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,

Petitioners,

v.

BOARD OF EDUCATION and OREGON SCHOOL ACTIVITIES ASSOCIATION,

Respondents.

CA No. A117678

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

PETITIONERS' REPLY BRIEF

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

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December 2002

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I. Discrimination Between Religions

The Board begins its Argument by contending that the OSAA tournament schedule "does not, in effect, 'unreasonably discriminate' based on religion *** because OSAA has valid, secular reasons for its policy of scheduling tournament games on days other than Sunday ***." (Board Br. at 7.) Although the Board, commendably, makes no effort to defend the OSAA's original explanation for rejecting petitioners' request for an accommodation of their religious beliefs (namely, as the OSAA put it, that such an accommodation "would violate the Establishment Clause of the First Amendment"; see Pet. Br. at 31; ER-4), the Board nevertheless tiptoes around the reality that the OSAA custom and practice of not scheduling activities on Sunday favors majoritarian religions – that is, the vast majority of Christians who recognize Sunday as their Sabbath.

The Board says that "the *most* that can be said is that OSAA over some period of time in the past based its policy of not scheduling tournament games on Sundays in part on the preference of Sunday worshippers." Board Br. at 14 (emphasis in original). In a footnote to that statement, the Board adds that "[t]he Board does not concede that the record supports even this inference," *id*. at 14 n 6, and then refers the reader to pages 36-37 of its brief. On those pages, the Board returns to the theme, conceding that "the record contains some hint of suggestion that OSAA's historical practice of not scheduling games on Sundays may have been driven in part by the wishes of some that that day be left open for religious observances ***." Board Br. at 37.

The Board thus concedes, on page 37 of its Brief, what it had denied on page 7, for there it contended, mistakenly, that "the record contains no evidence that were OSAA to schedule games on Sunday, doing so would violate a religious tenet of those who worship on Sundays." Board Br. at 7 n 4. On the contrary, the record contains evidence that the

Superintendent of one public school district objected to the scheduling of games on Sunday because "[p]laying on Sunday would violate many peoples' [*sic*] sabbath observance." (Ex. 4 at 18.) That evidence was not a piece of ancient history; the Superintendent's letter was written in 1997. Furthermore, there is evidence in the record that the religious beliefs of members of the Church of Jesus Christ of Latter Day Saints "prevent them from playing on the Sabbath" – that is to say, Sunday, which is the day observed as the Sabbath by members of that church. (Ex. 26 at 3-4.)[1]

To be sure, there is nothing in the record to indicate that any OSAA official ever said, "We want to prohibit games on Sundays in order to protect the religious sensibilities of the majority." They didn't have to say that, for it was obvious that the OSAA's scheduling decisions had precisely that effect. The very purpose of ORS 659.850 is to eliminate the discriminatory effects of practices and policies that had their roots in discrimination, and to suggest that recognition of Sunday as a day of rest did not have its roots in official deference to majoritarian religion is simply to deny the facts of history. The Ninth Circuit has noted "the overtly sectarian origins" of the Sunday closing laws, *Cammack v. Waihee*, 932 F2d 765, 778 (9th Cir 1991), *cert denied* 505 US 1219, 112 S Ct 3027, 120 LEd2d 898 (1992),

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[1] That exhibit refers to the religious beliefs of Brigham Young University. Petitioners ask the court to take judicial notice of the fact that BYU is a school dedicated to teaching the principles of the Church of Jesus Christ of Latter Day Saints. See OEC 201(f) ("Judicial notice may be taken at any stage of the proceeding."). Information about the religious basis for the entire BYU curriculum can by found at its website, http://www.byu.edu/about/aims/index.html (visited December 15, 2002). According to the Church's official website, under an entry headed "Sabbath observance," "Church members set Sunday aside as the Sabbath, or the Lord's day—a day to worship God and rest from their labors. After attending worship services, they may spend the remainder of the day quietly at home, in visiting family or friends, and in doing good." http://www.mormon.org/learn/0,8672,1579-1,00.html (visited December 15, 2002). An article in *The Oregonian* on March 24, 1999, reported that there were 130,000 members of the LDS church in Oregon, making it the state's second-largest religious group after Roman Catholics. See http://www.adherents.com/index.html (visited December 15, 2002). It is a reasonable assumption that some of those 130,000 LDS members are high school students who participate in interscholastic sports.

and the Georgia Supreme Court noted a century ago that "Sunday is not an ordinary working day. It is 'a day observed by the Christian world as holy, and set apart for the purposes of rest and worship.'" *Georgia R. & Banking Co. v. Maddox*, 42 SE 315, 323 (Ga 1902) (citation omitted).

