

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 34-780

TITLE OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
ET AL., Appellants V. STEPHEN J. ROY, ET AL.

PLACE Washington, D. C.

DATE January 14, 1986

PAGES 1 thru 54



(202) 628-9300
20 F STREET, N.W.
WASHINGTON, D.C. 20001

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

OTIS R. BOWEN, SECRETARY OF :
HEALTH AND HUMAN SERVICES, :
ET AL., :

Appellants, :

V. : No. 84-780

STEPHEN J. ROY, ET. AL. :

- - - - -x

Washington, D.C.

Tuesday, January 14, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:06 a.m.

APPEARANCES:

KENNETH S. GELLER, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the appellants.

GARY S. GILDIN, ESQ., Carlisle, Pennsylvania; on behalf
of the appellees.

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>
KENNETH S. GELLER, ESQ.,	
on behalf of the appellants	3
GARY S. GILDIN, ESQ.,	
on behalf of the appellees	28

1 PROCEEDINGS

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in Bowen, the Secretary of Health and
4 Human Services, against Roy.

5 Mr. Geller, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT BY KENNETH S. GELLER, ESQ.,

8 ON BEHALF OF THE APPELLANTS

9 MR. GELLER: Thank you, Mr. Chief Justice, and
10 may it please the Court, this case involves a challenge
11 to the constitutionality of two federal statutes that
12 require applicants for welfare benefits to provide the
13 government with their social security numbers as a
14 condition on receiving those benefits.

15 Appellees claim that it would violate their
16 rights under the free exercise clause of the First
17 Amendment if they had to provide the Social Security
18 number of their daughter, Little Bird of the Snow. The
19 District Court agreed with this claim and declared the
20 statute unconstitutional and ordered the government to
21 provide the welfare benefits without insisting that the
22 appellees comply with the Social Security Number
23 requirement. We have taken a direct appeal to this
24 Court.

25 Before turning to the facts of this case, I

1 would like to mention very briefly an important aspect of
2 the two federal programs that are involved here. Both
3 the aid to families with dependent children program and
4 the food stamp program are obviously based on financial
5 need, and the amount of the government grant is a
6 function of family size and family income.

7 As a result, all earned and unearned income of
8 each family member has to be counted in determining
9 eligibility and the amount of benefits. Therefore, under
10 both programs, it is essential that benefit applicants
11 furnish income and eligibility data for each member of
12 the family, including children, and that we be able to
13 verify that information for each member of the family.

14 Now, when appellee Stephen Roy applied for
15 AFDC and food stamp benefits, he agreed to give the
16 government his own Social Security Number and the Social
17 Security Numbers of his wife and older daughter, but he
18 refused to give the Social Security Number of his younger
19 daughter, Little Bird of the Snow.

20 Roy claimed that as a result of his religious
21 beliefs, he considers Social Security Numbers to be part
22 of the so-called Great Evil, because the numbers are used
23 by computers, and therefore rob people's spirits.

24 Now, Roy testified that the evil of Social
25 Security Numbers is related to their function as unique

1 personal identifiers, and that if he had to obtain a
2 Social Security Number for Little Bird of the Snow and
3 provide it to the government, it would rob her spirit and
4 deprive her of the ability to achieve greater power.

5 QUESTION: Mr. Geller, the Court below found
6 that the claim was based on a sincere religious belief.
7 Your comments suggest that you think that that might not
8 be the case. Do you concede that it was the product of a
9 sincere religious belief?

10 MR. GELLER: My comment was simply to explain
11 Roy's testimony. We have not challenged in this Court.
12 We did challenge in the District Court. We have not
13 challenged in this Court that it is the product of a
14 sincere religious belief, but I am sure it is sincere.
15 We have some doubts whether it is the product of a
16 religious belief. I think many people in our society
17 have these sorts of concerns.

18 QUESTION: Well, do you challenge in this Court
19 the finding of the District Court?

20 MR. GELLER: No, we have not. It is a futile
21 exercise, we think, to challenge those sorts of
22 findings.

23 QUESTION: Mr. Geller, I gather in fact the
24 number of Little Bird of the Snow had been at some stage
25 given to the government.

1 MR. GELLER: Well, yes. I was about to come to
2 that, Justice Brennan.

3 QUESTION: Sorry.

4 MR. GELLER: I am sure as this Court is aware
5 from reading the briefs, there are a number of peculiar
6 aspects to this case. The most peculiar, I think, is
7 that the case had been tried on the assumption that
8 Little Bird of the Snow did not have a Social Security
9 Number, and that it would violate Roy's First Amendment
10 rights if he had to obtain one for her and provide it to
11 the government, but it came out on the last day of trial
12 that she in fact did have a Social Security Number
13 because her mother had applied for one right after she
14 was born.

15 I think it is fair to say that when this
16 revelation was made Roy changed somewhat the nature of
17 his constitutional objections. This case had been brought
18 on the theory and the complaint charged that Roy's First
19 Amendment rights would be violated by having to obtain
20 and provide a Social Security Number to the government in
21 order to get welfare benefits.

22 But after the surprise revelation that despite
23 what Roy had led the District Court and the government to
24 believe, Little Bird in fact had a Social Security
25 Number. Roy claimed at that point that he was instead

1 concerned more with the use and dissemination of the
2 number rather than having to provide it to the
3 government.

4 In any event, the District Court held at the
5 conclusion of the trial that the Social Security Number
6 requirement was unconstitutional as applied to Roy, and
7 the court enjoined the government from denying welfare
8 benefits based on Roy's failure to provide that number to
9 the government.

10 Now, in reaching its constitutional holding,
11 the District Court found as --

12 QUESTION: How could the District Court have
13 enjoined the government from failing to provide Social
14 Security based on the failure to have furnished the
15 number if the number had already been applied for?

16 MR. GELLER: The District Court enjoined the
17 government from using or disseminating the number that we
18 already had. Of course, we have made a separate
19 objection to the injunction on the ground that our use of
20 the number, which doesn't require any action or belief on
21 the part of the appellee, wouldn't violate the First
22 Amendment.

23 QUESTION: What was the District Court's
24 response to that?

25 MR. GELLER: The District Court's response was

1 not much of a response. It held that this was the only
2 way to protect the perceived First Amendment rights of
3 Roy.

4 Now, as I said, the District Court did find
5 that Roy had a sincere religious objection, and we are
6 not objecting to that here, but by the same token, the
7 District Court also found that the government had a
8 compelling interest in using Social Security Numbers in
9 order to effectively manage programs of this size to
10 verify eligibility and the amount of benefits and to
11 ferret out and deter fraud.

12 And despite Roy's attempts to argue otherwise
13 in this Court, I don't think there can be any serious
14 objection to that finding by the District Court. There
15 really can't be any doubt that the government has a
16 compelling interest in seeing that \$20 billion a year in
17 welfare benefits are targeted to the people that Congress
18 meant to receive them, and it is undisputed that the use
19 of Social Security Numbers is instrumental in
20 accomplishing that important objective.

