THE UNPUBLISHED FREE EXERCISE OPINION IN *JENSEN V. QUARING*

Paul E. McGreal*

During the Summer of 2008, over the course of five days, I conducted research in the Harry A. Blackmun Papers at the Library of Congress.[1] My work focused on Justice Blackmun's Supreme Court files for cases covering federalism, equal protection, and the First Amendment Religion Clauses. This Essay, which is my first writing based on the research, discusses an unpublished Opinion of the Court drafted by Chief Justice Warren Burger in the case *Jensen v. Quaring*.[2] The Blackmun Papers reveal that *Jensen* could have been a turning point in the Court's Free Exercise Clause jurisprudence. Instead, it resides in constitutional law obscurity.

In the official United States Reports, *Jensen* is a summary disposition.[3] Because Justice Lewis Powell had recused himself, only eight justices heard the case, and they split four to four. The Court's convention in such cases is to summarily affirm the decision below,[4] and the disposition does not carry precedential weight.[5] The Blackmun Papers show that the vote after oral argument was five to three to reverse the court of appeals. After Chief Justice Burger circulated a draft Opinion of the Court,[6] Justice Blackmun switched his vote, making the tally four to four.

Jensen arose under the Free Exercise Clause of the First Amendment. The first part of this Essay describes the Court's Free Exercise Clause doctrine

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* Professor of Law, Southern Illinois University School of Law. I owe a great debt of gratitude to Dean Peter Alexander, and the SIU School of Law, for providing financial support for my research at the Manuscript Division of the Library of Congress in Washington, D.C.

1. *See* The Library of Congress, Research Centers, Manuscript Reading Room, Papers of Harry A. Blackmun at the Library of Congress, http://www.loc.gov/rr/mss/blackmun/ (last visited Nov. 20, 2008).
2. 472 U.S. 478 (1985).
3. *Id*.
4. *Id*. ("PER CURIAM. The judgment is affirmed by an equally divided court.").
5. *See* Hertz v. Woodman, 218 U.S. 205, 213–14 (1910) ("Under the precedents of this court, and, as seems justified by reason as well as by authority, an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged; but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts.").
6. First Draft, Opinion of the Court in *Jensen v. Quaring*, May 24, 1985, in Papers of Harry A. Blackmun, Library of Congress, Madison Building, Box 423, Folder 5 [hereinafter "Blackmun Papers"]. Appendix A reproduces Chief Justice Burger's First Draft of the Opinion of the Court.

at the time *Jensen* was argued. The second part discusses what the Blackmun Papers reveal about the Court's internal deliberations over *Jensen*. The essay then ends with a post-script about the Court's post-*Jensen* treatment of the Free Exercise Clause.

PROLOGUE: THE FREE EXERCISE CLAUSE BEFORE *JENSEN V. QUARING*

The Free Exercise Clause protects both religious belief and action. First and foremost, government may not coerce citizens to maintain specific religious beliefs–this protection is absolute.[7] Second, the Free Exercise Clause provides some protection for religiously-motivated actions that conflict with secular law.[8] The main issue is determining when the Free Exercise Clause exempts religious believers from the law. The Supreme Court's answer to this question has changed over time.

Prior to *Jensen*, the Court had held that the Free Exercise Clause required strict judicial scrutiny of laws that substantially burden the free exercise of religious beliefs.[9] Strict scrutiny is the most demanding constitutional standard of review, requiring the government to show that the challenged law is narrowly tailored to achieve a compelling government interest.[10] And to be narrowly tailored, a law must burden no more religious exercise than is necessary to achieve the government's compelling purpose.[11]

Sherbert v. Verner[12] is the canonical case for the Court's earlier Free Exercise review. There, a Seventh Day Adventist was fired by her employer because she refused to work Saturdays, which was her Sabbath. When she applied for unemployment benefits, the state determined that she was unemployed "without good cause" and denied her claim. The Court concluded that the state had substantially burdened the Seventh Day Adventist's religious exercise by forcing her to choose between religious observance and eligibility for unemployment benefits.[13] The state failed strict scrutiny because the denial

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7. *See* Employment Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) ("[T]he First Amendment obviously excludes all 'governmental regulation of religious *beliefs* as such.'"); Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983) ("This Court has long held the Free Exercise Clause of the First Amendment an absolute prohibition against governmental regulation of religious beliefs . . . .").
8. *Smith*, 494 U.S. at 877–78.
9. *See* Sherbert v. Verner, 374 U.S. 398, 406–07 (1963).
10. *Id.*
11. Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981).
12. 374 U.S. 398 (1963).
13. *Id.* at 403–04.

of benefits was not necessary to prevent the "filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work."[14]

One of the Court's last Free Exercise decisions before *Jensen*, *Thomas v. Review Board of Indiana Employment Security Division*,[15] applied the *Sherbert* analysis to another claim for unemployment benefits. *Thomas* involved a Jehovah's Witness who worked for a foundry. When the foundry transferred the Jehovah's Witness to a department that made gun turrets, he ended his employment on account of his religious beliefs. The state unemployment board denied employment benefits because it concluded that the Jehovah's Witness had "voluntarily left his employment without good cause." In short, the board concluded that religious opposition to participating in weapon making was not "good cause" for leaving employment.[16] As in *Sherbert*, the Court held that the denial of benefits substantially burdened religious exercise, thus triggering strict scrutiny:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[17]

The Court then held that the state had not proven a compelling reason for denying the Jehovah's Witness his unemployment benefits.[18] The decision was eight to one, with only then-Justice William Rehnquist dissenting.

THE FREE EXERCISE CLAUSE IN *JENSEN V. QUARING*

Under Nebraska law, all state driver's licenses must bear a picture of the driver. Frances Quaring objected that this requirement burdened her religious beliefs, which the Eighth Circuit described as follows:

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14. *Id.* at 406–09.
15. 450 U.S. 707 (1981). The Court also decided *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), during the intervening period. Bob Jones University had lost its federal tax exemption on account of Due its racially discriminatory admissions policy, which it claimed was religiously required. The Court upheld the denial of tax exemption, reasoning that the tax policy was necessary to promote the government's compelling interest in promoting racial equality.
16. On appeal, the state supreme court held that, "'Good cause' which justifies voluntary termination must be job-related and objective in character." Thomas v. Review Bd. of Ind. Employment Sec. Div., 391 N.E.2d 1127, 1129 (Ind. 1979).
17. *Thomas*, 450 U.S. at 717.
18. *Id*. at 719.

