IN THE COURT OF APPEALS OF THE STATE OF OREGON

| | |
|---|---|
| JAMES MONTGOMERY, ELLEN MONTGOMERY, ANDY MONTGOMERY, GREG NAKASHIMA, ESTHER NAKASHIMA, GREG NAKASHIMA, and ANTHONY NAKASHIMA,<br><br>Petitioners,<br><br>v.<br><br>BOARD OF EDUCATION and OREGON SCHOOL ACTIVITIES ASSOCIATION,<br><br>Respondents. | CA No. A117678<br><br>Agency No. 581-021-0034-4-00 |

# PETITIONERS' OPENING BRIEF AND EXCERPTS OF RECORD

Petition to Review a Final Order of the Board of Education
Dated February 25, 2002


Charles F. Hinkle,
Jeremy D. Sacks,
William R. Long,
ACLU Foundation of Oregon, Inc.
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204

Attorneys for Petitioners

Michael D. Reynolds,
Solicitor General
1162 Court St., NE
Salem, OR 97301

Attorney for Respondent Board of Education

Jonathan M. Radmacher,
McEwen, Gisvold, Rankin, Carter & Streinz
1600 Standard Plaza
1100 SW Sixth Avenue
Portland, OR 97204

Attorneys for Respondent Oregon School Activities Association


July 2002

# TABLE OF CONTENTS

**TABLE OF CONTENTS**
(continued)

Page

TABLE OF CONTENTS - EXCERPT OF RECORD

## TABLE OF AUTHORITIES

Page

**Cases**

**TABLE OF AUTHORITIES**
(continued)

Page

**TABLE OF AUTHORITIES**
(continued)

Page



**Rules and Statutes**



**Constitutional Provisions**



**Other Authorities**

## I. STATEMENT OF THE CASE

### A. Nature of the Action and Relief Sought.

Petitioners brought this case under ORS 339.430(3), to challenge the denial by the Oregon School Activities Association ("OSAA") of their request for accommodation of their religious beliefs in the scheduling of the State 2A High School Boys Basketball tournament. (To avoid confusion between the OSAA Executive Board and the State Board of Education, the latter will be referred to in this brief as "the Agency." References to "the Agency" will also include the Department of Education and the Superintendent of Public Instruction.)

Petitioners contend that the OSAA discriminates against students at Portland Adventist Academy ("PAA") and their parents, because of their religion, by refusing to make an accommodation that would permit the students to participate in all phases of the tournament without violating their belief in the sanctity of their Sabbath (which runs from sundown Friday to sundown Saturday).

While this case was pending before the Agency, the OSAA announced that in the future, it will accommodate the religious beliefs of petitioners (and other members of the PAA boys basketball team) by adjusting the tournament schedule on Friday. However, the OSAA continues to refuse to make any adjustment to the tournament schedule on Saturday.

The case began in March 2000 when petitioners (described more specifically below) submitted letters (Ex. 21)[1] to the OSAA, setting out their claim of religious discrimination

---

[1] The Agency transmitted the record in this case to this Court on May 13, 2002. (R -38.) The record consists of three parts: (a) a volume of 38 documents compiled by the Agency, which are referred to in this Brief as R-1, R-2, etc.; (b) Claimants' Exhibits 1 through 44, Respondent OSAA's Exhibits 101 through 121, and Hearings Officer's Exhibits A through K, which are referred to in this Brief as Ex. 1, Ex. 2, etc.; (c) and five transcripts. Three of the transcripts were of pre-hearing teleconferences. The fourth transcript is of the hearing on February 14, 2001, and will be referred to in this Brief as "2001 Tr." The fifth

(continued…)

and proposing certain scheduling alternatives for the tournament. They asked the OSAA to adopt one of their suggested alternatives, or any other alternative, "that will maximize the ability of PAA students to participate in the state tournament if they otherwise qualify." (Ex. 21 at 2.)

The OSAA Executive Board rejected petitioners' request in an "Order and Opinion Denying Complaint" dated June 3, 2000. (ER-1.) Petitioners filed an "Appeal and Request for Hearing" dated June 30, 2000, with the Agency. (ER-12 to ER-15.) As subsequently modified, petitioners' request for relief was for: (1) a finding that OSAA's refusal to accommodate their religion in scheduling games in the 2A basketball tournament constituted unlawful discrimination on the basis of religion; (2) an order requiring OSAA "to cease its discrimination" by adjusting the tournament schedule to accommodate petitioners' religious beliefs, and (3) an order requiring OSAA to require its member schools and leagues "to make the accommodations necessary" to permit the PAA team to participate in the tournament and the league playoffs leading to it. (ER-15, as modified by ER-16 and ER-17 to ER-18.)

A Hearings Officer for the Agency held a hearing on February 14, 2001, and issued "Proposed Findings of Fact, Conclusions of Law, and Order" on September 21, 2001. (R-21.) The Hearings Officer concluded that the OSAA "violated ORS 659.150(2) and Article I, sections 2 and 3 of the Oregon Constitution when it refused to accommodate claimants' religious beliefs ***," and proposed that the Agency issue an order to that effect. (R-21 at 132.) On December 5, 2001, the Agency ordered the Hearings Officer to reopen the record (R-25), and a second hearing was held on January 3, 2002. The Hearings Officer

---

(…continued)
transcript is of the reopened hearing on January 3, 2002, and will be referred to in this Brief as "2002 Tr."

issued "Proposed Supplemental Findings of Fact and Analysis" on January 16, 2002, but did not change his recommendation with respect to the proposed final order. (R-33.)

The Agency issued its final order on February 25, 2002, in a document entitled "Findings of Fact, Conclusions of Law and Order." (ER-19 to ER-41.) The Agency rejected the Hearing Officer's conclusion, and instead ruled that "[t]he OSAA has not violated any laws or rules in the scheduling of the [tournament]." (ER-41.)

**B. Nature of the Order.**

The Agency's final order dismissed petitioners' complaint in its entirety.

**C. Basis for Appellate Jurisdiction.**

This Court has jurisdiction under ORS 183.482.

**D. Date of Order and Petition for Review.**

The Agency's order is dated February 25, 2002. Petitioners filed their Petition for Judicial Review on March 22, 2002.

**E. Questions Presented on Appeal.**

1. Does the refusal by OSAA to accommodate the religious beliefs of Seventh-day Adventist students at PAA in the scheduling of certain games during the 2A Boys Basketball tournament violate ORS 659.850[2] and OAR 581-021-0045?

2. Does that refusal violate Article I, sections 2, 3, and 20 of the Oregon Constitution?

3. Does that refusal violate the Free Exercise Clause of the First Amendment to the United States Constitution?

---

[2] This statute is referred to by its former number, ORS 659.150, throughout the Agency record. It was renumbered to its present number in 2001.

**F. Summary of Argument.**

Oregon law prohibits both intended and unintended discrimination on the basis of religion in the conduct of interschool activities. The law prohibits discrimination that is fair in form but discriminatory in effect. ORS 659.850; OAR 581-021-0045(1)(a) and (3). By scheduling the 2A boys basketball tournament in such a way as to require the student petitioners to play on the Saturday Sabbath, the OSAA has discriminated on the basis of religion, in violation of the statute and rule.

Under the religious liberty guaranties of the Oregon Constitution, if the OSAA's practices infringe a student's religious beliefs, the OSAA must prove that its actions are the least restrictive means of furthering a compelling state interest. The religion clauses as well as the privileges and immunities clause of the Oregon Constitution prohibit the OSAA from treating one religion differently from another when it establishes the tournament schedule, and they prohibit the OSAA from treating religious factors differently from secular factors when it makes tournament scheduling decisions. Or Const Art I, §§ 2, 3 and 20.

State action that is both neutral with respect to religion and generally applicable to all affected persons nevertheless violates the Free Exercise Clause of the First Amendment if (a) it involves a system of individualized exceptions; (b) it appears neutral and generally applicable but is in fact gerrymandered in a way that discriminates against religion; or (c) it involves both the First Amendment and some other constitutionally protected right. State action that falls in those three categories is subject to strict scrutiny. The OSAA's actions in scheduling the 2A boys basketball tournament violate the Free Exercise Clause.

**G. Statement of Facts.**

**1. The Parties.** The original claimants in the appeal to the Agency were PAA students Jimmy Montgomery, Andy Montgomery, Greg Nakashima, Steve Sperley, and Josh

Madsen, together with the parents of Jimmy, Andy, Greg, and Steve. (R-1 at 231.) Jimmy Montgomery withdrew from the case before the hearing. (R-7 at 180; R-37 at 8.)

In a letter dated December 5, 2001, the Agency directed the Hearings Officer to reopen the record to obtain certain additional evidence and to obtain the answers to the following questions:

> "Lastly, what is the status of the complainants? Are the students still in school and participating in basketball? If some student complainants no longer attend or participate in basketball, do the parent complainants have other children at school participating in basketball this year?" (R-25 at 90.)

In response to that letter, petitioners submitted a letter to the Hearings Officer dated December 11, 2001, together with a motion for an order allowing Greg Nakashima's younger brother, Anthony, to join the proceeding as a claimant. The motion was supported by Anthony's affidavit. (R-28 at 82-85.) The affidavit established that in December 2001, Anthony was a freshman at PAA, that Greg Nakashima and Andy Montgomery were both juniors, and that all three of them continued to play basketball for PAA. (R-28 at 84.) The cover letter informed the Hearings Officer that Steve Sperley and Josh Madsen had graduated from PAA and were no longer members of its basketball team. (R-28 at 81.) The Hearings Officer granted the motion to add Anthony as a claimant on December 14, 2001. (R-29 at 80.) The petitioners presently before this Court, therefore, are Andy Montgomery, Greg Nakashima, and Anthony Nakashima (sometimes hereafter collectively referred to as "Students"), and their parents, James and Ellen Montgomery and Greg and Esther Nakashima.

OSAA is a voluntary organization that has been approved by the Board of Education to administer interscholastic activities pursuant to ORS 339.430. PAA, a Seventh-day Adventist high school, is a member of the OSAA. Based on its size, PAA is classified as a

2A school. It is not a party to this proceeding, but it supports petitioners in their request for accommodation of their religious beliefs concerning the Sabbath. (Ex. 19.)

