IN THE COURT OF APPEALS OF THE STATE OF OREGON

ANTHONY NAKASHIMA, GREG NAKASHIMA, ESTHER NAKASHIMA, JONNY LONG, LEE LONG, SUE LONG, LOREN LARRY, and VIOLET LARRY,

Petitioners,

v.

OREGON STATE BOARD OF EDUCATION, and OREGON SCHOOL ACTIVITIES ASSOCIATION,

Respondents.

Agency No. 581-021-0034-4-00

CA No. A123878

PETITIONERS' OPENING BRIEF AND EXCERPT OF RECORD

Petition to Review a Final Order of the Board of Education
Dated January 29, 2004

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I. STATEMENT OF THE CASE.

A. Nature of the Action and Relief Sought.

Petitioners brought this case under ORS 339.430(6), 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.

Petitioners contend that 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 PAA 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).

The present petitioners are current students at PAA and members of its boys' basketball team, and their parents. The case began in March 2000, when other PAA students and their parents asked OSAA to accommodate their religious beliefs in the scheduling of the basketball tournament. When OSAA rejected their request, the students appealed to the Board of Education ("Board"). During the Board proceeding, another student, Anthony Nakashima, was permitted to join the proceeding as a petitioner. The Board ruled that OSAA did not violate any laws in scheduling the tournament.

The students and their parents petitioned this Court to review that Board decision. This Court reversed the Board decision and "remanded for reconsideration." *Montgomery v. Board of Education*, 188 Or App 63, 79, 71 P3d 94 (2003).

On remand, two other PAA students and basketball team members, Jonny Long and Loren Larry, together with Jonny's mother and father and Loren's mother, were permitted to join the case as claimants. A Hearings Officer for the Board held a supplementary evidentiary hearing on September 29, 2003, and the Board issued its "Supplemental

Findings of Fact, Conclusions of Law, Ruling on Evidentiary Matters and Order on Remand" on January 29, 2004. That document will be referred to in this brief as the "Final Order."

B. Nature of the Judgment.

The Board's Final Order dismissed petitioners' complaints in their entirety.

C. Basis for the Appellate Judgment.

This Court has jurisdiction under ORS 183.482.

D. Date of Judgment and Notice of Appeal.

The Board's Final Order is dated January 29, 2004. Petitioners filed their Petition for Judicial Review on February 24, 2004.

E. Questions Presented on Appeal.

1. Did the Board err in concluding that "OSAA has complied with the requirements of ORS 659.850 in scheduling the 2000 and subsequent Class 2A Oregon State High School Basketball Tournaments"? (ER-42.)

2. Does OSAA's refusal to accommodate the religious beliefs of Seventh-day Adventist students at PAA in the scheduling of games on Saturday morning and afternoon during the tournament violate Article I, sections 2 and 3, of the Oregon Constitution?

F. Summary of Argument.

In the prior appeal of this case, this Court held that "ORS 659.850 require[s] OSAA to attempt to find a reasonable accommodation of the students' religious needs ***." *Montgomery*, 188 Or App at 78-79. It held that the statute "requires OSAA to accommodate petitioners' religious beliefs and practices by making adjustments that it would not make for nonreligious practices." *Id*. at 70. And it held that "for OSAA to require a person to choose between a religious obligation and participation in a covered activity, without first

attempting to find a reasonable accommodation for the conflict, is to *** [engage in] illegal discrimination." *Id*. at 77. The Court did not reach petitioners' constitutional arguments, stating that "[t]he basis for our decision makes it unnecessary to consider [those issues]." *Id*. at 79 n 18.

In response to this Court's decision, OSAA made no attempt to find a reasonable accommodation of petitioners' religion. By scheduling the tournament in such a way as to require the student petitioners to play on the Saturday Sabbath, and by declining to offer any accommodation that would not require the students to play on their Sabbath, OSAA has discriminated on the basis of religion, in violation of ORS 659.850, which prohibits both intended and unintended discrimination on the basis of religion in the conduct of interschool activities, and which prohibits discrimination that is fair in form but discriminatory in effect.

Under the religious liberty guarantees in Article I, sections 2 and 3, of the Oregon Constitution, if OSAA's practices infringe a student's religious beliefs, OSAA must prove that its actions are the least restrictive means of furthering a compelling state interest. The religion clauses prohibit OSAA from treating one religion differently from another when it establishes the tournament schedule, and they prohibit OSAA from treating religious factors differently from secular factors when it makes tournament scheduling decisions.

G. Statement of Facts.

1. The Record. In April 2004, the Department of Justice transmitted to this Court "the Judicial Review Record" in this case. That record was incomplete, and in August 2004, the Department filed a "Correction to Judicial Review Record." With that "Correction," the record before this Court consists of (a) a volume of 38 documents compiled by the Board in the original administrative proceeding, which will be referenced herein as "2002 R"; (b) a volume of 21 documents compiled by the Board on remand, which

will be referenced herein as "2004 R"; (c) a volume of four documents, comprising the "Correction to Judicial Record"; (d) petitioners' Exhibits 1 through 76 (with some omitted numbers); (e) OSAA's Exhibits 101 through 121 and 202 through 207; and (f) six hearing transcripts. Three of the transcripts were of pre-hearing teleconferences. The fourth transcript is of the original hearing on February 14, 2001, and will be referred to in this brief as "2001 Tr." The fifth transcript is of the reopened hearing on January 3, 2002, and will be referred to in this brief as "2002 Tr." The sixth transcript is of the hearing after remand from this Court, on September 29, 2003, and will be referred to in this brief as "2003 Tr."[1]

2. The Parties. When this Court decided the first appeal, the petitioners were PAA student Anthony Nakashima and his parents, Greg and Esther Nakashima. *Montgomery*, 188 Or App at 67. Other students who were among the original petitioners had "dropped out of the case as they graduated, while others who are younger joined." *Id*. at 65 n 1. On remand, the Board granted a motion by the Nakashima petitioners to add student Jonny Long and his parents, Lee Long and Sue Long, and student Loren Larry and his mother, Violet Larry, as claimants. (Final Order at 2; ER-13.) As of the date of the Final Order (January 29, 2004), Anthony, Jonny, and Loren were all members of the PAA basketball team, and the Board acknowledged that there was a "real possibility that PAA will make the 2004 tournament" (*id*.), since PAA was at the time ranked first in the State among 2A boys' basketball teams. (2004 R-131.)

[1] The full-size transcript of the September 29, 2003, hearing was transcribed by Miller Transcription Services. A reduced-size transcript of the same hearing transcribed by Naegeli Reporting Corporation is also in the record, at 2004 R-77 to R-43. The pagination of the two transcripts is substantially different. The reduced-sized transcript appears to be more accurate, and citations to "2003 Tr." in this brief will therefore be to that transcript.

Petitioners represent to the Court that Anthony Nakashima, Jonny Long, and Loren Larry have enrolled at PAA for the fall semester and intend to play on its basketball team in the 2004-05 school year. Anthony is a senior, and Jonny and Loren are juniors.[2]

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 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.)

3. 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.)

