
CONSTITUTIONAL LAW — FREE EXERCISE CLAUSE — NINTH CIRCUIT REJECTS STRICT SCRUTINY FOR PHARMACY DISPENSING REQUIREMENT. — *Stormans, Inc. v. Selecky*, 571 F.3d 960 (9th Cir. 2009).

In the wake of *Roe v. Wade*,¹ a public policy debate arose concerning the right of public health professionals and institutions to refuse to perform abortions based on religious and moral objections.² Over the past two decades, that debate has expanded to encompass similarly grounded objections to other interventions.³ One quite controversial addition to that debate concerns so-called “emergency contraception,” an intervention that involves high doses of contraceptives taken within seventy-two hours after intercourse to prevent fertilization of the egg or, failing that, implantation of the fertilized egg in the uterus.⁴ Believing that emergency contraception is designed to, at least in some instances, end human life,⁵ some pharmacists opposed to its use have refused to dispense it.⁶ These refusals have led, in turn, to debates over whether to protect such conscience-based choices as the free exercise of religious beliefs, or instead to require pharmacies and pharmacists to dispense with their objections as a condition of licensing.

Recently, in *Stormans, Inc. v. Selecky*,⁷ the Ninth Circuit overturned a preliminary injunction barring enforcement of Washington state regulations that required pharmacists to dispense emergency contraception and other drugs despite religious objections. Finding that the regulations were neutral toward religion and were generally applicable, the court held that they were subject merely to rational basis re-

¹ 410 U.S. 113 (1973).

² See Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 178–81 (1993) (describing the post-*Roe* adoption of “conscience clause provisions,” *id.* at 181, that protect health care providers who object to abortion or other interventions).

³ See, e.g., Julie Cantor & Ken Baum, *The Limits of Conscientious Objection — May Pharmacists Refuse To Fill Prescriptions for Emergency Contraception?*, 351 NEW ENG. J. MED. 2008, 2008 (2004) (discussing arguments for and against conscience clause protections for pharmacists, and stating that “reports of pharmacists who refused to dispense emergency contraception date back to 1991”); Wardle, *supra* note 2, at 179–80 (discussing state law conscience clauses that address sterilization, contraception, euthanasia, and artificial insemination).

⁴ See David A. Grimes & Elizabeth G. Raymond, Review, *Emergency Contraception*, 137 ANNALS INTERNAL MED. 180, 181–82 (2002), available at <http://www.annals.org/cgi/reprint/137/3/180.pdf>, cited in Robin Fretwell Wilson, Essay, *The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41, 41 n.5 (2008).

⁵ Because emergency contraception can prevent implantation in the uterus of a fertilized egg — a genetically distinct human organism — its opponents believe it is morally equivalent to abortion. See Wilson, *supra* note 4, at 41 n.5 (surveying both sides of the moral debate).

⁶ See, e.g., *Vandersand v. Wal-Mart Stores, Inc.*, 525 F. Supp. 2d 1052 (C.D. Ill. 2007) (rejecting employer’s motion to dismiss an employment discrimination suit brought by pharmacist who was suspended without pay when he refused to dispense emergency contraception).

⁷ 571 F.3d 960 (9th Cir. 2009).

view.⁸ However, the panel erred by refusing to consider the targeting of religiously motivated behavior shown by the regulations' administrative history, and by improperly analyzing the individualized exceptions to the regulations. Had the panel properly analyzed these additional factors, it would have upheld the district court's use of strict scrutiny (though it may have vacated the injunction on other grounds).

In 2004, the Washington State Board of Pharmacy ("the Board") began to receive complaints that some pharmacists were refusing to dispense prescriptions because of religious and moral objections.⁹ After a period for public comment,¹⁰ the Board unanimously agreed to pursue a draft rule that permitted pharmacists to decline to dispense prescriptions to which they had religious or moral objections.¹¹ The same day, however, Governor Christine Gregoire wrote to the Board to voice her "strong opposition" to the draft, informing them that "no one should be denied appropriate prescription drugs based on the personal, religious or moral objection of individual pharmacists."¹² Governor Gregoire subsequently submitted an alternative rule that made no provision for religious or moral objection by pharmacists; the Board unanimously adopted the substantive provisions of this rule in 2007.¹³

Stormans, Inc. is a family-owned company that operates a Washington pharmacy.¹⁴ Based on religious and moral objections, its owners refused to sell emergency contraception.¹⁵ Rhonda Mesler and

⁸ *Id.* at 987, 992.

⁹ *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245, 1250 (W.D. Wash. 2007).

¹⁰ The Washington State Pharmacy Association recommended that the Board permit conscientious refusals, while Planned Parenthood and others urged the Board not to allow such refusals. *Id.* The Washington State Human Rights Commission (WSHRC), a state agency, informed the Board that it believed allowing refusals "based on [pharmacists'] personal religious beliefs" would be unlawful discrimination. *Id.* (quoting Declaration of Kristen Waggoner at 52 exhibit J, *Stormans*, 524 F. Supp. 2d 1245 (W.D. Wash. 2007) (No. 07-CV-05374-DECL)). The WSHRC also made clear that, while the rule in question would affect other drugs, as far as it was concerned, "the drug at the center of this issue is Plan B, an emergency contraceptive." *Id.* at 1259 (quoting Declaration of Kristen Waggoner, *supra*, at 52 exhibit J).

¹¹ *See id.* at 1251.

¹² *Id.* (quoting Declaration of Kristen Waggoner, *supra* note 10, at 34 exhibit E) (internal quotation marks omitted). The Governor made it clear, at a press conference later that week, that she had the power — with the consent of the legislature — to remove the members of the Board from office, though she said she preferred not to have to take that step. *Id.*

¹³ *Id.*; see WASH. ADMIN. CODE §§ 246-863-095, -869-010 (Supp. 2008). Under the Board's interpretation, a pharmacist's objections could be accommodated only if the pharmacy provided a second, nonobjecting pharmacist to work during the same shift and fill any prescriptions to which the first pharmacist had a moral or religious objection; referring potential customers to a different pharmacy was not permitted. *Stormans*, 524 F. Supp. 2d at 1253.

¹⁴ *Stormans*, 571 F.3d at 967.

¹⁵ *See id.* at 967–68. The difference, if any, between the protection afforded by the Free Exercise Clause to morally motivated conduct and that afforded to religiously motivated conduct is beyond the scope of this comment. For a modern discussion of the issue, see Steven D. Smith, *What Does Religion Have To Do with Freedom of Conscience?*, 76 U. COLO. L. REV. 911 (2005),

Margo Thelen are individual pharmacists who refused to dispense emergency contraception because of their religious objections to it.¹⁶ Thelen, Mesler, and Stormans, Inc. brought suit in the United States District Court for the Western District of Washington to enjoin enforcement of the new rules against pharmacists who object to dispensing emergency contraception for moral or religious reasons.¹⁷ Finding that the plaintiffs had established “a likelihood of success on the merits and the possibility of irreparable injury,”¹⁸ the district court granted a preliminary injunction against enforcement of the regulations.¹⁹

The court applied the free exercise test developed by the Supreme Court in *Employment Division v. Smith*²⁰ and elaborated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.²¹ Under that test, a law restricting religious conduct must be neutral toward religion (that is, it must not target religious behavior because of its religious motivation)²² and must be generally applicable (that is, it may not target just religious conduct while leaving nonreligious conduct untouched).²³ If it does not meet both requirements, it must satisfy strict scrutiny.²⁴ The district court determined that the dispensing regulations were neither neutral with respect to religion nor generally applicable, and that they were therefore subject to strict scrutiny.²⁵ The court found that the regulations’ history and their actual effects demonstrated that they were targeted at religious and moral objections to emergency contraception and were therefore not neutral, even though they made no

noting that “[a] virtual consensus in the academic community and the courts holds that it would be unacceptable to give constitutional protection to religiously-formed conscience, but not to what we can call the ‘secularized conscience.’” *Id.* at 912. Because the plaintiffs all asserted religious objections to dispensing emergency contraception, the distinction would be relevant primarily in determining the *scope* of an injunction, not whether one should be granted. Although the difference might also be relevant if the Board asserted that it intended to target only morally motivated conduct and that it was permitted to do so, the Board appears not to have made that argument.

¹⁶ *Stormans*, 571 F.3d at 967.

¹⁷ *Id.* The defendants in the case were Mary Selecky, Secretary of the State of Washington Department of Health, as well as members of the Board and of the WSHRC. *Id.* at 967 n.6.

¹⁸ *Stormans*, 524 F. Supp. 2d at 1255 (citing *Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003) (stating preliminary injunction standard)).

¹⁹ *Id.* at 1266.

²⁰ 494 U.S. 872 (1990).

²¹ 508 U.S. 520 (1993). “[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Id.* at 531.