> Quaring's refusal to have her photograph taken is based on religious convictions. She believes in a literal interpretation of the Second Commandment, which states,
>
> > Thou shalt not make unto thee any graven image or likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth.
>
> Exodus 20:4; Deuteronomy 5:8. Quaring believes that the Commandment is violated by creating a likeness of God's creation.
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> Quaring's belief extends beyond her refusal to allow her photograph to appear on her driver's license. She believes the Second Commandment forbids her from possessing any image having a likeness of anything in creation. She possesses no photographs of her wedding or family, does not own a television set, and refuses to allow decorations in her home that depict flowers, animals, or other creations in nature. When she purchases foodstuffs displaying pictures on their labels, she either removes the label or obliterates the picture with a black marking pen.
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> Although Quaring is not a member of an organized church, she considers herself a Christian and attends a Pentecostal church in a nearby town with her family. She also participates in nondenominational Bible study groups. According to Quaring, Pentecostals do not share her belief that the Second Commandment forbids the making of photographs or images. Rather, her belief stems principally from her own study of the Bible.[19]

Quaring claimed that the Nebraska driver's license photo requirement violated her First Amendment right to free exercise of religion.[20] By forcing her to choose between a driver's license and religious exercise, she argued that state law had "condition[ed] receipt of an important benefit upon conduct proscribed by a religious faith."[21] Citing *Thomas*, the Eighth Circuit held that denial of a driver's license substantially burdened Quaring's free exercise of religion, and that Nebraska's photograph requirement was not necessary to

19. Quaring v. Peterson, 728 F.2d 1121, 1123 (8th Cir. 1984).
20. *Id*.
21. *Thomas*, 450 U.S. at 717.

achieve the state's compelling interests in public safety and preventing financial fraud.[22]

The Supreme Court granted certiorari on October 1, 1984,[23] and heard oral argument on January 7, 1985. In his notes from the Court's conference after oral argument, Justice Blackmun records the vote as five to three to reverse–Chief Justice Burger and Justices Byron White, John Paul Stevens, Blackmun, and Rehnquist voted to reverse, and Justices William Brennan, Thurgood Marshall, and Sandra Day O'Connor voted to affirm.[24] As the senior most justice in the majority, Chief Justice Burger assigned himself to draft the Court's opinion.

Justice Blackmun's notes from the Court's post-argument conference reveal the justices' thinking on the case. Justice Blackmun makes the following notation under Chief Justice Burger:

> I am not ready for greater exceptions
> We have gone a long way
> ___ has nothing to do with this[25]

Chief Justice Burger saw *Jensen* as too great an extension of, and qualitatively different from, both *Sherbert* and *Thomas*.

Chief Justice Burger's first draft of the Court's opinion, circulated on May 24, 1985, elaborated on his view that prior Free Exercise Clause decisions did not require a religious exemption in this case.[26] In the following passage, Chief Justice Burger distinguishes the prior cases:

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22. *Quaring*, 728 F.2d at 1126–27. The Court noted that Nebraska law permitted photo-less licenses in limited circumstances, indicating that the state's interests were not necessarily threatened by such a license. *Id*. at 1126 ("At trial, the associate director of the Department of Motor Vehicles testified that photographs of the licensee are not required on learner's permits, school permits issued to farmers' children, farm machinery permits, special permits for those with restricted or minimal driving ability, or temporary licenses for individuals outside the state whose old licenses have expired."); *Id*. at 1127 ("Because the state already allows numerous exemptions to the photograph requirement, the Nebraska officials' argument that denying Quaring an exemption serves a compelling state interest is without substantial merit.").
23. Jensen v. Quaring, 469 U.S. 815 (1984).
24. Notes of Justice Harry A. Blackmun from Oral Argument in *Jensen v. Quaring*, January 7, 1985, Blackmun Papers, Box 423, Folder 5. Justice Blackmun's oral argument notes are reproduced in Appendix B.
25. *Id*. The third line begins with a notation that I am unable to translate. The notation looks like the letter "L," which may be a reference to the "license" requirement at issue.
26. First Draft, Opinion of the Court in *Jensen v. Quaring*, May 24, 1985, Blackmun Papers, Box 423, Folder 5. Justice Blackmun's files also contain a second draft from Chief Justice Burger with the same date. Second Draft, Opinion of the Court in *Jensen v. Quaring*, May 24, 1985, Blackmun Papers, Box 423, Folder 5. The second draft is listed as having only "Stylistic Changes," and so it is not discussed above.

> The statutory requirement at issue in this case is religiously neutral and uniformly applicable. There is no claim that it is an attempt at invidious discrimination or covert suppression of particular religious beliefs or religion generally. It does not create any danger of censorship or place a direct condition or burden on the dissemination of religious views. It does not require affirmation or disavowal of any religious beliefs. It may confront some license applicants with choices, but it does not affirmatively compel respondent, by threat of criminal sanction, to refrain from religiously motivated conduct or engage in conduct that she finds objectionable for religious reasons. Rather, respondent seeks a license from the government and asserts that, because of her religious beliefs, she should be excused from compliance with a condition binding on all others who seek the same type of license.
>
> This is far removed from the historical instances of religious persecution and intolerance that were the concern of those who drafted the Free Exercise Clause. Although a government burden on religious liberty is not insulated from review simply because it is indirect or incidental, *Thomas v. Review Board*, 450 U.S. 707, 717–718 (1981); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Braunfeld, supra*, at 607, the nature of the burden on respondent's exercise of religion is relevant to the standard the government must meet to justify this burden. We are not unmindful of the importance of many government licenses and benefits today or of the value of sincerely held religious beliefs. However, we cannot ignore the reality that denial of such a license or benefit is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of criminal sanction, of conduct that has religious significance. *See Bob Jones University v. United States*, --- U.S. ---, --- (1983); *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972); *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 631–32 (1943); *Hamilton v. regents of the University of California, supra*; see also *School District v. Schempp*, 374 U.S. 203, 252–253 (1963) (Brennan, J., concurring); *McGowan v. Maryland*, 366 U.S. 420, 521 (1961) (opinion of Frankfurter, J.); cf. *Murdock v. Pennsylvania, supra*, at 112. Legislation that makes a person's religious practices unlawful is different in kind from government action that indirectly and incidentally causes some inconvenience or economic burden to a person because his religious beliefs come into conflict with the government action. See *Braunfeld, supra*, 366 U.S., at 605–6–6 (plurality opinion). These two very different forms of government action are not to be judged by the same constitutional standard.

