

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' REPLY BRIEF

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

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I. REPLY ON FIRST ASSIGNMENT OF ERROR

A. The Meaning of ORS 659.850 Is Properly Before the Court.

In its opinion in the first appeal of this case, this Court held that ORS 659.850¹ “required OSAA to attempt to find a reasonable accommodation of the students’ religious needs ***.” *Montgomery v. Board of Education*, 188 Or App 63, 78-79, 71 P3d 94 (2003). In discussing the meaning of “reasonable accommodation,” this Court repeatedly used the phrase “undue hardship.” *Id.* at 72, 73, 74, and 75. *See also id.* at 79 (remanding for determination of “what kind of hardships are undue”).

In this appeal, petitioners contend that the Board, on remand, “erred in equating ‘undue hardship’ with ‘*de minimis* burden.’” (Blue Br. at 15.) Both OSAA and the Board contend that petitioners failed to preserve that argument. (OSAA Br. at 11-15; Board Br. at 2-5.) That contention is without merit.

The statutory question before this Court is the same question that was before the Board: did OSAA comply with ORS 659.850? That question can be answered only after the meaning of the statute is determined. Petitioners argued to the Board, in a memorandum that OSAA reproduced in its brief (SER-5 to SER-7), that the relevant standard for determining what constitutes a “reasonable accommodation” is “undue hardship.” In that memorandum, petitioners quoted from a Ninth Circuit decision as to what that term means:

¹ ORS 659.850 reads in relevant part as follows:

“(1) As used in this section, ‘discrimination’ means any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on age, disability, national origin, race, marital status, religion or sex.

“(2) No person in Oregon shall be subjected to discrimination in any public elementary, secondary or community college education program or service, school or interschool activity or in any higher education program or service, school or interschool activity where the program, service, school or activity is financed in whole or in part by moneys appropriated by the Legislative Assembly.”

“Undue hardship means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts.” Claimants’ Reply Memorandum on Remand at 5 (SER-7), quoting *Anderson v. General Dynamics Convair, etc.*, 589 F2d 397, 402 (9th Cir 1978).

That is the standard that petitioners urged the Board to apply, and that is the standard that petitioners are urging this Court to apply. (See Blue Br. at 18-21.) The contention now made by OSAA and the Board that petitioners did not preserve that argument is meritless, as a matter of historical fact.

That contention is also meritless as a matter of law. Petitioners have *never* conceded that a *de minimis* standard applies to the interpretation of what constitutes an “undue hardship,” but even if they had made such a concession, it would not be binding on them, or on this Court. That is because the interpretation of a statute is a matter of law for the Court to decide, regardless of the parties’ arguments. In *Newport Church of the Nazarene v. Hensley*, 335 Or 1, 16, 56 P3d 386 (2002), the Court stated that when the meaning of a statute is in issue, a court may consider “particular arguments that counsel (1) made consistently throughout the proceedings, (2) made for the first time on appeal or review, or (3) never made at all ***.” *See also Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997) (“In construing a statute, this court is responsible for identifying the correct interpretation, whether or not asserted by the parties”); *Nibler v. Oregon Department of Transportation*, 338 Or 19, 21 n 1, 105 P3d 360 (2005) (court decides proper construction of statute, regardless of parties’ legal theories).

B. The Board Erred in Equating “Undue Hardship” with “De Minimis Burden.”

Petitioners’ first assignment of error presents a question of law: whether an entity that is subject to a duty of reasonable accommodation under ORS 659.850 can avoid that

duty merely by contending that any accommodation would impose something more than a *de minimis* burden on it. Petitioners’ opening brief (at 15-21) sets out the reasons why the Court should reject that interpretation of the statute, and should instead adopt the “business necessity” standard as enunciated in the court opinion that would have been most relevant to the 1975 legislature that adopted ORS 659.850: *Claybaugh v. Pacific Northwest Bell Telephone Co.*, 355 F Supp 1 (D Or 1973). Indeed, this Court may already have adopted that standard, for in *Montgomery*, it referred, with approval, to “the rule that an employer can justify a disparate impact by showing that it is necessary to the employer’s business.” *Montgomery*, 188 Or App at 69.

