

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:

EMPLOYMENT DIVISION, DEPARTMENT OF
HUMAN RESOURCES OF THE STATE OF
OREGON, ET AL.,

Petitioners,

v.

ALFRED L. SMITH;
and

EMPLOYMENT DIVISION, DEPARTMENT OF
HUMAN RESOURCES OF THE STATE OF
OREGON, ET AL.,

Petitioners,

v.

GALEN W. BLACK.

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SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

No. 86-946

No. 86-947

Pages: 1 through 45

Place: Washington, D.C.

Date: December 8, 1987

Heritage Reporting Corporation

Official Reporters
1220 L Street, N.W.
Washington, D.C. 20005
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2 -----X

3 EMPLOYMENT DIVISION, DEPARTMENT :

4 OF HUMAN RESOURCES OF THE STATE :

5 OF OREGON, ET AL., :

6 Petitioners, :

7 v. :

8 ALFRED L. SMITH; : No. 86-946

9 and :

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11 OF HUMAN RESOURCES OF THE STATE :

12 OF OREGON, ET AL., :

13 Petitioners, :

14 v. :

15 GALEN W. BLACK : No. 86-947

16 -----X

17 Washington, D.C.

18 Tuesday, December 8, 1987

19 The above-entitled matter came on for oral argument
20 before the Supreme Court of the United States at 10:57 a.m.

21 APPEARANCES:

22 WILLIAM F. GARY, ESQ., Deputy Attorney General of Oregon,

23 Salem, Oregon; on behalf of the Petitioners.

24 MS. SUANNE LOVENDAHL, ESQ., Roseburg, Oregon; on behalf of the

25 Respondent.

C O N T E N T S

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1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: Mr. Gary, you may proceed
3 whenever you're ready.

4 ORAL ARGUMENT OF WILLIAM F. GARY, ESQ.

5 ON BEHALF OF PETITIONERS

6 MR. GARY: Thank you, Mr. Chief Justice, and may it
7 please the Court:

8 The Respondents in these cases were employed as drug
9 counselors. They were fired from their jobs because they
10 deliberately violated their employer's rule that counselors
11 must refrain from all use of dangerous drugs. They applied for
12 unemployment benefits from the Petitioner State of Oregon. The
13 state's employment agency disqualified them because their drug
14 use was misconduct connected with their work.

15 The question presented is straightforward. Do
16 claimants have a constitutional right under the Free Exercise
17 Clause to compel the state to pay them unemployment benefits
18 solely because the criminal conduct that led to their firing,
19 the use of peyote, was religiously motivated.

20 QUESTION: Mr. Gary, there seems to be some dispute
21 between you and your opponents as to whether this particular
22 conduct was criminal under the laws of Oregon.

23 MR. GARY: Yes, Mr. Chief Justice, the conduct is
24 criminal under Oregon. That's an issue that was presented for
25 the first time in this Court, relying on one Court of Appeals

1 decision, State v. Downes, which was factually quite dissimilar
2 from this case. It involved a heroin addict who was injected
3 with heroin and never had any possession of the drug.

4 The Oregon law is very clear that possession means
5 merely exerting control and, of course, the reason for the
6 prohibition against possession of dangerous drugs is precisely
7 to deter the use of the drug itself.

8 QUESTION: Well, but, the statute prohibits
9 possession, not use, is that right?

10 MR. GARY: That's correct.

11 QUESTION: And it is, I guess, theoretically possible
12 that someone in a Native American church ceremony might have
13 peyote buds administered to him rather than possessing it, is
14 that right?

15 MR. GARY: Your Honor, as I understand the practice,
16 it would be difficult to have it administered without
17 possessing, but, in any event, under Oregon law, the mere
18 presence of an individual in the ceremony where the peyote is
19 there would probably constitute sufficient possession of the
20 drug to be criminal under Oregon law.

21 Mr. Smith, one of the claimants in this case, in
22 fact, has made the argument that he needs to be exempted from
23 the Oregon law because of his religious beliefs, because the
24 conduct that he engaged in in this case and generally --

25 QUESTION: Has the Oregon unemployment compensation

1 law dealing with commission of crimes been satisfied in this
2 case, either by the obtaining of a conviction of a felony or by
3 the admission of it?

4 MR. GARY: No, and the Oregon Supreme Court correctly
5 concluded that that was not the basis for disqualification of
6 these claimants under state law. The basis for
7 disqualification of these claimants under state law was that
8 they violated a policy of the employer --

9 QUESTION: The employer's policy.

10 MR. GARY: Yes, and --

11 QUESTION: Willful misconduct of an employer rule or
12 requirement.

13 MR. GARY: That's correct.

14 QUESTION: But the Oregon court went on apparently to
15 find that the purpose of the Oregon unemployment compensation
16 law did not include a purpose to enforce Oregon's criminal law,
17 didn't it?

18 MR. GARY: Your Honor, --

19 QUESTION: It seems to have determined as a matter of
20 state law that the purpose is to protect the fund and to take
21 care of the unemployment compensation policies, not the Oregon
22 criminal law policies.

23 MR. GARY: No. The Supreme Court's conclusion was
24 that it was bound by this Court's decision in Sherbert v.
25 Verner to consider only the state's interest in the fiscal

1 integrity of the fund. That is not entirely clear from the
2 opinion, but it is borne out by the --

3 QUESTION: Well, it certainly isn't because the
4 Oregon court said, as I read its opinion, that its purpose,
5 that the purpose of the Oregon law was to protect the fund.

6 MR. GARY: No. The argument that was advanced in the
7 Court of Appeals and in the Supreme Court revolved around the
8 question of whether Sherbert v. Verner would permit the Court
9 to look beyond the unemployment scheme itself at other
10 interests.

11 Oregon's interest in controlling the use of -- the
12 conduct that is at issue here is manifested in a variety of
13 different schemes, not only in the criminal law, but in
14 education programs, rehabilitation programs, and also in the
15 unemployment scheme itself.

16 In this case, the disqualification for job-related
17 drug use was entirely consistent with the Employment Division's
18 policy of disqualifying anyone who is found to engage in job-
19 related drug use. There is a policy that is included as an
20 appendix to the Respondent's brief that was promulgated after
21 this case was decided but is consistent with the practice that
22 was in effect at this time, that demonstrates that any use of
23 dangerous drugs in the job market, anything that is job-
24 related, will be grounds for disqualification, and, so, I think
25 it's clear by an examination of the briefs and taking the

1 Court's conclusion with respect to what interest it examines in
2 the context in which it was presented, that they were
3 concluding that this Court had found them by Sherbert to look
4 only at the fiscal interest.

