TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

IN THE

Supreme Court of the United States

October Term, 1962

No. 526

ADELL H. SHERBERT,

Appellant,

against

CHARLIE V. VERNER, *et al.*, as Members of the SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION and SPARTAN MILLS.

BRIEF OF SYNAGOGUE COUNCIL OF AMERICA, AMERICAN JEWISH CONGRESS, JEWISH LABOR COMMITTEE AND JEWISH WAR VETERANS OF THE USA, AS *AMICI CURIAE*

Interest of the *Amici*

This brief is submitted on behalf of the Synagogue Council of America, the American Jewish Congress, the Jewish Labor Committee and the Jewish War Veterans of the U. S. A.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of:

Central Conference of American Rabbis, representing the Reform rabbinate;

Rabbinical Assembly, representing the Conservative rabbinate;

Rabbinical Council of America, representing the Orthodox rabbinate;

Union of American Hebrew Congregations, representing the Reform congregations;

Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations;

United Synagogue of America, representing the Conservative congregations.

The American Jewish Congress is a national organization of American Jews, founded by Rabbi Stephen S. Wise, Supreme Court Justice Louis D. Brandeis, Federal Judge Julian Mack and others, to protect the religious, civil, political and economic rights of Jews and to promote the principles of democracy.

The Jewish Labor Committee is a national organization of trade unions with a substantial Jewish membership and Jewish labor-oriented community organizations concerned with the civil rights of all groups, the strengthening of democratic forces in the world, and the advancement of Jewish culture and the Jewish community.

The Jewish War Veterans of the U. S. A., the oldest active veterans organization in the United States, is dedicated to support of the national defense and to the extension to all citizens of the democratic rights guaranteed by the United States Constitution.

Since our members observe as their holy day the same day observed by the appellant in this case and this Court's

determination of the issue raised will affect their rights to unemployment compensation benefits, we obviously have a direct interest in the controversy before this Court. But our interest extends far beyond the narrow confines of this particular controversy. Were the Sabbath involved in this case the first rather than the seventh day of the week, we would be equally concerned. Those we represent are devoted to the preservation of religion and the protection of civil rights, and, we believe, affirmance of the decision of the court below would be inimical to the cause of religion and prejudicial to the cause of civil rights.

As organizations engaged in the teaching and practice of religion we are concerned about a decision which would compel an unemployed, financially distressed worker to choose between the sacrifice of her religious convictions and the unemployment benefits which may be desperately needed to carry her and her family through a period of unemployment. Since we are committed to the American democratic system, based as it is upon the principle of religious freedom, we are concerned about a decision which, by compelling the unemployed worker to choose between religion and economic relief, in effect deprives him of his religious freedom.

For these reasons we have sought and obtained the consent of counsel for the parties to the submission of this brief *amici curiae*.

Statement of the Case

Plaintiff-appellant had been employed at the Spartan Mills in Spartanburg, South Carolina, as a spool-tender for some thirty-five years. From the end of World War II until June, 1959, work in the plant on Saturdays was voluntary, and plaintiff had worked only five days a week. In August, 1957, plaintiff became a member of the Seventh-day Adventist church. It is not disputed that her conversion was entirely bona fide and that her membership in the church and adherence to its doctrines and beliefs are likewise bona fide.

According to the doctrines and beliefs of the Seventh-day Adventist church, as of Judaism, the biblically commanded Sabbath is the seventh, rather than the first day of the week. As in Judaism, too, in the Seventh-day Adventists' faith, the Sabbath begins at sundown on Friday and ends at sundown on Saturday. During this period engagement in work, business or other secular pursuits is forbidden.

Since Saturday work at Spartan Mills was voluntary until June, 1959, the plaintiff had no difficulty in adhering to her religious beliefs from August, 1957 until June, 1959. At the latter date, however, a six day week became mandatory and the plaintiff's refusal to violate her religious convictions by working on Saturday led to her dismissal. She thereupon applied to the South Carolina Employment Security Commission for unemployment insurance benefits. However, her refusal to accept any job which would require her to work on Saturday led to a determination by the Commission that she was ineligible for benefits because

she was not "available for work" within the meaning of the South Carolina statute (S. C. Code (1962) Sec. 68-113(3)), even though she expressed her willingness to work in any other mill or in any other industry so long as she was not required to work on her Sabbath.