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[2] After oral argument in the first appeal, Judge Edmonds sent a letter to the parties dated May 1, 2003, asking if the student petitioners were still members of the PAA basketball team. The author of this brief responded with a letter to Judge Edmonds dated May 2, 2003, stating that Andy Montgomery and Greg Nakashima had graduated, but that Anthony Nakashima would be a junior in the fall of 2003 and intended to play on the 2003-04 basketball team. The Court took judicial notice of those facts and relied on them in its opinion. *Montgomery*, 188 Or App at 67.

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.)

Each of the student petitioners testified about the importance, in their own lives, of the observance of the Saturday Sabbath. Anthony Nakashima, Jonny Long, and Loren Larry each stated as follows in their affidavits:

> "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." (2002 R-28 at 85; 2004 R-3; 2004 R-5.)

4. Events leading up to this appeal. This case has a long history. The Board's Final Order describes 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-17, ¶ 7.)

"After the 1996 tournament, the OSAA received numerous complaints about its decision to authorize a potential forfeit." (ER-17, ¶ 8.) In response to those complaints, OSAA changed its policy. "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 morning and afternoon games]. 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-18, ¶ 11.)

In the spring of 2000, the original petitioners in this case asked 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.) On June 3, 2000, OSAA's Executive Board issued an "Order and Opinion Denying Complaint" (2002 R-235 to R-245; ER 1-10), in which it 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 Board. (2002 R-231 to R-234.)

The Hearings Officer appointed by the Board held a hearing on February 1, 2001, and issued a Proposed Order on September 21, 2001. (2002 R-110 to R-133.) The Hearings Officer proposed the following order:

> "IT IS HEREBY PROPOSED that the OSAA be declared to have violated ORS 659.150(2) [since renumbered as ORS 659.850] and Article I, sections 2 and 3 of the Oregon Constitution when it refused to accommodate claimants' religious beliefs and also required that PAA agree to play during the Saturday Sabbath if PAA were to end up in a game scheduled during the Sabbath, and that the OSAA either withdraw its requirement that PAA agree to play during the

> Saturday Sabbath, or make some other reasonable accommodation of claimants' religious beliefs." (2002 R-132.)

A month later, 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.*)

Thus, as of January 2002, it was OSAA policy that it would accommodate the religious beliefs of PAA students at the tournament, at least to the extent of permitting them to enter the tournament without a prior commitment that they would play a game on Saturday morning or afternoon, if the PAA team happened to wind up in the consolation bracket final on Saturday morning or in the third place game on Saturday afternoon. (That is the schedule under the eight-team format adopted for 2004 and subsequent years, as shown in the tournament schedules for 2004 and 2005 set out in Ex. 69. In the 16-team format of prior years, the consolation final was played on Saturday morning, and the third- and fifth-place games were played on Saturday afternoon, before sunset, as shown in Ex. 30.)

On February 25, 2002, the Board issued its "Findings of Fact, Conclusions of Law and Order," in which it concluded that "The OSAA has not violated any laws or rules in the scheduling of the 2000 Class 2A *** Basketball Tournament." (2002 R-53.)

In December 2002, OSAA adopted an amendment to its policy that had the effect of revoking Welter's assurance, set out in his October 2001 letter to PAA (Ex. 44), that PAA could participate in the tournament without making a prior guarantee that it would not forfeit a game if it was required to play during the Saturday Sabbath. The change is described in the Board's Supplemental Findings on remand:

> "QQ. In December 2002 the OSAA amended Board Policy 75, 'Withdrawal from State Championships.' Previously the policy stated: 'No team or individual participant shall enter a state championship meet, contest or tournament intending to withdraw or forfeit prior to the conclusion of the event. Any withdrawal or intentional forfeiture shall be considered a sportsmanship violation, and shall be subject to reprimand and/or other penalties ***.' The amended policy replaced the first sentence with the following sentence: 'By entering participants in a state championship meet, contest, or tournament, each member school certifies that the team or individuals representing the school will participate in every game or competition which is part of that championship event, until the final conclusion of the meet, contest or tournament.'" (ER 33; see also Ex. 76 at 2 [OSAA board minutes showing adoption of new policy, "effective immediately, 12/9/02."])

The previous version of the policy (which was numbered Board Policy 22) was not interpreted by OSAA "to apply to PAA's decision to forfeit a Saturday Sabbath game, because PAA intends to win all of its games and hopes to avoid a forfeit." (Board Finding 25; ER-22. This Court noted that fact in the prior appeal. *Montgomery*, 188 Or App at 66 n 4.) After December 2002, however, forfeiture by PAA of a game scheduled during the Saturday Sabbath "would violate this policy." (Board Finding QQ, ER-33; see Finding N, ER 26, describing petitioners' Option 9, which proposed the forfeiture option.)

On June 5, 2003, this Court reversed the Board's decision that OSAA had not violated the law. The Court held that "ORS 659.850 required OSAA to attempt to find a reasonable accommodation of the students' religious needs" and that the Board "committed legal error by failing to consider whether OSAA had fulfilled that obligation." *Montgomery*, 188 Or App at 78-79.

After the case was remanded, petitioners submitted ten different scheduling options "that would acceptably accommodate their religious beliefs." (Board Findings B and C, ER-24.) OSAA rejected all of them. OSAA offered to accommodate petitioners' religion on Friday, as it had done in the past, by switching the afternoon and evening semi-final games (if PAA were scheduled to play after sundown on Friday evening), but "OSAA did not offer any suggestions about how the OSAA could accommodate PAA/claimants" with respect to the Saturday games. (Board Finding B, ER-24.) Instead, OSAA asked petitioners to make an exception to the tenet of their religion that bars competitive sports activity on the Sabbath. (*Id*.) Welter's testimony on that point at the remand hearing was as follows:

> "Q. So you did not offer any kind of accommodation from the OSAA's side; you – you requested that [the PAA students] rethink their position?
>
> "A. That's correct." (2004 R-60 (2003 Tr. 66).)

II. FIRST ASSIGNMENT OF ERROR

The Board erred in concluding that OSAA's refusal to accommodate petitioners' religious beliefs in the scheduling of Saturday games during the tournament did not violate ORS 659.850. The Board's analysis of the issue is set out at pages 23-31 of the Board's Final Order (ER-34 to ER-42), and its legal conclusion is set out at page 31 (ER-42): "The Superintendent concludes that OSAA has complied with the requirements of ORS 659.850

in scheduling the 2000 and subsequent Class 2A Oregon State High School Boys' Basketball Tournaments."

A. Preservation of Error.

The original petitioners in this case asserted in their appeal letter to the Board that OSAA's action violated ORS 659.850 and OAR 581-021-0045. (2002 R-231 to R-234.) On remand from this Court, petitioners restated that claim as follows:

> "1. Claimants request that the Board of Education find that the OSAA's refusal to make any accommodation for Claimants' religion in the scheduling of games in the Class 2A basketball tournament constitutes unlawful discrimination under ORS 659.850, OAR 581-021-0045, and Article I, sections 2 and 3, of the Oregon Constitution.
>
> "2. Claimants request that the Board of Education order the OSAA to cease its unlawful discrimination by implementing one or more of the scheduling options proposed by Claimants, or any other alternative that will maximize the ability of the students and their varsity teammates to participate in league and district playoffs and the state tournament, if they otherwise qualify." ("Claimants Hearing Memorandum on Remand from Court of Appeals," 2004 R-85; also quoted in Final Order at 3, ER-14.)