Justice Frankfurter once observed that "there comes a point where this Court should not be ignorant as judges of what we know as men," *Watts v. State of Ind*., 338 US 49, 52, 69 S Ct 1347, 93 LEd 1801 (1949) (plurality opinion), and the religious roots of Sunday observance are as undeniable as the racist roots of the employment and promotion practices that were at issue in *Griggs v. Duke Power Co*., 401 US 424, 91 S Ct 849, 28 LEd2d 158 (1971). Duke Power's policy of requiring job applicants to have a high school diploma was on its face completely fair, neutral and nondiscriminatory; but that facial neutrality was not enough to overcome the discriminatory origin of the policy. Similarly, a continuing pattern and practice of discrimination that favors Sunday Sabbath observers while disfavoring Saturday Sabbath observers cannot be justified by pointing out that Sunday happens to be the first day of the week, while papering over the historical basis for that happenstance.

II. Discrimination Between Religious and Secular Grounds for Accommodation

In the Board's view, the OSAA's discrimination against students whose religion prevents them from participating in basketball tournament games on their Sabbath (sundown Friday to sundown Saturday) is "reasonable" "because OSAA has valid, secular reasons for its policy of scheduling tournament games on days other than Sunday ***." Board Br. at 7. But that argument ignores the text of the statute. The statute bars "any act that unreasonably differentiates treatment, *intended or unintended*." ORS 659.850(1) (emphasis added). Thus, even if OSAA's motives were utterly fair and benign, and even if its long-standing ban on interscholastic competition on Sunday had nothing to do with protecting the interests of

persons whose religious beliefs prevent them from participating in such competition on that day, the fact remains that the OSAA's policy of scheduling events on the seventh-day Sabbath but not on the first-day Sabbath discriminates on the basis of religion. Students whose religious beliefs bar them from participating in interscholastic athletic competition on the first-day Sabbath are protected; those whose religious beliefs bar them from participating in such competition on the seventh-day Sabbath are not.

In any event, even if the sole reason for the OSAA policy of banning competition on Sundays was its desire, to use the Board's words, "that student athletes, student fans, and others who attend tournament games be given one day after the tournament is concluded to return home and have time to prepare themselves for the week ahead" (Board Br. at 7), that asserted desire would not be compromised by granting petitioners' request for an accommodation of their religious beliefs. Petitioners proposed several scheduling options that would accommodate their belief that they must not play on their Sabbath; *none* of them involved scheduling a game on Sunday. See Ex. 21 (scheduling proposals submitted in March 2000); Ex. 22 (additional options submitted in February 2001).[2]

Furthermore, neither the Board nor the OSAA explains why the asserted interest in a day of preparation for the coming school week should trump other interests that OSAA has publicly asserted, not to mention petitioners' religious liberty interests. For example, the OSAA Mission Statement states: "The OSAA will work to promote interschool activities

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[2] Petitioners' letter of March 2000 (Ex. 21) did point out that scheduling the tournament "from Saturday through Wednesday" would permit the PAA students to participate, but the letter noted that such a schedule "could create problems for students who worship on Sunday" and therefore petitioners "[do] not seriously propose this option as a viable alternative." (Ex. 21 at 8, 9.) The five options proposed by petitioners shortly before the hearing before the Board's hearing officer began in February 2001, submitted "to address both [petitioners'] religious convictions and the OSAA's concerns" (Ex. 22 at 1), all involved adjustments only to the Friday and Saturday schedules. The OSAA rejected those proposals.