Petitioners add just one point. As previously noted (Blue Br. at 16-17), the phrase “*de minimis*” first appeared in a U.S. Supreme Court opinion with respect to the duty to accommodate in *Trans World Airlines, Inc. v. Hardison*, 432 US 63, 84, 97 S Ct 2264, 53 L Ed 2d 113 (1977), and it appeared there with no explanation or analysis. It was supported by no citation to the text of the statute, to legislative history, or to any prior case law. The Oregon Supreme Court has recently made clear that courts need not follow *their own* precedents, if those precedents are not supported by adequate “justification,”² and Oregon courts should be even less inclined, when construing an Oregon statute, to follow *dictum* in a U.S. Supreme Court opinion that is supported by no reasoning or analysis—and which first appeared two years after the statute in question was enacted by the Oregon legislature.

C. The *De Minimis* Test Is Not Required by the Establishment Clause.

OSAA’s contention that the *de minimis* test is “require[d]” by the Establishment Clause of the First Amendment (OSAA Br. at 19) is mistaken. OSAA cites several federal

² *Yancy v. Shatzer*, 337 Or 345, 359, 97 P3d 1161 (2004) (declining to follow *David v. Portland Water Committee*, 14 Or 98, 12 P 174 (1886), because “[t]he court offered no justification, constitutional or otherwise” for its decision on the point at issue).

court decisions that discuss the *de minimis* test (OSAA Br. at 20-23), but *none* of those cases holds that application of that test is required by the Establishment Clause.³ OSAA contends that accommodation of religion somehow confers “special privileges” on persons of faith (OSAA Br. at 24), but this Court recognized, in its opinion in the prior appeal, that a statutory requirement of accommodation for religion does not violate the Establishment Clause. “To require OSAA and the other participants in the Class 2A tournament to accommodate petitioners’ religious obligations does not mean that they are endorsing petitioners’ religious views, nor are they being discriminated against on religious grounds.” *Montgomery*, 188 Or App at 78. The Court added, in a footnote, that “all federal circuit courts that have done so, including the Ninth Circuit ***, have held that the religious accommodation requirements of Title VII are constitutional.” (*Id.* at 78 n 17.)

For example, in *Tooley v. Martin-Marietta Corp.*, 648 F2d 1239 (9th Cir 1981), *cert denied*, 454 US 1098, 102 S Ct 671, 70 LEd2d 639 (1981), a collective bargaining agreement required an employer to discharge all employees who failed to join a union. Three employees refused to join the union because their religion prohibited them from doing so, and they offered to pay an amount equal to union dues to a mutually acceptable charity. The union refused the offer. When the employees then sued the company and the union for religious discrimination under Title VII, the union responded in the same way that OSAA responds to petitioners’ argument here, by “contend[ing] that the ‘substituted charity’ accommodation was unreasonable, that its implementation would cause the union undue hardship, and *that by authorizing such an accommodation, section 701(j) violated the Establishment Clause.*” 648 F2d at 1241 (emphasis added).

³ OSAA concedes that in *Hardison*, in which the *de minimis* standard first appeared, the U.S. Supreme Court “did not enunciate an Establishment Clause rationale for the *de minimis* test *** .” (OSAA Br. at 19; underscoring in original.)

The Ninth Circuit rejected the union’s argument. It held, first, that “Government can accommodate the beliefs and practices of members of minority religions without contravening the prohibitions of the Establishment Clause,” *id.* at 1244, and it then rejected the argument similar to that made by OSAA here, that imposing *any* burden on another person in order to accommodate someone’s religious beliefs is a violation of the Establishment Clause:

“The Steelworkers also contend that the accommodation violates the Establishment Clause because it will ultimately result in either the union curtailing necessary services, or forcing the accommodation cost on other employees. In either case, the Steelworkers argue that the plaintiffs receive the benefit of their religious beliefs at the expense of their co-workers. As a result, it is urged that the accommodation impermissibly places the burdens of accommodation on unaccommodated private parties.

“A religious accommodation does not violate the Establishment Clause merely because it can be construed in some abstract way as placing an inappreciable but inevitable burden on those not accommodated.” *Id.* at 1246.

The Seventh Circuit made the point even more forcefully in *Nottelson v. Smith Steel Wrks. D.A.L.U. 19806*, 643 F2d 445 (7th Cir 1981), *cert denied*, 454 US 1046, 102 S Ct 587, 70 LEd2d 488 (1981):

“[W]hen an individual is exempted from military service as a conscientious objector, another individual must go in his place. The cost to the second individual might very well include injury or death and is in any event clearly greater than the *de minimis* cost imposed on others by Section 701(j). Inasmuch as the selective service exemption does not offend the Establishment Clause, see *Gillette [v. United States]*, 401 US 437, 448-460, 91 S Ct 828, 28 LEd2d 168 (1971)], it follows necessarily that Section 701(j) on its face and as here applied does not either.” 643 F2d at 455.