**2. Petitioners' Beliefs.**

Petitioners are members of the Seventh-day Adventist Church. The Church has adopted a statement of 27 "fundamental beliefs," including the following belief concerning the Sabbath:

> "The beneficent Creator, after the six days of Creation, rested on the seventh day and instituted the Sabbath for all people as a memorial of Creation. The fourth commandment of God's unchangeable law requires the observance of this seventh-day Sabbath as the day of rest, worship, and ministry in harmony with the teaching and practice of Jesus, the Lord of the Sabbath. The Sabbath is a day of delightful communion with God and one another. It is a symbol of our redemption in Christ, a sign of our sanctification, a token of our allegiance, and a foretaste of our eternal future in God's kingdom. The Sabbath is God's perpetual sign of His eternal covenant between Him and His people. Joyful observance of this holy time from evening to evening, sunset to sunset, is a celebration of God's creative and redemptive acts." (Ex. 33 at 1.)

The Church's "Guidelines for Sabbath Observance" state that "[t]he Sabbath starts at the end of the sixth day of the week and lasts one day, from evening to evening (Gen 1; Mark 1:32). This time coincides with the time of sunset." (Ex. 33 at 2.)

Several of the petitioners testified about the importance, in their own lives, of the observance of the Saturday Sabbath. Esther Nakashima, for example, testified that the Bible "says to remember the Sabbath and keep it holy," and that for her, this meant "spending time with Jesus, with family, with other believers, like what Jesus did." (Ex. 34 at 9, 11.) She cited "competitive sports" as an example of an activity that would "distract" from Sabbath observance, because "sports brings out the human nature in me to compete, revenge, not to have Christ-like attitude inside my heart." (*Id*. at 21.)

The testimony of the student petitioners was in a similar vein. When OSAA counsel asked Andy Montgomery what it means to him to observe the Sabbath, he stated that "It means to be with your family and go to church and have time, spend time with God." (Ex. 38 at 5.) On the Sabbath, he said, "I don't play organized sports. I don't watch TV. I don't go to any organized sports if it doesn't involve my family. And I don't go to parties or anyplace where there's lots of activities, carnivals, that sort of thing."

Anthony Nakashima stated as follows in his affidavit:

> "To me, keeping the Sabbath holy means keeping a focus throughout that day on God, on family, on worship, and on charitable activities. It means avoiding activities that divert attention from that focus. In particular, it means that I do not, because of my faith, participate in competitive sports during the Sabbath." (R-28 at 85.)

**3. Events leading up to this appeal.** The Agency's final order described some of the background events. "In 1996, PAA asked the OSAA to agree, in advance, to accommodate PAA's religious beliefs by adjusting the Friday and Saturday schedules of the Class 2A Oregon State High School Boys' Basketball Tournament ('the tournament') in the event PAA ended up in a game scheduled during the Saturday Sabbath. The OSAA agreed that if such a conflict arose, they would adjust the schedule on Friday, because it would mean simply switching the time slots of two games, so that the game scheduled for 8:45 p.m. would be switched with the game scheduled for 3:00 p.m. The OSAA determined that it would not be reasonable to accommodate PAA for a Saturday game. They told PAA it would have to forfeit a Saturday game if it conflicted with the Saturday Sabbath." (ER-24 and ER-25, ¶ 7.)

"After the 1996 tournament, the OSAA received numerous complaints about its decision to authorize a potential forfeit." (ER-25, ¶ 8.) One principal wrote that "[t]he possibility of a forfeit at a State Championship Tournament (the Saturday morning or

afternoon games) is a horrifying thought for the non-accommodated team ***." (Ex. 4 at 9.) The Chief Administrator of another school wrote that OSAA policy should be "measured by what is right for the majority of kids." (*Id*. at 14.) The superintendent of another district wrote that "[i]f the majority rule against them then they can choose to comply or drop their membership." (*Id*. at 18.) Another administrator wrote that "if Portland Adventist has a problem with playing when the majority of schools choose to play then *** they should not participate in the State Tournament." (*Id*. at 20.) The coach at another school wrote that "[w]hile most of the coaches in [the Trico] league do not have a problem with changing a game time," they all opposed allowing a tournament game to be forfeited. (*Id*. at 10.)

The Agency's final order recounted what happened next: "In 1997, PAA again asked the OSAA to agree in advance to accommodate its religious beliefs in the event PAA were to end up in a *** tournament game scheduled for the Saturday Sabbath. Although the OSAA was willing to make an accommodation if it only entailed switching the times of two [Friday] games as it was willing to do in 1996, the OSAA was unwilling to make an accommodation [for the Saturday afternoon game]. Moreover, based on widespread opposition from its delegate assembly to allow forfeits, *** the OSAA Executive Board determined that it would not again agree to authorize PAA to forfeit a game that could not be rescheduled by simply switching two game times." (ER-25, ¶ 10.)

In the spring of 2000, petitioners asked the OSAA to accommodate their religious beliefs by adjusting the tournament schedule, if necessary, so that the PAA team would not be required to play on the Saturday Sabbath. Petitioners suggested several scheduling alternatives that would accomplish that result without a forfeiture. (Ex. 21.) The OSAA gave only one reason for denying that request, set out in its Conclusion of Law No. 1: "The Students' Requested Accommodation Would Require the OSAA to Violate the

Establishment Clause [of the First Amendment to the U.S. Constitution]." (ER-3.) Petitioners appealed that denial to the Agency. (ER-12 to ER-15.) On February 1, 2001, petitioners submitted to the OSAA additional scheduling options that would also accommodate the Students' religious beliefs without a forfeiture. (Ex. 22.)

On October 26, 2001, OSAA Executive Director Tom Welter sent a letter to the PAA principal stating that

> "in the future, *** [t]he OSAA will require no commitment from Portland Adventist that PAA will participate in games which are scheduled to occur from Friday at sundown until Saturday at sundown.
>
> "Furthermore, if PAA is selected to participate in the state basketball tournament, the OSAA will change the time of the Friday afternoon and Friday evening semifinal games, if necessary, so that PAA can play in that game without playing on the Saturday Sabbath. Despite this change, the OSAA recognizes that there may still be a situation where PAA might forfeit a consolation game." (Ex. 44.)

In January 2002, Welter testified that "this letter is consistent with current policy. If current policy changes, then it might not be consistent with future policy, if indeed it changes." (2002 Tr. 60.) Welter was then asked, "So if there are no other changes made to your policies this letter will be effective for 2003 and 2004 as well?" He responded: "I would assume so, yes." (*Id*.)

## II. FIRST ASSIGNMENT OF ERROR

The Agency erred in concluding that the OSAA's refusal to accommodate petitioners' religious beliefs in the scheduling of the 2A Boys Basketball Tournament did not violate ORS 659.850 and OAR 581-021-0045. The Agency's analysis of the issue is set out at pages 12-19 of the Agency's final order (ER-30 to ER-37), and its legal conclusion is set out at page 23 (ER-41): "The OSAA has not violated any laws or rules in the scheduling of the 2000 Class 2A Oregon State High School Boy's Basketball Tournament."

**Preservation of Error.** Petitioners asserted in their appeal letter to the Agency that the OSAA's action violated ORS 659.850 and OAR 581-021-0045. (ER-13 and ER-14.) They briefed the issue in their Hearing Memorandum. (R-6 at 186-194.)

## III. SECOND ASSIGNMENT OF ERROR

The Agency erred in finding that "The OSAA's reason for not scheduling games on Sundays do not include accommodation of anyone's religious beliefs." (Finding No. 14, ER-27.)

**Preservation of Error.** This finding of fact was set out in paragraph 14 of the Hearings Officer's "Proposed Findings of Fact" dated September 21, 2001. (R-21 at 115.) Petitioners objected to it in their "Exceptions" dated October 15, 2001. (R-22.) Petitioners stated: "This statement is incorrect, and Claimants request that it be deleted from the Proposed Order. The record contains correspondence sent to the OSAA stating directly and implying indirectly that Sunday play violates the Sabbath as observed by the majority of Christian sects. (See, e.g., Claimants' Ex. 12 [*sic*; should have been Ex. 4], pp. 12, 14, 18.)" (R-22 at 104.)

**Standard of Review.** "Orders in contested cases are subject to review by the Court of Appeals, ORS 183.482, and that court reviews for legal error, abuse of agency discretion, and lack of substantial evidence in the record. ORS 183.482(8)." *Norden v. State ex rel. Water Resources Dept*., 329 Or 641, 643, 996 P2d 958 (2000). In reviewing an agency's findings of fact in a contested case, "we examine the record as a whole to determine whether substantial evidence supports them." *Church at 295 S. 18th Street v. Employment Dept*., 175 Or App 114, 122, 28 P3d 1185, *rev den* 333 Or 73, 36 P3d 974 (2001).

## ARGUMENT

### A. ORS 659.850 Prohibits Unreasonably Differential Treatment of Persons that Has a Discriminatory Effect, Regardless of Intent.

By statute and by rule, Oregon prohibits discrimination on the basis of religion in the conduct of interscholastic activities. ORS 659.850(2) provides, in pertinent part:

> "No person in Oregon shall be subjected to discrimination in any public *** secondary *** education program or service, school or *interschool activity* *** where the program, service, school or activity is financed in whole or in part by moneys appropriated by the Legislative Assembly." (Emphasis added).

The same language appears in OAR 581-021-0045(2) (except that the rule, for some reason, refers to "monies" instead of the statutory word "moneys"). The word "discrimination" is defined identically in the statute and the rule to mean:

> "[1] any act that unreasonably differentiates treatment, intended or unintended, *or* [2] any act that is fair in form but discriminatory in operation, *either of which* is based on age, disability, national origin, race, marital status, religion or sex." ORS 659.850(1); OAR 581-021-0045(1)(a) (bracketed numbers and emphasis added).[3]

This statute defines two separate kinds of "acts" that can constitute unlawful discrimination: (1) "any act that unreasonably differentiates treatment" and (2) "any act that is fair in form but discriminatory in operation." Under the terms of the statute, the first type of discriminatory act is unlawful only if it is "unreasonabl[e]," but the second type is not so qualified: an act "that is fair in form but discriminatory in operation" constitutes forbidden discrimination whether or not it is "reasonable." Nevertheless, this Court seems to have concluded that *both* types of discriminatory "act," as defined in the statute, embody "a reasonableness standard." *Aiken v. Lieuallen*, 39 Or App 779, 785 n 4, 593 P2d 1243

[3] Since the statute and the rule are virtually identical, petitioners will discuss only the statute in the balance of this brief. The same arguments apply with respect to the rule.