that *provide equitable participation opportunities*, positive recognition and learning experiences to students, while enhancing the achievement of educational goals." (Ex. 31, emphasis added). That statement of policy and purpose was reinforced by the OSAA Executive Board in this very case, when it asserted, in its "Order and Opinion Denying Complaint" dated June 3, 2000, that one of the "considerations" that the OSAA takes into account in making its scheduling decisions is its desire "to maximiz[e] participation opportunities for students, coaches, parents, friends, family members and fans." (Ex. 23 at 3.) Maintaining a policy that refuses to accommodate the religious beliefs of students who observe the Saturday Sabbath is inconsistent with that stated goal. The OSAA asserts that it is dedicated to "maximizing participation" – and it makes that statement, it should be emphasized, with the full power and authority of an agency of the State of Oregon – yet in its next breath it says to the Seventh-day Adventist students of the state: "But not you. Your participation in accordance with your religious values and beliefs would be an inconvenience to the majority, and convenience to the majority is more important to us than participation by a religious minority."

The contrast between the OSAA's treatment of Regis High School and petitioners' high school, Portland Adventist Academy ("PAA"), is stark. In 1996, when the Central Linn girls' team was disqualified from participating in the 2A basketball tournament at the last minute, the Regis girls' team became eligible to participate, and its first game was scheduled for 1:30 p.m. on the first day of the tournament. However, because the Regis team did not arrive at the tournament site in Pendleton until late on the evening before the first day of the tournament, the OSAA moved Regis's game to 4:30 p.m. (Ex. 7.)

The OSAA thus applies its asserted policy interests, however they may be described, in a manner that accommodates secular reasons for making schedule changes, while

rejecting religious reasons for doing so. According to the Board, OSAA's policies "distinguish between when it will reschedule and when it will not" by allowing rescheduling because of "the occurrence of an event or a situation over which OSAA has no control – e.g., inclement weather, a team qualifying only at the last minute, broadcasting arrangements, venue availability," but not "when the decision to reschedule would serve only the interests of an individual team or player ***." (Board Br. at 9.)

Whatever else may be said about the merits of this distinction, it does nothing to further some of the OSAA's most important stated goals. Adjusting the tournament schedule to make it more convenient for the Regis team to play presumably furthered the OSAA goals of "provid[ing] equitable participation opportunities" (Ex. 31) and "maximizing participation opportunities for students, coaches, parents, friends, family members and fans." (Ex. 23 at 3.) But so would adjusting the Saturday tournament schedule to permit PAA to play. And shifting the schedule to permit PAA to play would "enhanc[e] the achievement of educational goals," which the OSAA says is also part of its mission (Ex. 31), by teaching respect for all persons regardless of their religion. Oregon law requires public schools to give "special emphasis" in their instruction to "[r]espect for all humans, regardless of *** religion" and to "[a]cknowledgment of the dignity and worth of individuals and groups and their participative roles in society." ORS 336.067(1)(b). The OSAA's refusal to accommodate the religious beliefs of those who adhere to the sanctity of the Saturday Sabbath is inconsistent with that goal.

More fundamentally, the distinction that the Board attempts to defend between permissible secular grounds for accommodation, on the one hand, and impermissible religious grounds for accommodation, on the other, completely eviscerates the prohibition in ORS 659.850 on "any act that unreasonably differentiates treatment, intended or unintended,

*** based on *** religion ***." The Board seems to equate petitioners' religious beliefs with the "planned, but avoidable, secular activities such as field trips or exams" that it cites as examples of activities for which the OSAA will not make a scheduling accommodation. (Board Br. at 4.) The Board apparently agrees with the view of former OSAA Executive Director Wes Ediger, who testified that he believed that PAA and its students "need to maybe make some adjustment in what their thinking is too." (Ex. 28 at 30.) In the Board's view, it should be as easy for petitioners to change their religious beliefs as it is for a high school to change the date of a field trip.

That attitude is impossible to square with the requirements of ORS 659.850, or with the commands of Article I, sections 2, 3, and 20 of the Oregon Constitution, and of the Free Exercise Clause of the First Amendment to the U.S. Constitution. The federal constitution "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), and OSAA's willingness to accommodate the travel needs of Regis High School or the scheduling preferences of a television station, but not the religious beliefs of petitioners, is exactly the kind of discrimination prohibited by the Free Exercise Clause.