In short, the notion that the *de minimis* test is required by the Establishment Clause has no foundation in the law.

D. The *De Minimis* Test is Not Required by Article I, Section 20.

OSAA contends that if ORS 659.850 were construed to require it “to bear more than a *de minimis* burden in order to accommodate Petitioners’ religious beliefs,” the statute would violate Article I, section 20, of the Oregon Constitution because it would confer on persons who request an accommodation for religious reasons a “privilege” that is denied to other persons who might request the same accommodation for non-religious reasons. (OSAA Br. at 32-33.) OSAA never raised that contention at any prior stage in these proceedings, and “appellate courts will generally not consider a constitutional issue raised for the first time on appeal ***.” *State v. Kral*, 55 Or App 212, 214, 637 P2d 1300 (1981).⁴

But even if OSAA’s argument were properly before the Court, it should be rejected. The text of the Oregon Constitution itself singles out religion for special protections, *see* Article I, sections 2 and 3, and those special protections do not violate the equal privileges and immunities provision of Article I, section 20. And the U.S. Supreme Court has squarely rejected the contention that Section 702 of the Civil Rights Act of 1964 “offends equal protection principles by giving less protection to the employees of religious employers than to the employees of secular employers.” *Corporation of Presiding Bishop v. Amos*, 483 US 327, 338-39 & n 16, 107 S Ct 2862, 97 LEd2d 273 (1987).

E. Petitioners Seek Review of the Board’s Legal Conclusions, Not its Factual Findings.

OSAA notes, correctly, that petitioners do not challenge any of the Board’s findings of fact. (OSAA Br. at 17, 26.) The Board’s findings are set out at ER-23 through ER-33, and they are supported by the record. However, OSAA also cites the Board’s discussion at

⁴ *Accord, Quackenbush v. Rogue Valley Medical Center*, 151 Or App 800, 801, 951 P2d 201 (1997) (declining to consider constitutional issue presented for first time on review of agency decision).

ER-39 through ER-42 as constituting “findings of fact.” (OSAA Br. at 3.) Later in its brief, OSAA also refers to that discussion as “findings.” (See, *e.g.*, *id.* at 25.) That is not correct. The Board’s discussion set out at ER-39 through ER-42 is part of its conclusions of law, which are reviewable for errors of law. That discussion does not contain findings of historical fact; rather, it contains the Board’s analysis and its conclusions regarding whether OSAA had, as a matter of law, satisfied its legal obligation under the statute.⁵ It is that legal conclusion by the Board, not its findings of historical fact, that petitioners are challenging before this Court.

“That the application of a statute requires an examination of the facts and circumstances presented to the court does not make the matter a ‘question of fact’ in all cases.” *Westfall v. Rust International*, 314 Or 553, 564 n 9, 840 P2d 700 (1992). In this instance, the Board’s conclusions about what constitutes an “undue hardship” were not findings about “facts,” which are “phenomena and events without reference to their significance under the law in question,” *id.* (citation and internal quotation marks omitted); rather, they were conclusions about “the meaning and application of dispositive terms used in [the statute and in this Court’s prior opinion].” *Id.* Those were conclusions of law, and they are subject to review for errors of law.

F. OSAA Has Not Met Its Burden of Showing that Every Possible Accommodation Would Impose an Undue Hardship.

OSAA contends that “[t]he OSAA is not required to demonstrate that ‘every conceivable accommodation’ would create an undue burden.” (OSAA Br. at 24.) The short

⁵ Even if the Board had labeled its discussion as “findings of fact,” this Court would not be bound by that label. *Hoage v. Westlund*, 43 Or App 435, 440, 602 P2d 1147 (1979) (treating “finding of fact” as “conclusion of law,” despite trial court’s characterization to the contrary). See also *Waldorf v. Elliott*, 214 Or 437, 441, 330 P2d 355 (1958) (appellate court “can in any case correct any misapplication of the law to the facts”).