The decision of the Commission was upheld by the Court of Common Pleas for Spartanburg County, and its decision in turn was affirmed, over a strong dissent, by the Supreme Court of South Carolina. Asserting that her constitutional rights were violated by this determination, the plaintiff appealed to this Court which, on December 17, 1962, noted probable jurisdiction.

Constitutional Provisions Involved

The First Amendment to the United States Constitution provides in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

The first section of the Fourteenth Amendment to the United States Constitution provides, in part:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Summary of Argument

A statute which is construed to disqualify from unemployment insurance benefits one who because of his religious convictions does not labor on Saturdays deprives him of free exercise of his religion. Even if the deprivation be deemed indirect and affecting a privilege rather than a right, it is nevertheless within the compass of the First Amendment. It is constitutionally permissible only if clearly and immediately necessary for the avoidance of a grave danger to the public welfare, and only if no method not infringing upon religious liberty is available to avoid the danger. This test cannot be met in the present case, and accordingly the disqualification of the plaintiff unconstitutionally deprived her of rights secured by the First Amendment.

Moreover, disqualification of a worker who for reason of religious conviction will not work on Saturdays while no such disqualification is imposed upon those who for the same reason will not work on Sunday constitutes a law respecting an establishment of religion in violation of the First Amendment and a denial of the equal protection of the laws in violation of the Fourteenth Amendment.

ARGUMENT

POINT I

Disqualification from unemployment insurance benefits of one who for reasons of conscience will not work on his Sabbath unconstitutionally deprives him of his freedom of religion.

We submit that the South Carolina statute, construed and applied to entail forfeiture of benefits for refusal to work on Saturday, restricts the religious liberty of those whose conscience requires them to abstain from labor on that day. The sanction imposed by the state for observing Saturday as holy time is certainly more serious economically to an unemployed worker than the imposition of a license tax for preaching which this Court has held to constitute a restriction upon religious liberty. *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943); *Follet* v. *Town of McCormick,* 321 U. S. 573 (1944).

We cannot agree with the statement of the Supreme Court of South Carolina that the statute as construed and applied "places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience" (Statement as to Jurisdiction, p. 25a). Only in the narrowest and most unrealistic sense can it be said that the State of South Carolina is not forcing the appellant to violate her Sabbath. An unemployed worker, without a source of livelihood, can hardly be said to be exercising full freedom of choice. While the compulsion may be indirect, it is quite substantial.

The impairment of the religious freedom of the appellant herein and others in her class is far more direct than that suffered by the Sabbatarians in the Sunday law cases. *Braunfeld* v. *Brown,* 366 U. S. 599 (1961); *Gallagher* v. *Crown Kosher Market,* 366 U. S. 617 (1961). In those cases, this Court was unanimous in holding that the religious freedom of the seventh-day observers was restricted by the operation of the Sunday laws. A majority of the Court held that this restriction was nevertheless permissible and did not violate the First Amendment. But that a restriction on the free exercise of religion was involved is evident from the fact that the Court dismissed the free-exercise claim in the non-Sabbatarian cases (*McGowan* v. *Maryland,* 366 U. S. 420 (1961); *Two Guys from Harrison-Allentown* v. *McGinley,* 366 U. S. 582 (1961)), while it did weigh the claim when asserted by the Sabbatarians.

Nor is the claim of violation of the First Amendment adequately met by asserting that unemployment benefits are in the nature of a privilege rather than a right. Even if there is a constitutional distinction between rights and privileges in respect to governmental action, and even if unemployment benefits properly belong in the latter category (which is far from certain), nevertheless the grant of a privilege may not be conditioned upon the forfeiture of a right secured by the First Amendment.

If receipt of unemployment benefits is a privilege, so too is attendance at public school. Yet, the privilege of attendance may not constitutionally be conditioned upon the child's violating his conscience by saluting the flag or pledging allegiance to it. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943). Tax exemption is certainly a privilege rather than a right, yet a state

may not condition the grant of tax exemption upon the taking of a loyalty oath. *Speiser* v. *Randall,* 357 U. S. 513 (1958). Appointment to the office of notary public is likewise a privilege rather than a right, yet it may not constitutionally be conditioned upon the applicant's taking an oath that he believes in the existence of God. *Torcaso* v. *Watkins,* 367 U. S. 488 (1961).