The recent decision in *Davey v. Locke*, 299 F3d 748 (9th Cir 2002), illustrates the point. In that case, the Ninth Circuit sustained a challenge to a Washington state program that provided college scholarship funds to state residents, but barred such aid "to any student who is pursuing a degree in theology." RCW § 28B.10.814, quoted in *Davey*, 299 F3d at 750 n 1. The court held that the policy violates the Free Exercise Clause, relying in part on *McDaniel v. Paty*, 435 US 618, 98 S Ct 1322, 55 LEd2d 593 (1978), in which the Supreme Court held that a Tennessee law that barred members of the clergy from serving as members

of a constitutional convention violated a minister's right to the free exercise of his religion. The Ninth Circuit summarized the governing free exercise principles as follows:

> "A state law may not offer a benefit to all ([in *McDaniel*], to hold a public position; here, to hold a Promise Scholarship), but exclude some on the basis of religion (there, ministers; here, would-be ministers). Washington's restriction disables students majoring in theology from the benefit of receiving the Scholarship just as Tennessee's classification disabled ministers from the benefit of being a delegate. A minister could not be both a minister and a delegate in Tennessee any more than Davey can be both a student pursuing a degree in theology and a Promise Scholar in Washington. As the Court explained,
>
> > "'[u]nder the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other ***. In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion. "[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties." *Sherbert v. Verner*, 374 US 398, 406, 83 S Ct 1790, 10 LEd2d 965 (1963).'" *Davey*, 299 F3d at 754, quoting *McDaniel*, 435 US at 626 (bracketed material in *McDaniel*).

To be sure, the Ninth Circuit in *Davey* was dealing with a statute that explicitly discriminated on the basis of religion, whereas in this case, the OSAA's discrimination is implicit. But implicit discrimination violates ORS 659.850 just as much as explicit discrimination does.

The Board's contention that the OSAA's scheduling policies are permissible because they distinguish between "a situation over which OSAA has no control," on the one hand, and "interests of an individual team or player," on the other (Board Br. at 9) is also contrary to *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). As noted in petitioners' opening brief, the

police department in that case prohibited officers from wearing beards, except for medical reasons. The department refused to allow an exemption from the policy for two officers, members of the Muslim faith, whose religious beliefs prevented them from shaving. The Third Circuit held that the department's decision "that secular motivations are more important than religious motivations" violated the Free Exercise Clause. *Id*. at 365.

The Muslim police officers' requested accommodation of their religious beliefs is precisely analogous to petitioners' request for accommodation of their beliefs in this case. The requested accommodation in *Fraternal Order of Police* furthered *only* the interests of the individual officers; the police department's interest in its employees' religious beliefs was no greater than the OSAA's interest in the religious beliefs of team members at its members schools. And the Muslim police officers could easily have complied with the "no beard" policy if only they had been willing "to adjust their thinking," as the former OSAA executive director suggested as a remedy for the PAA students here.

Moreover, allowing a Muslim police officer to wear a beard for religious reasons was no more disruptive to any interest of the police department than allowing another officer to wear a beard for medical reasons. Similarly, rescheduling a tournament game to accommodate the travel needs of the Regis girls basketball team, or scheduling games in order to accommodate the wishes of broadcasters (see Pet. Br. at 19), is no less disruptive to any interest of the OSAA than rescheduling a game to accommodate petitioners' religious beliefs. The Third Circuit concluded, with respect to the police department's enforcement of its "no beards" policy, that "We are at a loss to understand why religious exemptions threaten important city interests but medical exemptions do not." 170 F3d at 367. A similar observation is appropriate here: an accommodation for the religious beliefs of the PAA

students does not threaten any OSAA interest any more than does an accommodation for the travel needs of a team or for the convenience of television broadcasters.[3]

It should be emphasized here that the accommodation requested by petitioners with respect to the Saturday tournament schedule would not impose a hardship on fans, officials, or any other team in the tournament. If PAA were to find itself scheduled to play in a Saturday consolation bracket game (*i.e*., during its Sabbath), that game can be rescheduled and played at another site without depriving the other team or their fans of watching the championship game. The OSAA schedules its tournament games on the assumption that a game will last one and a half hours (see Ex. 30, the tournament schedules for 1999 and 2000). Applying that assumption, if a consolation bracket game involving PAA began at 6:15 p.m. on Saturday, it would end no later than 7:45 p.m. In 1999, the girls' championship game was scheduled to begin at 7:30 p.m. and in 2000, it was scheduled to begin at 7:00 p.m. (Ex. 30.) At worst, the participants and spectators at PAA's game would miss the first half of the girls' championship, and under the 1999 schedule, they would miss only the first quarter of the girls' championship. They would not miss any of the boys' championship. (There would be no additional cost to OSAA in moving a Saturday consolation bracket game to 6:15 p.m., because PAA has agreed to bear any increased costs in renting the alternate site. See Ex. 5 at 1 (1996 letter to OSAA from PAA principal stating that "PAA has agreed to bear the cost of renting [alternate] gym for the 1996 tournament.").)