answer to that contention is simple: it *is* required to do just that. In *Heller v. EBB Auto Co.*, 8 F3d 1422 (9th Cir 1993)—a case that OSAA strongly urges this Court to follow (OSAA Br. at 1, 12, 13, 14, 15)—the court held that the burden is on the employer to “undert[ake] some initial step to reasonably accommodate the religious belief” of an employee, but that “[t]he employer need not make such an effort if it can show that *any* accommodation would impose undue hardship.” 8 F3d at 1440 (internal quotation marks and citation omitted; emphasis added).⁶

But it is not necessary to resort to Ninth Circuit opinions under Title VII to show that OSAA is in error. As noted above, this Court in *Montgomery*, 188 Or App at 78-79, held that “ORS 659.850 required OSAA to attempt to find a reasonable accommodation of the students’ religious needs ***.” 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. On remand, the Board flatly ignored those holdings, and instead ruled that it was the *petitioners* who “must initiate an accommodation request by making a proposal.” (ER-24.) Petitioners contend that this ruling was error (Blue Br. at 21), and both OSAA and the Board have effectively conceded the point, since OSAA does not even attempt to defend the Board’s ruling, while the Board contends that “[t]he legal error, if any, is inconsequential.” (Board’s Brief at 10.) But the requirement, as stated by this Court, that the burden was on OSAA to “attempt to find a reasonable accommodation of the students’ religious needs,” *Montgomery*, 188 Or App at 78-79, would be meaningless if OSAA could satisfy that burden by making no attempt whatever to find an accommodation.

⁶ Petitioners quoted at length from this section of the *Heller* opinion in their Hearing Memorandum on remand; the pertinent pages of that Memorandum are reproduced in OSAA’s brief at SER-8 and SER-9.

Yet that is what OSAA did here. In response to this Court's holding that OSAA was required "to attempt to find a reasonable accommodation of the students' religious needs" and to "mak[e] adjustments [for petitioners] that it would not make for nonreligious practices," OSAA did nothing. This Court's decision in *Montgomery* had utterly no effect on the attitude or the actions of OSAA.

Thus, in January 2001, before this Court decided *Montgomery*, OSAA took the position that the burden was on PAA students to accommodate their religious beliefs to OSAA's scheduling convenience; as then-Executive Director Wes Ediger put it, PAA students "need to maybe make some adjustment in what their thinking is." (Ex. 28 at 30 (Ediger Depo., 1/10/01)). After this Court decided *Montgomery*, OSAA's attitude did not change: current Executive Director Tom Welter testified that the students should be willing to "make *** an exception or accommodation for their religious beliefs." (2003 Tr. 49; 2004 R-60 (2003 Tr. 66), 9/29/03.) In response to this Court's holding that "ORS 659.850 required OSAA to attempt to find a reasonable accommodation of the students' religious needs," 188 Or App at 78-79, OSAA was unmoved: Welter testified on remand that it was "correct" that OSAA "made [no] proposal or effort of any kind to *** accommodate Portland Adventist Academy or its students." (Ex. 65 at 5 (Welter Depo., 9/10/03, at 18:18-23); accord, 2003 Tr. 49, 9/29/03.) And despite the fact that this Court squarely held that ORS 659.850 "requires OSAA to accommodate petitioners' religious beliefs and practices by making adjustments that it would not make for nonreligious practices," 188 Or App at 70, the Board found, on remand, that OSAA's policy had not changed: both before and after *Montgomery*, "[t]he OSAA does not consider religious beliefs in scheduling the tournament." (2002 R at 37, ¶ 14 [2002 Finding]; ER-19 [2004 Finding].) It is quite clear that the *Montgomery* opinion was dead on arrival at OSAA.

G. The Court Should Conclude, As a Matter of Law, that the Accommodation Proposed by Petitioners and Recommended by Welter and Ediger in 1996 is Reasonable.

As petitioners noted in their opening brief, they proposed a number of options that would accommodate their religious beliefs, including, as Option 1, the same simple adjustment to the Saturday schedule that petitioners and their predecessors have been proposing since 1996: a shift of a Saturday morning or afternoon game to 6:15 p.m. on Saturday at Pendleton High School. This was the proposal approved in 1996 by Welter, Ediger, and all members of the OSAA Executive Board who voted on it. (Blue Br. at 27.)

OSAA accuses petitioners of making a “false” characterization of the facts, when they stated, in their opening brief, that Welter “told the [OSAA] Executive Board that at least one of the scheduling alternatives suggested by PAA that year was reasonable.”

(OSAA Br. at 30, quoting Blue Br. at 26.) OSAA’s accusation is without merit.