5 QUESTION: You can't derive that from the face and
6 text of the opinion, can you?

7 MR. GARY: No. I concede that it is not entirely
8 apparent from the face of the opinion, but I think that when
9 you read the opinion in light of the arguments that were
10 presented to the Court, it is clear

11 It's also --

12 QUESTION: What is -- say it again. You've lost me.

13 MR. GARY: The Oregon Court concluded that it was
14 bound by this Court's decision in Sherbert to look only at the
15 fiscal integrity of the fund as the state's interest, that it
16 was prohibited to look at other compelling health and safety
17 interests.

18 QUESTION: So, you think that sentence, which reads
19 "the state's interest in denying unemployment benefits to a
20 claimant discharged for religiously-motivated misconduct must
21 be found in the unemployment compensation statutes, not in the
22 criminal statutes", describing the use of peyote, you think
23 that sentence is meant to be a statement of federal law rather
24 than a statement of state law?

25 MR. GARY: Yes.

1 QUESTION: What they're saying is that under
2 Sherbert, you have to find it within the state's --

3 MR. GARY: Yes. The Supreme Court's opinion in this
4 case is merely a wooden application of the Sherbert rule, and
5 they make a wrong step because they missed the threshold
6 inquiry in Sherbert. Sherbert proceeds from the assumption
7 that the state has no interest in regulating the underlying
8 conduct.

9 Because the state has no interest in regulating the
10 underlying conduct in Sherbert, the state had no interest in
11 regulating Mrs. Sherbert's Sunday worship, then the only
12 interest that the Court -- the state could assert was an
13 interest other than interest in regulating that conduct.

14 Sherbert stands for the proposition that the state
15 cannot burden a protected religious practice indirectly when it
16 cannot burden it directly. The vital distinction in this case
17 between this case and Sherbert and Thomas and Hobbie is that
18 here the state does have a vital health and safety interest in
19 regulating the conduct that these claimants engaged in. It has
20 acted on that health and safety interest by making the conduct
21 criminal.

22 If the conduct is criminal, the state cannot be
23 required to provide benefits to these claimants because the
24 claimants had no right to engage in the conduct in the first
25 place.

1 QUESTION: Unless it's unconstitutional to render it
2 criminal.

3 MR. GARY: Precisely. And it is not unconstitutional
4 to render it criminal because of the nature of the state's
5 health and safety interest.

6 Oregon, like all states, has determined that there is
7 a compelling need to deal with the problems of drug abuse and
8 no one in this Court disputes that. The compelling nature of
9 the state's interest in regulating drug use is conceded by the
10 claimants.

11 They also concede that that compelling interest is
12 furthered by the criminal prohibition. Peyote is a Schedule 1
13 drug in Oregon. It is -- that means that it has determined
14 that there is no safe use for it. It cannot be used safely
15 even under the care of a physician and that there is a great
16 susceptibility to drug abuse.

17 Now, once we have borne the burden of demonstrating
18 our compelling interest, the responsibility then is to
19 demonstrate that that compelling interest would be undermined
20 by granting an exemption to the criminal law in order to
21 accommodate the religious practice at issue here.

22 In order to accommodate the religious practice would
23 undermine the state's compelling interest in at least four
24 different ways. First, peyote is dangerous to the user and to
25 those who come in contact with the user. That's the very

1 reason why the state has criminalized it in the first place.

2 It is also dangerous to the community which must
3 tolerate its presence within it. Peyote produces an
4 hallucinogenic state similar to that produced by LSD. All
5 fifty states and the Federal Government categorize peyote has
6 dangerous. The dangers posed by peyote are indifferent to the
7 motivations of the user, and the state is and should be no less
8 concerned about the dangers posed to a religious user than to
9 the dangers posed by the drug -- by one who uses it for
10 recreational purposes or for personal enlightenment.

11 Once peyote is made lawful for some purposes, as
12 these claimants contend they have a right to require the state
13 to do, then the problem of controlling drug trafficking is
14 significantly compounded. Peyote only grows in the
15 Southwestern United States, primarily Texas and in parts of
16 Mexico. It would be difficult to distinguish meaningfully
17 between traffic for lawful purposes and traffic for unlawful
18 purposes.

19 The simple fact is that once some people have a right
20 to possess peyote, there is an increased risk the drug will
21 fall into the hands of those who do not have that right. There
22 is a risk that others will commit crimes against persons who
23 possess peyote lawfully in order to obtain it from them.

24 These claimants, like eighty-nine percent of the
25 Native American population in Oregon, reside in urban areas,

1 and that merely compounds the risk that the presence of the
2 drug in the community will mean that it will fall into the
3 hands of persons who cannot possess it.

4 The record in this case includes an affidavit from
5 Stanley Smart, who is a road chief, who conducts the peyote
6 ceremony. He indicates that it is not uncommon for him to
7 conduct as many as four peyote ceremonies a week. That means
8 that at any given time, Mr. Smart is in the possession of a
9 large amount of peyote, and he makes himself thereby a target
10 for those who would mean to obtain the drug from him for
11 unlawful uses.

12 Moreover, to accommodate the religious drug use and
13 to treat all religious beliefs --

14 QUESTION: You can say the same thing about hospitals
15 that have cocaine, I suppose. Right? I mean, --

16 MR. GARY: In Oregon, Your Honor, hospitals would not
17 have cocaine because it's a Schedule 1 drug.

18 QUESTION: Well, pick some other narcotic that is
19 generally illegal for traffic but is allowed to be used for
20 some purposes.

21 MR. GARY: Yes. That's correct.

22 QUESTION: Laudanum or whatever you want.

23 MR. GARY: That's correct, and that problem is
24 addressed because there is a conclusion that there are some
25 safe uses for the drug and that it serves a purpose.

1 QUESTION: Well, the purpose alleged here is a
2 religious one.

3 MR. GARY: That's correct. But the religious use is
4 the same use that the state has concluded is dangerous and I
5 think demonstrably dangerous because of the nature of the
6 hallucinogenic state that it produces, and the record in this
7 case reflects that the purpose of the religious practice is to
8 induce that hallucinogenic state.

9 And, so, the danger that everyone concedes the state
10 has a compelling interest to address is directly implicated by
11 the practice at issue here.

