

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
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SUPREME COURT, U.S.
WASHINGTON, D.C. 20543
UNITED STATES

ORIGINAL

CAPTION: EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF
OREGON, ET AL., Petitioners V. ALFRED L. SMITH, ET AL.

CASE NO: 88-1213

PLACE: WASHINGTON, D.C.

DATE: November 6, 1989

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x

3 EMPLOYMENT DIVISION, DEPARTMENT :

4 OF HUMAN RESOURCES OF OREGON, :

5 ET AL., :

6 Petitioners :

7 v. : No. 88-1213

8 ALFRED L. SMITH, ET AL. :

9 -----x

10 Washington, D.C.

11 Monday, November 6, 1989

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:04 a.m.

15 APPEARANCES:

16 DAVID B. FROHNMAYER, ESQ., Attorney General of Oregon,
17 Salem, Oregon; on behalf of the Petitioners.

18 CRAIG J. DORSAY, ESQ., Portland, Oregon; on behalf of the
19 Respondents.

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1 perhaps even beyond that, other substance use by other
2 religions, from the reach of generally applicable criminal
3 laws regulating the use of controlled substances by all
4 citizens?

5 QUESTION: General Frohnmayer, the Oregon Supreme
6 Court really didn't tell us whether the Oregon
7 constitution would have been violated by this statute, did
8 it? We still don't know what the position would be under
9 the Oregon constitution.

10 MR. FROHNMAYER: In footnote 3 of the Oregon
11 Supreme Court's decision on remand, Justice O'Connor, the
12 court reserved the question of what would happen in a
13 fact-specific criminal prosecution related to the conduct
14 of a specific person arrested and prosecuted.

15 QUESTION: Has -- does -- do we know whether there
16 have ever been any criminal prosecutions in Oregon under
17 the statute of members of the Native American Church for
18 peyote use?

19 MR. FROHNMAYER: Yes, we do. More than a decade
20 ago, in a case called State v. Soto, which I believe is
21 described in our briefs, the conviction of a person who
22 was a Native American for peyote use was upheld, criminal
23 prosecution, and certiorari was denied by this Court.
24 That is a dozen years ago.

25 QUESTION: Was there any claim in that case that

1 the Oregon constitution barred the prosecution?

2 MR. FROHNMAYER: I believe not, Justice White, but
3 I will try to refresh my memory before we conclude our
4 argument. We are obviously acutely aware, as in all Free
5 Exercise cases, of the sensitive interests that are at
6 stake. On one hand we recognize that this is a genuine
7 church with doctrinal beliefs in peyote use that are real.
8 The church's members are unquestionably sincere, and the
9 adherents generally -- genuinely believe that the
10 existence of their religion is threatened if they are not
11 free to use this substance.

12 QUESTION: Is it also true that the federal
13 government and some 23 states exempt peyote use from their
14 drug enforcement schemes?

15 MR. FROHNMAYER: There is an exemption in the Drug
16 Enforcement Administration's regulations for bonafide use
17 by the Native American Church. The figure of 23, Justice
18 O'Connor, we believe, is wholly inaccurate. Footnote 8 of
19 our reply brief is a careful parsing of the states that
20 provide, either by legislative exemption or judicial
21 decision, an exemption for religious peyote use, sometimes
22 by a named religion, other times more generically
23 referring to bonafide religions. But the number by our
24 count is closer to 12 or 13.

25 QUESTION: But the federal exemption and the

1 exemption in the 12 states you are talking about applies
2 only to use by a member of the Native American Church?

3 MR. FROHNMAYER: Justice Scalia, no, the exemptions
4 are somewhat scattered in terms of how they are phrased.
5 For example, in Arizona it is simply a defense through a
6 prosecution rather than an exemption from Schedule I, and
7 it refers to bonafide use of peyote.

8 QUESTION: (Inaudible.)

9 MR. FROHNMAYER: I am sorry, Justice White.

10 QUESTION: By whom?

11 MR. FROHNMAYER: By the bonafide practice of a
12 religious belief.

13 QUESTION: Any religious belief?

14 MR. FROHNMAYER: That is right. Others -- in fact,
15 I would -- I think it is safe to say the majority of the
16 exemptions single out the Native American Church, so --

17 QUESTION: How about the federal?

18 MR. FROHNMAYER: The federal exemption is limited
19 to the Native American Church.

20 QUESTION: So, if you are sort of the Martin Luther
21 King, the Martin Luther -- not King, of the Native
22 American Church, you are just out of luck. You can't
23 start a branch religion using peyote.

24 MR. FROHNMAYER: Justice Scalia, that is one --

25 QUESTION: In the states that limit the exemption

1 to the Native American Church.

2 MR. FROHNMAYER: That is one of the deeply
3 troubling aspects we find in the Oregon Supreme Court's
4 decision, because there is another church, an offshoot of
5 this church, called the Peyote Way Church of God, which
6 also has many Native American members and which has
7 strictly controlled religious rights which a lower federal
8 court has denied the same exemption enjoyed by the Native
9 American Church.

10 QUESTION: Am I correct in thinking that one need
11 not be a Native American to be admitted to the Native
12 American Church, or to participate in its rituals?

13 MR. FROHNMAYER: Justice Rehnquist, I -- I would be
14 somewhat hesitant to answer that question, because that is
15 more properly directed, I believe, to the communicants of
16 the church. It is safe to say that the record is somewhat
17 obscure on this point. We know that Respondent Black --

18 QUESTION: What about Mr. Black --

19 MR. FROHNMAYER: I am sorry?

20 QUESTION: What about Mr. Black? He was not a
21 Native American, was he?

22 MR. FROHNMAYER: Mr. Black was not a Native
23 American. We believe it is a fair reading of the record
24 that he believed that he was a member of the Native
25 American Church. There is contradictory evidence in the

1 record concerning whether persons other than Native
2 Americans can be admitted to the ritual, at least if they
3 don't show a certain amount of blood lineage from Native
4 American ancestry. And in fact the Texas statute requires
5 a minimum of 25 percent. Other statutes are much vaguer
6 as to precisely the contours of the membership that's
7 required in this religion.

8 Let me turn on the other hand to the fact that
9 peyote is unquestionably a dangerous and powerful
10 hallucinogen. Government's interest in controlling peyote
11 and similar hallucinogens is real, it is compelling, and
12 it is evident by universal and pervasive regulation.
13 There are other religions using peyote, and there are
14 other religions using other drugs which also clamor for
15 First Amendment constitutional exemptions --

16 QUESTION: Is there any documentation in the record
17 or in reported opinions of the danger that peyote is
18 diverted from religious use and, say, sold on the street
19 in the normal drug distribution channels?

20 MR. FROHNMAYER: Justice Kennedy, we know that it
21 is found in normal drug distribution channels, although
22 not in great amounts.

23 QUESTION: Is it used for the derivative mescaline,
24 which in turn is used commercially? Or can you get
25 mescaline from some other source?

1 MR. FROHNMAYER: Mescaline, as we understand it,
2 can be produced synthetically, as well as, of course,
3 being found as the psychoactive ingredient in peyote
4 itself. In fact, the only thing that distinguishes peyote
5 from mescaline is the presence of alkaloids in a natural
6 way in the peyote button, which does create additional
7 effects on the particular user.