B. 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. Water Resources Dept.*, 329 Or 641, 643, 996 P2d 958 (2000).

C. Argument.

1. OSAA Made No Attempt to Comply With This Court's Opinion in the Prior Appeal.

In the first appeal of this case, this Court held that "the statutory prohibition of religious discrimination [in ORS 659.850] requires OSAA to accommodate petitioners' religious beliefs and practices by making adjustments that it would not make for

nonreligious practices," *Montgomery*, 188 Or App at 70, and that "for OSAA to require a person to choose between a religious obligation and participation in a covered activity, without first attempting to find a reasonable accommodation for the conflict, is *** illegal discrimination." *Id*. at 77. "It is clear from the board's findings that, without some accommodation of Anthony's religious obligations, OSAA's policy will have a direct impact on his ability to participate in the Class 2A basketball tournament." *Id*. at 71.

OSAA's response to these rulings was simple: do nothing. Its policies and practices after this Court's decision were exactly the same as they were before this Court's decision. There was no change in policy, no change in attitude, no offer to modify the Saturday schedule in any way — in short, OSAA made utterly no attempt to accommodate petitioners' religious beliefs. OSAA Executive Director Welter testified about OSAA's response to this Court's decision as follows:

- Despite the fact that this Court held that "ORS 659.850 required OSAA to attempt to find a reasonable accommodation of the students' religious needs," *Montgomery*, 188 Or App at 78-79, and that OSAA's failure to do so was "illegal discrimination," *id*. at 77, Welter testified that he believed that this Court had not found that OSAA had violated the statute. (Ex. 65 at 6 (Welter Depo. at 23:8-10).)

- Welter did not tell the OSAA Executive Board that this Court had found there had been a violation of the statute. (*Id*. (Welter Depo. at 22:23-25).)

- When Welter was asked, three times, whether he believed that this Court had ruled "that you had to take religion into account in scheduling," Welter could not or would not answer the question; each time, he responded that it was his "understanding that [the Court] remanded it back to the State Board of Education for review." (Ex. 65 at 6-7 (Welter Depo. at 22:23 to 25:23).)

- Despite this Court's holding that OSAA was required "to attempt to find a reasonable accommodation of the students' religious needs," *Montgomery*, 188 Or App at 78-79, OSAA made no change in its policy. (Ex. 65 at 6 (Welter Depo. at 18:3-12).) That policy includes a refusal to consider requests regarding religion in the scheduling of the tournament. OSAA's Executive Board described its policy, in its "Order and Opinion Denying Complaint" (2002 R-235 to R-245), as follows: "OSAA schedules the Tournament and other activities to take into consideration a number of factors, *none of which relate to the religion or religious beliefs of any of the participants*." (ER-3, ¶ 6; emphasis added.) The Executive Board added that OSAA "schedule[s] its activities, including the Tournament, without regard to the religious beliefs of student participants." (ER-6.) Its former Executive Director, Wes Ediger, testified in January 2001 that "we don't recognize, when we do our scheduling we can't, we don't recognize religion as, to show preferential treatment to any religious faith." (Ex. 28 at 6 (Ediger Depo. at 22:8-11).)

- Welter testified that it was "correct" that OSAA "has not made any proposal or effort of any kind to change the tournament schedule or accommodate Portland Adventist Academy or its students." (Ex. 65 at 5 (Welter Depo. at 18:13-17).)

- When asked if OSAA intended "to make any accommodation or propose any accommodation," Welter responded: "[A]t this point in time *** we don't intend to make any changes in our tournament schedule." (*Id*. (Welter Depo. at 18:18-23).)

In short, this Court's opinion in *Montgomery* had no effect on OSAA. OSAA continues to maintain that it has no duty to propose any accommodation of petitioners' religious beliefs with respect to the games scheduled on Saturday during the hours of the Sabbath; indeed, it has taken the position, by word and by deed, that it does not even have a duty to *attempt* to find an accommodation.

"Accommodation" does not mean doing nothing. "Accommodation," by definition, means a change in the way things have been done in the past.[3] But OSAA is unwilling to make any change that might be responsive to its duty to accommodate petitioners. As discussed more fully below, OSAA has been willing to make changes in the tournament schedule to accommodate a wide variety of secular concerns, and it has been willing to experiment with different tournament scheduling structures over the objection of several member schools. It remains adamant, however, that there is nothing it can do to accommodate petitioners' religious beliefs with respect to the Saturday games. It refused even to *try* to come up with a solution. And the Board, faced with that evidence, simply shrugged its shoulders, and ruled that OSAA had done all that was necessary.

2. The Board Misstated the Law Regarding the Duty to Accommodate.

The Board accurately concluded that the burden was on OSAA "to demonstrate that claimants' requested religious accommodations would create an undue hardship." (Final Order at 23, ER-34.) However, the Board made two significant errors of law that affected its determination that OSAA had met that burden. First, the Board erred in concluding that "claimants must initiate an accommodation request *by making a proposal* ***." *Id*. (emphasis added). Second, the Board erred in defining "undue hardship" as nothing more than a "*de minimis* burden." Petitioners will discuss those errors in reverse order.

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[3] "Accommodation" is defined as "[t]he act or an instance of making a change or provision for someone or something; an adaptation or adjustment." *Black's Law Dictionary* 16 (8th ed 1999). The two relevant synonyms in the dictionary most often cited by Oregon's appellate courts are "adaptation" and "adjustment." *Webster's Third New International Dictionary of the English Language* 12 (unabridged ed. 1993).

a. ORS 659.850 Does Not Incorporate a "*De Minimis*" Standard.

The Board ruled:

> "The Superintendent finds that each of the 10 proposals [submitted by petitioners] to accommodate the religious beliefs of the claimants would create an undue hardship because each would impose more than a de minimus [*sic*] burden on the interscholastic activity administered by the OSAA." (Final Order at 28; ER-39.)

That Board erred in equating "undue hardship" with "*de minimis* burden."

In construing a statute, a court must "seek to discern the intent of the legislature that passed that statute." *State v. Perry*, 336 Or 49, 52, 77 P3d 313 (2003). Under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993), "the context" of a statute is examined in "the first level of analysis." Part of that context is the statute's "historical background *** [which] is useful in determining legislative intent ***." *State v. Perry*, 336 Or at 54. *Accord*, *Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto*, 322 Or 406, 415, 908 P2d 300 (1995) (examination of "historical context" of statute was "necessary to a proper understanding" of its text).

This Court stated in the prior appeal that ORS 659.850, enacted in 1975, was based "on concepts that had developed under federal employment discrimination law" during the previous decade. *Montgomery*, 188 Or App at 71.[4] The Board therefore erred in adopting a "*de minimis*" standard for measuring "undue hardship," because the "*de minimis*" concept did not appear in federal employment discrimination law until *after* the legislature enacted ORS 659.850. In fact, the governing standard in 1975, as expressed by the U.S. Supreme Court, was quite different. Part of the definition of "discrimination" set out in the Oregon statute ("any act that is fair in form but discriminatory in operation," ORS 659.850(1)) was

[4] The statute was originally numbered ORS 659.150. It was renumbered to its present number in 2001.

taken verbatim from *Griggs v. Duke Power Co*., 401 US 424, 431, 91 S Ct 849, 28 LEd2d 158 (1971), in which the Court held that Title VII of the federal Civil Rights Act of 1964

> "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. *The touchstone is business necessity*." (Emphasis added.)