Strict scrutiny, then, should be reserved for laws that directly target religiously-motivated conduct for disadvantageous treatment. In a later

passage, Chief Justice Burger explained why the unemployment law in *Thomas* was such a law, and Nebraska's photograph requirement was not:

> We reject respondent's contention that *Sherbert* and *Thomas* compel affirmance here. The statutory conditions at issue in those cases provided that a person was not eligible for unemployment compensation benefits if, "without good cause," he had quit work or refused available work. The "good cause" standard created a mechanism for individualized exemptions. If a state has created such a mechanism or if it has previously permitted individual exemptions, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus, as was argued in *Thomas*, to consider a religiously motivated resignation to be "without good cause" exhibits hostility, not neutrality, toward religion. See Brief of the American Jewish Congress as *Amicus Curiae*, at 11. See also *Sherbert*, supra, at 401–402, n. 4. In those cases, therefore, it was appropriate to require the State to demonstrate a compelling reason for denying the requested exemption.
>
> Here there is nothing suggesting antagonism toward religion generally or particular religious beliefs. The photograph requirement is facially neutral and applies to all applicants for general driver's licenses. There is no provision for or history of individual exemptions. The requirement clearly promotes the legitimate public interest in highway safety by providing an accurate and instantaneous means by which motorists may be identified as lawfully licensed drivers. Hence the state was not constitutionally compelled to exempt respondent from the requirement.[27]

Read together, these two passages would establish a narrow approach to the Free Exercise Clause. The first passage limits strict scrutiny to laws that target behavior because of its religious motivation. The second passage explains that laws that provide for individualized exemptions create a danger of such targeting: By deciding that a religious adherent does not merit an exemption, the government expresses "hostility" towards religion. Given that prior cases made none of these distinctions, the Chief Justice's draft opinion would have recast Free Exercise law.

In the week after Chief Justice Burger circulated his draft opinion, the other justices weighed in. First, Justice O'Connor wrote a memo setting forth her intent to circulate a dissent,[28] which she sent shortly thereafter.[29] That

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27. *Id*. at 8–9.

28. Letter from O'Connor to Burger (May 24, 1985), *in* Blackmun Papers, Box 423, Folder 5. As the senior justice in the dissent, Justice William Brennan asked Justice O'Connor to write the principal dissent. Letter from Brennan to O'Connor (January 22, 1985), *in* Papers of Thurgood Marshall,

same day, Justice Powell wrote to again note his recusal from the case.[30] Next, Justices Brennan and Marshall joined Justice O'Connor's dissent, and Justices Stevens,[31] White,[32] and Rehnquist[33] wrote to join the Chief Justice's draft opinion. None of these correspondence commented on or suggested changes to the competing drafts. So, by May 29, 1985, all members of the Court save Justice Blackmun had voted on the circulating drafts, with the tally four to three to reverse. If Justice Blackmun adhered to his vote at conference, Chief Justice Burger would have his majority.

Then, on Friday, May 31, 1985, Justice Blackmun circulated a letter announcing that he had changed his vote:

> I have encountered difficulty with this case. You will recall that my initial vote to reverse was tentative. After reading the respective opinions, and after further reflection, I have come down now to affirm. It seems to me that, as Byron said at conference, our prior precedents clearly point in that direction. And the record, as Sandra points out, presents a very weak case for Nebraska. The facts another time might be stronger.
>
> I realize, and am distressed, that this results in a 4–4 vote. Perhaps at the next conference we should discuss whether the case should be reargued or should be announced as an affirmance by an equally divided Court.[34]

With this announcement, the Court went from a conference vote of five to three to reverse, to a vote of four to four, which meant affirmance without an opinion. The Free Exercise Clause approach inaugurated in *Sherbert* and applied in *Thomas* would live to see another day.

EPILOGUE: THE FREE EXERCISE CLAUSE AFTER *JENSEN V. QUARING*

Just one year after *Jensen*, in *Bowen v. Roy*,[35] Chief Justice Burger again tried to change the Court's Free Exercise Clause doctrine. There, Native American parents challenged a federal law that required a social security

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Library of Congress, Madison Building, Box 368, Folder 5.

29. O'Connor dissent, First Draft (May 24, 1985) *in* Blackmun Papers, Box 423, Folder 5.
30. Letter from Powell to Burger (May 24, 1985) *in* Blackmun Papers, Box 423, Folder 5.
31. Letter from Stevens to Burger (May 28, 1985) *in* Blackmun Papers, Box 423, Folder 5.
32. Letter from White to Burger (May 29, 1985) *in* Blackmun Papers, Box 423, Folder 5.
33. Letter from Rehnquist to Burger (May 29, 1985) *in* Blackmun Papers, Box 423, Folder 5.
34. Letter from Blackmun to Burger (May 31, 1985) *in* Blackmun Papers, Box 423, Folder 5. This letter is reproduced in Appendix C.
35. 476 U.S. 693 (1986).

number for participation in certain federal welfare programs. Chief Justice Burger re-deployed, in edited form, the two passages from *Jensen* quoted above.[36] This time, however, he garnered only two other votes–Justices Rehnquist and Powell. Recall that Justice Powell had recused himself in *Jensen*, where the Court had split four to four over the Chief Justice's proposed approach. *Bowen* suggests that if Justice Powell had not recused himself, he could have added a fifth vote to adopt Chief Justice Burger's approach in *Jensen*. Instead, Chief Justice Burger wrote only for a plurality of three in *Bowen*. He would leave the Court the following September, with Justice Rehnquist elevated to Chief Justice, and Antonin Scalia seated as Associate Justice.