8 QUESTION: Does this record show the presence of
9 peyote buttons in the normal drug trade in any significant
10 amounts?

11 MR. FROHNMAYER: The best evidence for that is in
12 material at least tangential to the record and in other
13 lower court proceedings, which shows that the DEA has
14 seized some 19 pounds, I believe, is the figure, over
15 perhaps the period of a decade. So that shows at least --

16
17 QUESTION: From whom? From whom?

18 MR. FROHNMAYER: From sources apparently other than
19 Native Americans. That is not clear from the DEA's
20 reports. However, we would assume that they would be
21 reporting illegal trafficking, as opposed to that which
22 they regulate.

23 The Oregon Supreme Court's resolution of the
24 federal law question, we believe, seriously compromises
25 three compelling and intersecting state interests. The

1 first is the state's interest in regulating all peyote and
2 hallucinogenic drug use to -- in order to further the
3 health and safety interests of its citizens. The second
4 is the state's interest in a regulatory scheme as a whole,
5 so that law enforcement does not face a patchwork of
6 exemptions of other drugs on a drug-by-drug, religion-by-
7 religion, believer-by-believer basis. And the third and
8 compelling interest is that the state constitution's
9 heightened requirement of neutrality in our jurisdiction,
10 requires it to avoid giving the preference of one church
11 over another.

12 Let me then examine these concerns in order.
13 Peyote, by all accounts, is a powerful and unpredictable
14 hallucinogen. That fact is largely conceded even by
15 Respondents, at least for the public generally, and it is
16 amply illustrated by the record. Its active ingredient is
17 mescaline. It stimulates respiratory changes, reflexes
18 and pulse rates, which are physiologically measurable.
19 The spectrum of effects experienced are similar, and in
20 most respects identical, to those of LSD, psilocybin, and
21 mescaline, accompanied by vivid visual and auditory
22 hallucinations, altered perceptions of time, space and
23 body -- emotional reactions that range from joy and
24 exhilaration to extreme anxiety and even terror.

25 There is no way to predict, even for the

1 experienced user, how the user will react on a given
2 occasion. There are effects on the central nervous system
3 and behavior which cause inability to distinguish reality
4 and non-reality. And it does induce psychotic reactions
5 in a small number of users.

6 QUESTION: How long do these things last?

7 MR. FROHNMAYER: It is said, Justice Blackmun, and
8 I am now trying to recall from memory precisely, that the
9 effect may last as long as 12 hours. To quote from the
10 record in Smith's case Exhibit 8 from a clinical substance
11 special -- abuse specialist, it is a powerful and potent
12 agent which does sometimes have long-lasting negative
13 effects on its user, with no predictability as to when
14 that can happen. It is "very risky."

15 The record is consistent with what is known
16 generally about this substance, and why every jurisdiction
17 in the country regulates it intensely. It is almost
18 universally a Schedule I drug, which means that it has a
19 high potential for abuse. There is no currently accepted
20 medical use, and there is lack of accepted safety for use
21 even under medical supervision. The experiences under the
22 influence of this substance may be good, but they are
23 unpredictable, and they are indifferent to the motives of
24 the user. The risk is largely unquestioned by
25 Respondents, and the risk cannot be meaningfully

1 distinguished from the risk of using any other
2 hallucinogen. These dangers are great enough that Oregon
3 has chosen, with respect to any user, to have a blanket
4 regulation without exemption.

5 In the face of these considerations, the Oregon
6 Supreme Court has concluded, however, that the federal
7 Constitution commands a judicially crafted exemption for
8 sincere adult users of a single church. And this poses
9 for us a dilemma. On the one hand, if the exemption is
10 crafted so narrowly that it applies to one group on a de
11 minimis basis, then that means that our state and federal
12 constitutions have preferred one religion over another,
13 and hopelessly compromised the constitution requirements
14 of neutrality.

15 QUESTION: Excuse me, what do you mean by --

16 QUESTION: Can we say the same thing about the
17 Yoder case?

18 MR. FROHNMAYER: I am sorry, Justice?

19 QUESTION: Can we say the same thing about the
20 result of the -- Wisconsin against Yoder?

21 MR. FROHNMAYER: No, we think not. Because there,
22 in Yoder, the church was not singled out by name and by
23 identity and by denomination, and there were no others
24 similarly situated who were clamoring for that particular
25 exemption. Yoder is a case which is distinguishable,

1 obviously, on many other important grounds, and I can
2 reach them now.

3 QUESTION: Well, suppose the Wisconsin legislature
4 had singled out the Amish church. Just because this Court
5 singles that out it is all right, but the legislature
6 can't?

7 MR. FROHNMAYER: We think the problem is compounded
8 when a legislature singles it out, because the judicial
9 exemption is free of broader interpretation, whereas, if
10 the legislature in its plenary judgment has singled out a
11 specific church, we believe it has, in many respects,
12 potentially run afoul of the Establishment Clause unless
13 it treats other religions clamoring for equal treatment on
14 similar grounds in similar ways.

15 QUESTION: Are you arguing that the 23 -- or it
16 isn't 23 under your figures, but whatever the number of
17 states is that grant exemptions, those exemptions all
18 violate the Establishment Clause?

19 MR. FROHNMAYER: No, we are not. We did not come
20 to this Court to argue that giving an exemption in some
21 form or another is an impermissible state act in the
22 exercise of its plenary authority. Our argument is simply
23 that the Free Exercise Clause does not command every state
24 in this union, as apparently our Oregon Supreme Court
25 would command, to craft an exemption singling out a

1 specific church. Some of those state exemptions, as we
2 pointed out, Justice Stevens, do speak neutrally with
3 respect to bonafide religious practices.

4 QUESTION: But some don't. And those that don't
5 you would say are invalid under the Establishment Clause?

6 MR. FROHNMAYER: I think we would need to know
7 more. And what more we would need to know is whether, if
8 a court were faced with a claim by another religion that,
9 notwithstanding the specific named claim of the particular
10 communicants of one church, if it denied it to another,
11 then perhaps that might implicate the Establishment
12 Clause, because it would have closed the doors to others
13 achieving this equally. So, I believe our position is
14 that we would have to wait for a case-by-case
15 determination to see whether those jurisdictions would
16 open their doors to other claims, if properly advanced by
17 other religions.

18 QUESTION: (Inaudible) these problems.

19 MR. FROHNMAYER: I am sorry, Justice?

20 QUESTION: You just don't want to have to face up
21 to those problems. You want to be able to -- not to have
22 any exemption at all.

23 MR. FROHNMAYER: That is correct. And this is not
24 a theoretical issue for the State of Oregon, because we
25 have pending in our appellate courts a case which in many

1 ways is on all fours with this, in which sincere religious
2 communicants who believe that their use of marijuana is
3 religiously inspired, have asked for exemption from
4 Oregon's drug laws. And that's part of the problem.

5 QUESTION: Well, that is also another problem in
6 deciding what the states can do without offending the
7 Establishment Clause. There is a problem in just allowing
8 all religions to use peyote, but not allowing all
9 religions to use marijuana, or any other hallucinogenic
10 drug, I would assume. Isn't that a problem, too?