Thus, when the Oregon legislature enacted the statute in 1975, a policy or practice that had a discriminatory effect could be justified only by "business necessity." The "*de minimis*" phrase does not appear in *Griggs*, and there is no suggestion in that opinion that an employer is entitled to enforce discriminatory policies merely because abandonment of those policies would cause it to incur something more than "*de minimis*" expense or inconvenience.

The first appearance of the "*de minimis*" phrase in any U.S. Supreme Court decision involving the duty to accommodate came in *Trans World Airlines, Inc. v. Hardison*, 432 US 63, 84, 97 S Ct 2264, 53 L Ed 2d 113 (1977). Hardison's religion required him to refrain from working during the Saturday Sabbath, *id*. at 67, and for a time, TWA accommodated his religious beliefs by not assigning him to any shift that occurred during the Sabbath. However, when he transferred to a position in which he had less seniority than other employees, he was the only person available to perform his job on Saturdays. When he refused to work on the Sabbath, TWA terminated his employment. *Id*. at 68-69.

The question before the Supreme Court was "whether TWA has met its obligation under Title VII to accommodate the religious observances of its employees." *Id*. at 75-76. In answering that question, the Court relied upon the 1967 EEOC guidelines that required employers "'to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.'" *Id*. at 72 (quoting 29 CFR § 1605.1 (1968)). However, the Court recognized that neither the EEOC nor Congress in enacting Title VII

provided any "guidance for determining the degree of accommodation that is required of an employer." *Id*. at 74. The Court stated that "the employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear," *id*. at 75, and it then reviewed the record to determine whether TWA had met that standard. The Court noted that "TWA itself attempted without success to find Hardison another job," *id*. at 77, and it held that it would have been an "undue hardship" to require TWA to give him extra days off or to replace him with a more senior employee. *Id*. at 84. That conclusion tracked the language of the EEOC regulation – that is, the "undue hardship" standard. However, the Court followed that conclusion with the statement, not supported by any explanation or analysis, that "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id*.

The Court in *Hardison* did not explain why it equated "undue hardship" with "more than a *de minimis* cost," nor did it define what it considered to be a "*de minimis* cost." As discussed more fully below, application of the "*de minimis*" test in the employment context is quite a different matter from application of that test in the context of this case. More importantly, however, it would be improper to import that test into the interpretation of a statute adopted by the Oregon legislature in 1975, two years before that test even came into existence in the 1977 *Hardison* opinion. The legislature could not have intended that the duty to accommodate set out in ORS 659.850 should be measured by a standard that had not yet been enunciated when it adopted that statute. Moreover, an Oregon statute cannot incorporate future federal laws; *a fortiori*, an Oregon statute cannot incorporate future federal court interpretations of a federal statute. *See* Or Const, Art I, § 21 ("nor shall any law be passed, the taking effect of which shall be made to depend upon any other

authority"); *Seale et al v. McKennon*, 215 Or 562, 572-73, 336 P2d 340 (1959) (state law cannot incorporate future federal laws); *Advocates for Effective Regulation v. City of Eugene*, 160 Or App 292, 311-12, 981 P2d 368 (1999) (same).

As this Court made clear in its first opinion in this case, the Oregon legislature adopted ORS 659.850 against the backdrop of federal employment discrimination law as it then existed — which included the requirement that an employer make "a reasonable accommodation of religious practices," *Montgomery*, 188 Or App at 76, unless the employer could show that any accommodation would impose an "'undue hardship on the conduct of the employer's business.'" *Id*. at 75, quoting 42 USC § 2000e(j), adopted in 1972. Before the enactment of ORS 659.850, the phrase "*de minimis*" had never appeared in any court decision or EEOC regulation regarding the duty to accommodate. The phrase that *did* appear in federal law prior to the enactment of ORS 659.850 was "undue hardship." It appeared in the federal regulation, 29 CFR § 1605.1 (1968), cited by this Court in the prior appeal, *Montgomery*, 188 Or App at 72, which constituted part of the federal law "concepts" on which ORS 659.850 was based. *Id*. at 71. The "undue hardship" phrase, or variations of it, appear six times in this Court's prior opinion, *id*. at 72, 73, 74, 75, and 79, and it is that phrase, not the "*de minimis*" concept, that provides the standard by which the reasonableness of an accommodation of petitioners' religious beliefs must be measured.

The Ninth Circuit has said this about "undue hardship":

> "Undue hardship means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts. Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship. As the Supreme Court pointed out in *Franks v. Bowman* [*Transportation Co*., 424 US 747, 775, 96 S Ct 1251, 47 LEd2d 444 (1976)] ***: '"If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little

> hope of correcting the wrongs to which the Act is directed."'"
> *Anderson v. General Dynamics Convair, etc*., 589 F2d 397,
> 402 (9th Cir 1978) (citation omitted), *cert denied* 442 US 921,
> 99 S Ct 2848, 61 LEd2d 290 (1979).

Accord, *Opuku-Boateng v. State of Cal*., 95 F3d 1461, 1474 (9th Cir 1996) ("A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships") (internal quotation marks and citation omitted), *cert denied* 520 US 1228, 117 S Ct 1819, 137 LEd2d 1027 (1997); *Heller v. EBB Auto Co.*, 8 F3d 1433, 1440 (9th Cir 1993) (courts are "skeptical of 'hypothetical hardships' based on assumptions about accommodations which have never been put into practice") (internal quotation marks and citations omitted)[5]; *Buonanno v. AT&T Broadband, LLC*, 313 F Supp 2d 1069, 1081 (D Colo 2004) ("the claimed hardship must be more than merely speculative. *** An employer's costs of accommodation 'must mean present undue hardship, as distinguished from anticipated or multiplied hardship.'").

The federal court cases just quoted were decided after ORS 659.850 was enacted, and so do not shed any light on the intent of the Oregon legislature in enacting the statute. However, the conclusion that the Oregon statute should be interpreted using the "undue hardship" test, and not the "*de minimis*" test, is supported by a decision of the federal court in Oregon issued two years before the legislature enacted the statute. The plaintiff in *Claybaugh v. Pacific Northwest Bell Telephone Co*., 355 F Supp 1 (D Or 1973), was a member of the Seventh-day Adventist Church who worked in one of Bell's offices that was required to "provide round-the-clock service." *Id*. at 2. Employees at that office worked rotating shifts, and on Saturday and Sunday, "usually only one person was on duty during the day shift." *Id*. Claybaugh's faith "compel[ed] him to avoid" work during four shifts that

[5] *Heller* was one of the federal cases cited by this Court in the prior appeal as sources of possible "assistance *** concerning what kinds of accommodations are reasonable and what kinds of hardships are undue." *Montgomery*, 188 Or App at 79.

included portions of the Saturday Sabbath. *Id*. at 3. When he sought accommodation of his religion, Bell told him that it "could not comply with his request. If he wished to keep his job, he would have to hold himself in readiness for regular assignments, including those which might fall during his Sabbath." *Id*. at 3-4. Ultimately, when Claybaugh left work at 5:30 p.m. one Friday afternoon, in order to avoid working on the Saturday Sabbath, "he was terminated," *id.* at 4, and he sued Bell for employment discrimination under Title VII.