12 QUESTION: Well, Mr. Gary, I'm still concerned
13 because I'm not sure we even get to that question, unless we
14 get over the initial hurdle that I asked you about. And if I
15 can return to that a minute, are you asking us to hold as a
16 matter of federal law that Oregon must exercise its police
17 powers through its unemployment compensation scheme?

18 MR. GARY: No, Your Honor. I am asking you to hold
19 as a matter of federal law two things. First, that where the
20 state has a regulatory interest in the conduct that underlies
21 the disqualification for unemployment benefits, it is
22 appropriate for the Court to consider that interest in
23 determining whether the disqualification is an impermissible
24 burden on free exercise.

25 QUESTION: Even when the Oregon Court, as a matter of

1 state law, perhaps has refused to do it?

2 MR. GARY: Well, if they refuse to do it as a matter
3 of state law, then my burden is much heavier to carry. My
4 point is that they did not and at a minimum --

5 QUESTION: But we don't know that for sure. We don't
6 know that.

7 MR. GARY: No. I suspect that the record in this
8 case, when you review it, will confirm my assertion that the
9 determination by the Supreme Court of Oregon was a
10 determination that they felt bound to make by virtue of this
11 Court's prior decisions.

12 If you reach that conclusion, then, at a minimum,
13 this case must be sent back to the Court for them to consider
14 the application of our health and safety interest in the
15 context of the regulatory scheme at issue.

16 But you don't even need to get to that point because
17 our threshold point is that the criminal law of Oregon is
18 relevant to the determination in a federal constitutional sense
19 that the Supreme Court of Oregon simply swept under the rug,
20 and that is our first argument, that because the conduct is
21 prohibited as a matter of criminal law, assuming that that
22 criminal prohibition is constitutional and we contend that it
23 is, then these claimants had no free exercise right to engage
24 in the conduct and Sherbert simply doesn't apply because
25 Sherbert only controls when the state has no interest that it

1 has acted upon in regulating the conduct itself.

2 When the state has regulated the conduct itself and,
3 as in this case, has outright prohibited it, Sherbert doesn't
4 apply. You don't even get past that threshold holding by
5 Justice Brennan in his opinion that you enter into the analysis
6 that requires the state to prove a compelling state interest
7 from withholding the benefits only because the state has no
8 interest in regulating the conduct.

9 QUESTION: Then, it seems to me you're suggesting
10 that really the critical issue in the case that has to be
11 decided is whether the conduct of using peyote in a Native
12 American religious ceremony is constitutionally protected or
13 not.

14 I think it's critical to your case that there is no
15 constitutional protection for this use of peyote.

16 MR. GARY: Yes. It is critical to our case that
17 there is no constitutional protection. It is not absolutely
18 necessary for the Court to decide that Oregon can criminalize
19 the conduct because we think that the Court can and should
20 evaluate the state's regulatory interest in the context of the
21 question of whether benefits may be denied.

22 QUESTION: You say if there really is no free
23 exercise right out there, then we don't even reach the problems
24 of Sherbert and those cases, is that right?

25 MR. GARY: That's precisely correct. And because of

1 that --

2 QUESTION: And do you read the Oregon Supreme Court's
3 opinion as resting perhaps by implication on the proposition
4 that the religious use of peyote cannot be punished or burdened
5 by the state because of the federal free exercise clause?

6 MR. GARY: No, I don't. I don't think the Supreme
7 Court even considered that question, although it was advanced
8 before them, and the reason that the Court's opinion should not
9 be read to hold that Oregon cannot punish the conduct
10 criminally is because it would require the Supreme Court to
11 overrule a prior Court of Appeals decision in Oregon State v.
12 Soto, which held precisely the opposite.

13 The only law in Oregon, judicial decision in Oregon,
14 says that there is no constitutional right to an exemption from
15 the application of the criminal law for religious use of
16 peyote.

17 QUESTION: So, the Supreme Court of Oregon rested its
18 decision on the federal free exercise clause, but not on the
19 ground that you could not criminalize peyote?

20 MR. GARY: That's correct. In essence, what the
21 Oregon Supreme Court did was leap-frog over that threshold
22 inquiry and then enter into a balancing test which was
23 hopelessly infected by a misreading of this Court's decision in
24 Sherbert. Even then, they only considered the regulatory -- I
25 mean, the financial interests and they did not consider our

1 regulatory interests.

2 QUESTION: Specifically, you think they read Sherbert
3 as requiring that whatever state interest exists in order to
4 overcome the claim for an exemption or an unwritten exemption,
5 whatever state interest exists must be reflected in the
6 compensation statutes themselves?

7 MR. GARY: That's correct.

8 QUESTION: Rather than just in some criminal law?

9 MR. GARY: Yes, Your Honor. I think that's the way
10 they read Sherbert, and in order for them to read that,
11 Sherbert, that way, they mistook this Court's conclusion in
12 Sherbert, reiterated in Thomas and Hobbie, that the state had
13 no interest in regulating the conduct as a holding that the
14 state's interest in regulating the conduct was irrelevant to
15 the inquiry. That was the constitutional mistake that the
16 Oregon Supreme Court made.

17 Now, --

18 QUESTION: Well, suppose there hadn't been any First
19 Amendment issue at all, did the Oregon Supreme Court indicate
20 that benefits should have in any event been granted in this
21 case because the legality of the conduct was just irrelevant?

22 MR. GARY: No, Your Honor. The Court specifically
23 held that the benefits would be denied as a matter of state
24 law, and if I could, I'd like to walk you through the Court's
25 decision.

1 QUESTION: And that was in the part of the opinion
2 that dealt with Oregon law?

3 MR. GARY: That's correct.

4 QUESTION: The first part of the opinion?

5 MR. GARY: That's correct.

6 QUESTION: So that the second part of the opinion
7 where the Court says that the unemployment benefit, the Board,
8 the Division concedes that the commission of an illegal act
9 does not in itself disqualify, if that were true, why, you
10 would think that they wouldn't have needed to get to any
11 federal issue.

12 MR. GARY: Yes. I think you're right, and that's why
13 it's a little astonishing that the Court takes our concession
14 in the part of our brief where we are talking about the state
15 law issue of whether these people are disqualified and then
16 translates that into our -- the part of our brief that dealt
17 with the impact of the criminal prohibition on the federal
18 constitutional issue, and it's a little bit baffling, but it's
19 very clear from our briefs that have consistently argued that
20 the criminal conduct was not the basis for the disqualification
21 under Oregon law, but that the fact that the conduct is
22 criminal is vital to the Court's assessment of the free
23 exercise clause.

