AMERICAN CONSTITUTIONALISM

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

The Contemporary Era—Individual Rights/Religion/Free Exercise

**Stormans, Inc. v. Wiesman, \_\_ U.S. \_\_** (2016)

*The Stormans family, who own a grocery store and pharmacy in Olympia, Washington refuse to stock emergency contraceptives because their Christian faith prohibits using that methods of birth control. That practice violated a 2007 rule mandated by the Washington State Board of Pharmacy declaring that pharmacies may not “refuse to deliver a drug or device to a patient because its owner objects to delivery on religious, moral, or other personal grounds.” The Stormans filed a lawsuit against John Wiesman, the Secretary of the Washington State Department of Health, asking for an injunction against enforcement of that rule on the ground that the free exercise clause of the First Amendment as incorporated by the due process clause of the Fourteenth Amendment forbade discrimination on the basis of religious beliefs. The local district court issued the requested injunction, but that decision was reversed by the Court of Appeals for the Ninth Circuit. The Stormans appealed to the Supreme Court of the United States*

*The Supreme Court refused to issue a writ of certiorari. Justice Samuel Alito, joined by Chief Justice John Roberts and Justice Clarence Thomas dissented from that denial, claiming that the Court should determine whether Washington had engaged in unconstitutional discrimination. Alito agreed that a law forbidding pharmacies from refusing to deliver drugs for any reason would be constitutional under the Supreme Court’s decision in* Employment Div., Dept. of Human Resources of Ore. v. Smith (1990). *He nevertheless insisted that Washington had unconstitutionally singled out religious reasons for not stocking or delivering certain drugs. Is this what Washington did? Is the failure to permit exceptions for “religious, moral, or other personal grounds” a religious gerrymander or a legitimate effort to distinguish business justifications from non-business justifications? Why the no other justice vote to hear the case? Do they agree with the result or think the time is not right for a decision on the merits? What would you have done?*

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Id34700aeb5b211e5b4bafa136b480ad2&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom THE CHIEF JUSTICE and Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Id34700aeb5b211e5b4bafa136b480ad2&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) join, dissenting from the denial of certiorari.

This case is an ominous sign.

At issue are Washington State regulations that are likely to make a pharmacist unemployable if he or she objects on religious grounds to dispensing certain prescription medications. There are strong reasons to doubt whether the regulations were adopted for—or that they actually serve—any legitimate purpose. And there is much evidence that the impetus for the adoption of the regulations was hostility to pharmacists whose religious beliefs regarding abortion and contraception are out of step with prevailing opinion in the State. Yet the Ninth Circuit held that the regulations do not violate the First Amendment, and this Court does not deem the case worthy of our time. If this is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern.

. . . .

The question presented in this case concerns the constitutionality of two rules adopted by the Washington State Pharmacy Board in 2007. The first rule, known as the Delivery Rule, requires pharmacies to “deliver lawfully prescribed drugs or devices to patients and to distribute drugs and devices approved by the U.S. Food and Drug Administration for restricted distribution by pharmacies.”  The Delivery Rule works in tandem with a pre-existing rule, called the Stocking Rule, that requires pharmacies to stock a “representative assortment of drugs in order to meet the pharmaceutical needs of its patients.” The net result of these rules is that, so long as there is customer demand for emergency contraceptives, pharmacies like Ralph's must stock and dispense them regardless of any religious or moral objections that their owners may have.

The Delivery Rule includes a number of exceptions. Four of these are narrow. A fifth exception is broader: Under subsection (c), pharmacies need not stock prescription medications that require specialized equipment or expertise, including the equipment or expertise needed to compound drugs.  And a sixth exception is very broad indeed: A pharmacy is not required to deliver a drug “without payment of [its] usual and customary or contracted charge.”  This means, among other things, that a pharmacy need not fill a prescription for a Medicaid patient. In addition, as discussed below, the District Court found that there are many unwritten exceptions to the Delivery and Stocking Rules.

The Board's second new rule, called the Pharmacist Responsibility Rule, governs individual pharmacists. The rule does not require any individual pharmacist to dispense medication in conflict with his or her beliefs. But because the Delivery Rule requires every pharmacy to dispense the medication, if a pharmacy wishes to employ a pharmacist who objects to dispensing a drug for religious reasons, the pharmacy must keep on duty at all times a second pharmacist who can dispense those drugs. We are told that few pharmacies are likely to be willing to bear this expense.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990), this Court held that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability.’ “ But as our later decision in *Church of Lukumi Babalu Aye* [*Inc. v. Hialeah*] (1993) made clear, a law that discriminates against religiously motivated conduct is not “neutral.” .. .

Even if we disregard all evidence of intent and confine our consideration to the nature of the laws at issue in the two cases, the similarities are striking. In *Church of Lukumi Babalu Aye*, the challenged ordinances broadly prohibited the unnecessary or cruel killing of animals, but when all the statutory definitions and exemptions were taken into account, the laws did little more than prohibit the sacrifices carried out in Santeria services.  In addition, the ordinances restricted religious practice to a far greater extent than required to serve the municipality's asserted interests.  Here, Ralph's has made a strong showing that the challenged regulations are gerrymandered in a similar way. While requiring pharmacies to dispense all prescription medications for which there is demand, the regulations contain broad secular exceptions but none relating to religious or moral objections; the regulations are substantially underinclusive because they permit pharmacies to decline to fill prescriptions for financial reasons; and the regulations contemplate the closing of any pharmacy with religious objections to providing emergency contraceptives, regardless of the impact that will have on patients' access to medication.