The court began its analysis of Claybaugh's claim by quoting the EEOC regulation that required employers "'to make reasonable accommodations to the religious needs of employees … where such accommodations can be made without undue hardship on the conduct of the employer's business.'" *Id*. at 4-5 (quoting 29 CFR § 1605.1(b) (1973)) (emphasis omitted; ellipsis in original). The court then held:

> "This guideline by its very language places an *affirmative duty* upon an employer to attempt an accommodation. Bell took no such affirmative action even though there were various alternatives available." *Id*. at 5 (emphasis in original).

In determining whether Bell had satisfied that duty, the court made no mention of a "*de minimis*" standard. On the contrary, the court adopted the "business necessity" standard from the U.S. Supreme Court's decision in *Griggs v. Duke Power Company*, *supra*:

> "The requirement upon an employer to make a reasonable accommodation to the religious needs of an employee is not unbending. However, an employer cannot sustain its burden of showing undue hardship without first showing that it made an accommodation as an attempted remedy. As the degree of business hardship increases, the quantity of conduct which will satisfy the reasonable accommodation requirement decreases. The balancing of reasonableness and hardship is what I believe Chief Justice Burger was referring to as the 'business necessity' which would qualify as a legitimate reason for discharging an employee.
>
> " *****

> "Balancing the facts of this case, the lack of any affirmative action to make an accommodation precludes the finding of an undue hardship." *Id*. at 6 (footnote omitted) (quoting *Griggs*, 401 US at 431).

Thus, the court in *Claybaugh* equated "undue hardship" with "business necessity," and it is that decision, issued by an Oregon court two years before the enactment of ORS 659.850, that is most instructive in determining the meaning of the statute — not the *Hardison* decision that was issued two years after its enactment.

b. It Was the Duty of OSAA, Not Petitioners, to Propose an Accommodation Under ORS 659.850.

The Board also erred in concluding that "claimants must initiate an accommodation request *by making a proposal*." (ER-34 (emphasis added).) That conclusion is directly contrary to this Court's holding in the prior appeal that "ORS 659.850 required OSAA to attempt to find a reasonable accommodation of the students' religious needs ***." *Montgomery*, 188 Or App at 78. This Court made it clear that once the petitioners presented a bona fide claim of religious discrimination, the burden was on OSAA, then and there, to make a proposal:

> "[F]or OSAA to require a person to choose between a religious obligation and participation in a covered activity, *without first attempting to find a reasonable accommodation* for the conflict, is to act in a way that is fair in form but discriminatory in operation. It is therefore illegal discrimination." *Id.* at 77 (emphasis added).

That holding is consistent with the court's decision in *Claybaugh*, which constituted an important part of the historical context out of which ORS 659.850 emerged. As noted above, the court in *Claybaugh* held that the employer has "an *affirmative duty* *** to attempt an accommodation." 355 F Supp at 5 (emphasis in original). An employer does not satisfy that affirmative duty, the court made clear, by sitting back and doing nothing:

> "At all relevant times, Bell contended there was no way on a permanent basis that it could omit scheduling Claybaugh for some required duty during his Sabbath. This conclusion by Bell was reached by looking at the schedule and determining the changes were insurmountable. Bell took no affirmative action whatsoever. A temporary accommodation such as Bell's asking that its employees exchange shifts or even a temporary readjustment would have allowed Bell to take a less drastic step than discharging Claybaugh. *The burden is on the employer and not the employee asking for an accommodation to seek out the cooperation of other employees* if, as here, this would be a reasonable accommodation.
>
> ****
>
> "Bell's overall position seems to be that so long as it studied a situation and in good faith believed that scheduling difficulties prevented a permanent scheduling solution to accommodate Claybaugh's religious needs, a discharge of Claybaugh would be lawful. I do not agree. This is not the 'making' of a reasonable accommodation. The fact that an employer's motives were pure does not obviate the illegality of a discharge." 355 F Supp at 5, 6 (emphasis added).

Here, OSAA never suggested *any* possible accommodation with respect to the Saturday games; its only suggestion was that the petitioners should reconsider their religious beliefs and make an exception to them. OSAA's view of what constituted an acceptable offer of accommodation to the current claimants was, in Welter's words, to ask if *petitioners* "could make any kind of an exception or accommodation" for their religious beliefs. (2004 R-60 (2003 Tr. 66).) As a federal court in Virginia said about a similar "offer" of accommodation, "This is the same as asking plaintiff not to observe her bona fide religious practices and, therefore, is not an accommodation to her religion but rather a request not to practice her religion." *Edwards v. School Bd. of City of Norton, Va*., 483 F Supp 620, 626 n 7 (WD Va 1980), *vacated in part and remanded for consideration of additional relief to plaintiff*, 658 F2d 951 (4th Cir 1981).

3. OSAA Has Not Demonstrated That Every Conceivable Accommodation of Petitioners' Religious Beliefs Would Impose an Undue Hardship.

OSAA has never attempted to accommodate PAA students with respect to the games played during the Sabbath on Saturday. Since OSAA has never actually conducted a tournament in which the time of a Saturday game has been shifted in order to accommodate the religious beliefs of PAA students, its concerns about inconvenience to participants and spectators are entirely speculative and hypothetical. In fact, OSAA's willingness to change tournament schedules for a variety of other reasons shows that its refusal to do so in response to petitioners' request is unreasonable.

In *Claybaugh*, the court held that the employer's willingness to accommodate requests made by other employees for adjustments in their work schedules for non-religious reasons was evidence that the employer would have incurred no "undue hardship" if it had made an accommodation for the plaintiff's religious beliefs:

> "Bell could have made temporary accommodations as it had done at other installations. Bell either by full scheduling or by allowing employees to come in late or leave early had met other employees' needs. These accommodations were for such purposes as Toastmaster meetings, Boy Scout meetings, bowling teams, and attendance by employees at Oregon State University." 355 F Supp at 5.

OSAA's conduct in this case closely parallels the conduct of the employer in *Claybaugh*. OSAA has been overseeing interscholastic athletics in Oregon since 1918. (Ex. 32.) It schedules 74 state championships in 19 interscholastic activities every year. (Ex. 8 at 2.) It has, over the years, shown a great deal of flexibility in trying different tournament formats, and in making last-minute adjustments to tournament schedules. 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:

- OSAA has been willing to "allow[]" member schools "to move a [playoff] game off *** an SAT test date to *** the previous day." (2002 Tr. at 45.)
- It has been willing to shift the time of a tournament game at the last minute, to accommodate a team that was a last-minute entry. (2004 R-46 (2003 Tr. 123); 2002 Tr. at 45.; Ex. 7.)
- It has been willing to shift games in the 4A tournament from Memorial Coliseum to Benson High School, to change the starting time from Tuesday afternoon to Tuesday morning, and to schedule three sessions on Tuesday instead of two, solely because the Trailblazers were using the Coliseum. (Ex. 45 at 4, 5.)
- It is willing to reschedule baseball games in the event of rain. (Ex. 28 at 25 [Ediger depo.].)
- It is willing to schedule tripleheaders and even quadruple-headers during the 2A tournament. (2004 R-51 (2003 Tr. 103).)
- It has been willing, in many 2A tournaments, to schedule more than one game at the same time. (See, *e.g.*, Ex. 53 at 1 and 2; Ex. 54 at 21-22.)
- It has been willing to schedule games at Pendleton High School, while other games are taking place at the same time at the "home" arena for the tournament, the Pendleton Convention Center. (*Id*.)
- It is willing to change the starting time for an eight-team tournament from Wednesday afternoon for both boys' and girls' teams, as was the case in 1996 (Ex. 48), to Wednesday afternoon for girls and Thursday afternoon for boys, as was the case in 2004 (Ex. 69).