The full text of the Welter letter in question, dated January 12, 1996, is in the record (Ex. 2, p. 1), and a copy is reproduced in the Appendix to this Brief. In it, Welter presented PAA’s accommodation request to the OSAA board. PAA proposed two adjustments that would allow its team to play every game in the tournament and avoid playing on the Saturday Sabbath: first, if PAA were scheduled to play a semi-final game on Friday after sundown, the game would be switched with the afternoon semi-final game, and second, if PAA were scheduled to play a consolation game on Saturday morning or afternoon, the game would be shifted to 6:15 p.m. on Saturday at a different site. Welter recommended accepting the PAA proposal:

“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.” (App-1; emphasis added.)

“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.) OSAA now wants the Court to believe that when Welter, Ediger, and the OSAA Executive Board recommended “last minute time/site adjustments” in the Saturday schedule in order to accommodate the religious beliefs of PAA students, they were recommending something that they thought was *not* reasonable.

The Court should reject OSAA’s effort to rewrite history, and it should order OSAA to accept the plan that its Executive Director, Assistant Executive Director, and Board approved in 1996. Notably, OSAA did not abandon that plan in 1996 because of any perceived hardship; indeed, Welter specifically stated his belief that this scheduling adjustment could be made “without sacrificing the structure of the tournament.” (Ex. 2 at 1; App-1, *post.*) Rather, OSAA abandoned the plan only because it received complaints from some of its member schools—complaints that were made not on the basis of any perceived “hardship” or inconvenience to those schools, but solely on the ground that OSAA should not make any accommodation for religion. (*See Blue Br.* at 28 & n 7.)

In the present appeal, OSAA now contends that the adjustment in the Saturday schedule would impose four “hardships.” First, it says that it would require “renting a new facility.” (OSAA Br. at 5.) The “hardship” of renting the Pendleton High School gym as an additional site for the Saturday evening games should be evaluated in light of the fact that OSAA rented that gym for two additional days from 1999 through 2003 so that 16 more teams could play in the 2A tournament. (*See Ex. 54, pp. 18-24* (1999-2002 tournament

schedules, showing games at Pendleton High and Pendleton Convention Center).) Its unwillingness to rent that gym for one two- or three-hour period so that PAA could participate in the tournament hardly amounts to a “hardship,” especially since history shows that PAA participation in the tournament is likely to produce significantly higher attendance and revenue for the games.⁷ Moreover, although OSAA’s concerns about additional rental costs were fully met by PAA in 1996, when “PAA offered to pay for the cost of renting an alternative site if needed in order to accommodate PAA’s request to have the boys’ 3rd place game played Saturday evening” (Finding of Fact CC, ER-30), after this Court’s remand in *Montgomery*, Welter conceded that OSAA did not even ask PAA if it would be willing to absorb any extra costs that might be incurred because of the rental of an alternate site for a Saturday evening game. (2004 R-59 (2003 Tr. 69).)

The second “hardship” identified by OSAA is the “possibility” that if overlapping games are scheduled, some fans might not be able “to watch the performances of both their boys’ and girls’ teams.” (OSAA Br. at 6.) There is a less than 4% chance that PAA’s opponent in the boys’ tournament would have a girls’ team in the championship game.⁸ And even if that occurred, Pendleton High School is a five-minute walk from the main tournament site. (Finding D, ER-25.) PAA’s game would start at 6:15 p.m. (*Id.*, ER-24.) The girls’ championship game could start 1¼ hours later, at 7:30 p.m., as it did in 1999. (Ex. 54 at 19.) Games generally last 1½ hours. (Finding AA, ER-30.) Thus, PAA’s game

⁷ Attendance at the games in which PAA participated in 1996 set attendance records that still stand. (Ex. 61.)

⁸ The same school would have its boys’ and girls’ teams playing at the same time on a Saturday evening only if (1) PAA is scheduled to play on Saturday morning or afternoon (50% probability), (2) PAA’s opponent also has a girls’ team in the tournament (2/7 probability, according to Board Finding HH, ER-31), and (3) the girls’ team from PAA’s opponent school makes it to the girls’ championship (a 25% probability). 50% times 2/7 times 25% = 3.57% probability of the girls’ and boys’ teams from the same school playing overlapping games.

would overlap with the girls' championship game by only 15 or 20 minutes. Fans could watch all of the PAA game and the last three quarters of the girls' championship game.⁹