(1979). See also *id*. at 788 n 7 ("the Oregon standard, as enunciated in [ORS 659.850], is one of reasonableness").

The determination of what is "reasonable" under the Oregon statute must be measured by reference to the U.S. Supreme Court opinions from which the Oregon standard was derived. ORS 659.850 was enacted in 1975 (Or Laws 1975, ch 204, § 1), and both definitions of "discrimination" contained in the statute were based on then-recent U.S. Supreme Court interpretations of the federal Civil Rights Act of 1964. In *Griggs v. Duke Power Co*., 401 US 424, 91 S Ct 849, 28 LEd2d 158 (1971), the Court held that a violation of Title VII of the Act, relating to employment discrimination, did not require proof of intent, and that an employer violated the Act when it used an objective employment test that had a disparate impact "directly traceable to race." *Id*. at 430. The Court ruled that:

> "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity." *Id*. at 431.

Three years later, the Court construed Title VI of the Civil Rights Act of 1964 in a similar fashion. The pertinent statute, section 601 of the Act, read as follows:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 USC § 2000d.

In *Lau v. Nichols*, 414 US 563, 94 S Ct 786, 39 LEd2d 1 (1974), the Court held that a school district violated that statute in its treatment of non-English speaking students. The Court held that the school district did not provide "equality of treatment" even though it "provid[ed] students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." *Id*. at 566. As in *Griggs*, the Court held that it was not necessary to prove an

intent to discriminate; under Title VI, the Court said, "[d]iscrimination is barred which has that *effect* even though no purposeful design is present ***." *Id*. at 568 (emphasis in original). Thus, "the Court in *Lau* interpreted § 601 itself to proscribe disparate-impact discrimination ***." *Alexander v. Sandoval*, 532 US 275, 285, 121 S Ct 1511, 149 LEd2d 517 (2001).

It is obvious that the Oregon legislature was directly influenced by the federal Act and by the interpretations given to it in *Griggs* and *Lau* when it adopted ORS 659.850 in 1975. Thus:

- The prohibition on "discrimination" in ORS 659.850(2) (set out on page 11, *supra*) exactly parallels the sentence structure of § 601 of the federal Act (set out on page 12).

- The second of the two definitions of "discrimination" in ORS 659.850(1) was copied verbatim from *Griggs*: an act that is "fair in form, but discriminatory in operation." *Griggs*, 401 US at 431.

- The first of those two definitions, "any act that unreasonably differentiates treatment, intended or *unintended*," ORS 659.850(1) (emphasis added), was plainly influenced by the *Lau* holding that unlawful discrimination in educational programs exists where there is a discriminatory "*effect* even though no purposeful design is present." 414 US at 568 (emphasis in original).

When the OSAA's acts in scheduling its 2A basketball tournament are measured against the definitions of "discrimination" in ORS 659.850, understood in light of the sources of those definitions in *Griggs* and *Lau*, it is clear that those acts violated the statute.

### B. In its Scheduling of the 2A Boys Basketball Tournament, the OSAA Treats Saturday Sabbath Believers Differently from Sunday Sabbath Believers.

The OSAA treats Students and their PAA teammates differently from the way it treats other students and schools in at least three ways.

**1. Schedules.** First, the OSAA, previously by rule and currently by practice, does not schedule any tournament games on Sunday, the day of worship for most Christians. On the other hand, the OSAA schedules tournament games on Friday evening and Saturday afternoon, during the time observed as the Sabbath by members of both the Seventh-day Adventist and Jewish faiths. Thus, the OSAA is willing to accommodate religion, but not every religion.

This accommodation of majoritarian religion is not inadvertent. Prior to December 1996, the OSAA Handbook made the policy explicit:

> "10-17 Q. May interscholastic events be held on Sundays?
>
> "A. No." (Ex. 10.)

OSAA records dating back almost a half-century show that the OSAA rigorously enforced that policy. In 1954 or 1959 (the date on the document produced by the OSAA is not clear), when the chairman of the State Golf Committee suggested changing the date of the State Golf Tournament to a Sunday, "[t]he Board expressed considerable opposition to having any activity on a Sunday." The Board approved a motion not to make the suggested change, and the Tournament was played as originally scheduled (on Friday and Saturday in 1954, and on Monday and Tuesday in 1959). (Ex. 1 at 1, 2.)

At a meeting in November 1973, the OSAA Board of Control "reaffirmed" that "A student may not represent his (her) high school in competition on Sunday." (Ex. 1 at 7.) At the same meeting, when the Wilson High swimming coach "asked for clarification in

regards to the rules for Sunday competition[,] [i]t was stated by the Board of Control that there shall be no competitive swimming on Sunday." (*Id*. at 8.) The minutes stated that the rule prohibiting Sunday competition was set out in the OSAA Handbook. (*Id*.)

The OSAA continued to take its prohibition on Sunday events so seriously that as late as 1995, the OSAA Executive Board fined South Albany and Corvallis High Schools $75 each and placed them on probation for the remainder of the softball season for playing a contest on Sunday. (Ex. 1 at 13.)

The OSAA repealed the formal statement of its policy against Sunday activities in 1996. There was no accident about the timing of this action; it came only after PAA raised the issue of accommodation of its students' religious beliefs in connection with the 1996 basketball tournament. As described in a memorandum dated January 12, 1996, to the OSAA Board from Tom Welter, who at the time was OSAA's Assistant Executive Director, PAA "requested that possible adjustments be made in the times of some games at the State 2A Boys' Basketball Tournament to be held on March 6-9 [1996]." (Ex. 2 at 1.) Welter's memo continued:

> "Because of their religious beliefs, [PAA players] observe the Sabbath from sundown on Friday until sundown on Saturday. This has prevented them from participating in our 2A tournament ***." (*Id*.)

Welter told the Board that at least one of the scheduling alternatives suggested by PAA that year was reasonable:

> "If [PAA] were scheduled to play in a consolation game on Saturday morning or afternoon, their request would be to play that game at 6:15 at another site (i.e., Blue Mountain Community College or Pendleton High School).
>
> "These requests can possibly be accommodated if other participating 2A schools were willing to cooperate and be flexible to the last minute adjustments that would be required. Our office strongly feels that we exist to serve all of our

> member schools and to make decisions that are in the best interest to all of the students in our state. *We feel that this request should be accommodated and that last minute time/site adjustments can be made without sacrificing the structure of the tournament*." (Ex. 2 at 1; emphasis added.)

Welter concluded by stating, "We need your input on how to proceed with this issue." He asked board members to complete an enclosed ballot and return it to the OSAA office. (*Id*.) The ballot contained two options. Board members were asked to vote either to (1) "Leave tournament bracket as published. **No adjustments**. Portland Adventist does not participate," or (2) "Allow Portland Adventist Academy to participate if it qualifies. **Make any necessary adjustments**. ***." (Ex. 2 at 2; boldface in original.) Each of the five board members who returned ballots voted for the second option. (Ex. 2 at 3-7.)

Despite this expression of support for Welter's proposal, it was not adopted. According to Wes Ediger, who at the time was OSAA Executive Director, the proposal "had become pretty much public knowledge," and after Board members' "constituencies *** had talked to them," the Board decided that "the tournament would have to go as scheduled." (Ex. 28 at 81-82.)

On January 23, 1996, therefore, Ediger wrote to the PAA principal to inform him of the OSAA's response to PAA's request for an accommodation. (Ex. 3.) The letter read in part as follows:

> "[T]he OSAA Executive Board has considered your request that 'reasonable' adjustments be made in the 2A Boys Basketball Tournament so that Portland Adventist Academy (PAA) can participate in the 1996 tournament. After thorough discussion, thought and consideration, the Board has approved that PAA can participate in the tournament, and if necessary, game time adjustments will be made so that PAA can potentially advance to the state championship game.
>
> "As we discussed, if PAA enters the tournament as the #2 seed from Districts 1 and 2 ***, then no adjustments would be required. If PAA enters as the #1 team from Districts 1 and 2

> ***, then the times of the two boys semifinal games would be reversed so that the top bracket semifinal game would be played at 8:45 p.m. on Friday and the bottom bracket semifinal game would be played at 3:00 p.m. on Friday.
>
> "This is the only adjustment that the OSAA Executive Board deemed as reasonable. Therefore, if PAA were scheduled to play at either 10:30 a.m. or 3:00 p.m. on Saturday, those games would go on as scheduled. Consequently, PAA would forfeit if they chose not to play those contests." (Ex. 3.)

Thus, the OSAA was willing, in 1996, to make an adjustment in the Friday schedule in order to accommodate PAA players who observed the Saturday Sabbath (by switching the Friday afternoon and evening games), but it was not willing to make an adjustment of the Saturday schedule. If the PAA team progressed through the tournament to reach the consolation finals on Saturday afternoon, it would have to forfeit the game. Despite Welter's opinion that PAA's request to adjust the Saturday schedule "should be accommodated" (Ex. 2 at 1), the OSAA Board concluded that adjusting the Friday schedule was "the only adjustment" that was "reasonable." (Ex. 3.)

This was the immediate background for the memorandum that Ediger sent to OSAA Board members ten months later, on December 5, 1996, asking them to vote on a proposal to delete Q&A 10-17 (the ban on holding events on Sunday; see p. 14, *supra*) from the Handbook. (Ex. 10.) The memorandum informed Board members that "Our attorney has recommended that the Q&A be removed from the handbook because it might be misinterpreted to imply an association interest in considering religion in the scheduling of association events," and it went on to assure Board members that repeal of the rule would not change the OSAA's practice of protecting those who worship on Sunday: "The elimination of the Q&A would not have an effect on when the OSAA could choose to schedule events." (Ex. 10 at 1.) Eight members of the Board – all who returned ballots – voted in favor of the deletion. (Ex. 10, pp. 1-8.) Less than two months later, on January 24,

1997, the OSAA told PAA that it would no longer accommodate PAA's religious beliefs, not even to shift the Friday evening game, as it had been willing to do in 1996. Ediger told the PAA principal that "OSAA has determined that it will not modify the scheduling of the Class 2A boys basketball state championship playoffs." (Ex. 14 at 1.)