- It is willing to schedule some games for an hour and a half, and others for an hour and 45 minutes — in the very same tournament, as it did in 1996. (Ex. 48; 2004 R-49 (2003 Tr. 112).)

- It has changed the 2A Boys' Basketball Tournament from an eight-team format to a 16-team format and back again to an eight-team format, even though "some of the coaches complained." (Ex. 65 at 3, Welter Depo. at 11.)

- It has been willing to begin regional playoffs, and to expand the number of teams that make the "playoffs" (*Id*. at 2 (Welter Depo. at 7)), even though this change will give fewer teams the opportunity to go to the tournament in Pendleton — an experience that Welter described, without prompting, as a "lifetime experience." (*Id*. at 4 (Welter Depo. at 13).)

- It has been willing to schedule its 4A football championship specifically for the purpose of accommodating the "three-hour window" that is available in the television broadcast schedule. (2002 Tr. at 47.)

- It has been willing to schedule the 4A basketball tournament to accommodate the timing desires of the Fox television network. (*Id*. at 48.)

- It has been willing to schedule the 3A basketball tournament from Monday through Friday, despite the fact that OSAA "prefer[s] to play it Tuesday through Saturday," in order to accommodate the availability of Gill Coliseum. (*Id*.)

- It has been willing to schedule the 4A boys' basketball tournament 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.)

OSAA has been willing to make all these changes and adjustments in its tournament schedules to accommodate a wide range of secular considerations — but it is not willing to

accommodate the religious beliefs of PAA students. Its lack of good faith in responding to the requests by petitioners and their predecessors is illustrated by OSAA's eight-year history of avoiding its duty to accommodate the students' religious beliefs.

That history began in 1996, when a group of PAA students and their parents first asked OSAA to accommodate their religious beliefs in the scheduling of the tournament. At that time, OSAA took the position that a change in the Saturday schedule to accommodate the religious beliefs of PAA students *would* be feasible. On January 12, 1996, Welter (then OSAA's Assistant Executive Director) sent a memorandum to the OSAA Executive Board, stating that PAA had "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 Executive 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*." (*Id*. (emphasis added).)

Welter was not the only person who thought that a shift of a Saturday morning or afternoon game to Saturday evening would be a reasonable accommodation, and that it could be done "without sacrificing the structure of the tournament." The athletic directors of OSAA's District 1 (of which PAA was a member) voted to endorse the proposal in January 1996. (Ex. 27, Ex. 46.) More significantly, "Wes Ediger, then Executive Director of the OSAA, agreed with Mr. Welter's recommendation, as did all five of the eight members of the OSAA Executive Board who returned Mr. Welter's questionnaire on the subject." (Board Finding O, ER-26 to ER-27.)

Nevertheless, the proposal was not adopted, because, as Ediger put it, OSAA board members heard from their "constituencies." (Ex. 28 at 81-82.) There is, of course, no scheduling option that will please everyone — not even OSAA's recent decision to change the 2A basketball tournament from a 16-team format to an eight-team format for 2004. With respect to that decision, Welter testified:

> "[S]ome of the coaches complained *** because they had worked for a number of years to expand their tournament to 16 boys and 16 girls, like we did at the 3A, 4A level, and so to see it cut back, they were not pleased with that decision." (Ex. 65 at 3 (Welter Depo. at 11).)

OSAA nevertheless has implemented its new eight-team format, despite opposition from several of its member schools, and despite the fact that it has no statutory duty to include any particular number of teams in a championship tournament. In contrast, when OSAA was presented with a request to accommodate the religious beliefs of PAA students — a situation in which OSAA *does* have an affirmative statutory duty to act — OSAA bowed to pressure from school representatives who urged it not to make any accommodation for the religious beliefs of PAA students.

One of the most vehement opponents of accommodation was Earl Fisher, principal at Clatskanie High School and former OSAA president.[6] On January 19, 1996, Fisher sent a memorandum to Ediger that read in part:

> "I have a concern when we begin to accommodate various religious practices in a public setting. Will we require that kosher food be available at all tournament sites? * * * If the question is reasonableness then we are in trouble on this issue since reasonableness and religion tend not to mix very well.
>
> "Go to court!" (Ex. 4 at 1.)

After receiving Fisher's memorandum, OSAA backed away from its offer to accommodate the PAA students. Then-Executive Director Ediger sent a letter to the PAA principal dated January 23, 1996, telling him that instead of allowing PAA to play at Pendleton High School after sundown on Saturday, as recommended by Welter and approved by the OSAA Executive Board, PAA must either play a Saturday day game (during the Sabbath) or forfeit the game. (Ex. 3.) OSAA thus bowed to the wishes of the "majority" in deciding that "the tournament would have to go as scheduled." (Ex. 28 at 81-82 [Ediger Depo.].)[7]

That decision, in itself, violated ORS 659.850, because the whole purpose of the prohibition on discrimination set out in that statute is to prevent the majority from imposing its standards on a minority, without first making a good-faith effort to accommodate the

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[6] He is so identified in Ex. 49 at 1.

[7] The "majority" continued to make its views known even after that decision was made. See Ex. 4 at 4-5 (Imbler High principal, 1/26/96: "I am opposed to any concessions made for Portland Adventist at the 2A State Tournament"; "decisions should be made in the best interest of the majority schools"); *id*. at 9 (Yoncalla High principal, 1/30/96: "Our league * * * is opposed to making accommodations for Portland Adventist"); *id*. at 11 (Athena-Weston superintendent, 2/2/96: "Changes to benefit an individual school based on a religious issue violates [*sic*] the principle of separation of church and state"); *id*. at 14 (Salem Academy administrator, 2/13/96: OSAA decisions should be based on "what is right for the majority of kids, and not what is convenient for a minority").

religious beliefs of the minority. Anti-discrimination laws would be meaningless if the rights of a minority could be ignored simply because the majority would be disturbed or inconvenienced if those rights were recognized and respected. As noted above, "[i]f relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed," *Franks v. Bowman Transportation Co*., 424 US at 775 (internal quotation marks and citation omitted), and the same observation is true with respect to relief under ORS 659.850.

Finally, in considering whether any weight should be given to the "complaints of others" in assessing whether OSAA would suffer an "undue hardship" by shifting the time of a Saturday game, it is pertinent to note that Welter conceded that OSAA has done nothing to encourage its member schools to consider the desirability of accommodating the religious beliefs of PAA students. (2004 R-45, 2003 Tr. 126). As noted earlier, this Court in the prior appeal cited an EEOC guideline, 29 CFR § 1605.1, as an important part of the history and context for interpreting the non-discrimination principle set out in ORS 659.850. *Montgomery*, 188 Or App at 72. The current text of that guideline states that the EEOC urges employers to encourage "voluntary" substitutions among their employees in order to accommodate religious beliefs, and that "[s]ome means of doing this which employers and labor organizations should consider are: *** to promote an atmosphere in which such substitutions are favorably regarded; ***." 29 CFR § 1605.2(d)(1)(i) (2004). The court in *Claybaugh* made the same point: "*The burden is on the employer* and not the employee asking for an accommodation *to seek out the cooperation of other employees* if, as here, this would be a reasonable accommodation." *Claybaugh*, 355 F Supp at 5 (emphasis added).