11 MR. FROHNMAYER: Justice Scalia, that is one of the
12 major reasons we have brought this case to this Court for
13 a second time, which is, we are asked, we believe, not
14 merely to see this as one case, but it is in fact the thin
15 end of the wedge in which analytical distinctions are
16 extremely difficult to draw, and in which claims certainly
17 will be made, as they have been made in lower courts with
18 increasing frequency, for other drugs and other --

19 QUESTION: I take it, then, that your flat rule
20 position would permit a state to outlaw totally the use of
21 alcohol, including wine, in religious ceremonies?

22 MR. FROHNMAYER: That's a different question.

23 QUESTION: Why is that different?

24 MR. FROHNMAYER: The issue of sacramental wine is
25 different because, at least at the present, it is not a

1 Schedule I substance. The --

2 QUESTION: Well, but the state certainly could
3 prohibit the use -- the consumption of alcohol within its
4 borders, or at least the sale or use of alcohol.

5 MR. FROHNMAYER: But there -- there might be a
6 religious accommodation argument of an entirely different
7 order than is presented here.

8 QUESTION: You mean, just a better-known religion?

9 MR. FROHNMAYER: No. It has nothing to do with --
10 it is religion indifferent. Even during prohibition there
11 was a statutory exemption for the use of sacramental --

12 QUESTION: Yes, but what I am asking is supposing a
13 state did not give that statutory exemption.

14 MR. FROHNMAYER: There, an argument for
15 accommodation is stronger, stronger in at least two
16 respects. First is that there -- that to the extent that
17 this Court examines or re-examines the nature of the
18 compelling state interest and the potential danger of the
19 ingestion of sacramental wine in small quantities, it
20 might -- might well question whether the state's over all
21 interest in regulation of a very dangerous substance --

22 QUESTION: So if this were a Schedule IV substance
23 it would be a different case?

24 MR. FROHNMAYER: It could be a different case.

25 QUESTION: I see.

1 MR. FROHNMAYER: The second is clearly that the use
2 of peyote in the ceremonies is at least in part for its
3 very hallucinogenic properties. That is to say, the
4 religious experience, at least for some communicants,
5 comes from the achievement of the heightened
6 hallucinogenic effect, where this is also not true of the
7 ingestion of sacramental wine in small quantities.

8 QUESTION: You don't think there is any special
9 spiritual feeling in taking communion?

10 MR. FROHNMAYER: Well, the feeling is different
11 than the induction of an actual altered state of
12 consciousness. What I am saying is that those two factors
13 at least distinguish, and would presumably cause this
14 Court or any other to say that the argument for
15 accommodation is much stronger in the case of those
16 religious sacraments than in the case where it is
17 unquestionably a very dangerous substance for everyone
18 else, acknowledged and conceded to be, and where it is
19 taken for the purposes of inducing the very state that
20 causes the danger, at least with respect to everyone else.

21 QUESTION: You would say that it would be at least
22 a close case as to whether a state could prohibit this and
23 not prohibit the use of alcohol in worship services to the
24 point of inebriation.

25 MR. FROHNMAYER: I think that would be a very, that

1 would be a much closer case, Justice Scalia.

2 QUESTION: But a quite different case.

3 MR. FROHNMAYER: Yes, indeed it would.

4 We believe that it is ironic that while Respondents
5 concede that the use of a Schedule I drug is dangerous as
6 to everyone else, it is safe as to them. And the burden,
7 we believe, lies properly on Respondents to show
8 convincingly why the dangers of the drug use, or substance
9 use, are less as to them. If there is to a judicially
10 crafted exemption, we are entitled to know who uses, with
11 what frequency, in what amounts, for what purposes, and in
12 what concrete ways do those uses reduce the risk. That is
13 the nature of the state's undoubted compelling interest.

14 The record provides us no security. The sources
15 cited in our reply brief are for -- almost universally the
16 same sources cited by Respondents or their amici with
17 respect to the nature of the practices. They show
18 considerable variation in the ritual, in the dosage, in
19 the membership, and yet no real information as to how the
20 underlying danger of the substance or harm is in fact
21 avoided.

22 What we do know about the religious use of the
23 substance is the same thing we know about the use of
24 peyote for anyone. And that is that there is a risk to
25 the user. It's use is inconsistent with the government's

1 compelling interest in preventing a known hazard to
2 anyone. And if on this ambiguous and incomplete record it
3 suffices to exempt under the Free Exercise Clause this
4 substance, many other religious users can make identical
5 claims persuasive to a court and to a legislature.

6 But there is a second reason --

7 QUESTION: General Frohnmayer, you -- much earlier
8 on you said that the state was presented with the problem
9 of whether to make a de minimis exemption. What did you
10 mean by a de minimis exemption?

11 MR. FROHNMAYER: It is argue --

12 QUESTION: Is it conceded that -- that the use of
13 peyote in these ceremonies is only de minimis? Are you --

14

15 MR. FROHNMAYER: No.

16 QUESTION: -- conceding that point?

17 MR. FROHNMAYER: No, I meant it on quite a
18 different basis, and it is responsive, I think, to an
19 argument of amici and perhaps others, that what we have is
20 a small group of sincere -- religious believers of deep
21 conviction, and that to make an exception in their case
22 would not compromise the interests of the state. The
23 problem is, of course, that the other interests are
24 compromised by the other claims of others equally
25 entitled.

1 QUESTION: We don't know how much peyote is used in
2 these ceremonies, I gather we don't know that it is just
3 a, you know, a sniff or whatever?

4 MR. FROHNMAYER: Again, bearing in mind the
5 admonition that it is not government's role to explore the
6 centrality of religious practices of a belief, the record
7 would fairly reveal that a hallucinogenic dose of four is
8 common, and that ingestion of between eight and 30 of the
9 peyote buttons is common. Beyond that the anthropological
10 literature and the other literature cited by both parties
11 is somewhat variable. But it does seem clear that there
12 is no uniformly prescribed amount, nor any real control
13 over the number of peyote buttons that may be ingested by
14 communicants at the particular religious ceremony.

15 QUESTION: Mr. Attorney General, why were these
16 people fired?

17 MR. FROHNMAYER: They were fired because they were
18 drug counselors. Their --

19 QUESTION: They what?

20 MR. FROHNMAYER: They were drug counselors.

21 QUESTION: Yes.

22 MR. FROHNMAYER: At a drug and alcohol treatment
23 center. Their employer had a drug and alcohol free policy
24 --

25 QUESTION: So they were fired because they violated

1 the employer's policy.

2 MR. FROHNMAYER: That is right.

3 QUESTION: They were not fired because the use of
4 peyote was illegal.

5 MR. FROHNMAYER: That is correct. And it would not
6 be a proper ground in Oregon to fire them simply because
7 their underlying conduct -- their conduct was otherwise
8 illegal. They were fired for the statutory purpose upheld
9 by the Employment Appeals Board of engaging in misconduct
10 at their work, because it was a drug and alcohol free
11 policy, consistent with the policy of many drug and
12 alcohol rehabilitation centers, that they act as role
13 models for those whom they were counseling. That was a
14 valid job-related requirement.

15 QUESTION: So we really have no question of
16 illegality before us, do we?

17 MR. FROHNMAYER: The illegality comes by virtue of
18 the question posed on remand by the majority of this
19 Court, which is another way of saying that it is a way to
20 distinguish this case from *Sherbert v. Verner* and its
21 progeny. Because in none of its pro -- *Sherbert* or its
22 progeny, was the underlying conduct which could constitute
23 the legitimate state interest actually contrary to a state
24 law, let alone to a state criminal law.