In the proceedings below, the Agency found that "[a]lthough the Q&A about Sunday events was deleted in 1996, no tournament basketball games have ever been scheduled on a Sunday." (ER-25, ¶ 10.) The OSAA's policy in that respect is in harmony with the written and unwritten rules of many schools. For example, the "Standard Operating Procedures" for the Northwest League (of which PAA is a member) provide that "No league contests shall be scheduled on a Sunday or on a Good Friday." (Ex. 18.) Proposals to play games on Sunday have met with strong resistance, often on religious grounds. In February 1997, when the Superintendent of Harrisburg School District thought the OSAA might move a tournament game to Sunday in order to accommodate PAA, he wrote:

> "The administrators [in our league] are unanimously opposed to modifying the Tournament so that some games might be played on Sunday or Monday. *** [¶] Almost all districts currently have unwritten policies that their teams do not play or practice on Sundays. [¶] Playing on Sunday would violate many people's Sabbath observance." (Ex. 4 at 18; underscoring in original.)

In short, regardless of motive, the OSAA regularly schedules tournament basketball games during the Saturday Sabbath. It has *never* scheduled a tournament basketball game during the Sunday Sabbath.

**2. Changes in Schedule.** Differential treatment is also illustrated by the fact that the OSAA is willing to take into account a wide range of secular considerations when it schedules interschool activities, but it is unwilling to take into account the religious beliefs of the students at its member schools in making its scheduling decisions. OSAA Assistant

Executive Director Mark Wallmark testified that "we make accommodations for lots of different things" (2001 Tr. 164), and the record bore him out:

- The OSAA has "allowed" member schools "to move a [playoff] game off *** an SAT test date to *** the previous day." (2002 Tr. at 45.)
- A game in the 1996 girls' 2A basketball tournament was rescheduled at the last minute because a school learned only the night before that it would be going to the tournament. (*Id*. at 47; see also Ex. 7.)
- OSAA policy permits rescheduling of baseball games in the event of rain. (Ex. 28 at 25 [Ediger].)
- The state 4A football championship is scheduled specifically for the purpose of accommodating the "three-hour window" that is available in the television broadcast schedule. (2002 Tr. at 47.)
- The 4A basketball tournament is similarly scheduled to accommodate the timing desires of the Fox television network. (*Id*. at 48.)
- In 2000, the 3A basketball tournament was played from Monday through Friday, despite the fact that the OSAA "prefer[s] to play it Tuesday through Saturday," in order to accommodate the availability of Gill Coliseum. (*Id*.)
- In another year, prior to 2000, the 4A boys basketball tournament was scheduled to start in the morning rather than at its usual afternoon starting time "because the Trail Blazers needed to use the Coliseum to play a night game." (*Id*. at 49.)

In contrast, the OSAA takes the position, as stated in its "Order and Opinion" that was the subject of petitioners' challenge before the Agency, that "If the OSAA took the religious beliefs of the student competitors into consideration in devising a Tournament

schedule and the schedule of other activities, it would violate the Establishment Clause of the First Amendment of the U.S. Constitution." (R-1 at 238.)[4]

**3. Imposition of Conditions.** A third example of the differential treatment accorded by the OSAA to PAA and its students occurred in 1997, when PAA repeated the request that it made in 1996 for an accommodation in the schedule. This time, OSAA officials told PAA that as a condition to placing PAA in the morning bracket (which would ensure it would not have to play on Friday night), it would have to agree not to forfeit any Saturday Sabbath game. (2001 Tr. 129-130 (Ediger); Ex. 28 at 97-98 (Ediger Depo.).) The OSAA has never required any other school to make a commitment not to forfeit a game prior to entering the tournament. (Ex. 28 at 98-99 (Ediger Depo.); Ex. 29 at 55 (Welter Depo.).)

### C. The OSAA's Different Treatment of Saturday Sabbath Believers Compared to Sunday Sabbath Believers Is Unreasonable.

As noted above, this Court has indicated that the "standard" for determining whether an act constitutes "discrimination" forbidden by ORS 659.850(1) "is one of reasonableness." *Aiken*, 39 Or App at 788 n 7. Since the legislature based its definitions of "discrimination" on the decisions in *Griggs* and *Lau*, it is appropriate to look to those decisions for guidance in determining "reasonableness." In *Griggs*, the Supreme Court held that

> "the objective of Congress in the enactment of Title VII *** was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained

[4] The OSAA has not explained how it reconciles that statement with its willingness to accommodate the religious beliefs of PAA students by switching the Friday afternoon and evening tournament games. That willingness, originally demonstrated in 1996 (Ex. 3), is now a permanent part of OSAA policy. (Ex. 44; 2002 Tr. 60.)

> if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 US at 429-30.

The Court held that Title VII does not "guarantee a job to every person regardless of qualifications," *id*. at 430, but "[w]hat is required *** is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id*. at 431. In that case, the plaintiffs challenged the employer's practice of requiring job applicants to have a high school diploma or to pass "a standardized general intelligence test." *Id*. at 425-26. This requirement was applied to *all* job applicants, and on its face, there was nothing discriminatory about it. Nevertheless, the Court held that the requirement fell in the category of "practices that are fair in form, but discriminatory in operation." *Id*. at 431.

A similar fact pattern was presented in *Lau*. The district court in that case had found (as quoted by the Court of Appeals) that the Chinese-speaking student plaintiffs received "the same education made available on the same terms and conditions to the other tens of thousands of students" in the school district, and the Court of Appeals added the observation that the school district itself had not caused the "different advantages and disadvantages" possessed by those students. *Lau v. Nichols*, 483 F2d 791, 793, 797 (9th Cir 1973), *rev'd* 414 US 563 (1974). The Supreme Court did not disagree with those statements, but held that "in our view the case may not be so easily decided." 414 US at 565. The fact that the school district "provid[ed] students with the same facilities, textbooks, teachers, and curriculum," *id*. at 566, did not mean that the district had not engaged in discrimination prohibited by Title VI; on the contrary, the Court concluded that the school district *had* violated the statute because its practices were discriminatory in "*effect* even though no purposeful design is present." 414 US at 568 (emphasis in original). Therefore, the Court concluded, the district was required to "'take affirmative steps to rectify the language

deficiency,'" *id*. (quoting an HEW regulation), and it remanded the case "for the fashioning of appropriate relief," *id*. at 569, which might include any of a number of alternatives that the Board of Education, in its "expertise," could use to "rectify the situation." *Id*. at 565.

The facts of this case present a close parallel to the facts in *Griggs* and *Lau*. The Agency here found that "Regardless of any historical reasons for not scheduling tournament games on Sundays, today there are valid secular reasons for trying not to schedule games on Sundays. Those reasons include allowing a day of travel to return home before starting a new school week and work week." (ER-27, ¶ 14.) But it cannot be denied that prohibitions on Sunday activities in our society had their origins in religious beliefs; Sunday closing laws had a "strongly religious origin," being rooted in English laws that were adopted "in aid of the established church." *McGowan v. State of Md*., 366 US 420, 433, 81 S Ct 1101, 6 LEd2d 393 (1961).[5] And as noted above, the very purpose of the federal Civil Rights Act of 1964, on which ORS 659.850 was modeled, was to "remove barriers that have operated in the past to favor an identifiable group." *Griggs*, 401 US at 429-30. Under the federal Act, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id*. at 430.

In the same way, the prohibition on religious discrimination in ORS 659.850 was intended to "remove barriers" that operated in the past to favor an identifiable group and to eliminate practices that were "neutral on their face, and even neutral in terms of intent, *** if they operate to 'freeze' the status quo of prior discriminatory *** practices." That is an

[5] For example, the religious origin of Oregon's first Sunday closing law, adopted by the territorial legislature in 1854, was obvious from its text, for the law (which bore the heading "an act to prevent Sabbath breaking") barred most "secular business activity" on "the Lord's Day." Laws 1854-55, pp. 283-84. The law was carried forward after statehood, and was eventually repealed when voters approved an initiative to that effect in 1916.

apt description of the OSAA's policies with respect to scheduling the 2A boys basketball tournament. Even if the OSAA does not *intend* to discriminate on the basis of religious belief in the scheduling of the tournament, the *effect* of its scheduling decisions is in fact discriminatory in favor of one identifiable group (namely, adherents of the majority religion who observe Sunday as their Sabbath), and against another identifiable group (namely, students who observe the Saturday Sabbath, as well as their school that teaches the importance of such observance). The OSAA's ostensibly "neutral" scheduling decisions are no more "reasonable" than the employer's use of standardized intelligence tests in *Griggs*, or than the school district's practice in *Lau* of providing identical textbooks to all students, regardless of whether they could read or speak English.

There are at least three other indicators of the unreasonableness of the OSAA refusal to accommodate petitioners' religious beliefs with respect to Saturday afternoon games. The first is that the OSAA itself is willing to adjust the schedule of the Friday afternoon and evening games in order to accommodate the PAA team. The OSAA announced its willingness to make these "game time adjustments," as then-Executive Director Ediger described them, in 1996 (Ex. 3), and in October 2001, current Executive Director Welter announced that from now on, it will make those adjustments, "if necessary, so that PAA can play in [the Friday] game without playing on the Saturday Sabbath." (Ex. 44.) This willingness to "change the time of the Friday afternoon and evening semifinal games" (*id*.) is, according Welter, "consistent" with OSAA policy. (2002 Tr. 59, 60.)

Second, Welter himself took the position, in his January 1996 letter to OSAA Board members, that an adjustment in the Saturday schedule was reasonable:

> "We feel that this request [that is, PAA's request to adjust the Saturday schedule] *should be accommodated* and that last minute time/site adjustments can be made without sacrificing the structure of the tournament." (Ex. 2; emphasis added.)

