1944
FRANCES J. QUARING :

-----x

Washington, D.C.

Monday, January 7, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

APPEARANCES:

RUTH ANNE E. GALTER, ESQ., Assistant Attorney General of Nebraska, Lincoln, Nebraska; on behalf of the petitioners.

THOMAS C. LANSWORTH, ESQ., Des Moines, Iowa; on behalf of the respondent.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
RUTH ANNE E. GALTER, ESQ. on behalf of the petitioners	3
THOMAS C. LANSWORTH, ESQ., on behalf of the respondent	24
RUTH ANNE E. GALTER, ESQ., on behalf of the petitioners - rebuttal	43

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Jensen against Quaring.

Ms. Galter, you may proceed whenever you are ready.

ORAL ARGUMENT OF RUTH ANNE E. GALTER, ESQ.,
ON BEHALF OF THE PETITIONERS

MS. GALTER: Thank you, Mr. Chief Justice, and may it please the Court, this case is here on the State of Nebraska's petition for certiorari to the Eighth Circuit Court of Appeals.

Nebraska contends that the lower court erred in mandating an exception solely on religious grounds to Nebraska's requirement that a photograph appear on the respondent's driver's license.

The lower court found two compelling interests in ready and instantaneous identification of licensed drivers as well as the security of financial transactions. It nevertheless held that the photograph requirement as applied to Mrs. Quaring was not the least restrictive alternative to accomplish the state's objectives.

We submit that the lower court erred in two respects. First, we submit that it failed to apply a qualitative and comparative analysis to the interests of

1 the state and Mrs. Quaring. Secondly, we contend that
2 it incorrectly applied the least restrictive alternative
3 test, in that the lower court's conclusion rests on the
4 faulty premise that a few exceptions do not undermine
5 the state's legislative purpose.

6 In short, we are asking the Court to clarify
7 the holdings in Thomas versus Review Board and in
8 Sherbert versus Verner to provide a qualitative analysis
9 of the degree of abridgement of religious freedom in
10 terms of its actual interference with an essential
11 practice of religion.

12 We feel this is significant for the reason
13 that the lower court specifically found that there was
14 no coercion of action which is contrary to a free
15 exercise claim.

16 The first question in any free exercise
17 analysis is, is there a burden. Our focus is how much
18 of a burden exists upon Mrs. Quaring. In that analysis,
19 we must look to the degree of infringement or, if you
20 will, the centrality of her belief and the degree which
21 the state's regulation infringes upon that central core
22 belief.

23 We have also evaluated it in terms of the
24 right to drive. As set forth in our brief, we have
25 indicated that we do not feel that Mrs. Quaring's

1 interest in the right to a driver's license is on the
2 same level as those interests presented in Thomas versus
3 Review Board and in Sherbert.

4 In essence, the interest or the benefits at
5 issue in those cases were unemployment compensation
6 benefits to which the individuals were otherwise
7 entitled. We feel that the right to a driver's license
8 is a highly regulated state activity. It is subject
9 always to the police power of the state, subject always
10 to reasonable regulations which relate to its purpose.

11 In other words, we may suspend or revoke for
12 repeated infractions. We may impose restrictions in
13 terms of financial responsibility. It is subject to a
14 whole host of state regulation.

15 QUESTION: Age, is that not another factor?

16 MS. GALTER: Age?

17 QUESTION: Age.

18 MS. GALTER: Yes, Your Honor, age is a
19 factor.

20 QUESTION: What are the limits in Nebraska?

21 MS. GALTER: At the age of 16 you may obtain a
22 regular driver's license.

23 QUESTION: On the other end, is there a limit?

24 MS. GALTER: You must demonstrate a
25 proficiency and knowledge of the rules of the road,

1 traffic regulations. You must demonstrate a certain
2 degree of visual acuity. You must also demonstrate your
3 manual ability to actually operate a motor vehicle. You
4 will take a license --

5 QUESTION: But there is no cutoff on the age?

6 MS. GALTER: At the present time, no, but
7 there are repeated examinations for dexterity, visual
8 ability, and so on, particularly for elderly drivers.

9 QUESTION: When does the examination -- at
10 what age does the examination begin?

11 MS. GALTER: Depending upon what type of
12 license you are applying for --

13 QUESTION: Just an ordinary --

14 MS. GALTER: The ordinary driver's license is
15 age 16. You may get a learner's permit at 15.

16 QUESTION: No, but on the other end.

17 MS. GALTER: You are reexamined every four
18 years.

19 QUESTION: A medical examination?

20 MS. GALTER: The visual.

21 QUESTION: I know, but how about the medical?
22 Some states have a medical examination after a certain
23 age.

24 MS. GALTER: No, we do not. As a general rule
25 we do not, but generally examiners will take into

1 account any physical handicap, and if there is a
2 discernible one to the examiner, that will then be noted
3 on the driver's license.

4 QUESTION: What is Mrs. Quaring's faith?

5 MS. GALTER: Mrs. Quaring believes a -- her
6 belief is a personally held one. She does not belong to
7 an organized religion as such, and the church to which
8 she does occasionally attend does not subscribe to the
9 same belief that she does.

10 QUESTION: But I gather the state concedes
11 that it is Christian in nature. Is that true?

12 MS. GALTER: The state has conceded that it is
13 a religious belief.

14 QUESTION: Well, Christian?

15 MS. GALTER: A Judaic Christian belief founded
16 in the Old Testament. I believe as well the lower
17 court's opinion indicated a Judaic background for this
18 belief.

19 QUESTION: There is no issue whether the
20 belief is sincerely held, is there?

21 MS. GALTER: No, Your Honor.

22 QUESTION: May I ask, Ms. Galter, if you could
23 explain a little bit more to me about the administrative
24 burden the state alleges to be present.