In 1990, Chief Justice Burger received a measure of vindication in *Employment Division v. Smith*.[37] Justice Scalia, whose appointment was made possible by Chief Justice Burger's retirement, wrote an Opinion of the Court that reconceived the Court's Free Exercise Clause doctrine. Citing Chief Justice Burger's plurality opinion in *Bowen*, Justice Scalia distinguished *Sherbert* and *Thomas* based on the individualized consideration involved in each case:

> Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. As a plurality of the Court noted in *Roy*, a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment: "The statutory conditions [in *Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions." *Bowen v. Roy*, *supra*, 476 U.S., at 708, 106 S.Ct., at 2156 (opinion of Burger, C. J., joined by Powell and Rehnquist, JJ.). See also *Sherbert*, *supra*, 374 U.S., at 401, n. 4, 83 S.Ct., at 1792, n. 4 (reading state unemployment compensation law as allowing benefits for unemployment caused by at least some "personal reasons"). As the plurality pointed out in *Roy*, our decisions in the

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36. *Id.* at 703–04. While *Jensen* was pending, the Court was also considering the petition for writ of certiorari in *Bowen v. Roy*. When it became clear that the Court was deadlocked four to four, Chief Justice Burger circulated a memo suggesting that the Court hold "hold *Quaring* or possibly reargue it in tandem with *Roy*." Memo from Burger to the Conference, June 7, 1985, Blackmun Papers, Box 423, Folder 5.

37. 494 U.S. 872 (1990).

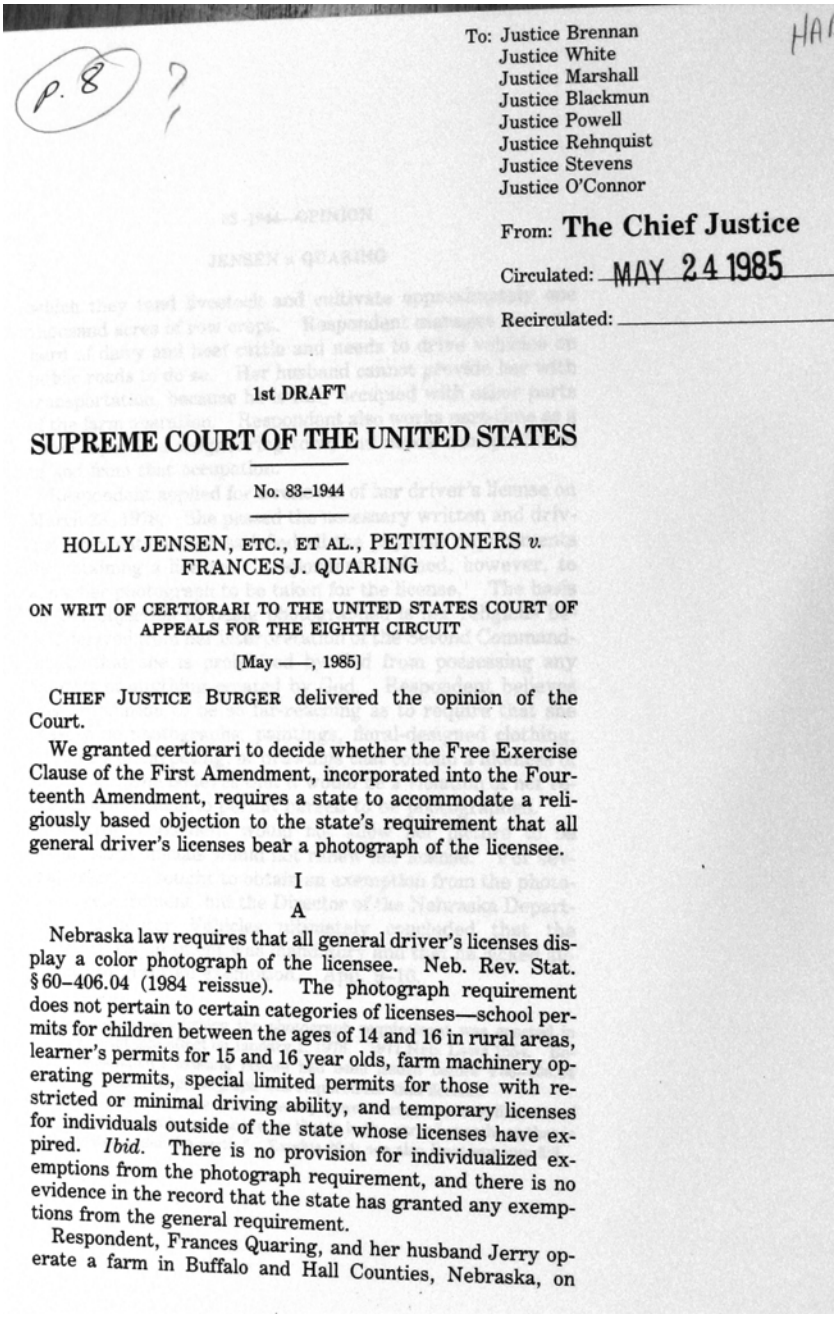
> unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason. *Bowen v. Roy*, *supra*, 476 U.S., at 708, 106 S.Ct., at 2156-57.[38]

Just five years after *Jensen*, then, the Court turned to Chief Justice Burger's approach to the Free Exercise Clause.[39]

38. *Id*. at 884.

39. A work-in-progress explores the doctrinal differences between the Court's opinion in *Smith* and Chief Justice Burger's draft opinion in *Jensen*. *See* Paul E. McGreal, The Road to Smith: Chief Justice Burger's Free Exercise Clause Revisionism (unpublished manuscript, on file with author).