21 Now, the District Court failed to have found
22 that there was a compelling government interest in using
23 Social Security Numbers, and the question under the free
24 exercise clause therefore became whether the government
25 had any less restrictive means available to it to

1 accomplish that objective in a way that wouldn't
2 interfere with Roy's religious beliefs.

3 We believe that the District Court was plainly
4 wrong in the way it went about answering that question.
5 I think the District Court first of all failed to
6 appreciate that under this Court's free exercise cases
7 any less restrictive alternative imposed on the
8 government must be -- must actually be capable of
9 achieving the governmental -- the compelling governmental
10 interest, at least to the same extent that the challenged
11 provision would achieve that interest.

12 And we also think that the --

13 QUESTION: Well, Mr. Geller, didn't the court's
14 findings below say that exempting Little Bird of the Snow
15 from use of the Social Security requirement could be
16 accomplished in this case without any increased
17 expenditures to the government and could be done
18 effectively?

19 MR. GELLER: Yes, we think that is the wrong
20 question.

21 QUESTION: And you say that is the wrong test.

22 MR. GELLER: The wrong test. I hope to
23 elaborate on this, but the Court has never asked that
24 question. When the Court has found that there was a
25 compelling government interest and there was no less

1 restrictive alternative available to the government, the
2 Court has never gone on to ask whether it makes any
3 difference if we just exempt one person.

4 And a number of this Court's cases in fact --

5 QUESTION: Well, certainly language in Sherbert
6 against Verner and Thomas against the Review Board cut in
7 the direction of making an individual --

8 MR. GELLER: I think, Justice O'Connor, that
9 case like Sherbert are explainable by the fact that the
10 Court there found and I think quite correctly that there
11 was a less restrictive alternative available to the
12 government in those cases.

13 In Sherbert, the purported government interest
14 was to prevent fraudulent claims on the unemployment
15 insurance fund. The way the state went about avoiding
16 fraudulent claims was to simply wipe out any religious
17 claim to an exemption.

18 And what the Court said was, there is a less
19 restrictive alternative. You can engage in an
20 individualized inquiry to see whether a religious claim
21 is in fact fraudulent. You don't have to wipe out all
22 religious claims.

23 QUESTION: Well, isn't that what the court here
24 said?

25 MR. GELLER: No, I believe not, Justice

1 O'Connor. The court here clearly found, and I hope to
2 read some of the court's findings in a few moments, that
3 there was no less restrictive alternative that was
4 equally effective as the Social Security requirement.

5 The Court in Sherbert made the opposite
6 finding. The Court in Sherbert didn't find that there
7 was no less restrictive alternative, but it didn't much
8 matter whether Mrs. Sherbert got her benefits. That is
9 precisely what the District Court found here. We think
10 there is absolutely no precedent in this Court's free
11 exercise cases for that sort of a finding.

12 Now, I don't think the Court should need any
13 convincing about the massive nature of the government
14 programs that we are dealing with here. There are about
15 eleven million people who receive AFDC benefits each
16 month, and there are about 20 million people who receive
17 food stamps.

18 And eligibility for both programs has to be
19 redetermined periodically. With AFDC, I think it is
20 every six months, and with the food stamp program, it is
21 once every month or so.

22 And that means that for 20 or 30 million
23 recipients, there have to be periodic determinations
24 about their eligibility for these benefits, and as I said
25 earlier, the way these programs are run, the income of

1 each family member, including children, has to be taken
2 into account in determining whether a family is eligible
3 for benefits and the amount of benefits.

4 It seems self-evident that the only way you can
5 run a program like this, the only way you can keep track
6 of eligibility and verify what you are told and deter
7 fraud is through the use of computers. And computers
8 talk to each other through unique -- through standardized
9 data formats that use unique personal identifiers.

10 And it was Congress's well-considered judgment
11 based on numerous reports that it received from
12 Inspectors General, the Grace Commission, and others that
13 only the use of Social Security Numbers would allow
14 effective verification of an applicant's resources and
15 income quickly and reliably.

16 Now, verification often requires that the
17 records of a number of data bases be checked, Social
18 Security records, and Motor Vehicle Bureaus, Unemployment
19 Bureaus, banks, schools, businesses. These records are
20 indexed and accessed across the country in a number of
21 different ways, but there is only one common element in
22 all these systems, and that is the Social Security
23 Number, and therefore you have to have the Social
24 Security Number if you are able to check a lot of the
25 things that you are being told by applicants about what

1 their income and resources are.

2 QUESTION: How many people in the country have
3 Social Security Numbers but are not involved in the
4 Social Security program? Is that shown by this record?

5 MR. GELLER: This record doesn't reflect that,
6 Mr. Chief Justice.

7 QUESTION: There are millions of people who --

8 MR. GELLER: There are three -- I think the
9 record shows that there are about 383 million active
10 Social Security Numbers. And these programs, as I said
11 earlier, have about 20 or 30 million people involved in
12 them.

13 QUESTION: For a population of 240 million,
14 that is quite a number.

15 (General laughter.)

16 QUESTION: There are a lot of dead ones.

17 MR. GELLER: There are some dead people, yes,
18 who -- once you get a Social Security Number, Justice
19 Rehnquist, that account never becomes dormant, and that
20 number is never given to anybody else, even if the
21 recipient is deceased.

22 QUESTION: Mr. Geller, if you give your
23 license, driver's license a number, you give his Social
24 Security Number, don't you?

25 MR. GELLER: Yes, in most jurisdictions you

1 have to.

2 QUESTION: So if the government asked that
3 anybody asking for this age shall show their driver's
4 license, you would be in just as much trouble, wouldn't
5 you?

6 MR. GELLER: Well, the problem if we only have
7 the driver's license is that we couldn't access a number
8 of these other record systems that don't use the driver's
9 license. The only element --

10 QUESTION: But the driver's license gives your
11 Social Security Number.

12 MR. GELLER: Well, we don't get the actual
13 driver's license. All we would ask on the form is for
14 their driver's license number, and the only record system
15 that would likely have that number is the Motor Vehicle
16 Bureau, so it wouldn't help in determining, for example,
17 whether they applied for a bank account.

18 QUESTION: Well, my driver's license has my
19 Social Security Number --

20 MR. GELLER: Well --

21 QUESTION: -- written on the license.

22 MR. GELLER: I understand that, Mr. Justice
23 Marshall.

24 QUESTION: That is what I am talking about.

25 MR. GELLER: What I am saying is --

1 QUESTION: What is the difference between that
2 and --

3 MR. GELLER: -- just having their driver's
4 license number and not their Social Security Number would
5 not allow access to any other data system other than the
6 Motor Vehicle Bureau.

7 QUESTION: What Justice Marshall is talking
8 about is, in Virginia your driver's license number is
9 your Social Security Number.

10 MR. GELLER: Well, I think it is the same way
11 in the District of Columbia. I am not sure it is the
12 same way all across the country, but I assume that the
13 appellees, if that were the case, would object to giving
14 that number just as well. They object to the Social
15 Security Number. They object to any unique personal
16 identifier.

17 QUESTION: All you want is the Social Security
18 Number.

19 MR. GELLER: Yes.

20 QUESTION: Well, you get it off the driver's
21 license.

22 MR. GELLER: Well, the problem, Justice
23 Marshall, is that I think Mr. Roy would have a First
24 Amendment objection to giving the driver's license number
25 if it was a unique personal identifier.

1 QUESTION: Well, his daughter wasn't old enough
2 to drive anyway.

3 (General laughter.)

4 MR. GELLER: That is why we couldn't use a
5 driver's license number in this case.

6 QUESTION: Mr. Geller, as a matter of fact, has
7 Little Bird of the Snow or whatever her name is in
8 receiving AFDC benefits?

9 MR. GELLER: Well, when you first apply --

10 QUESTION: Her parents applied for them, and --

11 MR. GELLER: The parents applied for it, and --

12 QUESTION: Have they included her in the
13 application?

14 MR. GELLER: Yes, they have.

15 QUESTION: So she has been receiving benefits.

16 MR. GELLER: She received it for a few months
17 until it was determined that they had not gotten -- as
18 soon as you apply you get the benefits, and then there is
19 a verification. It was determined that they hadn't
20 gotten the Social Security Number for Little Bird of the
21 Snow. The benefits were therefore refused to reflect
22 that fact, and that is when this suit was brought.

23 QUESTION: I see.

24 QUESTION: It is really kind of strange,
25 because I guess they had the number, as we now know, and

1 this number is supposed to prevent precisely the kind of
2 error that occurred in this case even though they had the
3 number.

4 MR. GELLER: No, the application said that she
5 didn't have the number, and we took their word for that --

6 QUESTION: I see.

7 MR. GELLER: -- until it was determined at the
8 trial, in fact, when some question was raised. We went
9 back and checked, and it was quickly determined that she
10 did have a number, but we are now enjoined from using
11 that number.

12 Now, in addition to the points I also made, it
13 seems clear that we need the Social Security Number to
14 ferret out fraud. For example, if two families were to
15 apply for AFDC benefits trying to claim the same child,
16 unless we have that child's Social Security Number, we
17 would never be able to determine that.

18 So, we think it is clear that in terms of
19 achieving the propelling government interests that are
20 involved here, program integrity, eligibility
21 verification, and ferreting out fraud, there is no
22 alternative to the Social Security requirement that works
23 anywhere near as well as the one mandated by Congress.

24 And I must say that even the District Court was
25 forced to acknowledge that fact. I think it is useful in

1 this regard to look at the District Court's precise fact
2 findings which appear at Pages 7A and 8A of the appendix
3 to the jurisdictional statement.

4 There, for example, Finding Number 60, the
5 District Court clearly finds that the efficient operation
6 of these welfare programs requires the use of computer
7 systems that utilize unique numerical identifiers such as
8 the Social Security Number, and Finding 62, such systems
9 ensure greater accuracy in providing benefits and in
10 reducing fraud, and all in the coordination of
11 information in various welfare systems to ensure the
12 recipients are not receiving duplicate benefits.

13 And on Page 3A, the Court finds in Finding 64
14 that using names instead frequently is not sufficient to
15 ensure the proper payment of benefits, and again, Finding
16 74, the Court finds that without Social Security Numbers
17 you would not be able to do effective cross-match.

18 So, the Court has found here that there is a
19 compelling government interest in using Social Security
20 Numbers. The Court has also found in the findings that I
21 just read to the Court that there is no less restrictive
22 alternative such as the use of names that is equally as
23 effective as Social Security Numbers in achieving the
24 government's compelling interest.

25 Now, that should have been the end of the

1 inquiry under this Court's free exercise cases, but
2 instead the Court nonetheless concluded that the
3 government should be required to accept admittedly less
4 effective alternatives simply because, as the Court
5 candidly announced, the benefits that Little Bird sought
6 were only an insignificant fraction of the federal
7 government's expenditures for the entire AFDC and food
8 stamp program, so what does it matter?

9 We think this Court -- this analysis is
10 completely misguided under this Court's free exercise
11 decisions. For example, in Braunfeld against Brown, the
12 Court rejected a free exercise challenge to the Sunday
13 closing laws. The Court found that the state had a
14 compelling interest there, that there was no less
15 restrictive alternative available to accomplish that
16 interest.

17 The Court didn't go on and then ask what would
18 be the harm to allow a few merchants to stay open on
19 Saturday -- on Sunday? That was just not part of the
20 free exercise analysis. By the same token, in Prince
21 versus Massachusetts, the Court rejected a free exercise
22 challenge to a state's child labor laws. The Court once
23 again found that there was a compelling state interest in
24 protecting the welfare of the state's children, and that
25 there was no less restrictive alternative available to

1 the state, and that was the end of the court's analysis.

2 The court did not go on, as the District Court
3 did in this case, by asking what would be the harm to
4 allow one 12-year-old to distribute a religious tract
5 under the supervision of her parent?

6 QUESTION: In the days when Prince was decided,
7 was the Court speaking then in terms of less restrictive
8 alternatives?

9 MR. GELLER: I believe that was the analysis
10 that the Court applied, Justice Rehnquist. It was enough
11 in those cases, and again in United States against Lee
12 the Court found that there was a compelling government
13 interest in having every employer contribute to the
14 Social Security fund, and that there was no less
15 restrictive alternative.

16 The Court again did not go on and do what the
17 District Court did in this case, which is to ask, what
18 would be the harm nonetheless in just exempting a few
19 Amish from the Social Security System? In fact, if the
20 Court had asked that question, as I think Justice Stevens
21 pointed out in his concurring opinion in Lee, the Court
22 probably would have concluded that the system wouldn't
23 have been hurt at all, because the Amish are also opposed
24 to receiving Social Security benefits, and the receipt of
25 benefits frequently costs more than you take in in taxes.

1 But the Court -- that was not the question that
2 the Court asked. By the same token here we think that
3 the District Court should have stopped after determining
4 as it did that the government had a compelling government
5 interest in using the Social Security Numbers, and that
6 there was no less restrictive alternative.

7 It doesn't matter, we think, that only a few
8 people might seek an exemption from the Social Security
9 requirement. It also doesn't matter that the
10 government's compelling interest wouldn't be totally
11 frustrated. The AFDC program wouldn't collapse if we had
12 to pay Little Bird in the Snow the benefits without being
13 able to verify whether she was entitled to them.

14 That wasn't part of the test that this Court
15 has consistently used in the free exercise area, but we
16 can't subscribe to the principal notion that seems to
17 underlie the District Court's opinion, which is that a
18 little bit of ineffectiveness or a little bit of fraud
19 really doesn't matter when you are dealing with a program
20 of this size.