Neither *Hamilton* v. *Regents of the University of California,* 293 U. S. 245 (1934) nor *In re Summers,* 325 U. S. 561 (1945) is contrary to this proposition. In the former case the Court held that a state could constitutionally condition attendance at its university upon the students' taking military training; and in the latter it held that a state could condition admission to the bar upon the applicant's willingness to bear arms. However, government may constitutionally compel citizens to bear arms in its defense (*Arver* v. *United States,* 245 U. S. 366 (1918)), and therefore may penalize refusal to do so by denial of a free higher education or admission to the bar. But government may not constitutionally compel any person to work on his Sabbath, and therefore may not penalize one who refuses to do so.

We submit, therefore, that the denial of unemployment benefits to one who will not violate his conscience by working on his Sabbath constitutes a restriction upon his religious freedom.

We recognize, of course, that a determination that the application of the South Carolina statute against the appellant restricts her religious freedom does not of itself determine the constitutional issue under the First Amendment. *Braunfeld* v. *Brown, supra.*

We recognize too that the religious freedom guaranteed by the First Amendment does not embrace absolute "freedom to act" and that all conduct "remains subject to regulation for the protection of society." *Cantwell* v. *Connecticut,* 310 U. S. 296, 303-304 (1940). Concededly, the First Amendment does not preclude proscription of polygamy, breaching of the peace or child labor. *Reynolds* v. *United States,* 98 U. S. 145 (1878); *Davis* v. *Beason,* 133 U. S. 333 (1890); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942); *Prince* v. *Massachusetts,* 321 U. S. 158 (1944).

Nevertheless, when courts consider the validity of legislation regulating rights secured by the First Amendment, they do not apply the usual presumption of constitutionality. They recognize, rather, "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945); *Marsh* v. *Alabama,* 326 U. S. 501, 509 (1946); *Prince* v. *Massachusetts, supra,* 321 U. S. at 164. Hence, "any attempt to restrict these liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." *Thomas* v. *Collins, supra,* 323 U. S. at 530. See also *West Virginia State Board of Education* v. *Barnette, supra,* 319 U. S. at 639.

Unless, therefore, the record establishes the existence of a clear and present danger that the Employment Security Law of South Carolina cannot be effectively administered if the appellant's view prevails, the statute as construed violates the religious guarantee of the Federal Constitution. Nothing in the record shows such a danger. Nothing establishes or even indicates that any substantial inconvenience to the administration of the law would result

from respecting the religious convictions of the appellant herein and others similarly situated. Indeed, there are several reasons to believe that no substantial prejudice would result to the administration of the Law by according benefits to a person whose convictions preclude him from accepting employment on Saturday.

1. The 5-day week has received almost uniform acceptance in American industry. It is clear from the statistics available on this subject that at present the 5-day, 40-hour week, has been established as a normal worktime schedule. Thus, the most recent figure available from the Bureau of Labor Statistics indicates that the average hours worked by all employed persons in January 1963 was 40.1. The average hours for production and manufacturing workers in 1952 was 40.7, in 1958, 39.9, in 1961, 39.8 and in 1962, 40.4. (Additional figures are available in *Employment and Earnings,* the monthly periodical of the Bureau of Labor Statistics. See, for example, the issue of January 1963.) While there are fluctuations in the average number of hours worked in the United States, on a yearly and monthly basis, it is apparent, first, that the average fluctuation is not very great, and, second, that the fluctuation tends to be tied to the business cycle. The long-range trend is toward a decrease in working hours. (The last time that there was a substantial deviation was during the war years when, with the need for increased production, many people worked overtime. During the war years, the average hours were between 45 and 46 hours a week.) There should therefore be no abnormal difficulty in obtaining employment on the basis of the 5-day week and consequently no abnormal strain on the administration of the unemployment law.

2. Appellant has not refused to work even six days weekly. She has simply refused to work on her Sabbath. She expressed her willingness "to work in another mill or in any other industry so long as she was not required to work on her Sabbath" (Statement as to Jurisdiction, pp. 6-7). South Carolina permits engaging in "works of necessity" on Sunday (S. C. Code, Sec. 64-2). Indeed, it even permits working on Sunday in textile plants, the very industry in which appellant has been engaged for 35 years, in order to "maintain a normal production schedule" (Sec. 64-4). Appellant therefore has not withdrawn herself from the available labor market, and her inability to find employment presents a situation not different from that which is the basis for all unemployment insurance laws.