The Agency gave great deference to Welter's expertise and credibility on other issues, noting that he had been "the Executive Director or an Assistant Executive Director [of OSAA] since June 1994 and *** the OSAA's tournament director for many years, with broad authority to interpret and implement OSAA regulations." (ER-33.) Welter clearly thought that the requested adjustment was reasonable, or else he would not have recommended that it be made. Furthermore, as noted above, the only Board members who returned Welter's ballot asking for their views on the question all voted in favor of making the accommodation.

In determining whether an act violates the test of being "fair in form but discriminatory in operation," as set out in ORS 659.850, "[t]he touchstone is business necessity." *Griggs*, *supra*, 401 US at 431. Welter (who, as "OSAA's tournament director for many years," ER-33, was in a position to know) concluded in 1996 that there was *no* business necessity in refusing to adjust the Saturday afternoon schedule to accommodate the religious beliefs of the PAA players. The adjustment could be make, he said, "without sacrificing the structure of the tournament." (Ex. 2.)

A third indicator of the OSAA's unreasonableness in refusing to adjust the Saturday afternoon tournament schedule is the fact that the NCAA is willing to make such an adjustment with respect to its national college basketball tournament games. The NCAA's general rule is that "NCAA championships competition may be scheduled or conducted on *any day*." (Ex. 26; emphasis added.) Thus, unlike the OSAA, which presumptively will not schedule events on Sunday, the NCAA does not favor or disfavor any persons on account of their religious practices. However, the NCAA policy goes on to provide for exactly the kind of accommodation that the present petitioners seek from the OSAA:

> "If a participating institution has a written policy against competition on a particular day for religious reasons, it shall

> submit its written policy to the governing sports committee on or before September 1 of each academic year in order for it or one of its student-athletes to be excused from competing on that day. *The championship schedule shall be adjusted to accommodate that institution* ***." (Ex. 26; emphasis added.)

In practice, the NCAA's policy means, for example, as noted in one national sports magazine, that the NCAA will not schedule a championship contest on Sunday, "in deference to schools such as Brigham Young whose religious beliefs prevent them from playing on the Sabbath" – that is to say, on the day that Brigham Young regards as the Sabbath. (Ex. 26 at 3-4.)

In summary, the OSAA 2A boys basketball tournament schedule "unreasonably differentiates treatment," as that term is used in the first definition of "discrimination" in ORS 659.850(1), and while it may be "fair in form," it is "discriminatory in operation" (based on religion), as those terms are used in the second definition of "discrimination" in that statute. The schedule prevents the PAA team from participating solely because its members observe Saturday Sabbath. The OSAA's refusal to modify the Saturday afternoon schedule to take into account petitioners' religious beliefs violates both ORS 659.850 and OAR 581-021-0045(3).

## IV. THIRD ASSIGNMENT OF ERROR

The Agency erred in concluding that the OSAA's refusal to accommodate petitioners' religious beliefs in the scheduling of the State 2A Basketball Tournament did not violate Article I, sections 2 and 3, of the Oregon Constitution ("the Religion Clauses"). This ruling is set out at pages 19-20 of the Agency's final order. (ER-37 to ER-38.) Specifically, the Agency ruled: "The OSAA's policy of scheduling tournaments without regard to religion and making adjustments to the schedule only as necessary to minimize

disruptions or to enhance organizational interests is consistent with the religion clauses of the Oregon Constitution." (ER-38.)

**Preservation of Error.** Petitioners asserted in their appeal letter to the Agency that the OSAA's action violated the Religion Clauses. (ER-14.) They briefed the issue in their Hearing Memorandum. (R-6 at 194-204.)

**Standard of Review.** In a contested case, the Court reviews an agency's legal conclusions for legal error. *Norden v. State ex rel. Water Resources Dept*., 329 Or at 643.

**ARGUMENT**

The Religion Clauses provide as follows:

> "Section 2. Freedom of worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.
>
> "Section 3. Freedom of religious opinion. No law shall in any case whatever control the free exercise, and enjoyment of religeous (sic) opinions, or interfere with the rights of conscience."

Administration of high school athletics by the OSAA constitutes government action subject to the state and federal constitutions. *Cooper v. OSAA*, 52 Or App 425, 430 n 6, 629 P2d 386, *rev denied* 291 Or 504 (1981).[6]

**A. OSAA's practices must be narrowly tailored to advance an overriding state interest.**

The methodology for analyzing a claim under the Religion Clauses is set out in *Employment Div. v. Rogue Valley Youth for Christ*, 307 Or 490, 770 P2d 588 (1989). The religious organization in that case asserted that it had a right, under the Religion Clauses, to be free from the obligation to pay unemployment taxes, and the Supreme Court held that this

[6] See also *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 US 288, 121 S Ct 924, 148 LEd2d 807 (2001) (Tennessee's analog to OSAA is "state actor" for purposes of Fourteenth Amendment).

state constitutional claim was properly analyzed "by the formula used in connection with the First Amendment." *Id*. at 498. Under that formula, the Court said, the claimant must first show that "the governmental action imposes a burden on the party's religion." *Id*. If the claimant meets that burden, that is "'not the end of the inquiry. Not all burdens on religious liberty are unconstitutional. * * * The state may justify a limitation on religion by showing that it is essential to accomplish an overriding governmental interest.'" *Id*., quoting *United States v. Lee*, 455 US 252, 257, 102 S Ct 1051, 71 LEd2d 127 (1982). Furthermore, such a limitation "is not essential, unless it represents the least restrictive means available to advance the overriding governmental interest." *Meltebeke v. Bureau of Labor and Industries*, 120 Or App 273, 279, 852 P2d 859 (1993), *aff'd*, 322 Or 132, 903 P2d 351 (1995). Application of that methodology here demonstrates that OSAA's refusal to adjust the Saturday basketball tournament schedule to accommodate petitioners' religious beliefs violates their rights under the Religion Clauses.

**(1) The OSAA's scheduling decisions burden petitioners' religion.**

**(a) Interference with parents' right to instill religious values is an infringement.**

Parents have a "fundamental interest" in "guid[ing] the religious future and education of their children," and in "direct[ing] the religious upbringing of their children." *Wisconsin v. Yoder*, 406 US 205, 232, 233, 92 S Ct 1526, 32 LEd2d 15 (1972).

The desire to participate in a state tournament that is scheduled during an athlete's Sabbath can have a significant detrimental impact on that student's religious beliefs and interfere with parents' ability to instill those beliefs in their child. The OSAA's practices force athletes who are members of minority religions to choose between observance of their religious faith and participation in interscholastic sports at the highest levels. As this Court has noted (and as the very existence of the OSAA attests), "participation in interscholastic

sports is an important part of the educational process," *Whipple v. OSAA*, 52 Or App 419, 423, 629 P2d 384, *rev denied* 291 Or 504 (1981), and it "is important to all students who *** undoubtedly derive uncalculated benefits from such competition." *Cooper v. OSAA*, *supra*, 52 Or App at 438. Thus, the OSAA's refusal to accommodate petitioners and their PAA teammates interferes with important parental rights.

**(b) Denial of benefits is an infringement.**

When a governmental entity prevents a person from receiving a benefit that is available to other persons solely because of the person's religion, that action violates the Religion Clauses. This point is illustrated in *Kay v. David Douglas School District No. 40*, 79 Or App 384, 719 P2d 875 (1986), *rev'd on justiciability grounds*, 303 Or 574, 738 P2d 1389 (1987). The benefit in that case was the ability of public high school seniors to participate in their commencement ceremony without violating their religious beliefs. The student plaintiffs contended that the school violated their rights of religious liberty by including a vocal public prayer in the ceremony. The school district justified its inclusion of prayer at graduation on grounds similar to those asserted by the OSAA for refusing to adjust the schedule for Saturday afternoon tournament games: their purpose was not to promote religion, school officials said; rather, they included prayer as part of the ceremony because they had "always" done so, and "a majority" of district taxpayers and of the graduating class wanted it this way. *Kay*, 79 Or App at 387.

This Court rejected these arguments. "It matters not that attendance at the ceremony is voluntary," the Court said. *Id*. at 392. "For many students and parents, commencement is the most significant high school experience," *id*., and "it is a ceremony in which *every student* is entitled to participate fully, regardless of his or her religious faith or absence of

religious faith." *Id*. at 388 (emphasis added). For that reason, the Court said, the fact that "a majority" of the students (or taxpayers) favored inclusion of prayer was irrelevant:

> "Religious freedom and majority rule must live side by side. The majority, no matter how pure its intentions, has no right under our system of government to exert its political muscle to gain a preferred place for its testimony to its religious beliefs *** ." *Id*. at 393.

Judge Warren made a similar point in his concurring opinion:

> "The greatness of this democracy is due in no small measure to the fact that we adhere to the principle that, although the majority rules, the rights of minorities are fiercely respected. No student or parent entitled to attend a commencement ceremony or any other governmentally sponsored event should feel a need to remain away or compromise principles because he or she holds beliefs at variance with those of the majority of American citizens." *Id*. at 396 (Warren, J., concurring).

*Kay* is relevant to the present case in several ways. First, the benefit at stake is similar. Just as "[f]or many students and parents, commencement is the most significant high school experience," *id*. at 392, it is widely recognized, as press coverage put it at the time of the OSAA basketball tournaments in 2000, that participation in the state championships is, for many high school student athletes, "the experience of a lifetime" (Ex. 20 at 3), one that "provide[s] memories that players and fans remember the rest of their lives." (*Id*. at 1.)

Second, *Kay* demonstrates that whether or not the OSAA intended to discriminate on the basis of religion is irrelevant under the Religion Clauses. Third, the decision shows that discrimination cannot be justified by appeals to tradition. Fourth, the fact that participation in the state basketball tournament is voluntary does not excuse the OSAA's discrimination. Fifth, a desire to yield to the wishes of the majority does not justify religious discrimination.