24 QUESTION: Because they did in the end rest their
25 judgment on the free exercise clause, did they not?

1 MR. GARY: Yes. What the Court did was begin as the
2 Oregon Court always does by looking at its own statutes,
3 concluded that under Oregon law, because these claimants
4 engaged in job-related drug use, that actively undermined their
5 employer's interests, which in this case happens to coincide
6 with the state's interests, that constituted misconduct in
7 connection with the work and like anyone who engages in job-
8 related drug use, these claimants are disqualified under state
9 law.

10 They then turn to the Oregon Constitution and
11 concluded that the Oregon religion clauses did not compel the
12 state to provide benefits in any event and they turned
13 specifically then to this Court's decision in Sherbert v.
14 Verner and that's where they made the wrong turn.

15 QUESTION: Well, they said that aside from any
16 federal law, this claimant would have lost, should have lost
17 under state law.

18 MR. GARY: Correct.

19 QUESTION: But only because -- not because the
20 conduct was criminal, but because it was wholly incompatible
21 with the employer's business. Right? That's the way you put
22 it a minute ago.

23 MR. GARY: Yes. The interest that the Supreme Court
24 was applying is the interest that the state has in deterring
25 job-related drug use and there are a wide variety of reasons.

1 QUESTION: Well, let me put it another way. Suppose
2 that in -- when the Court was dealing with Oregon law, it had
3 been found that what the employee did was not incompatible with
4 her job or his job, then the claimant would not have been
5 disqualified just because the conduct was criminal. Right?

6 MR. GARY: That's correct. In Oregon, one is
7 disqualified only for job-related drug use and there's a very
8 good reason for that. The Federal Unemployment Tax Act
9 requires that in order for states to have qualified programs,
10 they can only disqualify persons for job-related misconduct.
11 Therefore, it is completely irrelevant under the Federal
12 Unemployment Tax Act and in order for Oregon to have a
13 qualified program, we cannot disqualify persons for off-the-job
14 drug use.

15 But it is, nevertheless, very clear that if you're
16 going to apply the state's regulatory interest in the context
17 of the unemployment scheme, it plays out in exactly the same
18 way as when you look at the state's regulatory interest and
19 consider whether these claimants are entitled to an exemption
20 from the criminal law.

21 The criminal prohibition is just one important
22 application of the State of Oregon's public policy to curb drug
23 abuse. As I said earlier, the same policy is furthered and
24 reflected in other programs and is reflected in the
25 unemployment compensation scheme.

1 For example, a policy memorandum dealing with
2 employer drug testing that is attached to the Respondent's
3 brief states, "If an employee is discharged for failing a drug
4 test and it is demonstrated that the employee's job performance
5 was impaired by drugs, it is a discharge for misconduct."

6 The Federal Unemployment Tax Act limits our
7 disqualification only to job-related misconduct, but under
8 Oregon law, all job-related drug use is disqualified. All of
9 the health and safety concerns that drive our criminal
10 prohibition are further served by a disqualification for
11 misconduct connected with the work.

12 Job-related -- and, really, the Respondents in this
13 case can't contest that because the very heart of their claim
14 is that the disqualification burdens, their practice of drug
15 use, and since our purpose is to burden their practice of drug
16 use, demonstrates that the unemployment compensation scheme
17 serves that purpose, and the same reasons that we cannot give
18 an exemption to their use from the criminal law would apply in
19 analyzing whether they should be exempted from the
20 disqualification from the unemployment law.

21 In fact, when drug use spills into the work place,
22 the hazards of that use are even greater. In this case, we
23 were talking about drug counselors who, to serve the interests
24 of their clients by acting as role models, that suggested that
25 perhaps if you use drugs responsibly, you could continue to use

1 drugs, but it might just as well have been someone
2 manufacturing automobiles or flying airplanes.

3 Drug use in the work place is a very serious concern.
4 It's real, immediate and compelling, and the same reasons that
5 we can't grant the exemption would apply in the context of the
6 unemployment scheme itself.

7 QUESTION: Well, suppose this employee had worked for
8 Harry and David and just used peyote in a religious ceremony
9 and was fired because of that and the employee applied for
10 unemployment compensation, he would have gotten that.

11 MR. GARY: If the conduct was not job-related, they
12 would get unemployment benefits, but the reason for that, Your
13 Honor, is because, as I indicated, Federal Unemployment Tax Act
14 limits our inquiry to job-related conduct.

15 QUESTION: All right. But if the unemployment board,
16 nevertheless, denied compensation, it would have been reversed
17 in the Supreme Court?

18 MR. GARY: Sherbert v. Verner. It would have been
19 under state law. You're right.

20 QUESTION: Under state law.

21 MR. GARY: It would have been as a matter of state
22 law because the misconduct must be job-related in order for
23 anyone to be disqualified.

24 QUESTION: Well, isn't that essentially what happened
25 in the -- here in this case, when the Court was talking about

1 Oregon law? The only reason that compensation was denied was
2 because the conduct was job-related.

3 MR. GARY: Yes. And the Oregon Supreme Court
4 specifically so found.

5 QUESTION: And the fact it was criminal had nothing
6 to do with it.

7 MR. GARY: Yes, but even the rule that is cited in
8 the Respondent's brief relating to disqualification --

9 QUESTION: Well, how can you really argue that
10 although criminal conduct is not enough to deny compensation
11 for, it, nevertheless, can be relied on to overcome a free
12 exercise claim?

13 MR. GARY: For two reasons. First, because if the
14 conduct is criminal, the claimants have no right to engage in
15 the conduct and, therefore, they can't assert a free exercise
16 claim.

17 Second, because the state has a regulatory interest
18 that must be folded into the calculation, even if you look at
19 whether these people should have a constitutional exemption
20 from the application of the state law-based disqualification.

21 QUESTION: I'm not sure I understand why that's a
22 second reason. Isn't the regulatory interest the same as the
23 interest in enforcing the criminal law?

24 MR. GARY: Yes, Your Honor. It's the same interest.
25 The analysis is just slightly different depending on whether

1 you stop the analysis at the beginning or go into the second --

2 QUESTION: If you had a statutory exemption from the
3 prohibition on drug use for this particular -- for religious
4 use of peyote, then it seems to me one could argue that the
5 conduct was constitutionally protected and the regulatory
6 interest would fall by the way side. If there were an
7 exemption from the state criminal law.