Appendix A



p. 8 ?

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: MAY 24 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–1944

HOLLY JENSEN, ETC., ET AL., PETITIONERS *v.*
FRANCES J. QUARING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[May —, 1985]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Free Exercise Clause of the First Amendment, incorporated into the Fourteenth Amendment, requires a state to accommodate a religiously based objection to the state's requirement that all general driver's licenses bear a photograph of the licensee.

I

A

Nebraska law requires that all general driver's licenses display a color photograph of the licensee. Neb. Rev. Stat. §60–406.04 (1984 reissue). The photograph requirement does not pertain to certain categories of licenses—school permits for children between the ages of 14 and 16 in rural areas, learner's permits for 15 and 16 year olds, farm machinery operating permits, special limited permits for those with restricted or minimal driving ability, and temporary licenses for individuals outside of the state whose licenses have expired. *Ibid.* There is no provision for individualized exemptions from the photograph requirement, and there is no evidence in the record that the state has granted any exemptions from the general requirement.

Respondent, Frances Quaring, and her husband Jerry operate a farm in Buffalo and Hall Counties, Nebraska, on

which they tend livestock and cultivate approximately one thousand acres of row crops. Respondent manages her own herd of dairy and beef cattle and needs to drive vehicles on public roads to do so. Her husband cannot provide her with transportation, because he is fully occupied with other parts of the farm operation. Respondent also works part-time as a bookkeeper in a neighboring town and needs transportation to and from that occupation.

Respondent applied for a renewal of her driver's license on March 23, 1978. She passed the necessary written and driving examinations and satisfied all the physical requirements for obtaining a license. Respondent declined, however, to allow her photograph to be taken for the license.[1] The basis for her objection to being photographed is her religious belief, derived from her interpretation of the Second Commandment,[2] that she is prohibited by God from possessing any likeness of anything created by God. Respondent believes this prohibition to be so far-reaching as to require that she possess no photographs, paintings, floral-designed clothing, draperies or carpeting, or drawings that contain a likeness of anything. She believes that it would be a violation of her religious convictions to permit herself to be photographed.

Because respondent would not allow her picture to be taken, state officials would not renew her license. For several years she sought to obtain an exemption from the photograph requirement, but the Director of the Nebraska Department of Motor Vehicles ultimately concluded that the statutory requirement was mandatory and that he lacked authority to grant an exemption. App. 9–10.

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[1] The statute establishing the photograph requirement was enacted in 1977 and went into effect on January 1, 1978. 1977 Neb. Laws 1654. Because respondent's existing license had been issued before § 60–406.04 went into effect, no photograph was required for that license.

[2] "Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth." Exodus 20:4; see also Deuteronomy 5:8.

B

Respondent brought this action under 42 U. S. C. § 1983, alleging that the state's failure to grant her a license because of her refusal to comply with the photograph requirement violated her constitutional right to the free exercise of religion. The District Court, after conducting a bench trial, entered an injunction prohibiting petitioners from denying respondent a driver's license because of her refusal to be photographed.

A divided panel of the Court of Appeals for the Eighth Circuit affirmed. 728 F. 2d 1121 (1984). The court held that the state had placed a burden on the exercise of respondent's religious beliefs by conditioning receipt of an important benefit upon conduct forbidden by her beliefs. It held that the state could justify this restriction on respondent's religious liberty only by demonstrating that it was the least restrictive means of accomplishing a compelling state interest. The court acknowledged that the photograph requirement serves the "important" state interest of enabling accurate and immediate identification of motorists as properly licensed drivers. It concluded, however, that because the state provides certain types of licenses without photographs, there was no compelling reason for denying selective exemptions based on religious objections to the photograph requirement. The court also rejected petitioners' argument that the state's interests in ensuring the security of financial transactions and promoting administrative efficiency were compelling government interests that would be jeopardized by granting religiously based exemptions from the photograph requirement.

We granted certiorari, —— U. S. —— (1984). We reverse.

II

Our complex, modern society confers on people many benefits unknown in earlier times, and in turn it imposes numerous burdens and restrictions. One can hardly fail to recognize the importance of a driver's license in our society, but with the benefits conferred by a license come a multitude of

conditions. States require frequent inspections, prescribe speed limits, weight loads, and parking restrictions, and through traffic regulations, establish a host of other restraints on absolute liberty. It is within memory when a car could be driven on public highways with few if any restrictions, either as to the requirement of a license, the age or fitness of the driver, or the condition of the vehicle. With the vast increase in traffic, considerations of public safety led to licensing systems with testing for driving ability, fixed minimum age limits, upper age conditions, mandatory eye and hearing examinations, and various other conditions. No doubt some of these limits and restraints are irksome, and some plainly interfere with individual liberty, but all are designed to protect personal and public safety and welfare.

Here the claim is made that Nebraska's photograph requirement requires respondent to choose between having a driver's license and remaining true to her religious beliefs; this claim confronts the state's interest in highway safety and its obligation to all the people to regulate the use of vehicles. Although the right to the free exercise of religious beliefs holds a high place in our scheme of ordered liberty, the Court has steadfastly maintained that a claim of religious conviction does not automatically entitle a person to dictate to the government the conditions and terms of his dealings with it. In *Cox* v. *New Hampshire*, a case presenting a situation analogous to that here, Chief Justice Hughes wrote for the Court:

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the

> most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One could not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command . . . ."

312 U. S. 569, 574 (1941). We reaffirmed this point recently in *United States* v. *Lee*:

> "To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.'"

455 U. S. 252, 259 (1982). See also *Reynolds* v. *United States*, 98 U. S. 145, 167 (1878); *Hamilton* v. *Regents of the University of California*, 293 U. S. 245, 262 (1934); *Cantwell* v. *Connecticut*, 310 U. S. 296, 305 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 112 (1943); *Follett* v. *McCormick*, 321 U. S. 573, 577–578 (1944); *Braunfeld* v. *Brown*, 366 U. S. 599, 603 (1961) (plurality opinion).