**(2) The OSAA's scheduling decisions are not the least restrictive means of furthering its legitimate interests.**

If governmental action infringes religious beliefs, the state actor must prove that its action is the least restrictive means for achieving its goals. Thus, in *Meltebeke v. Bureau of Labor and Industries*, *supra*, 120 Or App 273, this Court considered an employer's challenge to a BOLI rule prohibiting "religious harassment" on the job. The employer contended that the rule infringed his right to exercise his religion freely. This Court agreed with BOLI that the rule "advanced *** [the] overriding interest" of "preventing religious discrimination," *id*. at 279, but it nevertheless held that the rule was unconstitutionally applied to the employer because it was not the least restrictive means available to advance the state's interest:

> "When *** the enforcement of a law does not always burden religious freedom, but may in some cases, the interference with religious freedom is incidental, rather than direct. The standard we apply to evaluate such laws is clear: 'The state may justify an incidental limitation on religion by showing that it is *essential* to accomplish an *overriding governmental interest*.' *Employment Div. v. Rogue Valley Youth for Christ*, *supra*, 307 Or at 498. ***
>
> "* * * * *
>
> "A law that burdens the free exercise of religion is not essential, unless it represents the least restrictive means available to advance the overriding governmental interest." 120 Or App at 278-79 (emphasis added; internal brackets, footnote, and some quotation marks omitted).

The Supreme Court affirmed. Although its analysis was somewhat different, it did not reject this Court's reliance on *Rogue Valley*, and it agreed with this Court that as applied, the BOLI rule violated the employer's rights under Article I, sections 2 and 3. Under *Meltebeke* and *Rogue Valley*, therefore, government cannot infringe religious beliefs even incidentally unless it can prove that (i) its action is essential to advance an "overriding"

governmental interest and (ii) its action represents the least restrictive means available. The OSAA's actions do not satisfy either prong of that test.

**Overriding Interest.** In its June 2000 decision rejecting petitioners' request for accommodation of their religious beliefs, the OSAA identified one, and only one, reason for declining to make the accommodation. It stated that "[i]f the OSAA took the religious beliefs of the student competitors into consideration in devising a Tournament schedule ***, it would violate the Establishment Clause of the First Amendment of the U.S. Constitution," and it characterized this desire to comply with the Establishment Clause as "a compelling interest." (ER-4, ER-8.) As noted above, the OSAA subsequently abandoned its contention that accommodation of "the religious beliefs of student competitors" would violate the Establishment Clause, since it has now stated that it will "change the time of the Friday afternoon and Friday evening semifinal games, if necessary, so that PAA can play in that game without playing on the Saturday Sabbath." (Ex. 44.) This statement of intent was not a departure from OSAA policy; Tom Welter testified, twice, that his letter (Ex. 44) "is consistent with current policy" (2002 Tr. 59, 60), and he stated that the OSAA's promise to "change the time" of the Friday games to accommodate the religious beliefs of PAA players would remain in effect in 2003 and 2004. (*Id*. at 60.)

There was, in any event, no merit to the OSAA's assertion that the Establishment Clause prohibits the accommodation of religious beliefs. The Supreme Court has made it clear that the First Amendment "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 US 668, 672, 104 S Ct 1355, 79 LEd2d 604 (1984). "[T]here is ample room for accommodation of religion under the Establishment Clause." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 US 327, 338, 107 S Ct 2862, 97 LEd2d 273

(1987). "[G]overnment may (and sometimes must) accommodate religious practices and [it] may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla*., 480 US 136, 144-145, 107 S Ct 1046, 94 LEd2d 190 (1987).

The Agency, in the decision below, ignored the principle that the burden was on the OSAA to demonstrate a compelling interest to justify its infringement on petitioners' right of religious freedom. In any event, the OSAA did not demonstrate any such interest.

**Least restrictive means.** Under *Meltebeke*, even if the OSAA had shown that its actions were motivated by a compelling interest, it must also show that there is no less restrictive means for achieving that interest. Many of the scheduling options proposed by petitioners (summarized in Exhibit 22), including the option of delaying one game by a few hours endorsed by Welter in his 1996 memo (Ex. 2), do not prevent the OSAA from accomplishing any of its legitimate interests. In fact, they enable the OSAA to maximize participation by all member schools. The OSAA did not meet its burden of proving that there is no less restrictive means of accomplishing its goals.

### B. The Religion Clauses prohibit discrimination among religions and between religious and secular considerations.

The OSAA discriminates among religions when it establishes the tournament schedule. It discriminates between religious and secular considerations when it makes modifications to the tournament schedule.

#### (1) Discrimination between religious beliefs.

By ensuring that no games are played on Sunday, the OSAA accommodates most Christian denominations. Yet, it is unwilling to accommodate members of minority religions who worship on Saturday Sabbath. This kind of discrimination among religions violates the Religion Clauses, as demonstrated by *Kemp v. Workers' Compensation Department*, 65 Or App 659, 672 P2d 1343 (1983). That case involved a challenge to

provisions of the workers compensation laws that allowed a claimant to refuse to undergo medical treatment without loss of benefits only if the worker obtained alternative treatment by a "duly accredited" practitioner of a "well-recognized" church. *Id*. at 664. "The question in this case," the Court said,

> "is whether benefits can be denied to a certain class of persons following religious beliefs and given to another class of person following identical religious beliefs, the only difference being that the second class are members of a 'well-recognized' church having 'a duly accredited practitioner.'" *Id*. at 665.

The Court concluded that it was "obvious" that the rule was unconstitutional. *Id*. Under both the First Amendment and the Religion Clauses, the Court held, government may not provide benefits to "some categories of people with religious beliefs, *i.e.*, members of 'well-recognized churches' who are being treated by 'duly accredited practitioners,' and deny benefits to those of less well-recognized churches or to those whose personal conscience without the dictates of a formal religious belief mandate no medical treatment." *Id*. at 666. Under this Court's rationale in *Kemp*, therefore, the OSAA may not provide a benefit (that is, preserving the Sabbath as a day when competitive sports events are avoided) to one category of people with religious beliefs (those who observe the Sunday Sabbath), while denying that benefit to a separate class of people with religious beliefs (those who observe the Saturday Sabbath).

**(2) Discrimination between religious and secular considerations.**

The Religion Clauses also prohibit the OSAA from drawing distinctions between secular and religious considerations. Drawing on First Amendment doctrine as stated in *Welsh v. United States*, 398 US 333, 90 S Ct 1792, 26 LEd2d 308 (1970), this Court in *Kemp* held that "laws may not draw a distinction between *** religious beliefs and secular beliefs." 65 Or App at 665. The Court held that the provisions of the workers compensation

law challenged in *Kemp* violated Article I, sections 2 and 3, on this ground as well: the rule, it said, "cannot survive the strict scrutiny mandated by the Supreme Court for cases which *** create a preference between religious and non-religious beliefs." *Id*. at 666.

That conclusion is squarely applicable here. The OSAA is willing, as its assistant executive director testified, to "make accommodations for lots of different [secular] things" when it schedules its tournament games (2001 Tr. 164); it has, for example, scheduled or rescheduled tournament games to accommodate team travel needs, media broadcast schedules, facility problems, SAT tests, and weather. (See page 19, *supra*.) At the same time, the OSAA is unwilling to adjust the Saturday afternoon schedule for its 2A boys basketball tournament in order to accommodate petitioners' religious beliefs. The OSAA's actions violate the Religion Clauses for the same reason that the workers compensation law did in *Kemp*.

## V. FOURTH ASSIGNMENT OF ERROR

The Agency erred in concluding that the OSAA's refusal to accommodate petitioners' religious beliefs in the scheduling of the State 2A Boys Basketball Tournament did not violate Article I, section 20, of the Oregon Constitution. This ruling is set out at pages 20-21 of the Agency's final order (ER-38 to ER-39), where the Agency ruled that "[t]he OSAA's willingness to schedule around secular concerns *** but not religious concerns does not appear to be a violation of Article I, section 20 ***." (ER-39.)

**Preservation of Error.** Petitioners asserted in their appeal letter to the Agency that the OSAA's action violated Article I, section 20. (ER-14. They briefed the issue in their Hearing Memorandum. (R-6 at 205-206.)

**Standard of Review.** In a contested case, the Court reviews an agency's legal conclusions for legal error. *Norden v. State ex rel. Water Resources Dept*., 329 Or at 643.

**ARGUMENT**

Article I, section 20, provides as follows:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not belong to all citizens."

The OSAA's scheduling policies violate that section in two ways. First, the OSAA grants to Sunday Sabbath believers the privilege of never having a tournament basketball game scheduled on their Sabbath, but it refuses to grant that privilege to Saturday Sabbath believers. Second, the OSAA takes secular considerations into account when it schedules its tournament games, but it refuses to take into account religious reasons. By making these distinctions, the OSAA violates Article I, section 20, as shown by the decision in *Salem College & Academy, Inc. v. Emp. Div.*, 298 Or 471, 695 P2d 25 (1985).

In *Salem College*, the Court examined the interplay between Article I, section 20, and the Religion Clauses in deciding a challenge to a statute that exempted some religious schools, but not others, from the state's unemployment compensation statutes, based on whether or not the school was operated by "a church." The Court held that this distinction violated both the Religion Clauses and Article I, section 20.

> "Equality of privileges among religious institutions is implicit in the religion clauses themselves. Article I, sections 2 and 3 do not speak of religion in the singular; nor do they refer to churches. They speak of men's rights to worship 'according to the dictates of their own consciences' and 'enjoyment of religious opinions' in the plural." 298 Or at 488-89.

The Court concluded that discrimination between religions contravenes the equality among faiths that is protected by the Oregon Constitution's guarantees of religious freedom. *Id*. at 490. If some religious schools were subject to the unemployment tax and others were exempt, solely because some were affiliated with "churches" and others were not,

> "they hardly would 'all' be equally 'secure' to exercise their rights under [Article I, sections 2 and 3] 'according to their dictates of their own consciences.' For the same reason, church affiliation cannot be made one of the 'terms' on which equality may be conditioned under Article I, section 20, with respect to 'privileges and immunities' that are not themselves guaranteed ***." *Id*.