8 MR. GARY: If there were an exemption from the state
9 criminal law, then I think you're correct. Oregon, by the way,
10 as a matter of constitutional law, I think, is foreclosed from
11 granting that kind of an exemption from its criminal law,
12 unless it is compelled by the free exercise clause.

13 I'll reserve the balance of my time. Thank you.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gary.

15 We'll hear now from you, Ms. Lovendahl.

16 ORAL ARGUMENT OF SUANNE LOVENDAHL, ESQ

17 ON BEHALF OF THE RESPONDENT

18 MS. LOVENDAHL: Thank you, Mr. Chief Justice, and may
19 it please the Court:

20 Essentially, the Attorney General is arguing that it
21 disagrees with the decision of state law on a state law issue,
22 which has been our position essentially all along. If you
23 remove the alleged criminality of the Respondent's conduct,
24 these cases are no different from the situations presented by
25 the patterns in Sherbert, Thomas and Hobbie.

1 QUESTION: Ms. Lovendahl, you say that's been your
2 position all along. Your brief in opposition to the Petition
3 for Certiorari doesn't mention at all that this case was
4 decided on the ground of state law, and I would have thought
5 that if that language is to be read the way you assert, now
6 assert it is to be read, you would have said that.

7 MS. LOVENDAHL: Well, in my brief in opposition, I
8 said that the state law correctly applied to principles in the
9 context of the state -- the state court applied them in the
10 context of the state law.

11 QUESTION: You had two points. Reason for denying
12 the writ: (1) the federal question raised by Petitioner has
13 been clearly settled, (2) the decision of the Oregon Supreme
14 Court is consistent with applicable decisions of this Court.
15 One would have expected (3) this case presents nothing but a
16 question of state law.

17 MS. LOVENDAHL: Well, --

18 QUESTION: It's just not there.

19 MS. LOVENDAHL: -- I was responding to the way that
20 they had done their issues, but within that response was the
21 assumption that that was a state law issue.

22 QUESTION: Well, I would have thought that the reason
23 they did their issues that way is that the sentence you're
24 relying upon, to wit the state's interest in denying employment
25 benefits must be found in the unemployment compensation

1 statutes, that is two sentences away from the lead sentence of
2 the paragraph, which reads: "Nor is the state's interest in
3 this case any more over-riding or compelling interest than in
4 Sherbert and Thomas", and I read that -- the later sentence as
5 the state did here, to be referring to what is necessary for
6 the state's interest to be considered over-riding under
7 Sherbert and Thomas, and the Court is saying in order to be so,
8 it has to be found in the unemployment compensation statutes,
9 and it seems to me that this whole case has been argued all the
10 way through right up to here on that assumption, and all of a
11 sudden, in your reply brief, we find that this case has just
12 been decided under state law.

13 Had we known that, we wouldn't have granted cert in
14 the case.

15 MS. LOVENDAHL: The decision, though, that the
16 interest had to be found on the state unemployment compensation
17 statutes was a decision, they were interpreting the state law.

18 QUESTION: Yes, but the -- I thought your argument
19 was that given that interpretation of state law, there's just
20 no really substantial federal question because it's so clear
21 that Sherbert governs it.

22 MS. LOVENDAHL: Correct.

23 QUESTION: But that's still a federal -- that still
24 leaves the decision below resting on the federal ground.

25 MS. LOVENDAHL: It rests on a federal ground in that

1 it was controlled by Sherbert and Thomas. Hobbie had not been
2 decided.

3 QUESTION: So, you really don't say that the case
4 went off on a state ground?

5 MS. LOVENDAHL: No. I mean that there's not a
6 federal distinction between this case and Sherbert, Thomas and
7 Hobbie.

8 QUESTION: Yes, yes.

9 MS. LOVENDAHL: Rather than it was not decided --

10 QUESTION: Given that interpretation of the state
11 law, the federal issue is perfectly clear.

12 MS. LOVENDAHL: Exactly. Those cases are
13 controlling.

14 If you accept the Attorney General Office's argument
15 here, the effect ultimately is to present, actually present
16 establishment law problem. They say that there is an
17 establishment law problem and I say that if these cases are
18 reversed, you're presenting an establishment law problem
19 because no other person who was in this situation would have
20 been denied benefits on the grounds of illegality. So, they
21 are really trying to get the Court to consider illegality in
22 the context that no other person would be penalized on that
23 specific basis.

24 QUESTION: Well, I guess they say they would have
25 been denied benefits on the grounds of employee misconduct.

1 MS. LOVENDAHL: Right. There is a work connection
2 here, but it was the same situation as Sherbert, Thomas and
3 Hobbie. There was a work connection in all of those cases.

4 The test isn't whether the person's getting a special
5 benefit because of their religion, but are they being
6 differently than other people who are forced -- they are being
7 forced to choose between their religion and their job. Are
8 they being treated differently from other individuals in the
9 state who are involuntarily unemployed and eligible for that
10 benefit program.

11 In Sherbert and Thomas and Hobbie, the people were
12 refusing to do work and nobody else who had been in that
13 situation, nobody who refused to do their job all together
14 would have gotten benefits. Nobody who refused to work on
15 Sunday would have gotten benefits, but other religions were not
16 put to that choice.

17 In this case, though, if you do compare fact for
18 fact, in fact, it is not true, as the Attorney General's Office
19 represents, that all job-related drug use is disqualified. I
20 cited two cases in my brief that are acknowledgement of the
21 recognition that alcoholism and drug use are considered -- this
22 was an employer who was a rehabilitation employer and it was
23 their philosophy that any use of drugs or alcohol by a
24 recovering person was an illness.

25 So, in this situation, if the people were drug and

1 alcohol counselors, if they used drugs off duty and it was a
2 product of a drug addiction or if they used wine in a church
3 ceremony, that would be considered relapse, and as long as the
4 individuals were able to work and do other jobs, they would, in
5 fact, be eligible for benefits.

6 So, these people would really be disadvantaged by
7 applying a test requested by the Attorney General's Office
8 rather than the reverse in this case.

9 The most disturbing suggestion that the state makes
10 in this case is that they can extinguish a free exercise
11 guarantee simply by labeling conduct as criminal. I think it's
12 been obvious for quite some time that the established test is
13 that under the Constitution you have a right --

14 QUESTION: May I ask you right there on that
15 question, of course, it's more than labelling it, I suppose
16 they do have a statute that makes it a crime to use certain
17 drugs.