Considering “the effect of [the regulations] in [their] real operation,” the District Court concluded that the burden they impose “falls ‘almost exclusively’ on those with religious objections to dispensing [Plan B.”](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2027182927&pubNum=0004637&originatingDoc=Id34700aeb5b211e5b4bafa136b480ad2&refType=RP&fi=co_pp_sp_4637_1188&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4637_1188) The court found that “the rules exempt pharmacies and pharmacists from stocking and delivering lawfully prescribed drugs for an almost unlimited variety of secular reasons, but fail to provide exemptions for reasons of conscience.”  For example, the District Court found that a pharmacy may decline to stock a drug because the drug requires additional paperwork or patient monitoring, has a short shelf life, may attract crime, requires simple compounding (a skill all pharmacists must learn), or falls outside the pharmacy's niche (e.g., pediatrics, diabetes, or fertility).  Additionally, the court found, a pharmacy can “decline to accept Medicare or Medicaid or the patient's particular insurance, and on that basis, refuse to deliver a drug that is actually on the shelf.” As the District Court noted, such secular refusals “inhibit patient access” to medication no less than do religiously motivated facilitated referrals. Allowing secular but not religious refusals is flatly inconsistent with *Church of Lukumi Babalu Aye*. It “devalues religious reasons” for declining to dispense medications “by judging them to be of lesser import than nonreligious reasons,” thereby “singl[ing] out” religious practice “for discriminatory treatment.”

. . . .

The District Court carefully laid out its rationale for finding that the regulations allow refusals for secular, but not religious, reasons. Secular refusals have been common, and commonly known, both before and after the regulations were issued, yet the Board has never enforced its regulations against such practices.  Nor has the Board issued any guidance disapproving secular refusals or otherwise made an “effort to curtail widespread referrals for business reasons.”  By contrast, the Board has specifically targeted religious objections. Upon issuing the regulations, the Board sent a guidance document to pharmacies warning that “[t]he rule does not allow a pharmacy to refer a patient to another pharmacy to avoid filling the prescription due to moral or ethical objections.” The negative implication is obvious. Additionally, a Board spokesman—who was charged with answering pharmacists' inquiries about the rules' requirements—testified that, “other than eliminating referral as an option for pharmacies which cannot stock Plan B for religious reasons, from a practical standpoint, nothing has changed after the enactment of these rules.”

. . . .

One last example. In adopting the rules, the Board recognized that some pharmacy owners might “close rather than dispense medications that conflicts with their beliefs.” Such closures would appear to inflict on customers a much greater disruption in access to medications than would allowing facilitated referrals: Shuttering pharmacies would make all of those pharmacies' customers find other sources for all of their medications, rather than have only some customers be referred to another pharmacy for a small handful of drugs. But the Board shrugged off this problem, asserting that it “may ... be temporary” because a religious objector may be replaced by “a new operator who will comply with these rules.” I don't dispute that the market will often work to fill such openings, but it cannot reasonably be supposed that new pharmacies will appear overnight. The bottom line is clear: Washington would rather have no pharmacy than one that doesn't toe the line on abortifacient emergency contraceptives. Particularly given the State's stipulation that “facilitated referrals do not pose a threat to timely access” to such drugs, it is hard not to view its actions as exhibiting hostility toward religious objections.

For these reasons and others, it seems to me likely that the Board's regulations are not neutral and generally applicable. Quite the contrary: The evidence relied upon by the District Court suggests that the regulations are targeted at religious conduct alone, to stamp out religiously motivated referrals while allowing referrals for secular reasons (whether by rule or by wink). If that is so, the regulations are invalid unless the State can prove that they are narrowly tailored to advance a compelling government interest. The Ninth Circuit did not reach this question, as it upheld the regulations under far less demanding rational-basis review.

. . . .

“The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.”  Ralph's has raised more than “slight suspicion” that the rules challenged here reflect antipathy toward religious beliefs that do not accord with the views of those holding the levers of government power. I would grant certiorari to ensure that Washington's novel and concededly unnecessary burden on religious objectors does not trample on fundamental rights. I respectfully dissent.[6](https://1.next.westlaw.com/Document/Id34700aeb5b211e5b4bafa136b480ad2/View/FullText.html?navigationPath=Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad6ad3c00000155984b63c66db08ec7%3FNav%3DCASE%26fragmentIdentifier%3DId34700aeb5b211e5b4bafa136b480ad2%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=1f5ea24832da225c637c17d77e5f2cac&list=CASE&rank=1&grading=na&sessionScopeId=0f9688d2d65f2152dd39df9c86d57f3f849204ac3209d32362d8b1627e278c3c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00662037955796)