25 QUESTION: But is it a plausible reading of the

1 Oregon Supreme Court's opinion on remand that even if we
2 reached the criminals question and sustained the criminal
3 statute, that the unemployment benefit is going to be paid
4 anyway?

5 MR. FROHNMAYER: No, we think not. We think that
6 the ACLU amicus brief simply misread, and clearly misread,
7 the Oregon Supreme Court's opinion on remand, which did
8 not reiterate its past holding as its present holding, it
9 simply repeated, in the past tense, what it had held. And
10 then went on reach, quite properly, the questions posed by
11 this Court on remand as to whether or not the federal
12 interest in free exercise demanded a specific exemption.
13 Moreover, the Oregon court's reasoning would hopelessly
14 insulate any federal court, holding of a state court, from
15 review by this Court, as we have argued I think -- I
16 believe persuasively in our reply brief.

17 The notion that the state's interest must be
18 cabined and confined within the unemployment laws suggests
19 that they have to incorporate by reference every other
20 prohibitory statute. And that, that to us is an absurd
21 reading of what the Oregon court would have said. We
22 believe it did not say that, it simply referred --

23 QUESTION: Mr. Attorney General, may I ask one
24 question here that I still can't quite figure out? Is
25 there any explanation, either in the argument on remand or

1 in part of the record that I am not familiar with, why the
2 Oregon Supreme Court, which has -- many times say they
3 decide state constitutional issues before federal, and
4 Justice Lindy has written on this, why didn't they do that
5 in this case?

6 MR. FROHNMAYER: Either because they did not
7 believe it was dispositive of this Court's question to it
8 on remand, or because they believed, more properly as we
9 conclude from the decision in Smith I in the Oregon
10 Supreme Court, that in fact there would not be an
11 entitlement to benefits under the Oregon constitution.

12 QUESTION: That wasn't actually held in that case,
13 and it is rather strange that they were totally silent on
14 the point.

15 MR. FROHNMAYER: Yes. The question --

16 QUESTION: And had they ruled the other way, or had
17 they ruled the way they did on the Oregon constitution,
18 that would have been the end of the ball game.

19 MR. FROHNMAYER: That is correct. But in both
20 cases the court reached out to decide the issue on federal
21 grounds. And you are quite right, Justice Stevens, that
22 of any court in the country ours is the most conscious of
23 putting first a state constitutional consideration if it
24 is relevant to decision of the case. But the court did
25 not choose to reach the federal --the state ground, or

1 perhaps concluded sub silentio that the state ground was
2 not dispositive of the case. And that's why the federal
3 issue is squarely before us again.

4 Let's make one other point. That is, we have a
5 claim by Respondent that line drawing of the kind that we
6 find so objectionable in pursuit of our interests in
7 religious neutrality is easy. And we point to the lower
8 federal court cases suggesting that other persons using
9 peyote, other persons using hashish, LSD or marijuana for
10 sincere religious reasons, that those cases can be easily
11 distinguished. We simply invite this Court's careful
12 review of those cases, which are shamelessly result-driven
13 and involve religious gerrymandering from which no
14 consistent neutral principle emerges. And our point is
15 that if we cannot accommodate on equal grounds, then the
16 requirement of accommodation must fail.

17 And there is a final and critical point here
18 related to our health and safety interest. That is that
19 denominational practices, and indeed individual believers,
20 even in long-standing religions, can and do change. They
21 change the nature of their religious beliefs, they change
22 the nature of their doctrine, and that is the very essence
23 of freedom of religion and belief. So a constitutional
24 exemption that is bound in time and place is very risky.
25 If we exempt a practice, even if we are presently

1 satisfied by its safety, control passes forever into
2 private hands. And that is proper.

3 But then we must ask, before we let that control
4 pass in the form of a constitutional exemption,
5 denomination specific or not, now and in the future, what
6 are the contours of that exemption and how will it be
7 conferred. Because if the denominational or church
8 controls weaken or change, there are still enshrined in
9 the Bill of Rights a permanent exemption for the practices
10 of that religion.

11 QUESTION: You do concede, I take it, that the
12 enforcement of the Oregon criminal laws would in effect
13 destroy the Native American Church and its ritual in your
14 state.

15 MR. FROHNMAYER: We don't concede that, Justice
16 Kennedy, for a very practical reason. The Oregon criminal
17 prohibition, construed as constitutional by the Oregon
18 court of appeals since State v. Soto, has been on the
19 books for more than a decade. There is no suggestion in
20 our state that that religion has been destroyed by
21 inappropriate police intrusion into the tepee ceremony.
22 In most --

23 QUESTION: What do you mean by inappropriate police
24 intrusion? You are asserting that they have the right to
25 intrude.

1 MR. FROHNMAYER: We are --

2 QUESTION: If they haven't been destroyed, it is
3 just that you have had inefficient enforcement.

4 MR. FROHNMAYER: We have had priorities in police
5 enforcement that are understandable in terms of what is at
6 stake. This, this --

7 QUESTION: (Inaudible) event, that is the reason.
8 Are you saying you are not going to enforce the criminal
9 law if we sustain it?

10 MR. FROHNMAYER: No, we are not saying that. We
11 are saying that, reading carefully and thoughtfully
12 footnote 3 of the Oregon Supreme Court's opinion on
13 remand, as Justice O'Connor has called to our -- the
14 Court's attention, there may be, in the specific context
15 of the specific use by a person accused of a specific
16 crime, special state constitutional restrictions on the
17 state which have not yet been explored. We do not know
18 the contours of those exemptions. But moreover, to answer
19 your question generally --

20 QUESTION: But if -- if the contour is just to
21 forgive or exempt the use of peyote by members of the
22 Native American Church, you would then be back here
23 arguing that that violates the Establishment Clause.

24 MR. FROHNMAYER: If the defense were that the
25 specific church and that church only was entitled to the

1 exemption, that would very probably be the case, Justice
2 O'Connor.

3 QUESTION: (Inaudible) to enforce the law to the
4 extent that some drug counselor who violates his
5 employer's rules isn't protected -- doesn't get
6 unemployment compensation.

7 MR. FROHNMAYER: Yes, Justice White, it's so
8 intuitively obvious that drug counselors ought not to be
9 partaking of the substances which they are asking others
10 to refrain from, that of course we would.

11 I would like to reserve the balance of my time if I
12 may.

13 QUESTION: Thank you, General Frohnmayer. Mr.
14 Dorsay, we'll hear from you.

15 ORAL ARGUMENT OF CRAIG J. DORSAY

16 ON BEHALF OF THE RESPONDENT

17 MR. DORSAY: Mr. Chief Justice, and may it please
18 the Court:

19 I am compelled as an initial matter to address the
20 subject raised by Justice Stevens relating to the use of
21 alcohol, which I think raised one of the primary problems
22 with this case as it comes before the Court. I think, if
23 you looked at this situation and Indian people were in
24 charge of the United States right now, or in charge of
25 government, and you look at the devastating impact that

1 alcohol has had on Indian people and Indian tribes through
2 the history of the United States, you might find that
3 alcohol was the Schedule I substance and peyote was not
4 listed at all. And we are getting here to the heart of an
5 ethnocentric view, I think, of what constitutes religion
6 in the United States. And I think that needs to be looked
7 at very hard before determining what is a dangerous
8 substance and what is not.