25 I think the brief indicates that 93 different

1 county commissioners would have to administer the
2 exceptions, and yet the respondent cites testimony
3 showing that the current practice is to require people
4 seeking exemptions to apply to the central office.

5 MS. GALTER: In response to your first
6 question, the administrative burden that we set forth
7 would be that the applications are made on a local
8 basis. There are 93 counties in Nebraska. Applications
9 are made -- actually I believe there are 95 examining
10 stations.

11 The county treasurers and their clerical staff
12 in each of those counties actually administer the
13 photograph. The applications would be made locally.

14 The testimony below does indicate that the
15 applications for exemptions that have been made have
16 been made to the central office. However, in
17 implementing an administrative scheme of statewide
18 applicability, it would be necessary to train all of
19 those individuals in terms of processing the
20 applications and making the determination.

21 It would be unfeasible for an individual in
22 Scott's Bluff, Nebraska, to travel in excess of 300
23 miles to present their side of the case, unless one
24 simply had a statement on the application itself which
25 would in our estimation result in exemption on demand,

1 simply saying, we chose not to be photographed for our
2 religious belief.

3 Unless one goes to such a very narrow
4 informational statement on an application, you do have
5 exemption on demand. Our concern with the
6 administrative burden is that we would have in excess of
7 100 people making a determination as to what is or is
8 not religious.

9 The problem that we foresee is that given the
10 fact that we are recognizing very narrowly held beliefs,
11 that the risk of prejudice and the risk of inconsistency
12 would be very high, and those are legitimate reasons for
13 according the state's interest a higher weight, if you
14 will, the risk of prejudice and inconsistency together
15 with the inability of those individuals to determine a
16 very personal belief as opposed to one that is easily
17 recognized.

18 QUESTION: Well, I suppose in considering
19 exemptions from the draft, for example, based on
20 sincerely held personal beliefs, the same kind of
21 determination is made at a variety of localities, is it
22 not?

23 MS. GALTER: That's correct. We feel that the
24 implications for this are magnified also by the fact
25 that all 50 states now require or will require as of

1 January photographic licenses, and together with the
2 fact that the numbers of people who would be making this
3 determination on a day by day basis is extremely
4 difficult, as the record below reflects.

5 Professor Turner indicated that indeed it was
6 a very difficult task to determine what is religious.
7 Perhaps it might be easier if we were dealing in context
8 of organized religion. For example, as in Thomas and
9 Sherbert, we were dealing with Sabbatarians, and that is
10 a very easily recognized religious precept.

11 It is much more difficult when someone simply
12 has a personal belief that someone may not be familiar
13 with or have enough historical background to make a fair
14 determination, and we submit that the risk of
15 inconsistent treatment across Nebraska as well as the
16 nation is a very significant factor in the
17 determination.

18 QUESTION: That hasn't prevented the extension
19 of a similar privilege in the case of the draft, has
20 it?

21 MS. GALTER: No. No, it has not.

22 QUESTION: When did Nebraska begin to require
23 a photograph on the driver's license?

24 MS. GALTER: I believe in 1977.

25 QUESTION: And when did they first begin to

1 require an automobile driver's license? Long before
2 your time, I am sure.

3 MS. GALTER: I don't know the answer to that.
4 I am sorry. The evidence reflects that from 1977 on, as
5 the testimony of the superintendent of the state patrol
6 indicated, the licenses were phased in over a four-year
7 period. We have the renewal every four years.

8 I think it is significant that his testimony
9 reflects that as those licenses were phased in, the
10 counterfeiting, which had been a problem prior to the
11 photographic licenses, the counterfeiting diminished, as
12 did the purchase of alcohol by minors.

13 And in that respect I think one of the
14 potential dangers which we can articulate as a state is
15 that Nebraska has just raised the legal drinking age
16 from 19 to 21. We are a university town, if you will,
17 and I think there will be a high incentive for young
18 people to perhaps fraudulently obtain nonphotographic
19 licenses in order to obtain alcohol.

20 There is also increasing federal pressure on
21 various states to raise their drinking age in terms of
22 the use of highway funds. I think we can articulate a
23 very real danger in that regard, that there would be a
24 potential for abuse, and it would be virtually
25 impossible to determine this security.

1 QUESTION: Couldn't you respond to that by
2 just limiting the exclusion for this purpose to adults,
3 I mean, to those over 21, saying you have a special
4 interest there? This case doesn't raise that question,
5 does it?

6 MS. GALTER: No, it does not.

7 QUESTION: She is older, I gather.

8 MS. GALTER: Yes, she is. One could posit an
9 equal protection argument on that. The other side of
10 that would be whether or not the state's interest in
11 preventing purchase of alcohol is sufficient, although
12 you would then also be discriminating on those --
13 against those individuals in terms of security.

14 QUESTION: Surely if you say that interest is
15 sufficient to deny everybody the right not to be
16 photographed, it ought to be at least sufficient to deny
17 those under 21 the right.

18 MS. GALTER: I am saying you could pass that
19 legislation. I think you would raise other problems
20 that would perhaps not be the same problems.

21 QUESTION: Exactly what is the state -- spell
22 out for me if you would, please, in a practical sense
23 what function does the photograph serve?

24 MS. GALTER: The photograph serves -- its
25 primary function is instantaneous identification. Law

1 enforcement officers at routine traffic stops
2 immediately know that the person that they are stopping
3 or encountering or whatever is in fact the person
4 displayed upon the license. It is an instantaneous
5 identifier.

6 Tangentially, it also serves purposes of
7 identification for cashing checks, purchasing alcohol,
8 admission to certain other things. But the primary
9 identification value is in law enforcement.