21 I might add that that is precisely what the
22 appellees argued in the District Court, and I think it is
23 once again instructive to look at the record. At Page
24 299 of the joint appendix, this is Mr. Gildin giving his
25 legal argument in this case in the District Court, and he

1 says at the bottom of the page, "The legal standard, Your
2 Honor, with respect to the case before the Court, is what
3 effect is it going to have with respect to exempting
4 Little Bird of the Snow from the Social Security
5 requirement. We believe we have amply established that
6 they can do this verification inquiry, but even if we
7 cannot," the appellees argue, "even if they cannot, and
8 even if every dollar that goes to her is not proper, you
9 will find that the error is miniscule with respect to
10 what this system accepts as an error rate."

11 QUESTION: Well, Mr. Geller, regardless of that
12 argument, the District Court did find that the
13 government's interest in preventing Little Bird of the
14 Snow from fraudulently receiving welfare benefits can be
15 satisfied without requiring use of her Social Security
16 Number.

17 MR. GELLER: I think that that conclusion,
18 first of all, doesn't follow from the fact findings that
19 the District Court just made about how there are no less
20 restrictive alternatives. I think --

21 QUESTION: Well, it was one of its findings in
22 --

23 MR. GELLER: I think, Justice O'Connor, that it
24 is not one of its findings. I think that all that the
25 District --

1 QUESTION: Number 77.

2 MR. GELLER: The District Court found that we
3 could -- that there is not going to be any withdrawal
4 here. That is a different sort of finding than there is
5 a lesser -- in fact, Justice --

6 QUESTION: Well, I was simply reading from one
7 of its findings.

8 MR. GELLER: Justice O'Connor, if I could refer
9 the Court on Page 19A of the appendix to the
10 jurisdictional statement, I think this is the District
11 Court's conclusion. This is about two-thirds of the way
12 down the page. The District Court concludes by saying,
13 "It appears to the Court that the harm that the
14 government might suffer if the plaintiffs prevailed in
15 this case would be at worst that one and perhaps a few
16 individuals could obtain welfare benefits fraudulently."

17 That is, I think, how the District Court
18 concluded that even though there was no less restrictive
19 alternative, it really didn't matter in this case,
20 because you are dealing with one person. If she doesn't
21 get the right amount of benefits, the whole system isn't
22 going to collapse. But that is not the right analysis,
23 we think, under this Court's free exercise cases. The
24 Court has never adopted that analysis.

25 QUESTION: May I just ask, Mr. Geller, do you

1 think there is any significant difference between the
2 issue in this case and the issue we had in that driver's
3 license case where the party didn't want to have a
4 picture --

5 MR. GELLER: I think the analysis is precisely
6 the same. I think that we have a much stronger case here
7 because there is a much stronger compelling government
8 interest in using the Social Security Numbers.

9 I think that is shown by the fact, for example,
10 that a number of states didn't require pictures on their
11 driver's licenses. I think that is some suggestion that
12 you can accomplish whatever the government interest is
13 without requiring every single person to give a
14 photograph.

15 There are no exemptions. Congress did not
16 allow any exemptions from the Social Security
17 requirement. So I think this is -- although the analysis
18 is the same -- we filed a brief in that case last year --
19 this is a much more compelling case for allowing the
20 government to impose a neutral requirement even if
21 someone may have a religious objection.

22 QUESTION: May I ask you -- maybe this is a
23 little bit too theoretical, but suppose computer
24 technology developed to the extent that they could use
25 letters in the name and do all the things you can do with

1 numbers, and so all you had to do was use letters for
2 Little Bird of the Snow, but the statute still required
3 numbers.

4 Would you think the government would have any
5 basis for prevailing then?

6 MR. GELLER: I think it could be shown that
7 there was a less restrictive alternative such as the use
8 of letters that was equally as good in achieving the
9 government's interest. Then, of course, under this
10 Court's free exercise cases the religious claim would
11 have to prevail. That is most unlikely, because only
12 numbers can be unique identifiers. There are only a
13 limited number of letters --

14 QUESTION: Well, Mr. Geller, what if in
15 addition to the fact that Justice Stevens has it could be
16 shown that it would cost the government \$10 billion to
17 convert from numbers to letters. Then what would be the
18 outcome of the claim?

19 MR. GELLER: Then, of course, we would take the
20 position that only a reasonable less restrictive
21 alternative can be imposed on the government. But here,
22 you don't have to wrestle with that question, because the
23 District Court found, and Congress has found, and I think
24 it is self-evident that there is nothing that is as
25 useful as Social Security Numbers for accomplishing the

1 compelling government interest that I identified earlier.

2 In fact, if there is one point I want to
3 emphasize today, it is this. There seems to us something
4 very, very wrong about the notion, something
5 fundamentally wrong about the notion that someone can
6 apply for welfare benefits, claim an entitlement to
7 welfare benefits, and yet refuse to give the government
8 the very information that they need to determine whether
9 that person is in fact eligible for those benefits.

10 Now, if Roy and his family wish to avail
11 themselves of AFDC benefits and food stamp benefits, that
12 is fine, but we can't believe that the free exercise
13 clause stands as an obstacle to Congress's decision to
14 ensure as efficiently, as effectively, as reliably as
15 possible that they are entitled to those benefits.

16 We can't believe that any --

17 QUESTION: Mr. Geller, do you think that
18 administrative efficiency in every case must prevail over
19 a free exercise claim?

20 MR. GELLER: Absolutely not.

21 QUESTION: Your argument certainly sounds as
22 though that is your position.

23 MR. GELLER: No, efficiency, as I said, Justice
24 O'Connor. I also said effectively and reliably. That is
25 what is important. Efficiency I would think would only

1 come into play if in Justice Rehnquist's hypothetical it
2 might cost \$20 million to accomplish something that we
3 could accomplish for 50 cents by using the Social
4 Security Number.

5 Here, we can't do it as effectively and
6 reliably without the use of the Social Security Numbers.
7 I can't believe that anything in this Court's free
8 exercise cases could possibly require the government to
9 grant welfare benefits on the basis of incomplete
10 information or whatever information applicant decides to
11 provide to us.

12 There has to be some independent way of
13 verifying, and if a person applies for benefits, it seems
14 to us only logical that they should be able to -- they
15 should be required to give us whatever neutral
16 information we need in order to verify that they are in
17 fact eligible for those benefits.

18 QUESTION: Do you think you could require a
19 date of baptism, a baptismal certificate? Often pension
20 funds do this.

21 MR. GELLER: Yes, I am sure we can and do
22 require --

23 QUESTION: Say somebody had an objection to
24 revealing whether or not they were baptised.

25 MR. GELLER: Well, once again, Justice Stevens,

1 it may well be that if we had the Social Security Number,
2 we could find out everything we needed even without the
3 date of birth or the date of baptism.

4 But the Social Security Number is central. It
5 is the only requirement that Congress has imposed on this
6 entire system, and it is the only requirement that allows
7 access to all of the data systems across the country. It
8 is unlike any other sort of information that Mr. Roy
9 offered to give us.

10 If there are no further questions, I would like
11 to reserve the balance of my time.

12 QUESTION: Mr. Gildin.

13 ORAL ARGUMENT OF GARY S. GILDIN, ESQ.,

14 ON BEHALF OF THE APPELLEES

15 MR. GILDIN: Mr. Chief Justice, and may it
16 please the Court, before this Court today are the parents
17 of now five-year-old Little Bird of the Snow Roy, whose
18 religion, founded in native American beliefs, tells them
19 that in order to preserve their daughter's spiritual
20 purity, they may not provide a Social Security Number for
21 her even if it means foregoing necessary welfare
22 benefits.