The statutory requirement at issue in this case is religiously neutral and uniformly applicable. There is no claim that it is an attempt at invidious discrimination or covert suppression of particular religious beliefs or religion generally. It does not create any danger of censorship[3] or place a direct condition or burden on the dissemination of religious views.[4]

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[3] Cf. *Cantwell* v. *Connecticut*, *supra*.

[4] Cf. *Follett* v. *Town of McCormick*, *supra*; *Murdock* v. *Pennsylvania*, *supra*.

It does not require affirmation[5] or disavowal[6] of any religious beliefs. It may confront some license applicants with choices, but it does not affirmatively compel respondent, by threat of criminal sanction, to refrain from religiously motivated conduct[7] or to engage in conduct that she finds objectionable for religious reasons.[8] Rather, respondent seeks a license from the government and asserts that, because of her religious beliefs, she should be excused from compliance with a condition binding on all others who seek the same type of license.[9]

This is far removed from the historical instances of religious persecution and intolerance that were the concern of those who drafted the Free Exercise Clause. Although a government burden on religious liberty is not insulated from review simply because it is indirect or incidental, *Thomas* v. *Review Board*, 450 U. S. 707, 717–718 (1981); *Sherbert* v. *Verner*, 374 U. S. 398, 403 (1963); *Braunfeld*, *supra*, at 607, the nature of the burden on respondent's exercise of religion is relevant to the standard the government must meet to justify this burden. We are not unmindful of the importance of many government licenses and benefits today or of the value of sincerely held religious beliefs. However, we cannot ignore the reality that denial of such a license or benefit is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of criminal sanction, of con-

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[5] Cf. *Torcaso* v. *Watkins*, 367 U. S. 488 (1961).

[6] Cf. *McDaniel* v. *Paty*, 435 U. S. 618 (1978).

[7] Cf. *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); *Cox* v. *New Hampshire*, *supra*; *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Reynolds* v. *United States*, *supra*.

[8] Cf. *United States* v. *Lee*, *supra*; *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); *Gillette* v. *United States*, 401 U. S. 437 (1971); *West Virginia Bd. of Educ.* v. *Barnette*, 319 U. S. 624 (1943); *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905).

[9] Cf. *Bob Jones Univ.* v. *United States*, —— U. S. —— (1983); *Thomas* v. *Review Board*, 450 U. S. 707 (1981); *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *Hamilton* v. *Regents of the Univ. of Cal.*, *supra*.

duct that has religious significance. See *Bob Jones University* v. *United States*, —— U. S. ——, —— (1983); *Wisconsin* v. *Yoder*, 406 U. S. 205, 218 (1972); *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 631–632 (1943); *Hamilton* v. *Regents of the University of California*, *supra*; see also *School District* v. *Schempp*, 374 U. S. 203, 252–253 (1963) (BRENNAN, J., concurring); *McGowan* v. *Maryland*, 366 U. S. 420, 521 (1961) (opinion of Frankfurter, J.); cf. *Murdock* v. *Pennsylvania*, *supra*, at 112. Legislation that makes a person's religious practices unlawful is different in kind from government action that indirectly and incidentally causes some inconvenience or economic burden to a person because his religious beliefs come into conflict with the government action. See *Braunfeld*, *supra*, 366 U. S., at 605–606 (plurality opinion). These two very different forms of government action are not to be judged by the same constitutional standard.

The general government interests involved here buttress this conclusion. Governments today grant a broad range of benefits and issue numerous permits and licenses; inescapably they impose many conditions and restrictions in connection with the benefits and licenses. A policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries into the genuineness of each objection to such conditions or restrictions is entitled to deference. Governments also may have legitimate and substantial reasons for avoiding even the appearance of favoring religious applicants over nonreligious applicants.

Balancing the government interests with the nature of the burden to respondent, we conclude that the strict test applied in cases like *Yoder* is not appropriate in this setting. In the enforcement of a facially neutral and uniformly applicable requirement for a government license or benefit, the state is entitled to more latitude than it is accorded in enforcing a statute that criminalizes conduct which, for some, is required

by religious conviction. In the absence of facts suggesting an intent to discriminate against particular religious beliefs or against religion in general, the ⟨ should not be put to the strict test applied by the Court of Appeals, which required the ⟨ to justify enforcement of the requirement as the least restrictive means of accomplishing a compelling state interest. Absent an inference of discrimination, the government meets its burden when it demonstrates that a challenged requirement, facially neutral and uniformly applicable, is a reasonable means of promoting a legitimate public interest.

We reject respondent's contention that *Sherbert* and *Thomas* compel affirmance here. The statutory conditions at issue in those cases provided that a person was not eligible for unemployment compensation benefits if, "without good cause," he had quit work or refused available work. The "good cause" standard created a mechanism for individualized exemptions. If a state has created such a mechanism or if it has previously permitted individual exemptions, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus, as was argued in *Thomas*, to consider a religiously motivated resignation to be "without good cause" exhibits hostility, not neutrality, toward religion. See Brief of the American Jewish Congress as *Amicus Curiae*, at 11. See also *Sherbert*, *supra*, at 401–402, n. 4. In those cases, therefore, it was appropriate to require the state to demonstrate a compelling reason for denying the requested exemption.

Here there is nothing suggesting antagonism toward religion generally or particular religious beliefs. The photograph requirement is facially neutral and applies to all applicants for general driver's licenses. There is no provision for or history of individual exemptions. The requirement clearly promotes the legitimate public interest in highway safety by providing an accurate and instantaneous means by which motorists may be identified as lawfully licensed driv-

ers. Hence the state was not constitutionally compelled to exempt respondent from the requirement.