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[3] The Third Circuit recently reaffirmed its holding in *Fraternal Order* in an opinion sustaining a challenge to a city ordinance that banned residents from affixing signs to utility poles, where the city allowed exceptions for several kinds of secular signs but no exception for Jewish religious symbols. The court held that the city violated the Free Exercise Clause because it "'devalues' [religious] reasons for posting items on utility poles by 'judging them to be of lesser import than nonreligious reasons' ***." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F3d 144, 168 (3rd Cir 2002) (citations omitted).

Petitioners are seeking only a reasonable accommodation of their religious beliefs, and the proposals they have submitted for adjusting the Saturday schedule fall in that category.

III. The Board's Mistaken View of the Record

Perhaps the most curious aspect of the Board's brief is the fact that it is based on a misunderstanding of the OSAA's policies. A great deal of the Board's brief is based on the mistaken assumption that the OSAA is unwilling to make any accommodation for PAA. The evidence, however, shows that the OSAA's present policy is that it *will* accommodate petitioners' religious beliefs with respect to the scheduling of Friday afternoon and evening games. Thus, in October 2001, the OSAA Executive Director informed PAA that:

> "The 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.)

Despite that recognition that PAA "might forfeit a consolation game," the Board asserts, mistakenly, that the OSAA has "abandon[ed] its forfeiture policy." (Board Br. at 20 n 9.) The "forfeiture policy" to which that statement refers is the OSAA's policy in 1996 of allowing PAA to participate in the tournament even though the OSAA knew that PAA would choose to forfeit a game rather than play on the Saturday Sabbath. It is true that the OSAA *did* abandon that policy for a period of time, for in 1997 it required PAA to make a commitment not to forfeit a Saturday Sabbath game. (See Petitioners' Opening Br. at 20.) But this requirement was itself discriminatory, since OSAA had never required any other school to make a commitment not to forfeit a game as a condition of entering a tournament

(*id*.), and the OSAA has now reinstated the policy that it followed in 1996, of allowing PAA to enter the tournament even if it means that PAA will forfeit a Saturday Sabbath game.

The Board's statement that "[i]t is easy to see why *** OSAA would opt for a policy of simply not allowing teams to forfeit and requiring them, as a condition of participating in the tournament, to commit in advance to playing the tournament schedule as originally drawn up" (Board Br. at 19 n 9), thus reflects an unfamiliarity with the record and with the fact that the OSAA has now "opted," to use the Board's word, to allow PAA to forfeit. And when the Board goes on to say that "any adjustment to accommodate petitioners' religious interests would disserve OSAA's interest," Board Br. at 20, citing the "interests" set out in its footnote 9 on page 19, the Board ignores the fact that the OSAA *does* make an adjustment to its Friday schedule "to accommodate petitioners' religious interests." The OSAA itself has determined that making such an adjustment does not "disserve" its own interests, and it is difficult to understand why an adjustment to the Saturday schedule could not similarly be made without violence to any legitimate interest of the OSAA.

One other point should be made with respect to the Board's defense of what it mistakenly believes to be OSAA's "no accommodation for religion" policy. The Board's argument appears to be on a collision course with itself, for the Board contends that *any* adjustment by the OSAA to its tournament schedule "to accommodate PAA's religious beliefs" would violate "[t]he plain wording of ORS 659.850." (Board Br. at 10.) If the Board really believes that the OSAA is presently violating the law, as reflected in Ex. 44, then it should take immediate steps to revoke the approval that the Board itself gave to the OSAA, pursuant to ORS 339.430, to administer interscholastic activities.