10 QUESTION: Counsel, why is the state
11 interested in the financial transactions of cashing
12 checks?

13 MS. GALTER: The state offers its protection
14 in terms of criminal statutes, in terms of theft by
15 deception, forgery, passing bad checks, and so on. The
16 state has an interest in the integrity of the commercial
17 system. To the extent that --

18 QUESTION: Yes, but what has the driver's
19 license to do with that, really? Anybody can get a
20 driver's license.

21 MS. GALTER: The driver's license serves as a
22 secondary piece of identification.

23 QUESTION: Because of the photograph.

24 MS. GALTER: The photograph serves as the
25 identification.

1 QUESTION: A passport would do the same thing,
2 wouldn't it?

3 MS. GALTER: Yes, another photograph would, if
4 it were properly validated by a state or a federal
5 regulatory authority, so that it had validity. I don't
6 believe a simple photograph would serve the same
7 function.

8 QUESTION: I will confess I am a little
9 puzzled by your reliance on financial transaction
10 integrity to support the photograph on a driver's
11 license.

12 MS. GALTER: I think the main emphasis is for
13 law enforcement and the identification of drivers. It
14 does serve corollary purposes, and to that extent those
15 also are compelling, and I believe the lower court so
16 found, that the --

17 QUESTION: Am I not correct that in some parts
18 of Asia there are sects who will not permit people to
19 photograph them?

20 MS. GALTER: I am not personally familiar.
21 That may very well be.

22 QUESTION: And if you had a large number of
23 people in Nebraska, would that create additional
24 problems for you, or would you be here making the same
25 argument?

1 MS. GALTER: I would be here making the same
2 argument, because, yes, I think it does create
3 problems. We also feel that the lower court was in
4 error in applying the least restrictive alternative
5 analysis to indicate that if we have only a very few
6 exceptions, it doesn't significantly undermine the
7 state's interest.

8 The faulty rationale is that if we had a
9 larger number, we might not very well be able to make
10 the exception without running afoul of the establishment
11 clause. The court's decision below has the strange
12 result of giving more protection to a very unusual
13 doctrinaire belief, if you will, that does not fit well
14 within established notions of religion.

15 So I think if we had 15,000 people or 500
16 people making the same request, the analysis would
17 change. And we submit that ought not be the test that
18 is applied. The decision ought not turn on the few
19 number of people that request the exemption.

20 As a practical matter, the state could always
21 make an exception if only one or two asked for it. It
22 wouldn't seriously undermine the integrity. But what we
23 are most concerned with is, we are concerned with this
24 case, we are concerned with future cases.

25 Counsel is aware in Nebraska of individuals

1 who now do not want to sign their driver's license on
2 religious grounds. There are individuals who do not
3 want a social security number on religious grounds.

4 QUESTION: Would this same rule in your view
5 be applied if Nebraska or some agency of the federal
6 government in Nebraska or in the Eighth Circuit required
7 a photograph for identification for government
8 employment or for a passport?

9 The same standards would apply across the
10 board, would they not?

11 MS. GALTER: Yes, I believe they would. It
12 also depends on the purpose, and when you have
13 government requiring them for different reasons, the
14 driver's license serves an identification purpose for
15 enforcement.

16 We also as state employees have photographic
17 ID's for security reasons, and that is why we would like
18 to posit a test which really examines on the one hand
19 the degree of infringement of an individual's essential
20 practice of religion.

21 We submit the state has not interfered with
22 the practice of Mrs. Quaring's religion. She is free to
23 worship as she pleases. She may decorate her home, and
24 avoid all indications of things in creation.

25 To answer your question, on the other hand, we

1 need to examine the interests of government. We have
2 identification as one. We have, as the Justice
3 Department has pointed out, a programmatic interest in
4 universal applicability of laws.

5 The use of numbers, for example. Fifteen
6 states now utilize a social security number as the
7 driver's license number. And given the widespread use
8 of computerization, those numbers are the only way in
9 which this information is accessed.

10 That also brings up driving records, which are
11 very important to a law enforcement officer when he
12 stops. If he has that information available to him at a
13 central location, he knows if he is looking at a
14 repeated offender.

15 The interests of government are much broader
16 than just the photograph. The government has a very
17 strong interest in uniform applicability, and I believe
18 that was set forth rather clearly in United States
19 versus Lee, in which an exemption was not granted to the
20 Amish because they had elected to enter a commercial
21 activity, and the viability of the system as a whole was
22 important.

23 And that is what we are positing, that you
24 look at the very degree of burden on Mrs. Quaring, and
25 we submit that, yes, we have not allowed her to have a

1 driver's license. On the other hand, we have not
2 interfered so strongly with the practice of her belief
3 that the government must give way and make an
4 exception. The government's interest is --

5 QUESTION: What would happen if somebody
6 applied for a driver's license, chauffer's license?

7 MS. GALTER: And did not want their photograph
8 taken?

9 QUESTION: Yes. I mean, you are saying that
10 didn't affect the livelihood. That would affect the
11 livelihood.

12 MS. GALTER: Yes, it would, most definitely,
13 but we also do not have a problem in lifetime
14 revocations of licenses, and I would agree with you that
15 the analysis is different, but I think if we look at the
16 interest of the license, and as we pointed out in Dixon
17 versus Love in indicta, it has been indicated that
18 perhaps a driver's license is not so important as cur
19 social welfare benefits, which is a subsistence
20 question.

21 In your example, the chauffer might have to
22 make a lifestyle adjustment, but those are not
23 sufficient reasons. Economic disadvantage or
24 inconvenience is not a sufficient reason to grant the
25 exemption.

1 QUESTION: What happens when you are
2 arrested? You couldn't be booked, could you?

3 MS. GALTER: No, and that was one of the
4 things that we would point out. It is a sliding scale
5 analysis. It truly is. You do not want the picture on
6 your license. But if in fact Mrs. Quaring were involved
7 in an accident and taken to the police station, I doubt
8 very much that the state would be forced to forego the
9 photograph on her mug shot.