9 QUESTION: Well, it could -- couldn't it be that
10 the exception that the Oregon court was referring to might
11 have been an exception for the use of peyote in
12 insignificant quantities that could -- could not produce
13 any hallucinogenic or other adverse physical effect?
14 Might not that be the exception that they were referring
15 to? And if that's the case, then -- then your pointing to
16 the traditional use of wine at religion services would not
17 make any difference. I don't assume that the states would
18 be compelled to allow excessive use of alcohol, drunken --
19 drunken parties, under -- on grounds of religion. I
20 don't think that that is the --

21 MR. DORSAY: Well, that is correct. And that
22 interest still exists here, for instance, for people who
23 might overuse alcohol in a religious ceremony, or for
24 instance, if communion is administered to minors, or some
25 other situation in which the state has a legitimate

1 interest.

2 QUESTION: Yeah, but, you see, I don't see a
3 correlation between the wine and the peyote. I mean, it
4 is acknowledge that the peyote -- do you disagree with
5 what the Attorney General said, that the whole purpose of
6 the ingestion of the peyote is its hallucinogenic effect.

7 MR. DORSAY: No, I do not disagree with that. What
8 I disagree with is the fact that that ingestion is
9 harmful. There is no documented evidence that the use of
10 the peyote in these carefully circumscribed ceremonials
11 has any harm to the individual, to society at large, or to
12 the state's law enforcement efforts.

13 QUESTION: How did it get to be a Schedule I
14 controlled substance?

15 MR. DORSAY: Well, I think it has --

16 QUESTION: I mean, somebody thinks it is harmful.

17 MR. DORSAY: Yes. We do not know that for sure.
18 It obviously, the drug mescaline has a high potential for
19 abuse. That is what Schedule I says. The synthetic
20 derivative has obviously been misused in society at large.
21 There is, however, no evidence that peyote, as used by the
22 Native American Church, has been misused in these sense
23 that is has been misused in society.

24 QUESTION: How would such evidence be acquired?
25 Would you want the state to send agents into church

1 services to observe them carefully and --

2 MR. DORSAY: Well, we have a long history with this
3 church of hundreds of years, and there has been no
4 documented evidence. We have one or two anecdotal
5 instances. I think, also, if you are going to look at the
6 legislative judgment that peyote is a dangerous substance,
7 you also have to look at the legislative judgment that
8 peyote can be exempted. There is some kind of legislative
9 fact finding when Congress and other states have acted to
10 exempt the use of peyote. They have based this in large
11 part, for instance, on testimony before Congress, the
12 factual findings by the California supreme court in People
13 v. Woody, that there have been no evidence that there have
14 been harmful use.

15 The first point I wanted to make is that this case
16 is indistinguishable from the previous unemployment cases
17 before this Court. The Oregon Supreme Court has now
18 decided twice, as a matter of state law, that the
19 criminality of Respondent's conduct is immaterial to
20 Oregon's unemployment compensation law. And I think the
21 point, I believe it was raised by Justice O'Connor, is
22 important here, and that is the reason the Oregon Supreme
23 Court did not address its constitutional question under
24 state law is because the criminality was not relevant.

25 The statement of the Oregon Supreme Court on remand

1 could not have been clearer. It said we also stated that
2 it was immaterial to Oregon's unemployment compensation
3 law whether the use of peyote violated some other law. It
4 didn't say it was constrained by the previous decisions of
5 this Court. It didn't say the state had conceded this
6 issue. So the two reasons that this Court used in the
7 majority opinion last time to find that the decision of
8 the Oregon Supreme Court was ambiguous, and that was why
9 this decision had been remanded, has now been cleared up.
10 It was not a summary of its previous decisions. The
11 Oregon court did not address a large number of things it
12 said in its first decision.

13 QUESTION: It gives the appearance of being
14 (inaudible) script in a way, when it says, when it is
15 describing its previous opinion. It says, we also stated
16 --

17 MR. DORSAY: That is correct.

18 QUESTION: -- as it if was just repeating what it
19 said in its earlier opinion.

20 MR. DORSAY: Well, I believe what they did is they
21 responded to the dissent's invitation to say this is what
22 we said the first time. We meant it, we are saying it
23 again. When this case went back on remand to the Oregon
24 Supreme Court, Chief Justice, we raised the fact that we
25 believed the state had distorted the Oregon Supreme

1 Court's previous holding, and that this decision should be
2 readdressed to find, or to address the fact of whether the
3 criminality was irrelevant as a matter of state law.

4 I can't disagree that I wish they had discoursed on
5 it at greater length, but we believe that statement is as
6 clear as you can find.

7 QUESTION: Mr. Dorsay, I -- whether it is
8 irrelevant is a matter of state law. I mean, it might be
9 irrelevant to whether you can fire the person --

10 MR. DORSAY: Yes.

11 QUESTION: -- for violation of your state rules, as
12 an original matter. But it may not be irrelevant to the
13 defense. I mean, is the supreme court of Oregon saying
14 that it makes no difference under Oregon law whether you
15 have a defense to the firing, that the matter is criminal,
16 that a religious practice is criminal under state law?

17 MR. DORSAY: That is correct, unless it is job
18 related or is involved in the actual firing of the person.
19 They said the first time you have to look in the Oregon
20 unemployment compensation statutes to find the state
21 interest. And where the only state interest is the fiscal
22 integrity of the unemployment fund, criminality has no
23 place in the federal constitutional inquiry.

24 Now, the state, and we conceded this in our brief,
25 could choose to tie legislatively criminality with the

1 receipt of unemployment benefits. They have never done
2 so. Or, if the state had brought a criminal prosecution,
3 then the criminality of the ingestion of peyote would have
4 been relevant in the federal constitutional analysis.

5 QUESTION: Why do you -- why do you say that the --
6 these people are entitled to workmen's compensation?

7 MR. DORSAY: Because they had a right to practice
8 their religion under the First Amendment to the
9 Constitution.

10 QUESTION: So, so the First Amendment issue is
11 here, I take it?

12 MR. DORSAY: It is, yes, in either form. But what
13 is perhaps not here, and we believe it is not necessary to
14 address the criminality, because the Oregon Supreme Court
15 has decided that as a matter of state law.

16 QUESTION: But it says that the -- your court says
17 they are entitled to compensation because the First
18 Amendment requires it.

19 MR. DORSAY: That is correct.

20 QUESTION: Even though the -- even though the
21 employee breached the rules of the employer.

22 MR. DORSAY: Well, we have a dispute about that.
23 If you look at the record in this case --

24 QUESTION: Well, suppose it is that there was a
25 rule like that.

1 MR. DORSAY: If that was the rule, and if the
2 employee knew of that rule when they were hired, then the
3 state could validly deny unemployment benefits. But --

4 QUESTION: Despite the First Amendment.

5 MR. DORSAY: No, not -- only if the interest was
6 criminalized. Not if -- under the previous decisions of
7 this Court, even where an employee is fired for
8 misconduct; all the previous decisions, the employees were
9 fired for misconduct, anyone else in their situation would
10 have been validly denied, been denied unemployment
11 benefits. This Court has chosen to view religious
12 beliefs, and I believe it is Justice Stevens who said this
13 in both the Goldman case and the Hobbie case, as
14 equivalent to a physical impairment. So this Court has
15 chosen to look at the issue as whether the state would
16 have denied benefits to other people with a similar
17 physical impairment. Religious belief has not been seen
18 to be a voluntary choice by this Court. For instance, in
19 Hobbie the Court rejected the State of Florida's view that
20 the respondent or the claimant in that case had come
21 voluntarily to the religion.