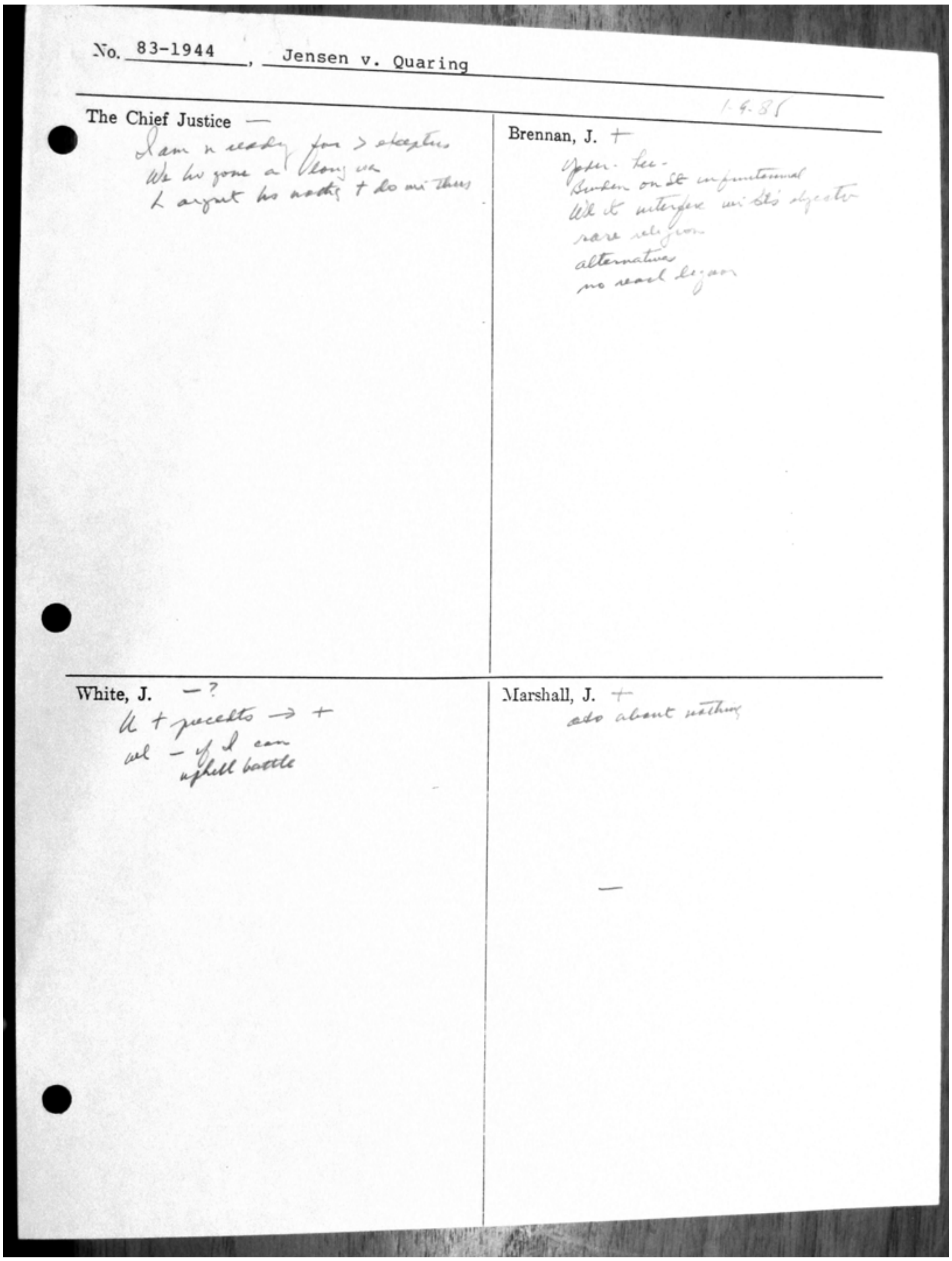
III

As the Court has recognized before, given the diversity of beliefs in our pluralistic society and the necessity of providing governments with sufficient operating latitude, some incidental restraints on the free exercise of religion are inescapable. As a matter of legislative policy, a state might decide to make religious accommodations to a general and neutral system of licensing, "[b]ut our concern is not with the wisdom of legislation but with its constitutional limitation." *Braunfeld* v. *Brown*, 366 U. S. 599, 608 (1961) (plurality opinion). We hold that the state's refusal to grant respondent an exemption from its photograph requirement does not violate the Free Exercise Clause.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed.

Appendix B


No. 83-1944, Jensen v. Quaring

1-9-85

The Chief Justice —

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alternatives

White, J. —?