10 I don't mean to be facetious, but it is a
11 sliding scale analysis. The state's interest then
12 becomes very high. We submit that now the state's
13 interest is very high, and the burden on Mrs. Quaring is
14 not so central. We are not interfering with the
15 practice.

16 And I think it is significant that the lower
17 court specifically found no coercion of action. And
18 given those reasons, we feel that the test to be applied
19 is consistent with Thomas and Sherbert. We feel that it
20 can be clarified in terms of an analysis of the
21 comparative burdens and the comparative costs.

22 QUESTION: Well, Ms. Galter, it really isn't
23 Ms. Quaring's driving privilege that is being infringed,
24 is it? It is her free exercise of religion.

25 MS. GALTER: That is the respondent's claim.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

QUESTION: Isn't that quite a valid claim?

MS. GALTER: The burden on Mrs. Quaring, if you will -- we submit that there is not a right to drive, but yes --

QUESTION: The burden is on her free exercise.

MS. GALTER: The burden is on her free exercise, but what we are urging the Court to examine is how much, how much are we interfering with the actual practice? I would --

QUESTION: Well, but you are asking the Court to do something that I don't think it has been doing in earlier cases. If you concede the sincerity of the religious belief or practice, do we really go beyond that and say how important is that really to the average person? That is not the test, is it?

MS. GALTER: I believe the test would be -- the initial question is, is there a burden, and then --

QUESTION: On what?

MS. GALTER: The burden on --

QUESTION: On her free exercise of her religion.

MS. GALTER: On free exercise of her religion. But the Court has been willing in other cases, such as Braunfeld versus Brown, to say even

1 though there is a burden, and even though it is
2 inconvenient, and even though it is expensive, the
3 state's interest is so compelling that the individual's
4 interest must give way.

5 So, yes, I think the Court has been looking at
6 a balancing test, and perhaps we are only asking for a
7 more refined balancing test.

8 QUESTION: Well, what is the state's interest
9 in denying the exemption? It isn't just the fact that
10 the state wants to have a program of ready
11 identification. I guess your position is, it is the
12 administrative burden.

13 MS. GALTER: It is the administrative burden
14 as the state's broader interest in achieving universal
15 application and extending that rationale into social
16 security numbers, signatures, and so on.

17 QUESTION: Well, but of course the state
18 doesn't have a uniform photo identification system now
19 because it has already been demonstrated that the state
20 has exceptions today, for temporary learner's permits
21 and other -- out-of-state permits and the kind of thing
22 that don't require a photograph today.

23 MS. GALTER: We have exceptions. However,
24 those exceptions bear a rational relationship for the
25 reasons that they were carved out. We submit that it is

1 well within the legislature's authority to make the
2 determination to grant those limited exceptions.

3 For example, the learner's permits are only
4 valid if they are accompanied by a regularly licensed
5 driver who has a photograph on his or her license. The
6 temporary permits are for those individuals who are
7 out-of-state and of necessity could not be photographed
8 in Nebraska. They are short-term in nature. When that
9 individual returns to the state, he then obtains a
10 regular license.

11 We submit that the legislature has the ability
12 to make that determination. Having once made that
13 determination, by contrast, it chose not to grant a
14 religious exemption. That may have been a better course
15 of action, but we are not required to do that, and that
16 is a legislative determination.

17 And we feel that it is unconstitutional to
18 force the state to grant an exception solely on
19 religious grounds. And the other exemptions may be
20 explained on a rational basis as within the authority of
21 the legislature.

22 The notion --

23 QUESTION: Ms. Galter, is any part of the
24 state's argument based on the idea that where you have a
25 fairly minimal time period of confrontation between the

1 licensing authority and the applicant, that the state
2 may find itself in a position of just having to give in
3 on a lot of claims that are either spurious or
4 borderline spurious?

5 MS. GALTER: I am not sure I understand your
6 question.

7 QUESTION: Well, if people who perhaps have
8 ulterior motives and really aren't all that interested
9 in religious claims find out that you can get a driver's
10 license with no photograph on it, that you will get a
11 lot of applications based on stated religious belief
12 that in fact doesn't exist but may be very difficult to
13 disprove.

14 MS. GALTER: Exactly. I believe it is
15 exemption on demand, and I think the incentive for
16 counterfeiting and the incentive for abuse will
17 increase, and the testimony below reflected that the
18 purchase of alcohol was one of those, and yes, I think
19 that is exactly one of the reasons that we are
20 articulating that the exemption would be on demand.

21 There would be no way for local licensing
22 authorities to make the determination. We also submit
23 that given the establishment clause, it would be an
24 impermissible inquiry on such a broad scale.

25 I would like to reserve the rest of my time.

1 QUESTION: Very well.

2 Mr. Lansworth.

3 ORAL ARGUMENT OF THOMAS C. LANSWORTH, ESQ.,

4 ON BEHALF OF THE RESPONDENT

5 MR. LANSWORTH: Mr. Chief Justice, and may it
6 please the Court, in answer to the question from Chief
7 Justice Burger with regard to when the licensing
8 photograph requirement took effect, that began in
9 January of 1978.

10 Mrs. Quaring at that time was driving on a
11 license that was issued under the prior statute, which
12 did not require a photograph, and she continued to do
13 that, as the evidence at trial indicated, for a period
14 of four years.

15 This woman then, because of her religious
16 belief, was placed in a situation where she drove her
17 farm vehicles and her automobile on what essentially was
18 an expired license, with the completed examination
19 certificate indicating that she had passed the
20 examination stapled to it.

21 I mention that simply --

22 QUESTION: Then it is pretty clear she
23 considered violating the law less important than
24 violating her subjective religious belief.

25 MR. LANSWORTH: I think, Your Honor, that --

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

QUESTION: Is that a fair statement?

MR. LANSWORTH: Excuse me?

QUESTION: Is that a fair statement of the situation?