22 QUESTION: Well, suppose that -- suppose someone
23 who wasn't claiming a religious privilege to use peyote
24 was a drug counselor, and he used peyote.

25 MR. DORSAY: That's right. He would be validly

1 denied unemployment benefits.

2 QUESTION: Why?

3 MR. DORSAY: It is --

4 QUESTION: Why, why?

5 MR. DORSAY: It is the religious belief that
6 changes the issue.

7 QUESTION: Well, he would be denied it because of
8 why? Because of --

9 MR. DORSAY: Well, again --

10 QUESTION: Because it was a breech of the criminal
11 law?

12 MR. DORSAY: If he was --

13 QUESTION: You can't say that because they -- the
14 court has said the illegality is beside the point.

15 MR. DORSAY: Well, if he was denied --

16 QUESTION: It, this would be, it would be
17 misconduct, wouldn't it?

18 MR. DORSAY: If he was fired for misconduct, yes.
19 And I want to get to that point very clearly. If you look
20 at the policies of the employer at the time these two
21 people were hired, the employer policy prohibited misuse
22 and abuse of illegal drugs and substances and said social
23 and recreational use is prohibited. After the first
24 Respondent, Galen Black, used peyote and was fired, the
25 employer realized that their policy was not clear, and

1 they changed their written policy. It is that second
2 written policy which was quoted by this Court in its first
3 opinion. So --

4 QUESTION: We get to a point where some of this is
5 water over the dam, isn't it?

6 MR. DORSAY: Yes, it is.

7 QUESTION: I mean, we granted certiorari on the
8 question presented, which is whether the Free Exercise
9 Clause of the First Amendment protects a person's
10 religiously-motivated use of peyote from the reach of the
11 state's general criminal law prohibition. And you say
12 maybe it is not so much a question of criminal law, but
13 you agree that the First Amendment issue is here.

14 MR. DORSAY: Yes, but we think it is disposed of,
15 and we need to keep reemphasizing this by Sherbert and
16 Thomas, that the criminality is irrelevant. If the
17 criminality is relevant, we still believe that the state
18 has not met their test under the First Amendment. And I
19 would be glad to move to that issue.

20 The state has failed to meet its burden under the
21 First Amendment to justify what we believe would be the
22 total destruction of this religion, and that is because of
23 the test that has been established by this Court in First
24 Amendment cases. There is a sincere religious belief, it
25 is a bonafide religion; that is conceded by the state.

1 But once that is shown, the state must show, as Justice
2 O'Connor summarized in the Goldman case, that the interest
3 will in fact be substantially harmed by granting the type
4 of exemption requested, and that the state interest will
5 be undermined by granting the exemption, and there is no
6 less restrictive alternative that can be granted in this
7 case.

8 And it is our belief that the state cannot meet any
9 of the burdens in this case. The compelling state
10 interest is the regulation of drug abuse generally, but we
11 do not have any evidence in this case that peyote has been
12 abused or that it contributes to the drug abuse problem.
13 In fact, all of the evidence is to the contrary. We have
14 the findings, for instance, of the federal agency charged
15 with enforcement of the drug laws in this country, which
16 found that and concluded that the religious use of peyote
17 by the Native American Church does not cause a law
18 enforcement problem in this country. And therefore there
19 is no harm that is --

20 QUESTION: Tell me, what does that mean?

21 MR. DORSAY: Well, what is means is, and they
22 listed a number of factors, and these are the factors
23 which we believe distinguishes the use of peyote from
24 other drugs, the amount of peyote that is in the system.
25 For instance, they found that the entire supply of peyote

1 is now used in bonafide religious ceremonies of the Native
2 American Church. They found, for instance, that the
3 marijuana problem in the United States, and the
4 availability of marijuana and the use of marijuana was a
5 much larger problem. And all of the courts that have
6 addressed it have found that no accommodation can be made
7 for marijuana.

8 QUESTION: Well, I think a very good case could be
9 made on the basis of what you say, that there is no risk
10 of its use spreading beyond the Native American Church.

11 MR. DORSAY: That is correct.

12 QUESTION: And that that church has been
13 responsible in its use. But why can't the state say we
14 don't want Native American Church members to use it
15 either. We think this is dangerous. It is harmful to
16 people. We don't want children to be brought into this
17 church and taught to use this thing, it is harmful to
18 them. It is a Schedule I substance; we have made that
19 determination.

20 MR. DORSAY: Because the First Amendment, I
21 believe, requires something more than a mere legislative
22 statement that we believe it may be harmful. States can
23 come up with all kinds of reasons to outlaw all kinds of
24 conduct, as we have cited in our supplemental brief, for
25 instance. That driving of Amish buggies without the

1 reflector warning system is certainly a dangerous act.
2 But if you allow the mere legislative proscription without
3 an actual inquiry into whether harm has in fact occurred,
4 then you are --

5 QUESTION: Excuse me, what do you mean in fact
6 occurred? You would not accept scientific evidence that
7 the use of peyote is physically harmful?

8 MR. DORSAY: I would not accept that.

9 QUESTION: In general. You would require the
10 showing in the particular context of the religious
11 service?

12 MR. DORSAY: Not in the context of the religious
13 service. The evidence is divided. The evidence is
14 particularly divided. In respect to this church, however,
15 there is reliable scientific evidence that the use of
16 peyote in the ceremony of the Native American Church
17 contributes to rehabilitation of people who have problems
18 with drug and alcohol abuse.

19 So the evidence is mixed. There is no evidence
20 that anyone, and we need to keep repeating this, over 300
21 years or more, has ever suffered harm. There is one or
22 two anecdotal --

23 QUESTION: But, Mr. Dorsay, under that analysis, is
24 there any -- can we possibly defend the state laws that
25 prohibit bigamy? What is the evidence that bigamy is

1 harmful?

2 MR. DORSAY: Well, I think the evidence that bigamy
3 was harmful in the 1800s perhaps may be different than
4 exists today.

5 QUESTION: What was the evidence then? It was
6 against a lot of people's religious and moral beliefs, but
7 did anybody ever prove it was harmful?

8 MR. DORSAY: Well, I would say that the analysis
9 conducted by the Court back in the 1800s was perhaps
10 different, and maybe that statute would not be upheld in
11 the present day. But --

12 QUESTION: I think that is the logic of your
13 position, that that statute probably falls, too.

14 MR. DORSAY: I think it is not substantially
15 justified. In that case the state, or the United States,
16 was obviously alleging that bigamy was harmful to society
17 in the United States. There is some evidence, for
18 instance, that the beliefs of the Mormon church were
19 believed to be so outrageous that there were riots,
20 massacres, and other things that occurred as the Mormon
21 church moved west from Indiana to Utah, and posed a
22 substantial and actual threat to public order at that
23 time.