The same principles apply to the state high school basketball tournament. Before PAA entered the tournament in 1996, the OSAA Handbook expressly protected those who worship on Sunday. (See "Q&A 10-17," quoted on page 14, *supra*.) Even though the OSAA deleted that express protection in December 1996 (just a few months after PAA won the 1996 tournament), it has maintained that protection in practice: as the Agency found, the OSAA has *never* scheduled any basketball tournament games on Sunday. (ER-26, ¶ 10.) Petitioners are of course not seeking a ruling that would bar the OSAA from accommodating the religious beliefs of the majority; what they seek is parity in accommodation: a willingness by the OSAA to make the minor adjustments necessary to enable PAA students to participate in the tournament without violating *their* religious beliefs. Similarly, petitioners seek the same level of accommodation for their religious beliefs that the OSAA is willing to make for secular considerations (such as the wishes of television networks and team travel needs) when it makes its tournament scheduling decisions.

## VI. FIFTH ASSIGNMENT OF ERROR

The Agency erred in concluding that the OSAA's refusal to accommodate petitioners' religious beliefs in the scheduling of the 2A Boys Basketball Tournament did not violate the First Amendment to the U.S. Constitution. This ruling is set out at pages 21-22 of the Agency's final order. (ER-39 and ER-40.) Specifically, the Agency ruled that "the standard of review [under the First Amendment] is whether there is a 'rational basis' for the challenged action," and it concluded that "Clearly, there is a rational basis both for

religion-neutral scheduling of the tournament, and for the OSAA's requirement that PAA agree not to forfeit as a condition of entering the tournament." (ER-40.)

**Preservation of Error.** Petitioners asserted in their appeal letter to the Agency that the OSAA's action violated the First Amendment. (ER-14.) They briefed the issue in their Hearing Memorandum. (R-6 at 206-216.)

**Standard of Review.** In a contested case, the Court reviews an agency's legal conclusions for legal error. *Norden v. State ex rel. Water Resources Dept*., 329 Or at 643.

**ARGUMENT**

The First Amendment to the U.S. Constitution reads, in part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ***."

The Agency's final order disposed of petitioners' First Amendment claim in a single paragraph. In ruling that "the standard of review is whether there is a 'rational basis' for the challenged action," and in concluding that "there is a rational basis" for the OSAA's decisions (ER-40), the Agency applied the wrong legal standard and reached the wrong conclusion. Under *Employment Div. v. Smith*, 494 US 872, 110 S Ct 1595, 108 L Ed2d 876 (1990), a law that is challenged under the First Amendment is subject to strict scrutiny in three situations: (1) when the challenged law permits individualized exceptions, (2) when it involves religious gerrymandering, and (3) when it affects a fundamental right in addition to the right of religious liberty (the "hybrid rights" situation).

**A. Individualized Exceptions.**

The Supreme Court in *Smith* did not overrule *Sherbert v. Verner*, 374 US 398, 83 S Ct 1790, 10 LEd2d 965 (1963). In *Sherbert*, the Court held that denial of unemployment compensation to a Seventh-day Adventist woman because she refused to work on Saturday violated the Free Exercise Clause. The case has three important similarities to this one:

(1) it dealt with the denial of a benefit, not an entitlement; (2) it involved a system of discretionary exemptions to a general rule; and (3) it involved a system of religious favoritism by which persons who worshiped on Sunday could obtain benefits, but persons who worshiped on Saturday could not.

**(1) Denial of a benefit is a burden to the free exercise of religion.**

In *Sherbert*, the Court held that denial of a benefit imposes a burden on a person's free exercise of religion.

> "Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling [by the Employment Security Commission] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." 374 US at 404.

The same analysis applies here. Participation in the state championship tournament in any sport is one of the benefits of a high school education in Oregon, and the decisions in *Lee v. Weisman*, 505 US 577, 112 S Ct 2649, 120 L Ed 2d 467 (1992), and *Santa Fe Ind. School Dist. v. Doe*, 530 US 290, 120 S Ct 2266, 147 L Ed 2d 295 (2000), demonstrate that the OSAA is subject to constitutional constraints in its administration of that benefit.

In *Lee*, the Supreme Court held that inclusion of vocal public prayer in a high school graduation ceremony violated the Establishment Clause of the First Amendment. The school district had defended the practice on the ground, among others, that attendance at the ceremony was "voluntary," but the Court rejected that argument, saying that it

> "lack[ed] all persuasion. Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. *** [A]bsence [from the ceremony] would require forfeiture of

> those intangible benefits which have motivated the student through youth and all her high school years." 505 US at 595.

More recently, the Court came to the same conclusion with respect to mere attendance at public high school football games. In *Santa Fe*, the Court held that vocal public prayer at such games violates the Establishment Clause, and once again rejected a school district's argument that its practice could be excused because attendance is voluntary. The Court "assume[d] *** that the informal pressure to attend an athletic event is not as strong as a senior's desire to attend her own graduation ceremony," but it concluded that:

> "The District also minimizes the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience. As we noted in *Lee*, '[l]aw reaches past formalism.' [citation] To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is 'formalistic in the extreme.' [citation] We stressed in *Lee* the obvious observation that 'adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.' [citation] High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause. Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one." 530 US at 311-312.

If the ability to attend a high school football game as a mere spectator is an interest sufficiently important to trigger the protection against compelled participation in a religious practice afforded by the Establishment Clause, as the Court held in *Santa Fe*, then participation in the state basketball tournament is an interest sufficiently important to trigger the protections of the Free Exercise Clause. The Oregon legislature has characterized participation in interscholastic athletics as a "right," ORS 339.450, and the Board of

Education has declared that such participation is one component of a "Standard Education for Oregon Students." OAR 581-021-0200(5)(e). The OSAA itself vigorously proclaims the importance of interscholastic athletic competition to the young people of this state:

> "Activities participation teaches students valuable lessons in leadership, teamwork and sportsmanship that might not be learned in a traditional classroom setting." (Statement of Wes Ediger in tournament brochure, Ex. 17, p. 1.)
>
> "Education through high school activities and athletics is a foundation of youth development. *** [T]he lessons learned are never limited to the specific activity but extend to issues of character, ethics, and values." (*Id*. at 2.)
>
> "Lessons learned on the courts *** compliment [*sic*] those learned in the classroom and help mold the minds and bodies of our future leaders. [¶] The on-the-field education goes beyond specific sports or activities, but is an extension of life issues that can provide motivation and direction to last a lifetime." (*Id*. at 3.)

The testimony of the student petitioners in this case confirmed the importance of participation in the championship tournament. "Going to State" is a familiar phrase in high school sports, and when asked why participating in the tournament was important to him, Steve Sperley testified:

> "Going to state for basketball is kind of a way to prove your position. You play the whole season, you know, working real hard to go to state to see where you stand. And if you can't play with the best of the best, you don't know where you stand. And I guess you just work real hard all season looking forward to being able to go to state. That's what they get to look forward to, and that's what they work for. I think that's important." (2001 Tr. 32-33.)

Josh Madsen testified:

> "[W]e work hard, just like every other team. It would be nice to get some recognition and keep working for a bigger goal." (*Id*. at 37.).

Greg Nakashima (the student, not the father) testified:

> "We work so hard to be the best that we are or the best that we can be, and getting to the top is such a great thing. It's such a great thing that you want to experience it and just to be on top and to have the satisfaction of all that work." (*Id*. at 41.)

Andy Montgomery testified:

> "If you think that you're the best, and you want to go play against the best and become the best, and if you think that you're the best, but no one else knows you're the best, then there's no reason to play. If you work – if you put in all the hard work, and then no one ever sees you play and knows how good you are, then what are you playing for?" (*Id*. at 45.)

This testimony from the student petitioners about the importance of "going to state" is consistent with the very reason that the OSAA sponsors a championship tournament. As former OSAA Executive Director Ediger put it, "Teams and individuals that excel during the regular season earn a top chance to go on to even greater heights at the state playoff level." (Ex. 17 at 1.) The desire to compete is so powerful that, as the OSAA has noted, one of the original claimants in this proceeding has chosen to play high school football on Friday night, during the Sabbath. (OSAA Decision at ER-3.) The student in question, Jimmy Montgomery, is "still struggling with" that decision, according to his father. (Ex. 37 at 24.)

The OSAA's refusal to make an adjustment in the Saturday afternoon schedule for the 2A basketball tournament forces the students and their PAA teammates to choose between following the precepts of their religion and playing the game. To paraphrase *Sherbert*: Governmental imposition of such a choice puts the same kind of burden on the free exercise of religion as would a fine imposed against the students for their Saturday worship.

**(2) The *Sherbert* test applies to situations that involve individual exemptions and exceptions.**

The decision in *Employment Division v. Smith* did not eliminate a state's obligation to make exemptions from a generally applicable statute (or other governmental action) on a religiously neutral basis. The continuing existence of that obligation was emphasized in *Church of the Lukumi Babalu Aye v. Hialeah*, 508 US 520, 113 S Ct 2217, 124 L Ed 2d 472 (1993):

> "As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without a compelling reason." *Id*. at 537 (internal quotation marks and citation omitted).

This Court recently stated the rule in similar terms: in cases "where the state has the authority to create ad hoc, individualized exemptions on the basis of the facts of an individual case, [the state is] required to extend an exemption for 'religious hardship' in the absence of a compelling reason not to do so." *Church at 295 S. 18th Street v. Employment Dept*., *supra*, 175 Or App at 126.

As noted above, the OSAA takes several secular factors into consideration when it schedules tournament games. The decision in *Fraternal Order of Police Newark v. City of Newark*, 170 F3d 359 (3rd Cir), *cert denied*, 528 US 817, 120 S Ct 56, 145 LEd2d 49 (1999), therefore, provides an instructive analogy. That case involved a police department policy that prohibited the wearing of beards by officers, except for medical reasons. Two police officers, both Muslims, refused to shave their beards because to do so would violate their religious beliefs. They argued that because the department provided medical, but not religious, exemptions to its no-beard policy, it unconstitutionally devalued their religious reasons for wearing beards by judging them to be of lesser importance than medical reasons.

The Third Circuit concluded that any government action allowing secular exceptions to a policy but disallowing religious exceptions requires heightened scrutiny:

> "[I]t is clear from [*Smith* and *Lukumi*] that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. *** [T]he Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as trigger heightened scrutiny under *Smith* and *Lukumi*. *** [¶] *** [T]he medical exemption raises concern because it indicates that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not. As discussed above, when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny." 170 F3d at 365, 366 (emphasis added; footnote omitted).