OSAA has done nothing "to seek out the cooperation" of member schools or to "promote an atmosphere" among those schools in which the accommodation of religious beliefs is seen as a good thing — much less a legal obligation. When asked if OSAA had "ever done anything to encourage its member schools to consider the desirability of accommodating the religious beliefs of PAA students," Welter responded that OSAA had "not [communicated] with our schools." (2003 R-45 (2003 Tr. 126).) Indeed, when faced with the knowledge that PAA would forfeit the Saturday afternoon game that it was scheduled to play during the 2002 tournament, OSAA did not even ask PAA's opponent, St. Mary's of Medford, if it would be willing to shift the game to after sundown. (Ex. 65 at 5-6 (Welter Depo. at 20-21).) Perhaps even more telling with respect to OSAA's attitude is the fact that it has never communicated with its member schools concerning this Court's decision in the first appeal of this case. (*Id*. at 6 (Welter Depo. at 23:11-20).)

OSAA's intransigence is further illustrated by the fact that it has refused to give the sixth-place trophy to PAA for its participation in the 2002 tournament, solely on the ground that PAA forfeited the game that it was scheduled to play on the Saturday Sabbath. (*Id*. at 8 (Welter Depo. at 29).) And as shown above, OSAA's view of what constituted an acceptable offer of accommodation to petitioners was, in Welter's words, to ask if *the petitioners* "could make any kind of an exception or accommodation" for their religious beliefs. (2003 R-60 (Tr. 66).)

In short, OSAA violated ORS 659.850 before this Court decided *Montgomery*, and it has continued to violate the statute after remand.

4. Petitioners' Proposed Accommodation Regarding the Saturday Schedule.

Since OSAA has never proposed *any* accommodation with respect to the Saturday tournament schedule, petitioners are "under no duty to suggest alternatives or compromise

[their] beliefs." *Heller*, 8 F3d at 1441. "An employee's 'concomitant duty' to cooperate *** arises only *after* the employer has suggested a possible accommodation." *Id.* at 1440 (emphasis in original).

Nevertheless, PAA and its students have been proposing the same basic adjustment of the Saturday schedule ever since 1996 (namely, a shift of the Saturday morning or afternoon game to a time after sundown on Saturday). In the current proceeding, petitioners proposed several different options that would accommodate their religious beliefs, in the event that PAA is scheduled to play on Saturday morning or afternoon. Petitioners told the Hearings Officer (Ex. 71) that they believe that their suggested Options 7 and 1 were the best choices. Option 1 is shown schematically in Ex. 55 at 3 to 5, and explained in Ex. 71. It would mean that if PAA winds up in the consolation final (which OSAA scheduled for 10:45 a.m. on Saturday in the 2004 tournament; see Ex. 69) or in the third place game (scheduled for 3:15 p.m. on Saturday; *id.*), that game would be shifted to 6:15 p.m. at Pendleton High School. This is the proposal that PAA made in 1996, and as noted earlier (page 27, *supra*), that proposal was approved by Welter, Ediger, and five of the eight members of the OSAA Executive Board members (the other three did not return ballots).[8]

The reasonableness of this suggested accommodation is supported by comparing it to the kinds of accommodations requested in other cases. In both *Hardison*, 432 US at 67-69, and *Balint v. Carson City, Nev.*, 180 F3d 1047 (9th Cir 1999),[9] for example, employees

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[8] The fact that OSAA's Executive Board had eight members at the time is indicated by Ex. 49 at 4 (minutes of OSAA delegate assembly meeting of April 11, 1996, approving amendment that "increases the composition of the Executive Board to nine (9) elected members effective 1996-97 school year").

[9] In the prior appeal of this case, this Court cited *Hardison* and *Balint*, along with *Heller*, as examples of federal cases that could provide "assistance *** concerning what kind of accommodations are reasonable and what kinds of hardships are undue." *Montgomery*, 188 Or App at 79.

asked for continuing, permanent changes in their work schedules. In such cases, the employer is not asked to make a one-time adjustment so that an employee can attend a one-time event on a particular day (as was the case in *Heller*); rather, the employees are seeking a permanent change in their work schedules, week after week, month after month, year after year. Those requested changes would have required the employers to make continuing schedule adjustments for all of their other employees, and would in many cases (such as *Hardison* and *Balint*) create conflicts with bona fide seniority systems that other employees had the right to rely on.

In this case, in contrast, petitioners' Option 1 proposed a potential change in a single 12-hour span of time on a single Saturday. It was a *potential* change, because of course there may be no need for an adjustment at all: if PAA is permitted to enter the tournament, it may win every game, as it did in 1996, or it may lose its first two games, and in either of those scenarios, it would not be scheduled to play during daylight hours on Saturday. It is only if PAA wins one of its first two games and loses one of its first two games that it would be scheduled to play either on Saturday morning (in the consolation final) or on Saturday afternoon (in the third-place game). In that event, petitioners' request for accommodation is simply for a schedule adjustment that would affect the events of a single 12-hour period on a single day.

Some of the other options proposed by petitioners did entail changes to the overall tournament schedule (Option 4, for example, proposed that the tournament begin with two triple-headers on Wednesday; see Ex. 55 at 15), but petitioners offered them only to show that there are many ways in which OSAA could accommodate their religious beliefs. As the Hearings Officer stated in his Proposed Order dated September 21, 2001, "There appear to be a number of accommodations that would reasonably address claimants' concerns." (2002

R-131.) But even an option that would make a permanent change to the tournament schedule affects only one event, one week per year. It does not involve a continuing, constant change of schedules, week after week, as is presented in many employment discrimination cases. Furthermore, OSAA has frequently made changes to the overall tournament schedule, so such changes, by themselves, clearly cannot constitute an "undue hardship."

The circumstances of this case are thus comparable to those in *Heller*, in which the employee asked for time off for the one-time event of attending his wife's religious conversion ceremony, and to those in *E.E.O.C. v. Ilona of Hungary, Inc*., 108 F3d 1569 (7th Cir 1997), in which the court held that a beauty salon violated Title VII's prohibition against religious discrimination when it refused to accommodate the request of two Jewish employees that they be allowed to take a day off without pay in order to observe Yom Kippur. Obviously, Yom Kippur is an annual event, and if the employer was required to give the employees the day off in one year, it would be required to do so again the following year, and the year after that. But the *Ilona* case shows that making an accommodation for the events of a single day, even on an annual basis, does not present an "undue hardship," and that kind of once-a-year accommodation is simply not comparable to making an accommodation for a permanent, continuing change of work shifts.

III. SECOND ASSIGNMENT OF ERROR

The Board erred in concluding that 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 Board's original order in this case, dated February 25, 2002. (2002 R-25 to R-26.) Specifically, the Board 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." (2002 R-26.)