24 QUESTION: The riots probably were the result of
25 the fact that they were a persecuted group.

1 MR. DORSAY: Yes, that is correct.

2 QUESTION: Well, Mr. Dorsay, do you say that the
3 State of Oregon can't rely at all on the fact that the
4 peyote is shown as a Schedule I drug? That the facts
5 behind that have to be proved all over again?

6 MR. DORSAY: No, I am not ask -- saying that. I
7 would say that the legislative proscription informs the
8 constitutional analysis, but it is certainly not a
9 conclusion that this Court is bound by. We have just as
10 reliable evidence by the legislature in terms of granting
11 the exemption, we cannot presume that the legislature
12 would be so outrageous --

13 QUESTION: Yes, but the Oregon legislatures didn't
14 choose to grant the exemption.

15 MR. DORSAY: All it did was adopt the Schedule I
16 listing that had been adopted previously by the federal
17 government. And that listing, in its legislative history,
18 provided an express exemption for the Native American
19 Church.

20 QUESTION: But Oregon didn't provide it.

21 MR. DORSAY: That is correct.

22 QUESTION: But on that, on that subject you earlier
23 suggested that the outcome of this case may result in the
24 total destruction of this religion.

25 MR. DORSAY: Yes.

1 QUESTION: But isn't it much more likely that there
2 will continue to be exemptions in the states which have
3 allowed them, and as I understand it, there are
4 proceedings pending in Oregon to grant exemptions --
5 doesn't some board, a state board, have authority to grant
6 an exemption here?

7 MR. DORSAY: Well, there is a question. The state
8 disputes whether the board has any authority to grant
9 exemptions, just, for instance, under the Federal
10 Controlled Substances Act there is no express authority to
11 grant exemptions. The Native American Church was exempted
12 only because it was listed in the legislative history.
13 The federal government takes the position that that is a
14 unique exemption, and is of no precedential value for any
15 other exemptions.

16 The Board of Pharmacy did exempt the religious use
17 of peyote. That exemption was withdrawn upon the advice
18 of the Attorney General that it might violate the
19 Establishment Clause, or for other reasons.

20 QUESTION: It might moot this litigation, I
21 suppose.

22 QUESTION: Well, would you -- wouldn't you think
23 that the same exemption would be required for other, other
24 sincere claims that the use of peyote is part of their
25 religion?

1 MR. DORSAY: Well, I have two points of response to
2 that. Yes, I do believe it would be required under normal
3 constitutional analysis, for other peyote churches, such
4 as the Peyote Way Church of God, which have the same exact
5 conditions that the Native American Church does. And
6 there are a number of conditions that go to that that show
7 that this church, or the use of peyote, is unique.
8 However, --

9 QUESTION: How about marijuana use by a church that
10 uses that as part of its religious sacrament?

11 MR. DORSAY: Well, see, I think we can get into a
12 lot of examples, and I don't want to go down that road too
13 far because we don't --

14 QUESTION: I'll bet you don't.

15 (Laughter)

16 MR. DORSAY: -- have the facts here.

17 (Laughter)

18 MR. DORSAY: But the fact is, and a number of
19 courts have looked at marijuana, and they have concluded
20 that marijuana contributes substantially to the law
21 enforcement problem. That has been the distinguishing
22 factor in a number of cases. This drug does not
23 contribute to the law enforcement problem. This substance
24 is used by -- as used in its sacramental purposes by the
25 church, does not cause those problems.

1 QUESTION: Only because the law is not enforced. I
2 mean, you know --

3 MR. DORSAY: Well, why is the law not enforced?

4 QUESTION: -- if it occurs on the reservation and
5 the law enforcement authorities say it can occur -- I am,
6 I am not comforted by the fact that it doesn't --

7 MR. DORSAY: Well no, not just because the law --

8 QUESTION: -- cause a law enforcement problem. I
9 don't know what that means.

10 MR. DORSAY: Well, what it means is it doesn't
11 contribute to the use of other drugs. It doesn't
12 undermine the federal government or the nation's law
13 enforcement efforts for other drugs. It doesn't get into
14 the distribution system. It is not one of the drugs that
15 is looked to by other people as a recreational substance.

16 QUESTION: But why can't the state consider it
17 itself as the law enforcement problem?

18 MR. DORSAY: Peyote itself?

19 QUESTION: The very use, even in religious
20 services. Just as the state may consider the very use of
21 marijuana, regardless of whether it pollutes commerce or
22 anything else, as being itself a problem. We don't want
23 it used. Why can't --

24 MR. DORSAY: The state can look at it as the
25 problem itself, but we're -- it is my position, strongly,

1 that they have to justify that position by showing some
2 actual harm. Otherwise there would really be no free
3 exercise right, because the state could outlaw any kind of
4 conduct and say --

5 QUESTION: So long as it does it generally, I think
6 -- why isn't that right?

7 MR. DORSAY: So long as it does --

8 QUESTION: So long as it does it generally and
9 doesn't pick on a particular religion. It has a generally
10 applicable law for good and sufficient reasons.

11 MR. DORSAY: Well, the problem is, is this law and
12 the "neutral," quote, unquote, prescription, does affect a
13 particular religion only. And it is not, this Court said
14 in Yoder, neutral laws may in its application have an
15 affect on other, on particular --

16 QUESTION: Well, I suppose you could say a law
17 against human sacrifice would, you know, would affect only
18 the Aztecs. But I don't know that you have to make -- you
19 have to make exceptions. If it is a generally applicable
20 law that the state --

21 MR. DORSAY: Well, for instance, a better example I
22 thought, the state is, for instance, cited to a case
23 outlawing the use of dangerous snakes. Now, that is a
24 legitimate belief. But, for instance, what happens if the
25 state says we want to outlaw all use of snakes by

1 religions. And you have a religion that believes that
2 garter snakes, the common garden snake, is a deity. Would
3 that general proscription hold up where you have an
4 overbroad legislative proscription, and it is not
5 necessary, though, in this particular instance of this --
6 the garter snake in that case. And we would hold, and
7 this Court has hold, that the proscription must be
8 narrowly drawn to only protect the interest that is
9 harmed, not the general interest that is not harmed.

10 QUESTION: (Inaudible) snakes. Nobody shall handle
11 poisonous snakes.

12 MR. DORSAY: Well, that would certainly be a large
13 step in the right direction. If there are some snakes
14 that have -- are, for instance, are poisonous, but you can
15 show one, that they never bite people, two, that the
16 effect is not really dangerous, that poison is not
17 dangerous, then even in that case I would say you should
18 not outlaw the use of that snake, because in fact it is
19 not causing any harm to people.

20 QUESTION: And the burden is on the state to show
21 that.

22 MR. DORSAY: Yes. All of the cases --

23 QUESTION: So if there were a cult that used
24 rattlesnakes, the state would have to show that in the use
25 of those rattlesnakes somebody has been killed or hurt.

1 MR. DORSAY: Well, I don't think there is any
2 dispute about the harm that rattlesnakes can cause.

3 QUESTION: I don't think there is any dispute about
4 the harm that peyote can cause. You haven't disputed
5 that, the general dangerousness of it, have you?

6 MR. DORSAY: The misuse of peyote, no. We do not
7 believe the circumscribed ceremonial use of this peyote
8 constitutes misuse under any circumstances. The other --

9 QUESTION: The Attorney General mentioned the
10 incidence of 18 to 30 buttons being consumed. Would that
11 be a dangerous use, or a use that the state could
12 proscribe?