IV. Constitutional Principles

"The religion clauses of Oregon's Bill of Rights *** are more than a code. They are specifications of a larger vision of freedom for a diversity of religious beliefs and modes of worship and freedom from state-supported official faiths or modes of worship." *Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or 358, 371, 723 P2d 298 (1986). "Religious pluralism is at the historic core of American guarantees of religious freedom" – including Oregon's. *Salem College & Academy, Inc. v. Emp. Div*., 298 Or 471, 489, 695 P2d 25 (1985). The OSAA does violence to that "vision of freedom for a diversity of religious beliefs" when it refuses to make the modest adjustments necessary to permit these Seventh-day Adventist students to participate fully in the state basketball tournament.

The OSAA's action does similar violence to "the essential command of the Establishment Clause [of the First Amendment], namely, 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.'" *County of Allegheny v. American Civil Liberties Union*, 492 US 573, 627, 109 S Ct 3086, 106 LEd2d 472 (1989) (O'Connor, J., concurring). Justice O'Connor's observation about the "essential command" of the Establishment Clause is equally applicable to the Free Exercise Clause, for the "common purpose [of both clauses] is to secure religious liberty." *Wallace v. Jaffree*, 472 US 38, 68, 105 S Ct 2479, 86 LEd2d 29 (1985) (O'Connor, J., concurring in judgment). "Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms—economic, political, and sometimes harshly oppressive." *Walz v. Tax Commission*, 397 US 664, 673, 90 S Ct 1409, 25 LEd2d 697 (1970). In this case, the Board's contention that it is permissible, under the statute and under the state and federal constitutional guarantees of religious liberty invoked

here by petitioners, for a state agency to accommodate the desires of television and radio broadcasters, but not to accommodate the religious beliefs of the students that it is supposed to be serving, is one more example of that kind of governmental hostility toward religion. It is out of place in Oregon in 2002.

Nor is it relevant that there is no constitutional right to engage in interscholastic sports, as the OSAA contends. (OSAA Br. at 3-4.) When government makes a benefit available, it must do so on a basis that does not violate the constitution. "Recognizing that constitutional violations may arise from the deterrent, or chilling, effect of governmental efforts that fall short of a direct prohibition against the exercise of First Amendment rights, our modern 'unconstitutional conditions' doctrine holds that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit." *Board of County Com'rs v. Umbehr*, 518 US 668, 674, 116 S Ct 2342, 135 LEd2d 843 (1996) (internal alterations, quotation marks, and citations omitted). The same principle applies to an infringement of religious liberty: "Likewise, to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Sherbert v. Verner*, 374 US 398, 406, 83 S Ct 1790, 10 LEd2d 965 (1963).

OSAA contends, mistakenly, that *Sherbert* has been "overruled." (OSAA Br. at 1 n 1.) In fact, as this Court has noted, "*Sherbert's* holding has been substantially narrowed," *Church at 295 S. 18th St. v. Employment Dept*., 175 Or App 114, 126, 28 P3d 1185, *rev den* 333 Or 73, 36 P3d 974 (2001), but this Court's discussion of *Sherbert* in that case shows that its test remains applicable here:

> "The [U.S. Supreme] Court [in *Employment Div. v. Smith*, 494 US 872, 110 S Ct 1595, 108 L Ed2d 876 (1990)] noted that, in

> particular, the good cause requirements of the eligibility statutes create a mechanism for individualized exemptions. Only in such cases, where the state has the authority to create ad hoc, individualized exemptions on the basis of the facts of an individual case, is the state required to extend an exemption for 'religious hardship' in the absence of a compelling reason not to do so." *Id*.

That is precisely the situation here. The OSAA makes "ad hoc, individualized" decisions to modify its tournament schedule based on secular considerations – and even on some religious considerations. Under *Sherbert*, as applied by this Court in *Church at 295 S. 18th St*., the OSAA must show a "compelling reason" for refusing to accommodate petitioners' request for an adjustment in the Saturday tournament schedule. It has not done so.

V. Conclusion

For the reasons stated here and in petitioners' opening brief, the Board's order should be reversed, and the case remanded to the Board with instructions to enter an order requiring the OSAA to grant petitioners' request for an adjustment of the Saturday afternoon tournament schedule to accommodate their religious beliefs.

DATED: December 18, 2002.

Respectfully submitted,

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