uphill battle

Marshall, J. +

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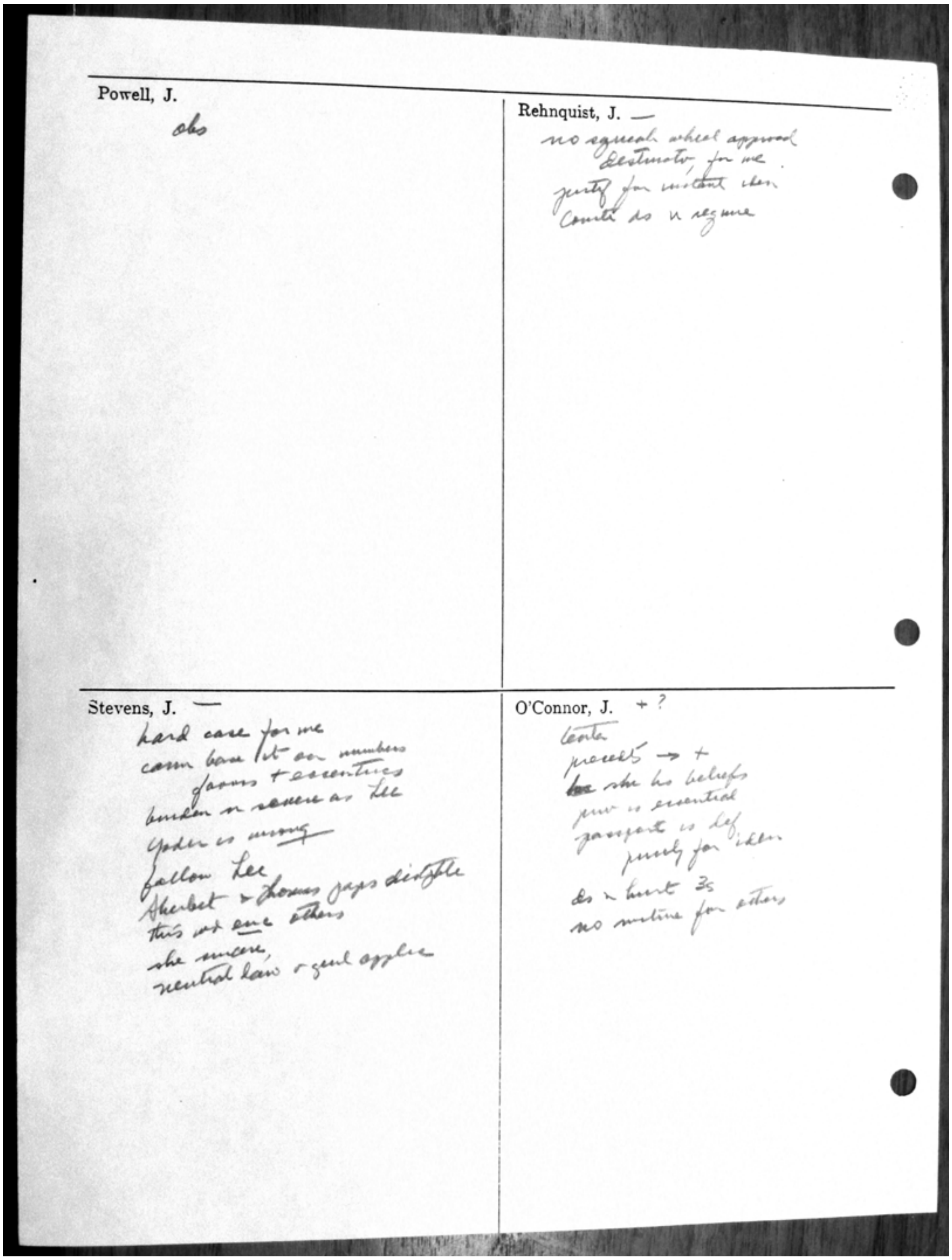

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O'Connor, J. + ?

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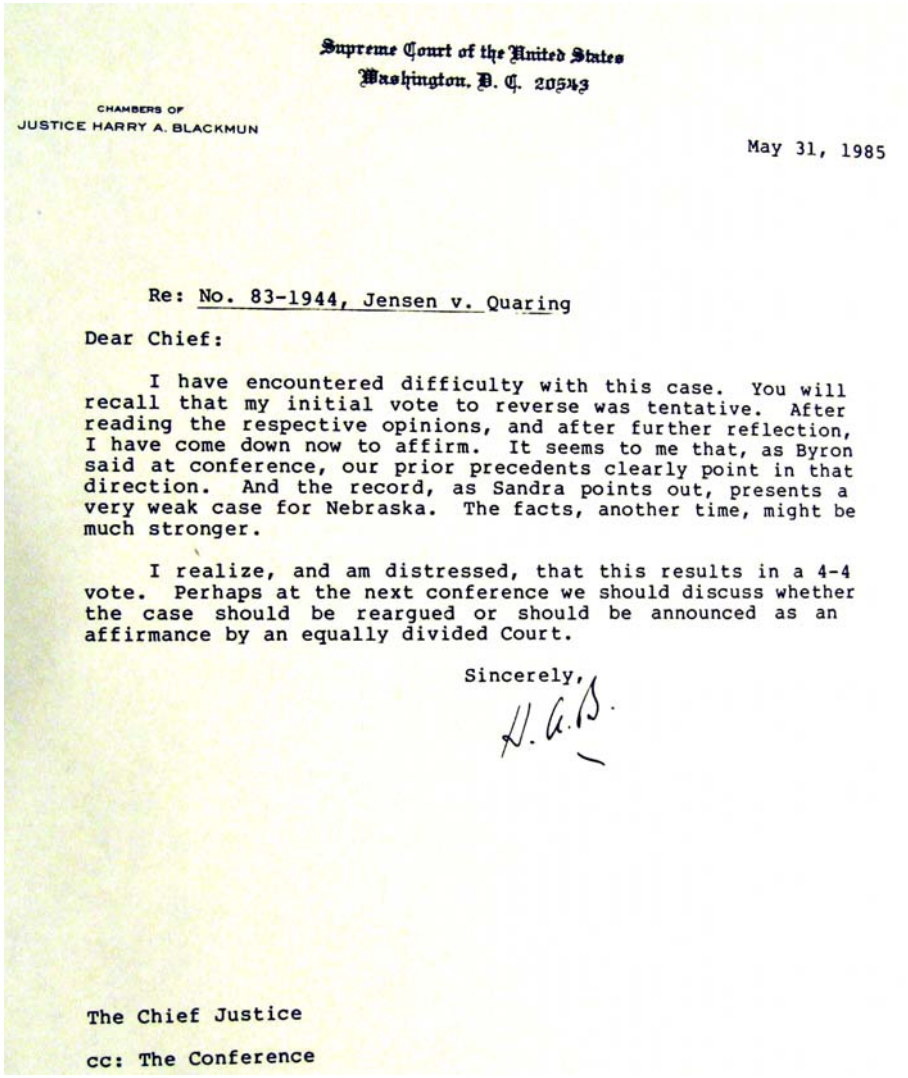
Appendix C



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1985

Re: No. 83-1944, Jensen v. Quaring

Dear Chief:

I have encountered difficulty with this case. You will recall that my initial vote to reverse was tentative. After reading the respective opinions, and after further reflection, I have come down now to affirm. It seems to me that, as Byron said at conference, our prior precedents clearly point in that direction. And the record, as Sandra points out, presents a very weak case for Nebraska. The facts, another time, might be much stronger.

I realize, and am distressed, that this results in a 4-4 vote. Perhaps at the next conference we should discuss whether the case should be reargued or should be announced as an affirmance by an equally divided Court.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference