

U.S. Supreme Court

EMPLOYMENT DIV., ORE. DEPT. OF HUMAN RES. v. SMITH, 494 U.S. 872 (1990)

494 U.S. 872

JUSTICE SCALIA delivered the opinion of the Court.

This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

I

Oregon law prohibits the knowing or intentional possession of a "controlled substance" unless the substance has been prescribed by a medical practitioner. Ore. Rev. Stat. 475.992(4) (1987). The law defines "controlled substance" as a drug classified in Schedules I through V of the Federal Controlled Substances Act, 21 U.S.C. 811-812, as modified by the State Board of Pharmacy. Ore. Rev. Stat. 475.005(6) (1987). Persons who violate this provision by possessing a controlled substance listed on Schedule I are "guilty of a Class B felony." 475.992(4)(a). As compiled by the State Board of Pharmacy under its statutory authority, see 475.035, Schedule I contains the drug peyote, a hallucinogen derived from the plant *Lophophora williamsii* Lemaire. Ore.

Admin. Rule 855-80-021(3)(s) (1988).

Respondents Alfred Smith and Galen Black (hereinafter respondents) were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members. When respondents applied to petitioner Employment Division (hereinafter petitioner) for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related "misconduct."

...

## II

Respondents' claim for relief rests on our decisions in *Sherbert v. Verner*, *supra*, *Thomas v. Review Bd. of Indiana Employment Security Div.*, *supra*, and *Hobbie v. Unemployment Appeals Comm'n of Florida*, [480 U.S. 136](#) (1987), in which we held that a State could not condition the availability of unemployment insurance on an individual's willingness to forgo conduct required by his religion. As we observed in *Smith I*, however, the conduct at issue in those cases was not prohibited by law. We held that distinction to be critical, for "if Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon," and "the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation." [485 U.S., at 672](#). Now that the Oregon Supreme Court has confirmed that Oregon does prohibit the religious use of peyote,

we proceed to consider whether that prohibition is permissible under the Free Exercise Clause.

## A

The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into [\[494 U.S. 872, 877\]](#) the Fourteenth Amendment, see *Cantwell v. Connecticut*, [310 U.S. 296, 303](#) (1940), provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. Const., Amdt. 1 (emphasis added). The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." *Sherbert v. Verner*, *supra*, at 402. The government may not compel affirmation of religious belief, see *Torcaso v. Watkins*, [367 U.S. 488](#) (1961), punish the expression of religious doctrines it believes to be false, *United States v. Ballard*, [322 U.S. 78, 86](#) -88 (1944), impose special disabilities on the basis of religious views or religious status, see *McDaniel v. Paty*, [435 U.S. 618](#) (1978); *Fowler v. Rhode Island*, [345 U.S. 67, 69](#) (1953); cf. *Larson v. Valente*, [456 U.S. 228, 245](#) (1982), or lend its power to one or the other side in controversies over religious authority or dogma....

But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though

no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used [494 U.S. 872, 878] for worship purposes," or to prohibit bowing down before a golden calf.

Respondents in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has

not been offended. Compare *Citizen Publishing Co. v. United States*, [394 U.S. 131, 139](#) (1969) (upholding application of antitrust laws to press), with *Grosjean v. American Press Co.*, [297 U.S. 233, 250](#) -251 (1936) (striking down license tax applied only to newspapers with weekly circulation above a specified level); see generally *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, [460 U.S. 575, 581](#) (1983).

Our decisions reveal that the latter reading is the correct one. We have never held that an individual's religious beliefs [[494 U.S. 872, 879](#)] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in *Minersville School Dist. Bd. of Ed. v. Gobitis*, [310 U.S. 586, 594](#) -595 (1940): "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted)." We first had occasion to assert that principle in *Reynolds v. United States*, [98 U.S. 145](#) (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to

make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.*, at 166-167.