23 As this Court has plainly demonstrated in its
24 free exercise decisions, it does not respond to these
25 beliefs by either rejecting them because they may seem to

1 others unorthodox nor replying, well, that since Congress
2 requires generally a Social Security Number, it must be
3 provided here.

4 Rather, it is the majesty of our Constitution
5 and its profound respect for religion that this Court
6 accepts these beliefs when as here they are undisputably
7 religious and sincere, and ask the question, can the
8 government reasonably accommodate these beliefs in order
9 to preserve the religion of these native Americans.

10 Are there alternatives to the Social Security
11 Number which can in fact satisfy the government's
12 interests while at the same time preserving the spirit of
13 Little Bird of the Snow, and this is done not to afford
14 the Roy family any favored treatment on account of its
15 religion, but rather to avoid unequal treatment which the
16 free exercise clause precludes and Congress did not
17 intend.

18 The District Court in fact held that there is
19 no need in this case to either sacrifice the Roes'
20 religion nor sacrifice governmental interests. Because
21 the core of the government's position seems to be its
22 disagreement with the District Court's express findings
23 of fact, I would like to begin by examining those
24 findings and briefly why they are not clearly erroneous,
25 but to the contrary are quite obviously correct.

1 Contrary to Mr. Geller's representations, the
2 District Court did not find that accommodating a little
3 fraud, rather, allowing a little fraud is the type of
4 accommodation required.

5 Rather, it expressly found in both findings of
6 fact 77 and 85 that in fact alternatives to the Social
7 Security Number can in fact satisfy the government's
8 interest in preventing fraud, alternatives as noted in
9 findings 82 and 84 which require no modification to the
10 government's computer system.

11 QUESTION: Well, Mr. Gildin, what do you say to
12 your opponent's comment about the opinion of the Court at
13 Page 19A that he quoted from that last paragraph carrying
14 over to Page 20 where the Court says, "It appears to the
15 Court that the harm that the government might suffer if
16 the plaintiffs prevailed in this case would be at worse
17 that one or perhaps a few individuals could fraudulently
18 obtain welfare benefits."

19 MR. GILDIN: That was made after discrete
20 findings by the District Court that searches can be done
21 of all federal files that are relevant without the Social
22 Security Number, that searches could be done intrastate
23 of all files without the Social Security Number, that
24 notwithstanding the government's representations, the
25 District Court was not persuaded that interstate

1 searches, searches of whether an individual is receiving
2 benefits in two states.

3 QUESTION: But certainly that sentence suggests
4 that the District Court says there may be a little
5 problem but we will just have to live with it.

6 MR. GILDIN: I think, Justice Rehnquist, that
7 follows its findings that it was not persuaded by the
8 government's evidence that such interstate searches would
9 be impossible. The alleged conflict there was that
10 perhaps the formatting of information in the computers
11 between two states would not be common, that one state
12 may use four letters of the last name and the other would
13 use in fact the full last name, and that we may not be
14 able to in fact do the searches because of the same
15 format by the computer.

16 However, the District Court also found at
17 worst, I suggest, it would take a little clerical time to
18 conduct such searches. And indeed, as I stated, the
19 searches can be done without modification as the District
20 Court found can be done without any discrete financial
21 expenditure, as the District Court found. Indeed, these
22 alternatives are currently in place and being utilized.

23 QUESTION: Does the belief of this person or
24 this particular faith have any problem with accepting any
25 benefits out of a system that is tainted by the use of

1 numbers for the other people who are in it?

2 MR. GILDIN: No, it does not, Chief Justice
3 Burger. Mr. Roy does not object to the fact that numbers
4 of other persons are provided. It is his belief that for
5 him to provide a number for his daughter, Little Bird of
6 the Snow, would rob her spirit and perhaps deprive her of
7 her ability to become a holy person, and that is a
8 decision that only she can make.

9 Indeed, he is not suggesting that she must
10 follow that decision. What he needs to do is to preserve
11 a state of affairs where she will be able to make that
12 choice, which is why the fact this injunction extends
13 only to the time when she is age 16 gives him entirely
14 the relief which he seeks.

15 QUESTION: May I ask, Mr. Gildin, on this
16 question, religions sometimes have a way of captivating
17 the interest of large numbers of people very suddenly,
18 and supposing there were to become a large number of
19 people who subscribed to the same view about the harmful
20 effects of numbers, so you had instead of one family, you
21 had maybe 10,000 or 15,000 families with the same
22 objection.

23 Would the case constitutionally be any
24 different?

25 MR. GILDIN: It may, but based upon particular

1 factual differences here, the District Court considered,
2 I think properly, that that is not likely to occur.
3 First of all, past history in the eleven years that this
4 number has been required it is undisputed that there have
5 been only four religious objections to the numbers, and
6 no evidence offered by the government that there were in
7 fact other exemptions.

8 QUESTION: Well, I understand the
9 improbability, but that really wasn't my question.
10 Assuming that it did happen, that the religion suddenly
11 took off, would the analysis really be any different?

12 MR. GILDIN: If in fact the government could
13 show that in fact what would happen as in the Lee case is
14 that we would be besieged by a number of requests for
15 exemptions. Yes, the analysis would differ. But this is
16 something that the District Court considered, because
17 unlike the situation with tax exemptions, there is no
18 economic incentive to suddenly convert one's belief to
19 object to a Social Security Number. You are not afforded
20 favored treatment. The government does not relax its
21 eligibility requirements to allow one to receive
22 benefits. It is the same economic standards required.

23 Nor does the scrutiny become relaxed for
24 failure to provide the number. As the District Court
25 found, we do the very same computer searches without the

1 Social Security Number, and indeed I think it may be
2 reasonably inferred that given the rarity of these
3 exemptions, we are likely to see at least equal if not
4 greater scrutiny, given the unusual nature of such
5 claims.

6 And we think that you may not, as this Court
7 suggested in Sherbert and Thomas, simply deny an
8 individuals' free exercise of religion based upon the
9 government's ability to simply hypothesize a situation
10 which results in a flood of exemptions, because that
11 would result in denying free exercise in virtually every
12 case.

13 What the Court is required to do, and we think
14 sensibly, is to not only take a look at the past, but try
15 to project the future based upon evidence and common
16 sense as to whether there are likely to be a rash of
17 exemptions, and, absent the economic incentives here which
18 distinguishes this case significantly from the lead case,
19 it is not likely that this is about to occur.

20 With respect to the District Court's findings
21 of fact, it is significant that its findings by all
22 purposes served by the Social Security Number may be
23 accomplished by alternate means of identification was not
24 arrived at by accepting the testimony of the witnesses we
25 called and rejecting the testimony of the government

1 witnesses.

2 Rather, those findings were based upon evidence
3 which issued from the government's very own witnesses,
4 which conceded that in fact these searches not only can
5 be but have been done without the Social Security Number.

6 As has been already noted, Little Bird of the
7 Snow received benefits for nine months prior to the time
8 that this lawsuit was commenced without providing a
9 Social Security Number. And the witnesses, as the
10 District Court noted, presented no evidence that any harm
11 had resulted or would result.

12 QUESTION: Wasn't that simply a result of the
13 fact that in a system dealing with millions and millions
14 of people, they don't catch up with all of these details
15 the way it would happen with the local corner grocery
16 store if there were something like that happening?

17 MR. GILDIN: The system as described by the
18 government's own witnesses would be that in fact the
19 computer verification would have been done within that
20 nine-month period of time. Indeed, the government was
21 well aware at the state level that no number had been
22 provided.

23 QUESTION: Do you think they should defer the
24 benefits? If the papers come in without a number, are
25 you suggesting they should defer the benefits until the

1 applicant had complied with all the legal requirements?

2 MR. GILDIN: No, we are not. All I am
3 suggesting, Chief Justice Burger, is that the government
4 never said that in this nine-month period of time they
5 did not and could not do these computer searches. In
6 fact, this wasn't the first time the government was
7 required to provide benefits without a Social Security
8 Number.

9 In 1977, Judge Weinstein from the Eastern
10 District of New York ordered the Department of Health,
11 Education, and Welfare to provide benefits to the
12 Stephens children without requiring a Social Security
13 Number because, as here, there were religious objections
14 lodged by the parents.

15 Each and every one of the government's
16 witnesses was asked what happened after the Stephens
17 case. Was there any need to modify your computers? Was
18 there any problem with conducting the searches. And as
19 the District Court noted, no witness was aware of any
20 harm. It is important that at no time did the government
21 contend that these searches could not be done without a
22 Social Security Number.

23 If one consults the affidavit of Mr. Herrin
24 which was filed in support of the summary judgment motion
25 by the government, Paragraph 9 of that affidavit at Page

1 23 of the joint appendix explains what the problem is if
2 we don't have a number. And that is that without a
3 Social Security Number, were we to search by name only,
4 we would have duplication in the sense that there may be
5 many files which would share a certain name.

6 And what would be required would be to do
7 additional searches, according to Mr. Herrin, using
8 additional identifiers such as date of birth, county of
9 residence, parents' names, and the like, and he did not
10 say that those would be unworkable.

11 Indeed, if we look at the government's own
12 evidence, which indicated that there were 55,000 persons
13 nationwide with the last name of Roy, and simply adding
14 one identifier, the first name Stephen, reduces it to 32
15 persons nationwide without regard to adding middle
16 initial, date of birth, county of residence, parents'
17 names, and the like.

18 The vice of the absence of a Social Security
19 Number, as that affidavit indicated, that searches might
20 take more time, these additional searches, not that they
21 would be unworkable or unreliable, but would take more
22 time.

23 We learned at trial that there is no need for
24 additional searches, because given the sophistication of
25 computers, each and every search includes not only name

1 and Social Security Number, but includes date of birth,
2 county of residence, in some instances parents' names.

3 And indeed, within the searching system, the
4 Social Security Number is not given the greatest weight
5 amongst the various factors searched. That is, the
6 factors of name, date of birth, and county of residence
7 cumulatively have three and a half times the weight of a
8 Social Security Number. Searches can be done without
9 this number reliably. It is not the infallible
10 identifier, which is why it is given less weight.

11 As Congress itself has recognized, many people
12 have more than one Social Security Number. A person
13 attempting to defraud the government could provide only
14 one of those numbers in an application for welfare
15 benefits, and if he was receiving benefits under another
16 number, searching under the number provided alone would
17 not identify that particular attempt to defraud the
18 government.

19 QUESTION: Doesn't that suggest that even at
20 best, with all the modern computer technology, the
21 handling of these matters is quite difficult?

22 MR. GILDIN: The handling of these matters is
23 quite difficult in all circumstances, and we don't
24 contest that fraud is in fact a significant concern as a
25 general proposition, but as the District Court found, the

1 government's interest in preventing fraud can in fact be
2 accomplished without requiring the Social Security Number
3 for these religious objectors.

4 The question was asked as to whether this was a
5 situation where we are just exempting one person, and the
6 trial judge went beyond that. He expressed the concern,
7 as Justice Stevens has just asked about, what about other
8 potential likely religious objectors? He considered that
9 issue, and noted, first of all, that the same
10 alternatives would work for persons who unlike a native
11 American Indian like Little Bird of the Snow had a unique
12 name, using these other identifiers but also work for
13 persons whose names were not unique.

14 He also determined that there are not likely to
15 be a great number of exemptions sought based, as I noted,
16 on past history, which indicated that there had only been
17 four to date.

18 QUESTION: Mr. Gildin, on that point, it is a
19 bit anomalous, though, to suggest that if there were many
20 such claims based on broadly held religious views, that
21 the analysis or the result might somehow differ, but if
22 there were only a few such beliefs, then the result you
23 asked for should be accorded more weight.

24 That is somewhat anomalous, don't you think?
25 And how do you respond to that?

1 MR. GILDIN: What the government contends is
2 anomalous we suggest makes constitutional common sense.
3 First of all, were these widespread religious beliefs?

4 QUESTION: You don't think there is an
5 obligation to accommodate widespread religious beliefs?

6 MR. GILDIN: We think an accommodation ought to
7 be made to the extent possible. We ask for reasonable
8 accommodation. First of all, for widely held religious
9 beliefs, there is access to the political or legislative
10 process, and we suggest that had this been a Roman
11 Catholic objection to the Social Security Number, it may
12 not have been enacted in the first place.

13 When you get down to the fact that individuals
14 with beliefs where they do not have the ability to either
15 inform, much less influence the political process, at
16 some point we agree that even with beliefs that are not
17 mainstream, the numbers may be large enough to present
18 problems for the government.

19 It is not idiosyncratic. It is unfortunate
20 that we cannot accommodate all such believers, but
21 certainly we should not adopt a rule that says, since
22 ultimately we are going to have to draw a line here, that
23 we should therefore disregard protection of all religious
24 beliefs because of our need eventually to deny an
25 exemption based upon the number of believers.

1 As this Court noted in *Zorach*, constitutional
2 rights are a matter of degree, and certainly at some
3 point when accommodation ceases to be reasonable, we have
4 to draw a line and deny the exemption, even if we regret
5 doing so. But that certainly does not follow logically
6 that therefore we should deny exemptions where in fact we
7 are able to accommodate it.

8 So, I don't believe that that is either
9 idiosyncratic or anomalous.

10 So, the Court did in fact consider not only the
11 effect of exempting *Little Bird of the Snow*, but the
12 effect if other likely religious objectors were afforded
13 exemptions and found that there are not likely to be a
14 significant number to present the type of problems that
15 we had in the *Lee* case.

16 The government suggests that the District Court
17 erred by looking only at reality, that because in reality
18 there are not likely to be an adverse effect on the
19 system by exempting *Little Bird of the Snow* and other
20 likely religious objectors, the government posits that
21 through its programmatic interest analysis, that the
22 District Court should have considered the effect of
23 exempting all persons from the requirement, not only
24 religious objectors but persons who have currently
25 provided the Social Security Number and who will continue

1 to do so notwithstanding whether or not religious
2 exemptions are granted.

3 It is in some all or none test. You either
4 must exempt all persons or you must exempt none.

5 QUESTION: May I ask another question, Mr.
6 Gildin, about the ramifications of your prevailing in the
7 case? Supposing you do win and there is this right at
8 stake, and the government gets another application from a
9 person who has previously identified himself as having
10 this religion. Is there any special procedural
11 requirement the government should follow? Do they have
12 to grant it right away or do they have to set up a
13 hearing for -- how do they process these in the future?

14 MR. GILDIN: The parties seeking an exemption
15 must certainly establish that his belief is both
16 religious and sincerely held. No new administrative
17 mechanism need be set up. It is currently in place,
18 indeed was utilized in this case.

19 QUESTION: So that somebody in the department
20 would have the authority to pass on the sincerity of the
21 application?

22 MR. GILDIN: Precisely, and that was done in
23 this case with no special training, interestingly
24 enough. This case began with a hearing before a hearing
25 examiner employed by the Pennsylvania Department of

1 Public Welfare, who again received no special training
2 for this process.

3 We brought Mr. Roy to the hearing. We also
4 presented the testimony of an expert in native American
5 religions, Professor Drinnan. We submitted briefs about
6 the objective legal standards that this Court has set
7 forth to determine whether a belief is religious and
8 sincerely held. The government submitted its belief, its
9 briefs, and the hearing examiner concluded based upon her
10 observation as testimony as well as based upon the legal
11 standards that in fact this belief was both religious and
12 sincere.

13 Should we prevail here, no new administrative
14 mechanism need be set up. No special --

15 QUESTION: At least do we have to assume that
16 there would be a hearing of that magnitude on every
17 application?

18 MR. GILDIN: Certainly the applicant must
19 establish that his belief is both religious and sincere.
20 The decisions of this Court have demanded that, and we
21 think properly so.

22 QUESTION: Professor Gildin, get me on the
23 track. This injunction was not only against the
24 acquisition of a Social Security Number which the
25 government has now, but also against the government's use

1 of it. Am I correct in that?

2 MR. GILDIN: That is correct.

3 QUESTION: What right does Little Bird of the
4 Snow or her parents who do not object to the use of their
5 own Social Security Numbers have to prevent the
6 government from using information it has?

7 MR. GILDIN: I think in order to answer that
8 question, Justice Blackmun, we have to identify how the
9 government came into the possession of this number, and
10 this was no surprise revelation to Mr. Roy or anyone else
11 at the conclusion of this trial.

12 The number was obtained for her without
13 anyone's knowledge in terms of her family. At the time
14 that Karen Miller, her mother, was being wheeled out of
15 the labor room literally as a welfare recipient she was
16 presented with a sheaf of papers which she signed, and
17 with no knowledge that one of those was an application
18 for the Social Security Number.

19 QUESTION: Oh, it was application?

20 MR. GILDIN: Application.

21 QUESTION: What she signed did not include the
22 Social Security Number?

23 MR. GILDIN: No, it did not. In fact, then
24 suddenly a number came in the mail to them, and when Mr.
25 Roy received it, he asked his wife, you know, where did

1 this come from, did you file an application? She said,
2 no, I have no awareness of it. They sent it back. They
3 received assurance from the Social Security
4 Administration that it would remain dormant so long as
5 they had not used it.

6 QUESTION: Well, granting all that, there is a
7 number outstanding, and the government has it. Now, what
8 right do the Roys have to prevent the government from
9 making use of it?

10 MR. GILDIN: The government's proposed use of
11 the number places the very burden on the Roys' religion
12 that this Court has found -- has condemned in both
13 Sherbert --

14 QUESTION: That is on the child's religion, not
15 on the parents', because apparently they are not
16 concerned about the use of their own Social Security
17 Numbers.

18 MR. GILDIN: No, they are concerned now as to
19 the use of the child's, and certainly at age 2 Little
20 Bird of the Snow is not in a position to say, I have
21 articulated my religious beliefs and consequently I don't
22 think you should use it, nor can she do so at age 5.

23 Mr. Roy's religion, consistent with that of
24 native Americans, is that ultimately the children are
25 going to have to make this decision for themselves, and

1 what he has to do is to preserve the state of affairs
2 that is going to enable Little Bird of the Snow to come
3 to her own understanding.

4 Should he permit the government to use this
5 number now, she is deprived forever of that choice.
6 Should she ultimately conclude that, yes, the Social
7 Security Number can rob one's spirit should he permit
8 this number to be used, again, that choice is denied to
9 her.

10 What he has sought and what he has obtained
11 from the District Court is preservation of a state of
12 affairs which allows Little Bird of the Snow to make that
13 decision for herself.

14 QUESTION: So that one's religious belief can
15 dictate what somebody else does with information in his
16 possession.

17 MR. GILDIN: Certainly to that -- to the extent
18 that that information when used would affect the
19 individual's religion, and in this case have the potency
20 to --

21 QUESTION: Well, for example, suppose somebody
22 has the view that the use of cocaine or heroin in a
23 religious exercise is important to them, and the
24 government in its effort to prohibit traffic in cocaine
25 is aware of the use of it by this individual.

1 Now, can a free exercise claim prevail over the
2 government's right to use the information in criminal
3 proceedings?

4 MR. GILDIN: No, we do not claim the right to
5 free exercise of religion to be absolute. The inquiry
6 that this Court has used which we accept is that once the
7 belief is established as religious and sincere, the
8 government may in fact put its interests above those
9 beliefs if those interests are both compelling and there
10 is no less restrictive alternative.

11 And in a situation as you posit, Justice
12 O'Connor, where the government had in the interest of
13 public welfare or public safety made the determination
14 that use of these drugs was in fact something not to be
15 sanctioned, the exception in that case would undermine
16 the government's very judgment, and if that interest was
17 found to be compelling, religion would have to give way.

18 QUESTION: Well, the interest in preventing
19 fraud in welfare programs is likewise compelling, is it
20 not?

21 MR. GILDIN: If it is --

22 QUESTION: You don't dispute that, do you?

23 MR. GILDIN: Not if in fact it was demonstrated
24 that there was the risk of fraud presented that would in
25 fact undermine or make the statutory scheme unworkable.

1 This Court has, however, in some of its
2 opinions, in Sherbert and Thomas, indicated that simply
3 asserting that there is fraud at stake does not in and of
4 itself make it compelling. We have to find out, are
5 those interests in fact endangered.

6 More significantly, however, where in fact the
7 exemption, as here, does not in fact undermine the
8 government's interest in fraud, accommodation is
9 required.

10 QUESTION: Well, if it did undermine it, the
11 court below could not have found that there was a less
12 restrictive alternative.

13 MR. GILDIN: That is certainly correct, and we
14 disagree with the government's attempt to challenge those
15 findings, first, today, by saying that those findings are
16 not there, and in its brief, we submit, by saying those
17 findings are clearly erroneous when quite obviously --

18 QUESTION: Mr. Gildin, I tried once. I still
19 don't understand how the parents can accept all of the
20 benefits from Social Security, including the use of their
21 Social Security Numbers, but the religion says you don't
22 allow that to happen to your daughter.

23 MR. GILDIN: The religion says, Justice
24 Marshall, that they would not allow it to happen to
25 themselves. Unfortunately for Mr. Roy, his spirit has

1 been robbed by virtue of the use before he came to an
2 understanding of these religious beliefs.

3 QUESTION: And does he continue to use it?

4 MR. GILDIN: He does, because under his
5 religion once extensive use has been made, that part of
6 your spirit has been robbed, and there is no way to
7 retrieve it.

8 QUESTION: Well, the daughter's had been used
9 for nine months.

10 MR. GILDIN: The daughter's --

11 QUESTION: Why doesn't that put the daughter in
12 the same place as him?

13 MR. GILDIN: The evidence is that the
14 daughter's number has never been used, that the
15 government in that nine-month period of time did not use
16 her number. It was in their files, and lie dormant. He
17 did not provide that number. It was not utilized. There
18 was never a witness who took the stand and said, the way
19 we did it for those nine months was to use the number.
20 The evidence --

21 QUESTION: If you leave that number there
22 "dormant," you have no case.

23 MR. GILDIN: I am sorry.

24 QUESTION: If the government leaves that number
25 there "dormant," you have no case.

1 MR. GILDIN: If they are willing to provide the
2 benefits while leaving that number dormant, we would not
3 be here today because there would be no burden --

4 QUESTION: But jst to leave it there doesn't
5 affect you at all, does it?

6 MR. GILDIN: If that number would remain
7 dormant, that would not undermine his religious beliefs.
8 Indeed, his objection is not to the existence, but to the
9 extensive use of that number, and that is what that
10 injunction protects under those circumstances.

11 QUESTION: Let me go back to the question
12 Justice Blackmun put to you. Suppose instead of the
13 government putting a number, something is ordered by
14 these people for their little daughter from Sears
15 Roebuck, and Sears Roebuck automatically through the
16 computer puts a number on every account. Let's assume
17 that.

18 Can they get an injunction against Sears
19 Roebuck to tell Sears Roebuck they must identify this
20 girl by a number?

21 MR. GILDIN: Under the free exercise clause of
22 the Constitution, they cannot. That would be a private
23 use of that number, and there is no constitutional right
24 against the private use of that particular number.

25 QUESTION: It isn't very private when you get

1 it in the mail with a number on it any more than the
2 Social Security benefits with a number on it.

3 MR. GILDIN: I agree --

4 QUESTION: What is the public use that you
5 object to?

6 MR. GILDIN: It is the extensive use by the
7 government. Indeed, if there is no Social Security
8 Number that is distributed to the private sector as there
9 will not be under this Court's injunction, Sears Roebuck
10 will not be identifying Little Bird of the Snow with a
11 Social Security Number.

12 Should Sears Roebuck decide to use some number
13 to identify her that is not going to be common to other
14 governmental uses, Mr. Roy has no religious objection to
15 that.

16 QUESTION: Then suppose they take this dormant
17 Social Security Number and use that. Do you think you
18 can get an injunction against Sears Roebuck?

19 MR. GILDIN: The injunction we have obtained
20 would preclude Sears Roebuck from getting that Social
21 Security Number. The District Court enjoined the
22 Secretary of Health and Human Services from disseminating
23 that number to any public or private entity, so Sears
24 Roebuck cannot contact the Social Security Administration
25 and say, can you tell us what a Social Security Number

1 for Little Bird of the Snow is? That is not available.

2 QUESTION: Well, Mr. Gildin, if you put
3 together the express findings with the opinion, the
4 discussion, do you really think the District Court held
5 that there was an equally effective, less restrictive
6 element in there?

7 MR. GILDIN: What we lose by not --

8 QUESTION: Yes or no?

9 MR. GILDIN: No. Only with respect to
10 efficiency. Yes in terms of reliability. Without the
11 Social Security --

12 QUESTION: I don't know. His only answer with
13 respect to the interstate aspect was that, well, the
14 chances of their making a mistake is remote. He just
15 didn't think there was much of a chance.

16 MR. GILDIN: I disagree respectfully, Justice
17 White. What I believe would happen is that they would
18 have to manually attempt to do the verification. Because
19 the computer wouldn't be able to match them up because of
20 different formatting, we would have to spend clerical
21 time to find out last names and these other identifiers,
22 and that is the difference with the Social Security
23 Number. In such instances, it simply takes more time, an
24 interest which this Court has held and we suggest is not
25 the type of compelling interest. It is the computer that

1 enhances the reliability. Having the number gives an
2 incremental increase in efficiency.

3 QUESTION: May I ask another hypothetical
4 question? Assume Little Bird grows up to be 18 years of
5 age and decides she wants to enter the military service,
6 and everyone in the military service has to have a
7 number. Would her religion then compel her to make the
8 same arguments you are making here today? Is it use of
9 any number, or just a number that results in her
10 receiving money free from the government rather than
11 money that may come as pay for military service?

12 MR. GILDIN: If she would have the objection,
13 and I can't speak to that, this case would not preclude
14 the government automatically from requiring the number.
15 We would have to engage --

16 QUESTION: Why not?

17 MR. GILDIN: Because we would have to engage in
18 the analysis in this different program that was used
19 here. Is the government's interest there compelling, and
20 are there less restrictive alternatives under the facts
21 of that circumstance.

22 QUESTION: But you are saying that her position
23 is that the use of any number that may result in benefit
24 directly or indirectly to her is forbidden by her
25 religion?

1 MR. GILDIN: No, I believe the objection is the
2 use of the Social Security Number as the unique
3 identifier --

4 QUESTION: But not a military identification
5 number?

6 MR. GILDIN: I can't speak to that, because the
7 objection -- they have not been presented with that
8 situation. The objection is to a Social Security Number
9 presently because it is unique to her and extensively
10 used. It is not an objection to all numbers. It is not
11 objection to all identification, and should that military
12 situation arise where the government's interests may be
13 different, and in fact the alternatives perhaps
14 unavailable, then certainly the government is entitled to
15 put on that case.

16 I see my time is up. Thank you.

17 CHIEF JUSTICE BURGER: Do you have anything
18 further, Mr. Geller?

19 MR. GELLER: Not unless the Court has any
20 questions, Mr. Justice.

21 CHIEF JUSTICE BURGER: Thank you, gentlemen.
22 The case is submitted.

23 (Whereupon, at 11:02 a.m., the case in the
24 above-entitled matter was submitted.)

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:

#84-780 - OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Appellants V. STEPHEN J. ROY, ET AL.

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

'86 JAN 21 P3:22