MR. LANSWORTH: I think that what I would draw from that is that she had such a high level of concern about the situation in which she was placed that she went to the trouble of doing the next best thing in her mind.

And that is, she had passed the examination. She had qualified under all of the substantive requirements in order to obtain a renewed driver's license at that time, but she was not able to get a renewed driver's license because her religious beliefs prevented her from submitting to being photographed.

Mrs. Quaring and her husband operate a large farming operation in central Nebraska, where they live under what might truly be called the wide open spaces. The ability to drive a motor vehicle in those circumstances is essential to her ability to continue to work as both a farmer and in her part-time employment as a bookkeeper in a small town that is located approximately ten miles from where she and her husband farm.

She operates both the automobiles and various

1 vehicles in the farming operation. She needs to be able
2 to drive. I think that as far as whether or not this is
3 a question of whether she is just simply trying to
4 impose some kind of thorn in the side of the state, I
5 don't think that is an issue here.

6 She is not a woman who has ever before found
7 herself in a court of law. The evidence indicates that
8 this is the first time that she has ever been confronted
9 with a legal problem, not only in general, but
10 specifically with regard to whether or not she presents
11 any danger to the state's interest with regard to
12 licensing motor vehicle operators. She has never been
13 the recipient of any kind of traffic citation.

14 QUESTION: Would you agree that -- what is
15 your view on whether Nebraska's need for photographs on
16 these licenses is a compelling state interest?

17 MR. LANSWORTH: We have -- my personal
18 position on that is that I find it difficult to see that
19 that is a compelling state interest. Since the lower
20 courts were --

21 QUESTION: You think it would not make it
22 easier for people to have fraudulent licenses?

23 MR. LANSWORTH: I think it is a step that --
24 the photograph makes it more difficult to create
25 fraudulent licenses, but the testimony by the

1 superintendent of the Nebraska State Patrol at trial
2 indicated that that event still happens, that there are
3 still fraudulent licenses that are being made.

4 And I think that as far as the questions with
5 regard to whether or not spurious claims might be made
6 so that people can somehow have fraudulent
7 identifications, I doubt that people would want an
8 identification to go out and write bad checks, if that
9 is the state's concern, that did not have a photograph.

10 My suspicion would be that the fraudulent
11 licenses that exist have pictures on them of the people
12 who are carrying them, but the other information has
13 been somehow counterfeited, and it is not the photograph
14 that is the subject of counterfeiting in this kind of
15 situation.

16 QUESTION: On the identification, is there any
17 faster one than a photograph?

18 MR. LANSWORTH: Is there any faster method of
19 identification?

20 QUESTION: Yes.

21 MR. LANSWORTH: I think that probably there is
22 not. However, I don't think that it is simply a
23 question of speed of identification when we are dealing
24 with the burdens being placed on Mrs. Quaring's free
25 exercise rights under the First Amendment.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

In addition, I think that a person who --

QUESTION: We are not talking about that. We were talking about the state's interest.

MR. LANSWORTH: Yes, Your Honor.

QUESTION: And you do agree that that is the best way to facilitate identification?

MR. LANSWORTH: I think that it is probably the fastest way. I am not sure that it is any better than the physical description that appeared on the previous license form.

QUESTION: Well, would you mind physically describing me?

No, of course not.

(General laughter.)

MR. LANSWORTH: In that situation, I think I would prefer a photograph.

QUESTION: Right.

(General laughter.)

MR. LANSWORTH: But I don't think that a preference for a photograph --

QUESTION: Has Mrs. Quaring ever applied for a passport?

MR. LANSWORTH: No, she has not, that I am aware of.

QUESTION: And you know a photograph is

1 required for those. Would she be challenging the
2 federal procedure for photographs on passports if she
3 wanted to go to --

4 MR. LANSWORTH: If she were to make
5 application for a passport, my suspicion is that her
6 position with regard to the photograph on that document
7 would be the same with regard -- as it is with regard to
8 the driver's license.

9 QUESTION: How about for federal employment
10 which required in a particular agency a photograph?

11 MR. LANSWORTH: For Mrs. Quaring, as the
12 individual, particular individual who is involved in
13 this case, her position would be that she cannot allow
14 herself to be photographed.

15 So, in any situation in which someone would
16 impose a photographic requirement, her position would be
17 the same as it has been with regard to the driver's
18 license. And I would -- it seems to me that the
19 interests involved in those photographs is going to vary
20 from situation to situation.

21 But with regard to the state's interest that
22 is involved in the photograph on the driver's license,
23 it seems clear to me, particularly from the record in
24 this case, that with the exemptions that already exist
25 under the statute, and with regard to whether or not

1 Mrs. Quaring as an individual presents any threat to
2 those interests, with or without a photograph, I think
3 the record is clear that she does not.

4 QUESTION: Well, Mr. Lansworth, do you concede
5 that the government's interest in obtaining a photograph
6 or passport or some ready identification for security
7 reasons in a secure area might be weighty, or weightier
8 than the state's interest for driver's license
9 purposes?

10 MR. LANSWORTH: I think it would be
11 different. Whether or not it is weightier, I think,
12 would depend upon the particular situation in which the
13 requirement might arise, and also we are dealing in this
14 particular case with a --

15 QUESTION: Well, those are the suggested
16 circumstances, the passport or the photograph required
17 for employment in a secure area.

18 MR. LANSWORTH: It is my understanding that
19 there is a possibility of an exemption to a photograph
20 on passports. I am not a frequent traveler, so I am not
21 personally aware of whether that in fact is the law.