...B

Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a [\[494 U.S. 872, 883\]](#) religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner*, [374 U.S. 398](#) (1963). Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. See *id.*, at 402-403; see also *Hernandez v. Commissioner*, [490 U.S., at 699](#). Applying that test we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion. See *Sherbert v. Verner*, *supra*; *Thomas v. Review Bd. of Indiana Employment Security Div.*, [450 U.S. 707](#) (1981); *Hobbie v. Unemployment Appeals Comm'n of Florida*, [480 U.S. 136](#) (1987). We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied, see *United States v. Lee*, [455 U.S. 252](#) (1982); *Gillette v. United States*, [401 U.S. 437](#) (1971). In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all. In *Bowen v. Roy*, [476 U.S. 693](#) (1986), we declined to apply *Sherbert* analysis to a federal statutory scheme that required benefit

applicants and recipients to provide their Social Security numbers. The plaintiffs in that case asserted that it would violate their religious beliefs to obtain and provide a Social Security number for their daughter. We held the statute's application to the plaintiffs valid regardless of whether it was necessary to effectuate a compelling interest. See [476 U.S., at 699](#) -701. In *Lyng v. Northwest Indian Cemetery Protective Assn.*, [485 U.S. 439](#) (1988), we declined to apply Sherbert analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities "could have devastating effects on traditional Indian religious practices," [485 U.S., at 451](#). [[494 U.S. 872, 884](#)] In *Goldman v. Weinberger*, [475 U.S. 503](#) (1986), we rejected application of the Sherbert test to military dress regulations that forbade the wearing of yarmulkes. In *O'Lone v. Estate of Shabazz*, [482 U.S. 342](#) (1987), we sustained, without mentioning the Sherbert test, a prison's refusal to excuse inmates from work requirements to attend worship services.

Even if we were inclined to breathe into Sherbert some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The Sherbert test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. As a plurality of the Court noted in *Roy*, a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment: "The statutory conditions [in *Sherbert* and *Thomas*] provided that a person was not

eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions." *Bowen v. Roy*, supra, at 708 (opinion of Burger, C. J., joined by Powell and REHNQUIST, JJ.). See also *Sherbert*, supra, at 401, n. 4 (reading state unemployment compensation law as allowing benefits for unemployment caused by at least some "personal reasons"). As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason. *Bowen v. Roy*, supra, at 708.

Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct. Although, as noted earlier, we have sometimes used the *Sherbert* test to analyze free exercise challenges to such laws, see *United States v. [494 U.S. 872, 885] Lee*, supra, at 257-260; *Gillette v. United States*, supra, at 462, we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Lyng*, supra, at 451. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious

beliefs, except where the State's interest is "compelling" - permitting him, by virtue of his beliefs, "to become a law unto himself," *Reynolds v. United States*, [98 U.S., at 167](#) - contradicts both constitutional tradition and common sense. [2](#)

The "compelling government interest" requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, see, e. g., [\[494 U.S. 872, 886\]](#) *Palmore v. Sidoti*, [466 U.S. 429, 432](#) (1984), or before the government may regulate the content of speech, see, e. g., *Sable Communications of California v. FCC*, [492 U.S. 115, 126](#) (1989), is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields - equality of treatment and an unrestricted flow of contending speech - are constitutional norms; what it would produce here - a private right to ignore generally applicable laws - is a constitutional anomaly. [3](#)

Nor is it possible to limit the impact of respondents' proposal by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. Cf. *Lyng v. Northwest Indian Cemetery Protective Assn.*, [485 U.S., at 474](#) -476 (BRENNAN, J., dissenting). It is no [\[494 U.S. 872, 887\]](#) more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative

merits of differing religious claims." *United States v. Lee*, [455 U.S., at 263](#) n. 2 (STEVENS, J., concurring). As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." ...

If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld v. Brown*, [366 U.S., at 606](#), and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind - ranging from [\[494 U.S. 872, 889\]](#) compulsory military service, see, e. g., *Gillette v. United States*, [401 U.S. 437](#) (1971), to the payment of taxes, see, e. g., *United States v. Lee*, *supra*; to health and safety regulation such as manslaughter and child neglect laws, see, e. g., *Funkhouser v. State*, 763 P.2d 695 (Okla. Crim. App. 1988), compulsory vaccination laws, see, e. g., *Cude v. State*, 237 Ark. 927, 377 S. W. 2d 816 (1964),

drug laws, see, e. g., *Olsen v. Drug Enforcement Administration*, 279 U.S. App. D.C. 1, 878 F.2d 1458 (1989), and traffic laws, see *Cox v. New Hampshire*, [312 U.S. 569](#) (1941); to social welfare legislation such as minimum wage laws, see *Tony and Susan Alamo Foundation v. Secretary of Labor*, [471 U.S. 290](#) (1985), child labor laws, see *Prince v. Massachusetts*, [321 U.S. 158](#) (1944), animal cruelty laws, see, e. g., *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 723 F. Supp. 1467 (SD Fla. 1989), cf. *State v. Massey*, 229 N.C. 734, 51 S. E. 2d 179, appeal dismissed, 336 U.S. 942 (1949), environmental protection laws, see *United States v. Little*, 638 F. Supp. 337 (Mont. 1986), and laws providing for equality of opportunity for the races, see, e. g., *Bob Jones University v. United States*, [461 U.S. 574, 603](#)-604 (1983). The First Amendment's protection of religious liberty does not require this. [5](#) [[494 U.S. 872, 890](#)]

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. See, e. g., *Ariz. Rev. Stat. Ann. 13-3402(B)(1)-(3)* (1989); *Colo. Rev. Stat. 12-22-317(3)* (1985); *N. M. Stat. Ann. 30-31-6(D)* (Supp. 1989). But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is

desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

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Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug. The decision of the Oregon Supreme Court is accordingly reversed.

. It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join as to Parts I and II, concurring in the judgment. \*

Although I agree with the result the Court reaches in this case, I cannot join its opinion. In my view, today's holding dramatically departs from well-settled First Amendment

jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty.

...

## II

The Court today extracts from our long history of free exercise precedents the single categorical rule that "if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." Ante, at 878 (citations omitted). Indeed, the Court holds that where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply. Ante, at 884. To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct. [494 U.S. 872, 893]

## A

The Free Exercise Clause of the First Amendment commands that "Congress shall make no law . . . prohibiting the free exercise [of religion]." In *Cantwell v. Connecticut*, [310 U.S. 296](#) (1940), we held that this prohibition applies to the States by incorporation into the Fourteenth Amendment and that it categorically forbids government regulation of religious beliefs. *Id.*, at 303. As the Court recognizes, however, the "free exercise" of religion often, if not invariably, requires the performance of (or abstention from) certain

acts. Ante, at 877; cf. 3 A New English Dictionary on Historical Principles 401-402 (J. Murray ed. 1897) (defining "exercise" to include "[t]he practice and performance of rites and ceremonies, worship, etc.; the right or permission to celebrate the observances (of a religion)" and religious observances such as acts of public and private worship, preaching, and prophesying). "[B]elief and action cannot be neatly confined in logic-tight compartments." *Wisconsin v. Yoder*, [406 U.S. 205, 220](#) (1972). Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause.

The Court today, however, interprets the Clause to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as that prohibition is generally applicable. Ante, at 878. But a law that prohibits certain conduct - conduct that happens to be an act of worship for someone - manifestly does prohibit that person's free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons. It is difficult to deny that a law that prohibits [\[494 U.S. 872, 894\]](#) religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns.

The Court responds that generally applicable laws are "one large step" removed from laws aimed at specific religious practices. *Ibid.* The First Amendment, however, does

not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice. As we have noted in a slightly different context, "[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides." *Hobbie v. Unemployment Appeals Comm'n of Florida*, [480 U.S. 136, 141](#) - 142 (1987) (quoting *Bowen v. Roy*, [476 U.S. 693, 727](#) (1986) (O'CONNOR, J., concurring in part and dissenting in part)).

To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. See, e. g., *Cantwell*, *supra*, at 304; *Reynolds v. United States*, [98 U.S. 145, 161](#) -167 (1879). Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest. ... The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies

a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests "of the highest order," *Yoder, supra*, at 215. "Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Roy, supra*, at 728 (opinion concurring in part and dissenting in part).

). The Court attempts to support its narrow reading of the Clause by claiming that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Ante*, at 878-879. But as the Court later notes, as it must, in cases such as *Cantwell* and *Yoder* we have in fact interpreted the Free Exercise Clause to forbid application of a generally applicable prohibition to religiously motivated conduct. See *Cantwell, supra*, at 304-307; *Yoder, 406 U.S., at 214 - 234*. Indeed, in *Yoder* we expressly rejected the interpretation the Court now adopts...).

The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them "hybrid" decisions, *ante*, at 892, but there is no denying that both cases expressly relied on the Free Exercise Clause, see *Cantwell, 310 U.S., at 303 -307*; *Yoder, supra*, at 219-229, and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence. Moreover, in each of the other cases

cited by the Court to support its categorical rule, ante, at 879-880, we rejected the particular constitutional claims before us only after carefully weighing the competing interests. See *Prince v. Massachusetts*, [321 U.S. 158, 168](#) -170 (1944) (state interest in regulating children's activities justifies denial of religious exemption from child labor laws); *Braunfeld v. Brown*, [366 U.S. 599, 608](#) -609 (1961) (plurality opinion) (state interest in uniform day of rest justifies denial of religious exemption from Sunday closing law); *Gillette*, supra, at 462 (state interest in military affairs justifies denial of religious exemption from conscription laws); *Lee*, supra, at 258-259 (state interest in comprehensive Social Security system justifies denial of religious exemption from mandatory participation requirement). That we rejected the free exercise [\[494 U.S. 872, 897\]](#) claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us.

## B

Respondents, of course, do not contend that their conduct is automatically immune from all governmental regulation simply because it is motivated by their sincere religious beliefs. The Court's rejection of that argument, ante, at 882, might therefore be regarded as merely harmless dictum. Rather, respondents invoke our traditional compelling interest test to argue that the Free Exercise Clause requires the State to grant them a limited exemption from its general criminal prohibition against the

possession of peyote. The Court today, however, denies them even the opportunity to make that argument, concluding that "the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [compelling interest] test inapplicable to" challenges to general criminal prohibitions. *Ante*, at 885.

In my view, however, the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community. As we explained in *Thomas*:

- ) "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." [450 U.S., at 717](#)-718. [494 U.S. 872, 898]
- ).

See also *Frazee v. Illinois Dept. of Employment Security*, [489 U.S. 829, 832](#) (1989); *Hobbie*, [480 U.S., at 141](#). A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible, for it "results in the choice to the individual of either abandoning his

religious principle or facing criminal prosecution." Braunfeld, *supra*, at 605. I would have thought it beyond argument that such laws implicate free exercise concerns.

...

Legislatures, of course, have always been "left free to reach actions which were in violation of social duties or subversive of good order." Reynolds, [98 U.S., at 164](#); see also Yoder, *supra*, at 219-220; Braunfeld, [366 U.S., at 603](#) -604. Yet because of the close relationship between conduct and religious belief, "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." Cantwell, [310 U.S., at 304](#). Once it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion, we have consistently asked the government to demonstrate that unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest," Lee, *supra*, at 257-258, or represents "the least restrictive means of achieving some compelling state interest," Thomas, *supra*, at 718. See, e. g., Braunfeld, *supra*, at 607; Sherbert, *supra*, at 406; Yoder, *supra*, at 214-215; Roy, [476 U.S., at 728](#) -732 (opinion concurring in part and dissenting in part). To me, the sounder approach - the approach more consistent with our role as judges to decide each case on its individual merits - is to apply this test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling. Even if, as an empirical matter, a government's criminal laws might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each

particular claim. Cf. *McDaniel*, [435 U.S. at 628](#), n. 8 (plurality opinion) (noting application of *Sherbert* to general criminal prohibitions and the "delicate balancing required by our decisions in" *Sherbert* and *Yoder*). Given the range of conduct that a State might legitimately make [\[494 U.S. 872, 900\]](#) criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment never requires the State to grant a limited exemption for religiously motivated conduct.

Moreover, we have not "rejected" or "declined to apply" the compelling interest test in our recent cases. *Ante*, at 883-884. Recent cases have instead affirmed that test as a fundamental part of our First Amendment doctrine. See, e. g., *Hernandez*, [490 U.S. at 699](#); *Hobbie*, *supra*, at 141-142 (rejecting Chief Justice Burger's suggestion in *Roy*, *supra*, at 707-708, that free exercise claims be assessed under a less rigorous "reasonable means" standard). The cases cited by the Court signal no retreat from our consistent adherence to the compelling interest test. In both *Bowen v. Roy*, *supra*, and *Lyng v. Northwest Indian Cemetery Protective Assn.*, [485 U.S. 439](#) (1988), for example, we expressly distinguished *Sherbert* on the ground that the First Amendment does not "require the Government itself to behave in ways that the individual believes will further his or her spiritual development . . . . The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Roy*, *supra*, at 699; see *Lyng*, *supra*, at 449. This distinction makes sense because "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Sherbert*, *supra*, at 412

(Douglas, J., concurring). Because the case sub judice, like the other cases in which we have applied *Sherbert*, plainly falls into the former category, I would apply those established precedents to the facts of this case.

Similarly, the other cases cited by the Court for the proposition that we have rejected application of the *Sherbert* test outside the unemployment compensation field, ante, at 884, are distinguishable because they arose in the narrow, specialized contexts in which we have not traditionally required [\[494 U.S. 872, 901\]](#) the government to justify a burden on religious conduct by articulating a compelling interest. See *Goldman v. Weinberger*, [475 U.S. 503, 507](#) (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society"); *O'Lone v. Estate of Shabazz*, [482 U.S. 342, 349](#) (1987) ("[P]rison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights") (citation omitted). That we did not apply the compelling interest test in these cases says nothing about whether the test should continue to apply in paradigm free exercise cases such as the one presented here.

The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion. Although the Court suggests that the compelling interest test, as applied to generally applicable laws, would result in a "constitutional anomaly," ante, at

886, the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a "constitutional nor[m]," not an "anomaly." Ibid. Nor would application of our established free exercise doctrine to this case necessarily be incompatible with our equal protection cases. Cf. *Rogers v. Lodge*, [458 U.S. 613, 618](#) (1982) (race-neutral law that "'bears more heavily on one race than another'" may violate equal protection) (citation omitted); *Castaneda v. Partida*, [430 U.S. 482, 492](#) -495 (1977) (grand jury selection). We have in any event recognized that the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause. See *Hobbie*, [480 U.S., at 141](#) -142. As the language of the [\[494 U.S. 872, 902\]](#) Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity. See, e. g., *McConnell, Accommodation of Religion*, 1985 S. Ct. Rev. 1, 9 ("[T]he text of the First Amendment itself 'singles out' religion for special protections"); P. Kauper, *Religion and the Constitution* 17 (1964). A law that makes criminal such an activity therefore triggers constitutional concern - and heightened judicial scrutiny - even if it does not target the particular religious conduct at issue. Our free speech cases similarly recognize that neutral regulations that affect free speech values are subject to a balancing, rather than categorical, approach. See, e. g., *United States v. O'Brien*, [391 U.S. 367, 377](#) (1968); *Renton v. Playtime Theatres, Inc.*, [475 U.S. 41, 46](#) -47 (1986); cf. *Anderson v. Celebrezze*, [460 U.S. 780, 792](#) -794 (1983) (generally applicable laws may impinge on free association concerns). The Court's parade of horrors, ante, at 888-889, not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible

balances between religious liberty and competing state interests.

Finally, the Court today suggests that the disfavoring of minority religions is an "unavoidable consequence" under our system of government and that accommodation of such religions must be left to the political process. Ante, at 890. In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish. Indeed, the words of Justice Jackson in *West Virginia State Bd. of Ed. v. Barnette* (overruling *Minersville School Dist. v. Gobitis*, [310 U.S. 586](#) (1940)) are apt: [\[494 U.S. 872, 903\]](#)

- ). "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." [319 U.S., at 638](#).

See also *United States v. Ballard*, [322 U.S. 78, 87](#) (1944) ("The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of

the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views"). The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a "luxury," ante, at 888, is to denigrate "[t]he very purpose of a Bill of Rights."

### III

The Court's holding today not only misreads settled First Amendment precedent; it appears to be unnecessary to this case. I would reach the same result applying our established free exercise jurisprudence.

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