18 Is it your position that it's constitutionally
19 impermissible to prohibit the religious use of peyote?

20 MS. LOVENDAHL: Well, I think that that balancing
21 test has to be applied. You can't ignore the balancing test.

22 QUESTION: But if you apply the balancing test, do
23 you end up with -- in order to prevail, is it not correct that
24 you must submit that your clients had a constitutional right to
25 make -- to use peyote in their religious ceremonies, that the

1 state could not interfere with that right?

2 MS. LOVENDAHL: Well, our position is that if you
3 have to look at the statute at issue that's imposing the
4 burden. In the unemployment context scheme, there was -- the
5 legality of the contact was really irrelevant. So, it wasn't
6 an issue that was decided before.

7 QUESTION: Well, it's relevant if you say that the
8 state may enforce a neutral law that prohibits all drug use
9 even that that is religiously motivated. Then, the law is
10 relevant to the ultimate question of whether you have -- your
11 clients had a constitutional right to engage in this conduct.

12 MS. LOVENDAHL: Right. It's a very circular type of
13 situation that we're in and that is presented by the state in
14 this case, but the fact is that under the Constitution, you
15 have a free exercise right and it can only be overcome if the
16 state can show a compelling interest.

17 Now, in each individual fact situation, the fact is
18 that under the unemployment statutes, this person is put to the
19 same choice as the person who is under their religion. They
20 have to choose between the job requirement and adhering to
21 their faith.

22 In a criminal situation, --

23 QUESTION: Yes, but the difference that I don't think
24 you're really confronting is the fact that there's really no
25 dispute that in the Sherbert and Hobbie and Thomas cases, the

1 conduct that was -- that caused the discharge was conduct that
2 they had a constitutional right to engage in.

3 There's an issue, however, in this case as to whether
4 your clients had a constitutional right to engage in the
5 conduct that led to their discharge.

6 MS. LOVENDAHL: Yes, and in --

7 QUESTION: And don't you have to convince us that
8 they did have a constitutional right in order to prevail?

9 MS. LOVENDAHL: No, I don't think we do, because I
10 feel that that's the problem with their argument, is that they
11 can't boot strap another statute.

12 The fact is that he has a free exercise right --

13 QUESTION: If you don't have such a federally
14 protected right, I don't see that there's even a federal
15 question in the case.

16 MS. LOVENDAHL: Well, there would be if that issue
17 could be decided, but under the state unemployment statute, the
18 interest to be served by that statute is to protect
19 involuntarily unemployed workers, and I think the question in
20 this case really is would that interest be thwarted by giving
21 unemployment benefits --

22 QUESTION: Yes, but the Court ruled that under Oregon
23 law, there was -- these benefits were properly denied, and the
24 claim then was, well, yes, but the first -- the free exercise
25 clause forbids you to deny benefits in this case, even though

1 to every other employee that engaged in misconduct, benefits
2 would be denied.

3 So, you have to get around, it seems to me, to saying
4 that there is a free exercise clause right to engage in
5 criminal conduct.

6 MS. LOVENDAHL: Well, the fact is that other people
7 who want to argue this --

8 QUESTION: Well, let me just ask you, do you think
9 there is a free exercise clause right to engage in criminal
10 conduct?

11 MS. LOVENDAHL: Well, it's our position that this
12 particular religious practice is protected, and we've argued
13 that in our brief.

14 QUESTION: Well, I think you have to convince us of
15 that. Have you got any cases like that, that say that there's
16 a free exercise clause right to engage in -- to use drugs?

17 MS. LOVENDAHL: Well, not to use drugs, but in terms
18 of whether the conduct is criminal or not, in Wisconsin v.
19 Yoder, the Court made clear that you still have to go through
20 the entire balancing test. Obviously, where conduct is made
21 criminal, the most extreme burden that you could have and the
22 state has an obligation to show --

23 QUESTION: I read the Oregon Supreme Court's opinion
24 as reciting without any criticism the fact that the Oregon
25 Court of Appeals had held that religious use of peyote are not

1 exempt from criminal sanctions in Oregon. I'm just reading the
2 footnote.

3 MS. LOVENDAHL: Right.

4 QUESTION: And they don't seem to take any exception.
5 The State v. Soto.

6 MS. LOVENDAHL: Well, because that wasn't the issue
7 before them and that was why they didn't address it. That was
8 one of the things that --

9 QUESTION: But is it part of your submission here
10 that this wasn't criminal conduct under Oregon law at all? I
11 don't see -- I don't know whether --

12 MS. LOVENDAHL: Well, our position is that there
13 would be no distinction between this case at all, if the
14 conduct -- if it was clear that this conduct was
15 constitutionally protected. That's an issue that's never
16 clearly been decided and since, in this case, the unemployment
17 compensation statutes are the statute being applied, --

18 QUESTION: I understand that argument, but are you
19 asking us to affirm on another ground, namely that this conduct
20 wasn't criminal under Oregon law anyway?

21 MS. LOVENDAHL: Well, we don't really feel that
22 that's an issue that has to be decided in this case.

23 QUESTION: All right. Then, you aren't asking us.

24 MS. LOVENDAHL: No.

25 QUESTION: All right.

1 QUESTION: The Attorney General -- the Solicitor
2 General says that it was a policy established by regulation of
3 the Employment Division that drug-related -- that job-related
4 drug use would be automatically disqualified.

5 You don't quarrel with that proposition, do you?

6 MS. LOVENDAHL: Job-related drug use? That's
7 correct.

8 QUESTION: Yes. And, so, why do you say then that
9 this policy or whatever was not found in the unemployment
10 compensation statute?

11 MS. LOVENDAHL: Well, let me correct myself to your
12 last question, though. Job-related drug use would be protected
13 if it was a product of an illness. In other words, not
14 willful, which I think is the same situation when you're
15 talking about a religious impulse, and, so, that's why we feel
16 that they're in the same position in Sherbert, Thomas and
17 Hobbie.

18 QUESTION: That they didn't smoke the stuff or
19 whatever you do with it voluntarily?

20 MS. LOVENDAHL: It was in response to a dictate of
21 their religion. I think that that's the idea behind Sherbert,
22 Thomas and Hobbie, is that you're responding to an authority
23 higher than your employer, but not --

24 QUESTION: Yes, but in Sherbert and Thomas, there was
25 no question but what the conduct engaged in was perfectly

1 lawful.

2 MS. LOVENDAHL: That's correct, and that's the
3 question in this case, is does that have an effect or not, and
4 our position is that you look to the state law and if, under
5 the state law, that's not an interest to be served by that
6 particular legislation, then it has no bearing.

7 QUESTION: Is that a question of federal law or state
8 law whether you look to the state law? I guess you're coming
9 back to that sentence, and I hate to be dense, but I still
10 don't understand what you're asserting that the sentence means.

11 I think you're saying that the Court was saying that
12 the state's interest -- that for purposes of Sherbert and
13 Thomas, as a matter of state law, the state's interest apart
14 from the interest found in the unemployment compensation
15 statute is irrelevant. Right? For purposes of Sherbert and
16 Thomas, as a matter of state law, any interest not in the
17 unemployment compensation statute is irrelevant. Is that a
18 question of state law?

19 MS. LOVENDAHL: Yeah.

20 QUESTION: Can you say as a matter of state law, it's
21 irrelevant for Sherbert and Thomas or is that a question of
22 federal law?

23 MS. LOVENDAHL: Well, what they did was they were
24 deciding how to consider the legality and decided that it was
25 irrelevant and then went on and did their balancing, but under

1 state law, it wasn't anything that could be considered because
2 the legality wasn't relevant, and --

3 QUESTION: What do you mean under state law? But
4 he's not discussing state law. He's discussing Sherbert and
5 Thomas.

6 MS. LOVENDAHL: My reading of that portion of the
7 opinion was that they looked to the legality before they did
8 the balancing test to see whether it should be considered or
9 not. I think that they rejected the Attorney General's
10 argument because the purpose of the unemployment statute was
11 not to enforce the state criminal code.

12 Admittedly, that's a statute that imposes a burden,
13 but the unemployment compensation, the burden imposed by that
14 statute, was what the Court was trying to determine.

15 QUESTION: Determine the state law issue and it was
16 conceded that it was a violation under state law. What was
17 contended for was a requisite exception under federal law,
18 under Sherbert and Thomas.

19 MS. LOVENDAHL: The state law portion of it was that
20 they interpreted their Constitution more restrictively than the
21 federal Constitution has determined. Under the way that they
22 interpreted the Oregon Constitution, Sherbert, Thomas and
23 Hobbie would not have gotten benefits.

24 There has been one case applying these cases since
25 then involving a Jehovah's Witness and they reached the same

1 result, that they were not entitled to benefits under the state
2 Constitution, but they were entitled to them under the federal
3 Constitution.

4 So, that's not the state law decision that we're
5 interested in. We're concerned about how you consider
6 criminality under the unemployment statute. It was a separate
7 determination that they had made.

8 In Wisconsin v. Yoder, the Court stated that only
9 those interests of the highest order and those not otherwise
10 served can over-balance claims to the free exercise of
11 religion, and in this case, the state has a set of statutes
12 designed to serve its interests in law enforcement and the
13 state legislature made it clear that the unemployment
14 compensation statute is not to serve that purpose.

15 There might be some instances where that's not the
16 case, but accepting their theory in this situation, the fact is
17 that the individuals would not -- would be discriminated
18 against rather than favored. The Division does pay benefits to
19 people who engage in criminal law, and the only difference here
20 is that the people are work-connected. They're claiming that
21 they're getting a special protection under the free exercise
22 clause that they wouldn't have gotten but for their religion,
23 but the fact is that the reason we have a free exercise law is
24 to balance the rights that the majority has through
25 legislation.

1 If this was a majority religion in this country, this
2 practice would never be illegal, and that's where that balance
3 comes in, and why it's important to protect this type of
4 conduct.

5 We do feel, though, that if the state is obligated
6 somehow under the federal Constitution to consider the status
7 of the criminal statutes, that, first, it is extremely unclear
8 that Mr. Smith and Mr. Black could have been charged with any
9 crime. They admitted that they used peyote in the ceremony.
10 Use itself is not illegal. They never admitted that they
11 possessed it or exercised dominion and control over it.

12 From the Native American Church amicus brief, it is
13 clear that it's the road man who exercises dominion and control
14 and that the people who attend the ceremony have no more
15 control than an individual who's at a christian ceremony when
16 wine is used. It is essentially the same situation.

17 QUESTION: Well, is it necessary for the state's case
18 in order to refute the necessity -- the constitutional
19 necessity for an exception to their unemployment scheme, is it
20 necessary for them to show that this particular conduct would
21 have been unconstitutional or isn't it enough to show that
22 there is a general state policy against the use of drugs?

23 I mean, the policy against the possession of it is
24 obviously directed to prevent the use of it, and wouldn't it be
25 enough just to show a general policy whether the state showed

1 that this particular individual was criminally in violation or
2 not?

3 MS. LOVENDAHL: Well, in Wisconsin v. Yoder, this
4 Court found that the interest should be weighed where the
5 state's interest in enforcing that law against this particular
6 religious group. Otherwise, the state's interest would always
7 outweigh the interest of the division.

8 QUESTION: I'm not quarreling about the weighing
9 argument. I'm quarreling about your assertion that there's
10 nothing to weigh because this individual had not violated the
11 criminal law. You're trying to preclude the weighing.

12 MS. LOVENDAHL: Right. That would make it a different
13 case if the Court could find that, and that is our position,
14 that they didn't engage in criminal conduct and they couldn't
15 be charged. The Attorney General's Office disputes that. That
16 was never an issue that was ruled on by the Court.

17 QUESTION: I'm saying I don't see how that's
18 relevant. It clearly is a state policy, expressed in its
19 criminal laws, against the use of peyote.

20 MS. LOVENDAHL: Right.

21 QUESTION: Against the possession. The criminal law
22 addresses possession, but the objective of it is to prevent the
23 use, isn't that so?

24 MS. LOVENDAHL: Right. But if these people are
25 exercising their free religious exercise right, it's not

1 illegal under federal law, their particular conduct, I don't
2 see how the state can consistently with the Constitution impose
3 a penalty against them on the basis of their activity as, in
4 fact, illegal.

5 It's not -- it's sort of a false issue, you know, I
6 agree, but in terms of whether the church practice itself is
7 exempted, the Federal Government and every state that has
8 considered this particular issue has found this to be a safe
9 practice.