22 With regard to the security photograph, if
23 that was the uniform system that had been established,
24 and if it was equally applicable to all, and that it was
25 a necessity for entrance to a secure area, or something

1 of that nature, then I think it would be weightier in
2 that situation than the license photograph --

3 QUESTION: You have your Sack Air Force Base
4 in your state.

5 MR. LANSWORTH: That's correct.

6 QUESTION: What is your response to that
7 situation?

8 MR. LANSWORTH: If a photograph was required
9 for entrance at Sack Air Force Base?

10 QUESTION: I don't think it's if. I think it
11 is required.

12 MR. LANSWORTH: I think that may be the case.
13 You are right, Your Honor.

14 QUESTION: Let me ask another question, if you
15 place a great deal of weight on the existence of other
16 exemptions in the Nebraska system.

17 MR. LANSWORTH: I think that the weight that I
18 place on that is because of the reason that that
19 indicates to me that the addition of Mrs. Quaring to
20 that group of people who is on the highways and streets
21 of Nebraska without a photograph on their driver's
22 license is not going to have any impact upon the
23 achievement of the state's interests that are being
24 served by that photograph.

25 QUESTION: Of course, aren't each and every

1 one of those exemptions rather minor? They are
2 temporary in nature, and --

3 MR. LANSWORTH: I think generally speaking
4 most of them would fit that description, except there is
5 a category --

6 QUESTION: There is a certain element of
7 impossibility with respect to some of them, anyway.

8 MR. LANSWORTH: I think with regard to -- the
9 temporary permit I believe is the one that is issued to
10 persons who are outside of the state at the time that
11 their renewal comes due. The others, however, are not
12 temporary in the sense of a period of days or --

13 QUESTION: How about a learner's permit? That
14 doesn't go on forever.

15 MR. LANSWORTH: The learner's permit, Your
16 Honor, I believe, is issued for a year at a time. It is
17 issued generally to a 15-year-old who then learns to
18 drive before reaching the age of 16, and being able to
19 obtain a regular driver's license.

20 That is -- I guess I don't consider that a
21 year is a short period of time with regard to driving on
22 the streets and highways without a photographic
23 license.

24 QUESTION: Well, it is shorter than the period
25 of time that a normal Nebraska driver's license runs,

1 though, isn't it?

2 MR. LANSWORTH: Yes, Your Honor. The normal
3 period of time is four years.

4 QUESTION: If she were here today, or in the
5 courts in Nebraska, and newspaper photographers took a
6 picture of her as she was leaving the courthouse, could
7 she enjoin the publication of that in your view?

8 MR. LANSWORTH: No, Your Honor. I don't
9 believe that she could. I think the First Amendment
10 would protect the newspaper's right to publish that
11 photograph.

12 I think that if she were here today, she would
13 attempt to avoid that event, and as a matter of fact,
14 one of the reasons that she is not here today is that
15 possibility.

16 But I think her position and her testimony at
17 trial indicates that -- a question very similar to that
18 was asked of her at trial, and her response, as I recall
19 it, was that she would attempt to avoid that event, but
20 that if it occurred, it would be distressing to her with
21 regard to her religious beliefs, but it would not be to
22 her the kind of religious burden that being forced to
23 submit to a photograph in order to obtain this
24 particular state extended privilege would be.

25 QUESTION: In other words, you are saying that

1 her religious belief, her rights under the religion
2 clauses are subordinate to the First Amendment rights of
3 others to take her picture if they want to?

4 MR. LANSWORTH: I think that in the question
5 that you posed with regard to a news photograph being
6 taken of her, you don't have involved in that situation
7 any governmental action that is burdening her exercise.
8 Rather, you have the competing interests of two private
9 parties, both of whom have, it seems to me, equal
10 footing under the First Amendment with regard to the
11 activities that we are talking about.

12 QUESTION: Mr. Lansworth, what about a person
13 whose religious, sincerely held religious belief is that
14 one should not have one's social security number used
15 for identification purposes, or should not have a social
16 security number at all, and wants a symbol substituted?

17 Would you think that that would fall in the
18 same category as your client's --

19 MR. LANSWORTH: Your Honor, I would think that
20 it could fall in the same category. There are a number
21 of situations that have arisen in the courts around the
22 country that involve just that issue, as I know you are
23 aware.

24 It seems to me that the answer to whether or
25 not one can be exempted from the requirement of the

1 social security number has to do with what the interests
2 being served by that number are as they are asserted by
3 the government in that situation, and also it has to do
4 with whether or not the facts in a given situation
5 demonstrate that whatever the system being served by
6 that number is, whether it will be able to function
7 without that.

8 QUESTION: Do you think that part of the
9 balance that the Court must make is the presence or
10 absence of economic or other motives to cause people to
11 claim the exemption?

12 MR. LANSWORTH: I think that the decisions of
13 the Court certainly in recent years have indicated a
14 concern with that motivation, and I think that is a
15 legitimate concern.

16 The Court has repeatedly said, or at least
17 discussed from cases beginning as long ago as Sherbert
18 through the recent decisions in Thomas and Lee what
19 happens if people -- if we grant exemptions and people
20 are then placed in a situation where they can be
21 exempted from paying the taxes, and I think that is a
22 legitimate concern.

23 And I think that is a concern that I find very
24 difficult to see in this particular case. It is very,
25 very hard for me to see what in the world is the

1 incentive for someone to spuriously request an exemption
2 from a photograph.

3 QUESTION: Well, I think Ms. Galter suggested
4 one, which is young people who want to buy liquor under
5 age. That might be one.

6 MR. LANSWORTH: I think that might be one, and
7 I would agree that she has suggested that, but there is
8 certainly no evidence to suggest that that is a real
9 possibility in this case, and there is certainly no
10 evidence in this case to suggest that Mrs. Quaring
11 presents any law enforcement difficulty.

12 I realize that the Court does not simply look
13 at Mrs. Quaring. But again, I think that with regard to
14 the illegal purchase of alcohol, that the person who is
15 seeking to do that would most likely want to have a
16 photograph on their license that looks like them, and
17 that they might want to counterfeit their age, for
18 example, on the license rather than their appearance.

19 It has been my experience, longer ago now, I
20 guess, than I wish, that --

21 QUESTION: That is the way you worked it?

22 (General laughter.)

23 MR. LANSWORTH: -- that retailers usually were
24 very strict about requiring identification, and if there
25 was anything fishy or questionable about someone's

1 identification, they would refuse to do business with
2 them, particularly in a young person purchasing alcohol
3 situation.

4 So it is difficult for me to see that granting
5 an exemption in this case would create a situation where
6 that kind of transaction would really be a threat to the
7 interests that are served by the state here.

8 I think that the argument that the state
9 officials, the petitioners in this case have made would
10 require the Court to reverse what it has said in cases
11 such as Sherbert versus Verner or Thomas versus Review
12 Board.

13 The Court has not indicated that it is willing
14 to consider that, as far as I understand the decisions
15 of the Court. And the burdens that were placed upon the
16 exercise of the individuals' religious beliefs in those
17 cases it seems to me are nearly identical to what they
18 are here.

19 The Court did not examine the quality of the
20 burden. Rather, it examined the quality of the state's
21 interest and whether or not that interest could be
22 served by some means that is less restrictive of the
23 religious believer's free exercise of his or her
24 beliefs.

25 To suggest that you have to somehow evaluate

1 whether or not the burden is big or small or heavy or
2 light I think is really begging the question. The
3 analysis that this Court has traditionally followed
4 throughout its decisions in free exercise cases is that
5 you determine whether there is a burden upon the
6 exercise of the religion. You determine whether or not
7 there is some compelling state interest served by that
8 requirement that is burdensome to the exercise, and
9 finally, whether or not that interest can be served in
10 some way that is less restrictive of the exercise of a
11 religious belief.

12 The lower courts, both the lower courts in
13 this particular case have found that there exists a
14 burden on a religious exercise. They have also found
15 that there exist compelling or important, as the Eighth
16 Circuit opinion said, interests that are served by the
17 photographic requirement here, but they have also both
18 made specific findings that those interests can be
19 served in some means less restrictive.

20 In this particular case, that less restrictive
21 means is an exemption from the photographic
22 requirement.

23 QUESTION: Is that your approach to the case?
24 You accept the findings on the first two prongs, that
25 there is an important state interest being the second

1 one?

2 MR. LANSWORTH: We have taken that position in
3 this court. Yes, Your Honor. As I said, personally, it
4 is difficult for me to see that it is compelling, but
5 since the decision extended the exemption to Mrs.
6 Quaring, that was the --

7 QUESTION: So the case gets down to a less
8 restrictive alternative then.

9 MR. LANSWORTH: That's correct.

10 QUESTION: All right.

11 QUESTION: Would you tell me again how -- the
12 purpose of the photo identification, as I understand it,
13 is instant identification in a law enforcement
14 situation. And how is that interest served equally well
15 without the photograph?

16 MR. LANSWORTH: It is not served equally well
17 without the photograph, but what we are talking about
18 here is an overall program of identification, and the
19 overall program of identification can be served equally
20 well and achieved equally well with a limited number of
21 exceptions.

22 QUESTION: That then turns on the number of
23 people accepted. Is that right? The fact that there is
24 only one exception, why, you would always be able to be
25 entitled to it, I suppose.

1 MR. LANSWORTH: I think that the fewer the
2 number, the less problem you have with continuing the
3 programmatic interest, but I wouldn't make that the test
4 if that is your question.

5 QUESTION: Well, it seems to me that that is
6 the test under your argument. Maybe I don't follow it
7 completely. If you are acknowledging that there isn't a
8 substitute way of achieving the state purpose of instant
9 identification or prompt identification, what you have
10 to say is, well, it really isn't all that important if
11 we only exempt a handful of people.

12 And therefore it turns entirely, I think, on
13 the number of people who are exempted, which would
14 differentiate this case, I suppose, from the numbers
15 case. Or maybe there are a lot of people who have this
16 particular faith. I don't really know.

17 MR. LANSWORTH: Mrs. Quaring's particular
18 faith?

19 QUESTION: Yes.

20 MR. LANSWORTH: The record in this case
21 indicated that one of the career persons in this Motor
22 Vehicle Division was aware of her claim and perhaps one
23 other one during his tenure. So I think that this is a
24 situation where the numbers are certainly small.

25 I do not believe that the Court has said that

1 numbers is the test. But I think that numbers are one
2 of the measures with regard to --

3 QUESTION: Well, I know the Court hasn't said
4 it, but I think that is what you are saying. That is
5 what I am trying to ask you about. I am trying to
6 really be sure I understand precisely what your position
7 is.

8 MR. LANSWORTH: I think numbers -- the number
9 of exemptions which might be possible is one measure of
10 whether or not the impact will be so great upon the
11 state's ability to achieve its interests that --

12 QUESTION: I suppose another thing is, she is
13 a law-abiding citizen, you say, so it is not very
14 important.

15 MR. LANSWORTH: That's correct, but I think
16 there are situations where numbers are not the only
17 situation or the only consideration.

18 For example, the Court's decision in the
19 recent Lee case is one of those where the Court has
20 indicated in that opinion that it is very concerned with
21 regard to any kind of exemption from taxing systems
22 within -- certainly on the national level.

23 And I think that that is a situation in which
24 numbers would not be the determinant, and the Court, if
25 it didn't directly state that, I think it clearly

1 indicated that there are some types of programmatic
2 interests that are so universal in nature, particularly
3 the tax system being one such example, that we are not
4 going to entertain exemptions to them other than those
5 that Congress itself creates.

6 QUESTION: Do you think the exemption for the
7 Amish in the Lee case would have been more or less
8 burdensome than the exemption here? There were more
9 Amish than there were here.

10 MR. LANSWORTH: I think it could have -- that
11 the -- in terms of the numbers involved?

12 QUESTION: Well, actually, there they
13 contributed their own social security system, so -- I
14 had some difficulty understanding how that was really
15 all that burdensome in that case.

16 MR. LANSWORTH: I think that my reaction to
17 the facts in the Lee case was similar to what I in fact
18 remember you writing, Your Honor, which is that it was
19 difficult to see how this was going to impact in any
20 negative way upon the social security system, but I
21 think that the Court had another consideration in mind
22 in that opinion, which was that if you begin to make
23 exceptions to any kind of national tax system in a
24 nation such as ours where tax systems operate on a
25 primarily voluntary payment system, that you are leading

1 into a very troubled area.

2 I think that was a consideration that led the
3 Court in that case on the facts of that case to come to
4 the result they came to in that opinion.

5 In conclusion, Your Honors, I guess I would
6 simply say again that the lower courts in both instances
7 in this case have applied the analysis that has been
8 stated by this Court throughout its free exercise
9 decisions, and that this Court should affirm that
10 result.

11 Thank you.

12 CHIEF JUSTICE BURGER: Do you have anything
13 further, Ms. Galter?

14 ORAL ARGUMENT OF RUTH ANNE E. GALTER, ESQ.,
15 ON BEHALF OF THE PETITIONERS - REBUTTAL

16 MS. GALTER: Briefly, Your Honor.

17 For purposes of clarification of the record,
18 to the extent that this Court deems it important that
19 the legislature has carved out exemptions, there is
20 reference made to exceptions for limited permits with
21 restricted or minimal ability. That is not correct, and
22 it is not supported in the record.

23 And at Page 91 of the record you will find
24 that limited or restricted permits are not particularly
25 well defined in the record, but those operator's

1 licenses do have photographs on them. So that is one
2 exception that is incorrectly characterized in the
3 record below.

4 In closing, we would stress that the least
5 restrictive alternative test ought be examined in terms
6 of the overall objective sought to be accomplished, and
7 if one looks at this in a means-end analysis, the end
8 result is identification. The means is a photograph.
9 It is conceded that the photograph is the only
10 identifier which will achieve that goal as well.

11 In examining whether or not we make an
12 exemption, we have to be very careful about looking at
13 just one or two exemptions, and look at the future
14 impact of granting, Number One, exemptions on demand,
15 and other kinds of exemptions, such as numbers or
16 signatures or photographs on security documents or
17 security cards for --

18 QUESTION: May I ask again, does your case, do
19 you think, depend on there being all these other
20 problems around the corner, numbers and signatures and
21 so forth? Supposing we somehow knew, which of course we
22 don't, that there are no other religious claims going to
23 be made other than the claim to be exempt from the
24 photographic problem, and we could figure out some way
25 to say those cases are all different, maybe because

1 there are a lot more people or something?

2 Would you still make the same argument, just
3 concentrating on photo?

4 MS. GALTER: Concentrating on photographs
5 alone --

6 QUESTION: Yes.

7 MS. GALTER: -- yes, we would. The state's
8 interest is very high in having an instantaneous
9 identifier. The other interest in government, and I
10 think perhaps it is an interest for religious freedom,
11 is not having 100 odd officials across the State of
12 Nebraska determining whether or not someone really holds
13 a religious belief.

14 QUESTION: Couldn't you solve that by saying
15 no exemption shall be granted except by the governor or
16 somebody, you know, have a special -- one person to
17 grant the exemption? I don't know if -- aren't they
18 rare enough that you are not going to have these things
19 every day?

20 MS. GALTER: I don't think they are rare
21 enough, and I think the incentive for an increased
22 number is going to be present. I think you are going to
23 have more requests, and it would be unworkable to have
24 the central -- if the central --

25 QUESTION: Well, say no exemption until you

1 fill out the following 97 forms and take a visit through
2 your house to show you have got no pictures at home, and
3 about 19 different things you have to do to get the
4 exemption, and until you fulfill all those requirements
5 you don't get the license. Couldn't you put the burden
6 on the applicant?

7 MS. GALTER: One could. One could also make
8 the application much more difficult. It is not possible
9 in a geographic state as Nebraska to do these other than
10 at local levels, and the intrusion, the -- aside from
11 the high cost to government of implementing an
12 administrative mechanism to implement this, I think the
13 very high degree of intrusion into people's beliefs at
14 that level is impermissible, and I think that we ought
15 not do that.

16 QUESTION: What if you required them to bring
17 in their high school yearbook and show that their
18 picture wasn't in it?

19 (General laughter.)

20 MS. GALTER: One could posit a number of
21 requirements.

22 QUESTION: It seems to me this one is
23 singularly easy to prove. Maybe I am wrong. But it
24 seems to me it is unlike a lot of others, because I
25 can't imagine there being too many people that you can't

1 tell whether they have sometimes consented to have a
2 photograph taken of themselves.

3 MS. GALTER: It would be possible on one or
4 two or three, but to implement that kind of a program in
5 93 counties presents a tremendous cost to the State of
6 Nebraska, and it is a tremendous intrusion of government
7 into people's lives.

8 QUESTION: Ms. Galter, in hindsight, if you
9 had just granted this one exception, you wouldn't have
10 had any of this trouble if nobody knew about it, would
11 you?

12 (General laughter.)

13 MS. GALTER: I am afraid there are more
14 coming. I don't think we can --

15 QUESTION: Well, they are not here yet.

16 MS. GALTER: They are not here yet, Your
17 Honor.

18 Any other questions? Thank you.

19 CHIEF JUSTICE BURGER: Thank you, counsel.
20 The case is submitted.

21 (Whereupon, at 1:52 o'clock p.m., the case in
22 the above-entitled matter was submitted.)
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:
#83-1944 - HOLLY JENSEN, ETC., ET AL., Petitioners v. FRANCES J. QUARING

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'85 JAN 15 A9:00