3. Even if an abnormal difficulty existed in obtaining employment for persons whose religious convictions prohibited them from working on Saturday, no serious prejudice to the administration of the Unemployment Compensation Law would result. According to the *Census of Religious Bodies of the United States,* Department of Commerce, Bureau of Census, there were in 1936 only 429 Seventh Day Adventists and 605 Jews in South Carolina. Today, these figures may have increased at most by 100%, making at most a combined total of about 2,000. Of course, only a small proportion of these are workers who are covered by the Unemployment Compensation Law. The population of South Carolina according to the 1960 census, was 2,382,594. Hence, it is clear that only an insignificant number of seventh-day observers are involved. Even if all found abnormal difficulty in obtaining employment not re-

quiring work on Saturday, which is obviously highly improbable, no undue burden upon the unemployment compensation administration would result.

4. Of the 50 states in the Union, at least 35 do not impose forfeiture of benefits for refusal of a seventh-day observer to accept a position requiring Saturday work.* The three reported decisions on the subject by highest state courts all uphold Sabbatarians' right to unemployment benefits. *In re: Miller,* 243 N. C. 509 (1956); *Tary* v. *Board of Review,* 161 Ohio St. 251 (1945); *Swenson* v. *Unemployment Security Commission,* 340 Mich. 430 (1940). In addition numerous state administrative commissions have ruled the same way.**

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* This statement is based upon a survey conducted by the American Jewish Congress in 1952. The question was put to the unemployment compensation administration of 48 states and the District of Columbia. Replies were received from all. These indicated that in five states (Georgia, Massachusetts, South Carolina, Utah and Wisconsin) the issue had not then arisen and no policy had been reached. In eight states (Kansas, Missouri, Montana, New Hampshire, Ohio, Oregon, Tennessee and West Virginia) the replies were that forfeiture would be imposed. In the other 35 states and the District of Columbia the replies were that forfeiture would not be imposed.

** California, Case No. 7643, Cal. A., Unemp. Comp. Int. Serv., Ben. Serv., Vol. 5, No. 10; Connecticut, Susman v. The Administrator of Unemp. Comp., No. 463-C-45 (1945); District of Columbia, Case No. 11372, D. C. A., Unemp. Comp. Int. Serv., Ben. Serv., Vol. 10, No. 4; Georgia, Case No. 11931, Ga. A., *id.* at Vol. 10, No. 11; Idaho, Case No. 12661, Ida. A., *id.* at Vol. 11, No. 8; Illinois, Case No. 8303, Ill. A., *id.* at Vol. 7, No. 1; Illinois, Case No. 10325, Ill. R., *id.* at Vol. 9, No. 3; Kansas, Case No. 10451, Kans. A., *id.* at Vol. 9, No. 4-5; Kentucky, Case No. 9596, Ky. A., *id.* at Vol. 8, No. 7; Louisiana Board of Review, Decision No. 114-BR-50, 1950. Maryland, Case No. 11705, Md. R., Unemp. Comp. Int. Serv., Ben. Serv., at Vol. 10, No. 8; Michigan, Case No. 8029, Mich. A., *id.* at Vol. 6, No. 6; New Jersey, Case No. 8767, N. J. R., *id.* at Vol. 7, No. 9; New York Case No. 10197, N. Y. A., *id.* at Vol. 9, No. 1; North Carolina, Case No. 9007, N. C. A., *id.* at Vol. 7, No. 12; Okla-

In many of these states there are far greater numbers of Orthodox Jews and Seventh-day Adventists than in South Carolina. Nevertheless, these states have not found that any undue burden on the unemployment compensation fund resulted from the granting of benefits to such Saturday observers. It may therefore be asserted with reasonable certainty that no undue burden on the unemployment compensation fund of South Carolina would result from the granting of benefits to the few Jewish and other seventh-day observers unable to find employment not repugnant to their morals and conscience.

5. The best evidence that the administration of the unemployment insurance system would not be unduly prejudiced in the present case if the appellant's religious convictions were respected is the fact that there are some 150 Seventh-day Adventists in the Spartanburg area and that, with the exception of the appellant and one other person, all are gainfully employed but not working on their Sabbath (Statement as to Jurisdiction, p. 27a).

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homa, Case No. 7600, Okla. A., *id.* at Vol. 5, No. 10; Oregon, Case No. 7512, Ore. A., *id.* at Vol. 5, No. 9; Tennessee, Case No. 10055, Tenn. R., *id.* at Vol. 8, No. 11; Tennessee, Case No. 12796, Tenn. R., *id.* at Vol. 11, No. 9; Virginia, Case No. 11273, Va. A., *id.* at Vol. 10, No. 2; Washington, Case No. 9107, Wash. R., *id.* at Vol. 8, No. 1; West Virginia, Case No. 7267, W. Va. A., *id.* at Vol. 5, No. 5; Wisconsin, Case No. 10154, Wisc. A., *id.* at Vol. 8, No. 12.

POINT II

The denial of unemployment insurance benefits to the appellant, although no such forfeiture is suffered by those who refuse for reasons of conscience to work on Sunday, violates the First Amendment's ban on laws respecting an establishment of religion and deprives the appellant of the equal protection of the laws.

South Carolina does not forbid all labor on Sundays. Works of charity and necessity are allowed (South Carolina Code 64-2). Moreover, even work in textile plants of the kind engaged in by the appellant is legally permissible where necessary to "maintain a normal production schedule" (Sec. 64-4). However, the statute makes it quite clear that a worker who for religious reasons refuses to work on Sunday may not for that reason be denied unemployment insurance benefits. Sec. 64-5 of the statute expressly provides that "* * * no employee shall be required to work on Sunday who is conscientiously opposed to Sunday work, and if any employee should refuse to work on Sunday on account of conscientious or physical objections he shall not jeopardize his seniority rights by such refusal *or be discriminated against in any other manner.*" (Emphasis added.)

If there is anything certain in constitutional law it is that the First Amendment forbids government from preferring one religion over another. Four times within little more than a decade this Court has specifically stated (*Everson* v. *Board of Education,* 330 U. S. 1, 15 (1947); *McCollum* v. *Board of Education,* 333 U. S. 203, 210 (1948); *Mc-*

Gowan v. *Maryland, supra,* 366 U. S. at 443; *Torcaso* v. *Watkins, supra,* 367 U. S. at 492-3):

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, *or prefer one religion over another* * * *. (Emphasis added.)

Almost a century ago, and repeated often since then, this Court said: "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson* v. *Jones,* 80 U. S. (13 Wall.) 679, 728 (1872). In *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953), this Court held unequivocally that under our Constitution government may not prefer large, conventional religions over small, unorthodox ones.

We submit that it is exactly this forbidden type of preference that is involved in the present case. By allowing a conscientious observer of Sunday to refrain from labor on that day without forfeiting his right to unemployment compensation while this sanction is imposed upon one who conscientiously observes Saturday, the state clearly prefers Sunday-observing over Saturday-observing faiths. This, we submit, the First Amendment forbids.

It should be noted that, in upholding the Sunday law statute in *McGowan* v. *Maryland, supra,* this Court carefully stated that the decision was based on the ground that the statute was secular in its purpose and operation, intended not to aid religion or prefer Sunday-observing Christianity over other faiths but to assure a common day of rest and relaxation for all. The Court made it clear that Sunday legislation would violate "the 'Establishment'

Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or its operative effect—is to use the State's coercive power to aid religion."

That is the situation in the present case. Here, the statute excuses refusal to work on Sunday for two reasons, one ("physical objections") obviously secular, but the other ("conscientious objections") expressly religious. Here, a Seventh-day Adventist or Jew is forced, under penalty of loss of financial benefits from the State at a time when they are most needed, to violate his conscience by working on his Sabbath, whereas Sunday-observing Christians suffer no such penalty.

For the same reason, the action of the South Carolina Employment Security Commission denies to the appellant the equal protection of the laws. (See concurring opinion of Mr. Justice Frankfurter in *Fowler* v. *Rhode Island, supra,* 345 U. S. at 70.) In effect, it imposes a religious test for the right to receive unemployment benefits. What this Court said in *Torcaso* v. *Watkins, supra,* 367 U. S. at 495-496, in respect to public employment is equally applicable to unemployment benefits:

> The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution. This was settled by our holding in Wieman v. Updegraff, 344 U. S. 183. We there pointed out that whether or not "an abstract right to public employment exists," Congress could not pass a law providing "* * * that no federal employee shall attend Mass or take any active part in missionary work."

Applicable too is the statement of this Court in *Everson* v. *Board of Education, supra,* 330 U. S. at 16, that a state "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation." (Emphasis in original.)

This, we submit, is exactly what is happening in the present case. Under the decision below, a Seventh-day Adventist or a Jew is excluded from receiving the benefits of public welfare legislation exclusively because of adherence to his faith, for if he were of a Sunday-observing faith he would not be excluded because of his membership in that faith and his adherence to its doctrines and principles.

Conclusion

For the reasons stated, we respectfully submit that the decision of the court below should be reversed.

Respectfully submitted,

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