10 In the Attorney General's reply brief, they conceded
11 that this particular church has a long history of safe use.
12 The lack of enforcement of the statutes against Native American
13 Church members --

14 QUESTION: Even so, I take it that the Oregon Supreme
15 Court essentially held that whether the conduct is criminal is
16 irrelevant to determining the free exercise clause, and I guess
17 that that's your submission, too.

18 MS. LOVENDAHL: Right.

19 QUESTION: And if we disagree with you, I would think
20 we could disagree with the Oregon Supreme Court's conclusion
21 that it is irrelevant and send it back. They may end up saying
22 that, well, it's -- so it's relevant, but in this case, there's
23 no criminal conduct.

24 MS. LOVENDAHL: Right. The problem, of course, is
25 that it's not a decision that the Court could determine --

1 could really consider under its opinion of the law in the
2 context of an unemployment proceeding since it decided that it
3 was irrelevant, and I do feel that that was the state court's
4 decision.

5 The Attorney General's Office did present the
6 argument that it was -- there was no protected constitutional
7 right and they did reject it. In the course of rejecting it,
8 they -- both the Court of Appeals and the Oregon Supreme Court
9 referred to the ambiguity about whether there was, in fact,
10 some constitutional protection and suggested that their state
11 decision in Soto v. State would be overruled if it came before
12 them again. They noted that it appeared to be a relic of a
13 prior time. It was based on a statute that was repealed as
14 well.

15 QUESTION: May I ask another question? Has the
16 Oregon Supreme Court ever addressed the question of whether
17 this conduct is protected under the Oregon Constitution?

18 MS. LOVENDAHL: The Native American Church practice
19 conduct?

20 QUESTION: Yes. The use of peyote in their religious
21 ceremony. Has that ever come up, do you know?

22 MS. LOVENDAHL: Well, in the Soto case, I believe
23 that was disposed of under the federal Constitution. What they
24 basically decided was that it was a positive legislative
25 enactment and didn't go into any kind of balancing test at all.

1 An individual who is --

2 QUESTION: You have to help me a little more. The
3 Soto case held what?

4 MS. LOVENDAHL: That the individual could not even
5 raise the defense.

6 QUESTION: The what?

7 MS. LOVENDAHL: The individual who was charged with
8 the possession could not even raise the religious freedom
9 defense. So, in the dissent, they --

10 QUESTION: They implicitly held that it was not
11 constitutionally protected.

12 MS. LOVENDAHL: Right. That there was no protection
13 whatsoever. Well, the person couldn't even raise the defense.
14 They didn't get to the balancing test.

15 QUESTION: But the reason they couldn't -- was it a
16 procedural reason or because there's no constitutional
17 protection for the use of peyote?

18 MS. LOVENDAHL: They just considered that the fact
19 that it was made criminal under state law was sufficient to
20 over-ride the individual's claim.

21 QUESTION: As regard to state law.

22 MS. LOVENDAHL: Yeah, and there was a strongly worded
23 dissent in that case, essentially to the effect that the Court
24 was abdicating its responsibility as final arbiter of
25 constitutional rights.

1 In any event, in terms of the constitutionality of
2 the practice, the state has a history of lack of enforcement.
3 So, it doesn't appear that they have an overwhelming interest
4 in over-riding or disposing of this particular church practice,
5 and the only concern that they have is that flood gates will
6 essentially be opened.

7 This isn't a situation, though, where many other
8 churches meet the test of safety that the history of the Native
9 American Church has demonstrated. This is an ancient religion
10 that's been going on before the practice was made criminal. The
11 classic kind of situation that was presented in Wisconsin v.
12 Yoder, with the Amish. Their practices were not illegal before
13 enactment of the state criminal code.

14 In fact, this church practice serves the purpose that
15 the criminal law statutes were intended to serve. It's
16 actually a treatment program for individuals who have had
17 difficulty with problems of alcoholism and a number of alcohol
18 rehabilitation treatment centers use peyote in Native American
19 Church ceremonies as a way of helping Native Americans. It's
20 an extremely important cultural-specific treatment plan that
21 would actually compromise the interest of the state in helping
22 people overcome, particularly Native Americans to overcome, the
23 problems of drug addiction and substance abuse.

24 The reasons that the state has given are purely
25 speculative and, in essence, they have admitted that they do

1 not have a strong interest in terminating this particular
2 religious practice. There have been a number of state court
3 decisions that have had the benefit of the full evidentiary
4 record on this particular issue, and they have made it clear
5 that this is something that should be constitutionally
6 protected.

7 The effect of a decision finding the criminality of
8 these individuals' conduct to distinguish this case from
9 Sherbert, Thomas and Hobbie by implication suggests that there
10 is no constitutional protection here, and I submit that that
11 would indicate a discrimination against this religious practice
12 that would effectively cast a shadow over this entire church.

13 I don't see any reason why these people, this
14 situation presented here is different from a situation in
15 Sherbert, Thomas and Hobbie, and I feel that the same results
16 should obtain.

17 Thank you.

18 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Lovendahl.

19 Mr. Gary, you have one minute remaining.

20 ORAL ARGUMENT OF WILLIAM F. GARY, ESQ.

21 ON BEHALF OF PETITIONERS - REBUTTAL

22 MR. GARY: Thank you.

23 Quickly to answer your question, Justice Stevens, the
24 Oregon Supreme Court held in this case that a denial of
25 benefits did not violate the Oregon Constitution. They have not

1 specifically addressed the question that you asked under the
2 Oregon Constitution, but in Oregon, it is very clear under
3 their other decisions that that would violate what is our
4 equivalent of the establishment clause because, to borrow a
5 phrase from Justice Scalia, in Oregon, a pinkie on the scale is
6 as bad as a thumb and that would favor the religious practice,
7 unless it is required by the free exercise clause.

8 Claimants do not get unemployment benefits under
9 state law. That's settled. These claimants cannot prevail
10 unless you conclude that they had a right to engage in the
11 conduct that they engaged in. If the conduct is criminal, they
12 had no right to engage in the conduct. This Court has never
13 held that a state must accommodate prohibited conduct.

14 Therefore, the criminal law issue must be addressed
15 as a matter of federal law in order for the claimants to
16 prevail, and at a minimum, this case must be sent back to the
17 Oregon Supreme Court with instructions to do so.

18 Thank you.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gary.

20 The case is submitted.

21 (Whereupon, at 11:52 o'clock a.m., the case in the
22 above-entitled matter was submitted.)

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LOCATION: Washington, D.C.

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