Applying that heightened scrutiny, the court rejected each of the justifications advanced by the department for its no-beard policy, in part because the department could not explain why those justifications applied to officers who wore beards for religious purposes, but did not apply to officers who wore beards for medical reasons. *Id*. at 366, 367.

The decision in *Fraternal Order* is directly on point. Even if the tournament schedule is a "generally applicable" governmental action, the OSAA is willing to make adjustments to that schedule for a number of secular reasons; as noted at pages 18-19, *supra*, those adjustments have included accommodation for SAT tests, television broadcast schedules, team travel needs, availability of facilities, and weather. The disparity in treatment is glaring: in 1996, the OSAA delayed a tournament game by several hours to give a team time to travel to the tournament (see Ex. 7), yet it is not willing to adjust its Saturday afternoon tournament schedule to accommodate the minority religious beliefs of one of its member schools. (Ex. 28 at 13-14, 22, 63 [Ediger].) The OSAA cannot plausibly contend that rescheduling a tournament game for religious reasons threatens important

governmental interests but rescheduling a tournament game to accommodate a team's travel needs does not.

The OSAA candidly admits that it denied petitioners' request for an adjustment in the Saturday afternoon tournament schedule precisely because the request was based on religious beliefs. Its decision was motivated, it said, solely because of its concern that to grant an accommodation for petitioners' religious beliefs "would violate the Establishment Clause of the First Amendment ***." (ER-44.) Moreover, the OSAA says, it *never* takes religious beliefs into account in making its scheduling decisions; in its decision rejecting petitioners' request for accommodation, the OSAA stated: "The OSAA schedules activities for all member schools without regard for the religious beliefs of any students at those member schools." (ER-9.) And its Assistant Executive Director, Mark Wallmark, testified that the OSAA is "religious-neutral," and that he was not aware that the OSAA had ever made an accommodation in its scheduling for any religious consideration. (2001 Tr. 164-65.)

This favoritism for secular considerations over religious considerations indicates a hostility towards religion, and it is prohibited by the Free Exercise Clause of the First Amendment. In *Sherbert*, the Supreme Court said that South Carolina could not take all other circumstances into account except for religion in deciding whether to grant unemployment benefits. In *Fraternal Order*, the Third Circuit said the police department could not take secular reasons like a medical condition into account while at the same time refusing to accommodate religion in applying its no-beard policy. By the same token, therefore, the OSAA cannot take a host of *secular* circumstances into account in scheduling tournament games, and at the same time refuse to make even a minor adjustment in the schedule for *religious* reasons, for the Free Exercise Clause prohibits the government from

"deciding that secular motivations are more important than religious motivations." *Fraternal Order*, 170 F 3d at 365.

**B. Religious gerrymandering.**

The OSAA's actions since 1996 reveal that its scheduling rules are neither neutral nor generally applicable. The OSAA made two important changes to its Handbook between March 1996, when PAA won the championship, and January 1997, when the OSAA said it would no longer accommodate PAA's religious beliefs.

The first was to repeal the no-Sunday contest rule that had been on the OSAA books for almost half a century. (See pp. 17-18, *supra*.) The second was to revise the OSAA Non-Discrimination Policy. The OSAA took both actions shortly after it received a letter dated September 25, 1996, from the Department of Justice, raising questions about the effect of OSAA policies on PAA:

> "[PAA's] memorandum, however, raises new issues on which we express no opinion on the merits of their arguments. Those issues include the impact of the OSAA's Executive Board Policies on discrimination and a potential equal protection argument based on language in the OSAA Handbook prohibiting athletic events on Sunday." (Ex. 9.)

The non-discrimination policy in the 1996 Handbook (the "Original Non-Discrimination Policy") contained several strong protections for religious minorities. In section 1, the OSAA said it "intends to comply with the [federal] Civil Rights Act of 1964" as well as state law governing discrimination. In Section 4, it "guarantee[d]" that no person in Oregon would, on the basis of religion, "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any activity," and it promised that it would provide students "an opportunity in which rights and responsibilities are equally protected and emphasized." (Ex. 12 at 3.) The current policy has been watered down

considerably. It merely contains a statement that the OSAA "does not discriminate on the basis of *** religion *** in the performance of its authorized functions *** ." (*Id*. at 4.)

The Original Non-Discrimination Policy had been on the books for years, and the no-Sunday contest prohibition had been on the books for decades. The fact that the OSAA repealed these two provisions only after PAA, in 1996, raised the issue of accommodating the religious beliefs of its players raises the inference that religious gerrymandering of the kind condemned in *Church of the Lukumi Babalu Aye*, *supra*, was afoot.

*Lukumi* involved adherents of the Santeria religion, which practices animal sacrifice. When the church announced plans to establish a house of worship in Hialeah, there was a public outcry. The city council responded by adopting ordinances prohibiting the unnecessary killing of any animal, while exempting hunting, fishing, and other types of killings that the city deemed "necessary." The Supreme Court found that while the ordinances were on their face both generally applicable and religiously neutral, they were in fact gerrymandered so as to discriminate against the Santeria religion:

> "The Free Exercise Clause *** extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality,' *** and 'covert suppression of particular religious beliefs,' *** . Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt. 'The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.'" 508 US at 534 (citations omitted).

The ordinances were not neutral because they had been gerrymandered so that few, if any, killings of animals were prohibited other than Santeria sacrifice.

> "[B]ecause it requires an evaluation of the particular justification for the killing, this ordinance represents a system of 'individualized governmental assessment of the reasons for the relevant conduct,' [citing *Smith*]. As we noted in *Smith*, in

> circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship without a compelling reason.' [citation] Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment." 508 US at 537-38.

With respect to the requirement of "generally applicability," the Court said:

> "All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause protects religious observers against unequal treatment, *** and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.
>
> "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious beliefs is essential to the protection of the rights guaranteed by the Free Exercise Clause." 508 US at 542-43 (internal quotation marks, brackets, and citation omitted).

The Court concluded that where the government restricts "only conduct motivated by religious conviction" while failing to apply the same standards to similar conduct motivated by secular reasons, "[t]here can be no serious claim that [the government's] interests justify [the distinction]." *Id*. at 547.

The OSAA's historical protection of Sunday observance and its willingness to make scheduling changes for secular but not religious reasons devalue petitioners' religious beliefs and indicates that the OSAA judges them to be less important than both the religious beliefs of the majority and secular needs. The OSAA has singled out petitioners' religious practice for discriminatory treatment, and in doing so it has violated the Free Exercise Clause.

**C. Hybrid Rights.**

Finally, *Smith* did not overrule either *Wisconsin v. Yoder*, *supra*, 406 US 205, which involved a Wisconsin compulsory school attendance law, or *Pierce v. Society of Sisters*, 268 US 510, 45 S Ct 571, 69 L Ed 1070 (1925), which involved a compulsory public education law. Those cases involved neutral, generally applicable laws that impacted both the Free Exercise Clause and some other constitutionally protected right such as the right of parents to control the upbringing of their children. These "hybrid rights" cases were not affected by the reformulation of Free Exercise Clause jurisprudence set out in *Smith*. The Court in *Smith* quoted with approval the following passage from *Yoder*:

> "'[T]he Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with the free exercise claim of the nature revealed in the record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment.'" *Employment Div. v. Smith*, 494 US at 881 n 1, quoting *Yoder*, 406 US at 233.

The Court's recent decision in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, ___ US ___, 122 S Ct 2080, ___ LEd2d __ (2002), illustrates that the "hybrid rights" doctrine remains viable. The plaintiffs in that case, who wished to distribute religious tracts door-to-door in the Village's residential areas, challenged a facially neutral licensing ordinance that required "any canvasser who intends to go on private property to promote a cause [to] obtain a 'Solicitation Permit' from the office of the mayor." 122 S Ct at 2083. The Court invalidated the ordinance in part on the ground that "there are a significant number of persons whose religious scruples will prevent them from

applying for such a license." 122 S Ct at 2090. There was, thus, both a free speech and a free exercise component to the Court's analysis.[7]

As in *Yoder*, *Pierce*, and *Watchtower*, the claims asserted here involve "hybrid rights." Like *Yoder* and *Pierce*, this case involves both the Parents' right to direct the religious education of their Students and the Students' right to the free exercise of their religion. If student athletes are unable to participate in sports within the parameters of their families' religion, at least some may choose to violate the religious beliefs their parents hope to instill, as the OSAA itself recognizes. (OSAA Decision at ER-2 and ER-3.) By conditioning the Students' full participation in the state tournament on their willingness to violate their religious beliefs, the OSAA substantially burdens petitioners' hybrid rights of free exercise of religion and parental control. Its refusal to make adjustments to the Saturday afternoon tournament schedule to accommodate petitioners' religious beliefs therefore violates their rights under the Free Exercise Clause.

## VII. CONCLUSION

The OSAA's refusal to accommodate petitioners' religious beliefs by rejecting their request to adjust the Saturday schedule for the 2A boys basketball tournament violates ORS 659.850, OAR 581-021-0045(1)(a) and (3), Article I, sections 2, 3, and 20 of the Oregon Constitution, and the Free Exercise Clause of the First Amendment to the U.S. Constitution. The Court should reverse the Board of Education's final order, and remand the case to the Board with instructions to enter an order requiring the OSAA to accommodate petitioners' religious beliefs in the scheduling of the Saturday afternoon

---

[7] The fact that this was one basis for the Court's decision is confirmed in Justice Scalia's concurrence. He concurred in the judgment, but noted that he "[did] not agree *** that one of the causes of the invalidity of Stratton's ordinance is that some people have a religious objection to applying for a permit ***." 122 S Ct at 2092 (Scalia, J., concurring in the judgment).

games during the 2A boys basketball tournament, just as the OSAA is already willing to do with respect to the Friday evening games.

DATED: July 15, 2002.

Respectfully submitted,

Charles F. Hinkle,
Jeremy D. Sacks,
William R. Long,
ACLU Foundation of Oregon, Inc.

Attorneys for Petitioners James Montgomery, Ellen Montgomery, Andy Montgomery, Greg Nakashima, Esther Nakashima, Greg Nakashima, and Anthony Nakashima