13 MR. DORSAY: See, this is one of the problems with
14 the record in this case. The normal, generally-accepted
15 use is four buttons, as it goes around -- the use of
16 peyote goes around twice during the ceremony. People can
17 choose to take one to four more the second time it goes
18 around. We do not know, the use varies in some instances,
19 the circumstances --

20 QUESTION: Well, I am not sure if it is a general
21 problem with the record or a general problem with the
22 exemption you seek to have us adopt.

23 MR. DORSAY: If it could be shown that the
24 ingestion of a large number, 30 or more peyote buttons,
25 caused harm, I would say that perhaps the state could

1 limit the use of peyote in the ceremony to a smaller
2 amount that would not cause those problems.

3 QUESTION: How often are these ceremonies held?

4 MR. DORSAY: They vary among people.

5 QUESTION: Like every day?

6 MR. DORSAY: No. My client participates in them
7 once or twice a year. Some people participate in them --
8 the chiefs, road chiefs who conduct the ceremonies, do
9 them once a week in different settings. I think the
10 normal use is in the order or once a month or so.

11 QUESTION: Is peyote habit forming?

12 MR. DORSAY: No. It has not been shown to be habit
13 forming or addictive in any respect.

14 I wanted to briefly address the other Establishment
15 Clause issue, and that is the second reason for just
16 upholding the Native American Church is that it's a
17 federal exemption that is governed by the United States
18 trust responsibility to Indian tribes. That's why the
19 Native American Church has been singled out in the
20 legislative history and in the American Indian Religious
21 Freedom Act.

22 There have been a number of other instances, for
23 instance the Bald Eagle Protection Act, which was
24 addressed by this Court in U.S. v. Dion, provides an
25 exemption for the religious use, Indian use, of eagle

1 feathers for Indian religious purposes. There are a
2 number of other statutes. The Indian Child Welfare Act,
3 which was addressed by this Court earlier in the year, is
4 based on the cultural integrity of tribes. The Indian
5 Civil Rights Act provides an express exemption from the
6 Establishment Clause because the cultural integrity of
7 tribes was so important. We don't believe it is necessary
8 to address that issue again in this case, but we certainly
9 believe that the singling out of one church in this case
10 is based on the federal government's relationship with
11 Indian tribes. And that is why they have singled out this
12 church.

13 Oregon Supreme Court only exempted the Native
14 American Church because that was the only church before
15 it. It was not there to look at a broad exemption for all
16 churches, and that is the purpose of the First Amendment.
17 In the Frazee case, the Court said we realize it is
18 difficult to balance between different religious beliefs,
19 but the First Amendment requires it. If you have a long
20 history, if you have organized tenets of a church, it
21 makes the inquiry easier, but that does not get rid of
22 that burden on this Court or other courts, if those
23 organized beliefs aren't there. In this case they are
24 here, there is -- this church supports the state's drug
25 enforcement effort in every respect. The tenets of the

1 church believe any misuse of this drug, any misuse of
2 other drugs or alcohol is sacrilegious. And so there is
3 no disparity between the beliefs of this church, we
4 believe, and the beliefs of -- the interests of the state
5 in this case.

6 QUESTION: I suppose any, any individual outside
7 this church could have a sincere religious belief also
8 that two buttons a month is required by my religious
9 beliefs, and that can't be forbidden.

10 MR. DORSAY: Well, the problem is, this is only
11 ingested in a ceremony which is led by a road chief, in
12 which no one leaves --

13 QUESTION: I know, what if he says I have a
14 ceremony in my house twice a month.

15 MR. DORSAY: Well, see, that has been the
16 distinction with other religions. In some of the
17 marijuana religions, for instance, they believe we should
18 be able to use it in any conditions under any
19 circumstances. That, of course, implicates the state's
20 law enforcement interest.

21 QUESTION: I thought the record here showed that
22 some members of the church do use it to cure illness,
23 apart from these mass ceremonies where they use it, but
24 some use it at home --

25 MR. DORSAY: It is used in the ceremony, but it is

1 also used for medical treatment as part of the ceremony.

2 Thank you.

3 QUESTION: Thank you, Mr. Dorsay. General
4 Frohnmayer, you have three minutes remaining.

5 REBUTTAL ARGUMENT OF DAVID B. FROHNMAYER

6 ON BEHALF OF THE PETITIONERS

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

9 Two points on Oregon law. The case of State v.
10 Soto which is relevant to my answer to Justice O'Connor's
11 decision, the court did not address the Oregon
12 constitution, and that was probably prior to a time at
13 which state and federal constitutional claims were
14 separately considered.

15 With respect to the question propounded by -- to
16 opposing counsel, the question of benefits and the
17 entitlement of Respondents to benefits under the state law
18 and under the state constitution was fully settled by the
19 Oregon Supreme Court before this Court ever reached this
20 case in Smith v. -- Smith I. So the state constitutional
21 entitlement to benefits, putting aside the criminal law
22 issue, is settled law, it is, as the Chief Justice said,
23 water over the dam in terms of what the state law ruling
24 was on misconduct and whether that is covered by -- or
25 protected, by the state constitution. It is not.

1 QUESTION: The reason the benefits are required in
2 this case, according to the court below, is that it -- the
3 First Amendment requires it.

4 MR. FROHNMAYER: That is correct. That is the only
5 reason we are here at this Court is because --

6 QUESTION: And it may, it may have said that,
7 whether it is criminal under Oregon law is irrelevant --

8 MR. FROHNMAYER: That is correct.

9 QUESTION: -- but, but we don't need to think that
10 it is irrelevant to the First Amendment issue.

11 MR. FROHNMAYER: And we hope that you do not. It
12 is clear that --

13 QUESTION: That is why we -- I suppose that is why
14 we remanded.

15 MR. FROHNMAYER: That's -- and we believe that a
16 different answer would have been forthcoming on remand,
17 because we believe that it is relevant and it is a
18 distinguishing factor.

19 Third is a factual point, Mr. Chief Justice, and
20 that is that it is generally agreed that the ingestion of
21 four buttons of peyote is sufficient to induce a
22 hallucinogenic state. Both Petitioners and Respondents
23 cite essentially the same anthropological and sociological
24 studies in terms of the variabilities of this practice.
25 They are referred to in our briefs, and we would refer

1 this Court to our reply brief in terms of citations to the
2 authorities which would describe the variations in
3 ceremonies.

4 QUESTION: General, suppose you just frankly said,
5 or just from experience you would conclude that the
6 state's criminal law, even if they could apply it, is just
7 never applied to these ceremonies. They are just never
8 going to do it. I guess the case is still alive because
9 of this -- this workmen's compensation issue.

10 MR. FROHNMAYER: At the very least it is alive
11 because of that, and also because there is on the books a
12 very adverse precedent decided by the Oregon Supreme Court
13 purporting to construe federal law in a way which we
14 believe is not consistent with the teachings of this
15 Court.

16 Thank you very much.

17 CHIEF JUSTICE REHNQUIST: Thank you, General
18 Frohnmayer.

19 The case is submitted.

20 (Thereupon, at 12:04 p.m., the case in the above-
21 entitled matter was submitted.)
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24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:
No. 88-1213 - EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON, ET AL.,

Petitioners V. ALFRED L. SMITH, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Leona M. May
(REPORTER)