Moreover, the “hardship” of overlapping girls’ and boys’ games must be assessed in light of the fact that OSAA schedules the third round of the boys’ 4A tournament on the same day as the girls’ 4A championship, third place, and consolation final games. (OSAA Br., SER-21.) Obviously, the same school may have both girls’ and boys’ teams playing in the 4A tournament at the same time, yet the inability of fans of that school to watch both games does not seem to be a “hardship” that OSAA worries about. No doubt OSAA has valid secular reasons for scheduling girls’ and boys’ 4A tournament games at the same time, but certainly OSAA’s duty to accommodate petitioners’ religious beliefs is an equally valid reason for scheduling girls’ and boys’ 2A tournament games in overlapping time slots.¹⁰ Indeed, as this Court held in *Montgomery*, ORS 659.850 “requires OSAA to accommodate petitioners’ religious beliefs and practices by making adjustments *that it would not make for nonreligious practices.*” 188 Or App at 70 (emphasis added).

The third and fourth “hardships” identified by OSAA in shifting the Saturday schedule are “the issues that would arise with last-minute scheduling changes to the most-attended games,” including the possibility that “fans would not be able to make last-minute travel arrangements to see games.” (OSAA Br. at 6.) But every interested person will know

⁹ OSAA’s concern that fans who watch the girls’ game at Pendleton High might have “to run back to the Convention Center, hoping that a seat is still available for the championship game” (OSAA Br. at 10), is absurd in light of the fact the data in Ex. 61 show that attendance at the 2A tournament games rarely comes anywhere near the 3,400-seat capacity of the Convention Center (Ex. 64). Welter admitted that “in my years with the association, we have not turned anyone away.” (2004 R-58 (2003 Tr. 75).)

¹⁰ And such an accommodation would further Oregon’s strong public policy that public education should give “special emphasis” to instruction in “[r]espect for all humans, regardless of *** religion,” ORS 336.037(1), as well as the State’s goal of “eliminat[ing] attitudes” on which religious discrimination is based. ORS 659A.003(1).

at the beginning of the tournament that if PAA is in the tournament, there may be an adjustment of the Saturday schedule. The Board itself found that “OSAA could use an asterisk by the Saturday morning and afternoon games in the printed program to inform fans and the media that if PAA is scheduled to play in either of those games, that game would be played at Pendleton High School at 6:15 p.m.” (Finding KK, ER-32.) If PAA plays for fourth place, everyone will know about the schedule change on Thursday morning, two full days before the schedule change; if PAA plays for third place, everyone will know on Friday afternoon that there will be a schedule change the next day. (The tournament schedule is set out in OSAA Br., SER-23; see Board Finding KK, ER-32.) OSAA delayed the Regis girls’ game in 1996 by three hours with much less notice than Option 1 provides. (Board Finding 20, ER-20, 21; OSAA Br., SER 1-3, 19, 20.)

II. REPLY ON SECOND ASSIGNMENT OF ERROR

OSAA’s observation that there is no constitutional right to engage in interscholastic sports (OSAA Br. at 34) is irrelevant. Because “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, *** 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. *McDaniel v. Paty*, 435 US 618, 626, 98 S Ct 1322, 55 LEd2d 593 (1977) (state may not condition availability of benefits on person’s willingness to violate his or her religious faith).

The Board’s constitutional argument is devoted largely to an attack on the Supreme Court’s holding in *Employment Div. v. Rogue Valley Youth for Christ*, 307 Or 490, 770 P2d

588 (1989), and it urges this Court not to follow it. (Board Br. at 15-18.) This Court provided the answer to that argument in *Powell v. Bunn*, 185 Or App 334, 357, 59 P3d 559 (2002), *rev denied* 336 Or 60, 77 P3d 635 (2003): “the fact that the Supreme Court is free to revisit its own precedents *** does not mean that we may do so. [When] the Supreme Court has never overruled [a prior case] ***, that case remains binding on this court.”

III. CONCLUSION.

The record is very clear. The OSAA will make no adjustment to its Saturday tournament schedule unless it is directly ordered to do so, and the Board will do nothing to require OSAA to comply with its statutory duty to accommodate petitioners’ religious beliefs unless this Court orders it to do so. The Court should remand this case to the Board with instructions to enter an order requiring OSAA to allow petitioners and their team to enter the 2A basketball tournament (if they qualify), and to accommodate their religious beliefs by making adjustments to the Saturday schedule (if necessary) so that petitioners are not required to play during the Saturday Sabbath.

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Respectfully submitted,

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