A. Preservation of Error.

The original petitioners asserted in their appeal letter to the Board that OSAA's action violated the Religion Clauses. (2002 R-233.) They briefed the issue in their original Hearing Memorandum (2002 R-194 to R-204), and they reiterated that claim in their Hearing Memorandum on Remand (2003 R-85). The Board acknowledged, on remand, that petitioners were making a constitutional claim (ER-14), but it did not expressly rule on that claim in its Final Order on remand, presumably because this Court did not consider the constitutional claim in the prior appeal (*Montgomery*, 188 Or App at 79 n 18), and the Board therefore simply adhered to its earlier ruling.

B. Standard of Review.

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

C. Argument.

The Religion Clauses provide as follows:

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

OSAA's administration of high school athletic competitions 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).

1. 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 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*. (ellipsis in original) (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 tournament schedule to accommodate petitioners' religious beliefs violates their rights under the Religion Clauses.

a. OSAA's scheduling decisions burden petitioners' religion.

(i) 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," *Wisconsin v. Yoder*, 406 US 205, 232, 92 S Ct 1526, 32 LEd2d 15 (1972), and in "direct[ing] the religious upbringing of their children." *Id*. at 233.

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. OSAA's practices force student 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 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 such participation "is important to all students who *** undoubtedly derive uncalculated benefits from such competition." *Cooper v. OSAA*, 52 Or App at 438. Thus, OSAA's refusal to accommodate petitioners and their PAA teammates interferes with important parental rights.

(ii) 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 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 those 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 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 (citation omitted).

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, participation in a state high school championship tournament is, according to OSAA's executive director, a "lifetime experience." (Ex. 65 at 4 (Welter Depo. at 13).) Welter is not alone in his view of the significance of tournament participation in the life of a high school student athlete; as press coverage put it at the time of the 2000 OSAA basketball tournaments, such participation 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 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 basketball tournament is voluntary does not excuse OSAA's discrimination. Fifth, a desire to yield to the wishes of the majority does not justify religious discrimination.

b. 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*, 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 and footnote 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 the Religion Clauses. 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. 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, 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, OSAA subsequently abandoned its contention that accommodation of "the religious beliefs of student competitors" would violate the Establishment Clause, since its current policy is 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 was not a departure from OSAA policy; Welter testified, twice, that his letter (Ex. 44) "is consistent with current policy" (2002 Tr. 59, 60), and he stated that 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 OSAA's assertion that the Establishment Clause prohibits the accommodation of religious beliefs. The U.S. 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, 673, 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 v. Amos*, 483 US 327, 338, 107 S Ct 2862, 97 LEd2d 273 (1987). "[G]overnment may (and sometimes must) accommodate religious practices and **** may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Com'n*, 480 US 136, 144-45, 107 S Ct 1046, 94 LEd2d 190 (1987).

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

Least Restrictive Means. Under *Meltebeke*, even if OSAA had shown that its actions were motivated by a compelling state interest, it must also show that there is no less restrictive means for furthering that interest. Many of the scheduling options proposed by petitioners (summarized in Ex. 71), including the option of delaying one game by a few hours (endorsed by Welter in his 1996 memo, Ex. 2), would not prevent OSAA from pursuing any of its legitimate interests. In fact, they would enable OSAA to maximize participation by all member schools. OSAA did not meet its burden of proving that there is no less restrictive means of accomplishing its goals.

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

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.

a. Discrimination among religious beliefs.

By ensuring that no games are played on Sunday, OSAA accommodates most Christian denominations.[10] Yet it is unwilling to accommodate members of minority religions who worship on the Saturday Sabbath. This kind of discrimination among religions violates the Religion Clauses, as demonstrated by *Kemp v. Workers' Comp. Dept.*, 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.

This 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

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[10] This Court found in the prior appeal that there was substantial evidence to support the Board's finding that "OSAA's reasons for not scheduling games on Sundays do not include accommodating a particular group's religious beliefs." *Montgomery*, 188 Or App at 70 n 8. Nevertheless, regardless of its motivation, OSAA's policy of not scheduling games on Sunday has the *effect* of accommodating persons whose religion includes belief in the Sunday Sabbath.

'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, 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).

b. Discrimination between religious and secular considerations.

The Religion Clauses also prohibit 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. This 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. 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 games to accommodate team travel needs, media broadcast schedules, facility problems, SAT tests, and weather; it has scheduled more than one game at the same time; it has scheduled triple-headers and even quadruple-headers; it has scheduled games at two different locations. (See pages 24-25, *supra*.) All of these schedule adjustments and

experiments with different tournament formats were carried out for secular reasons. At the same time, however, OSAA is unwilling to adjust the Saturday schedule for its 2A tournament in order to accommodate petitioners' religious beliefs. OSAA's actions violate the Religion Clauses for the same reason that the workers' compensation law did in *Kemp*.

IV. CONCLUSION.

By constitution and statute, Oregon has determined that its government should not discriminate against persons because of their religion. It has determined, to borrow Justice O'Connor's words with respect to the First Amendment, "that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message that religion or a particular religious belief is favored or preferred." *Elk Grove Unified School Dist. v. Newdow*, ___ US ___, 124 S Ct 2301, 2321, 159 LEd2d 98 (2004) (internal quotation marks and citation omitted). Governmental endorsement of a particular religion, Justice O'Connor has said, "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id*. (internal quotation marks and citation omitted).

That is what OSAA does with the scheduling of the 2A basketball tournament. All high school teams are welcome; all are judged on their ability; all are allowed to compete on equal terms. All, that is, except one. If members of a team adhere to a disfavored religious faith that prevents them from participating on a particular day, that team is excluded from the tournament.

Justice Ginsburg's recent observation with respect to the action of Congress in adopting the Americans with Disabilities Act ("ADA") is equally applicable here:

> "Including individuals with disabilities among people who count in composing 'We the People,' Congress

> understood in shaping the ADA, would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation." *Tennessee v. Lane*, __ US __ , 124 S Ct 1978, 1996, 158 LEd2d 820 (2004) (Ginsburg, J., concurring).

In that case, Tennessee had followed a policy of "blindfolded equality" with respect to courthouse access: all persons were welcome to climb the stairs to the second-floor courtroom, regardless of whether they were able to walk or were in wheelchairs. In this case, OSAA has similarly followed a policy of "blindfolded equality" with respect to the state basketball tournament: all teams are invited to enter the tournament, provided that all teams agree to play during the daylight hours on Saturday — regardless of whether such participation violates the religious beliefs of team members.

But like the ADA, ORS 659.850 and the Religion Clauses of the Oregon Constitution require something more than "blindfolded equality." Sometimes they require "responsiveness to difference; not indifference, but accommodation." OSAA has been unwilling to acknowledge that requirement. It has resisted every suggestion for accommodation. It has made utterly no attempt to respond to religious differences among the students who attend its member schools; it has refused to make the slightest effort to find a way to accommodate petitioners' religious beliefs with respect to games played during the daylight hours on Saturday; it has shown indifference at every step of the way. Its actions were in violation of ORS 659.850 and the Religion Clauses of the Oregon Constitution before this Court issued its opinion in the first appeal, and its actions continue to be in violation of those provisions after remand.

The Board's decision in upholding OSAA's actions has rendered toothless the duty to accommodate religious beliefs under ORS 659.850 and the Religion Clauses. Its decision should be reversed, and the Court should order OSAA to accommodate petitioners' religious

beliefs with respect to the scheduling of tournament games during the daylight hours on Saturday.

DATED: September 23, 2004.

Respectfully submitted,

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