²² *Id.* at 533 (noting that “if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral”).

²³ *Id.* at 543 (“The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause.”).

²⁴ *Id.* at 531–32.

²⁵ *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245, 1263 (W.D. Wash. 2007).

mention of religion.²⁶ The court applied a means-ends test to determine whether the regulations were generally applicable, examining whether the means chosen by the state (prohibiting refusals to dispense lawfully prescribed medications in most circumstances) were well matched to the problem the state sought to remedy (lack of access to medication).²⁷ Because there was no evidence that anyone had failed to access drugs because of pharmacists' religious or moral objections, and because the regulations created exceptions for pharmacists who declined to dispense for other specified reasons, the court determined that the regulations did not match the state's ends, and thus were not generally applicable.²⁸ Finding no compelling state interest sufficient to meet strict scrutiny,²⁹ and noting that a colorable First Amendment claim is sufficient evidence of irreparable injury to support injunctive relief,³⁰ the court granted a preliminary injunction.³¹

The Ninth Circuit reversed. Writing for the panel, Judge Wardlaw³² held, *inter alia*, that the regulations were both neutral and generally applicable, and thus required only rational basis review.³³ Judge Wardlaw rejected the district court's use of the historical background of the regulations, pointing out that only Justices Stevens and Kennedy had joined the portion of *Lukumi* that looked to the history of the ordinance in question there.³⁴ Confining the neutrality analysis to just the regulations' text, therefore, the panel found no indication that the regulations targeted religiously motivated conduct.³⁵ Judge Wardlaw also held that, rather than applying a means-ends test to determine general applicability, the lower court should have looked at whether the rule was "substantially underinclusive."³⁶ Examined under that more deferential standard, the rule qualified as generally applicable: it applied to all medications, not just those to which pharmacies or pharmacists had religious or moral objections,³⁷ and the available non-religious exceptions were "narrow" and "reasonable."³⁸ Because the

²⁶ See *id.* at 1259–60. Explaining its examination of the regulations' history, the court observed that "[t]he Free Exercise Clause protects against government hostility which is masked, as well as overt." *Id.* at 1258 (quoting *Lukumi*, 508 U.S. at 534) (internal quotation marks omitted).

²⁷ *Id.* at 1260–62.

²⁸ *Id.*

²⁹ *Id.* at 1263–64.

³⁰ *Id.* at 1255 (citing *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005)).

³¹ *Id.* at 1266.

³² Judge Wardlaw was joined by Judge N. Randy Smith.

³³ *Stormans*, 571 F.3d at 987.

³⁴ *Id.* at 981–82 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540–42 (1993) (plurality opinion)).

³⁵ *Id.* at 983.

³⁶ *Id.* at 984.

³⁷ *Id.*

³⁸ *Id.* at 985.

district court had relied on strict scrutiny in granting the injunction, the panel reversed and remanded for consideration under the rational basis standard.³⁹

Judge Clifton concurred in all but one part of the majority opinion, but wrote separately to express his view that “it is not illogical to consider the historical background of how the provision in question came to be adopted.”⁴⁰ Nevertheless, even taking into consideration the administrative history of the regulations, Judge Clifton agreed with the panel that they were neutral and generally applicable.⁴¹

The panel’s analysis of whether the regulations merited strict scrutiny in this case was wrong for two reasons. First, the panel erred by refusing to examine the regulations’ administrative history, which showed a focus on conduct undertaken for religious and moral reasons. Second, the panel failed to attach sufficient importance to the nonreligious exceptions to the regulations’ dispensing requirements, which showed that the regulations were not applied to nonreligiously motivated conduct that posed greater barriers to access. Taken together, these factors warranted strict scrutiny.

While Judge Wardlaw was correct that Justice Kennedy’s use of legislative history fell in a section of *Lukumi* not joined by a majority of the Court, it is just as relevant to note that Justice Scalia’s opinion rejecting legislative history garnered only two votes in *Lukumi*.⁴² The question of whether to use legislative and administrative history was therefore left open by *Lukumi* itself.

Justice Scalia and others have mounted powerful objections to the use of administrative and legislative history in any context.⁴³ The panel’s approach in this case, however — singling out free exercise claims for the exclusion of administrative history — is the worst of

³⁹ See *id.* at 987. The panel also found that the district court had failed to properly weigh the balance of hardships between the parties, had not placed sufficient emphasis on the public interest involved in the injunction, and had granted an overly broad injunction. *Id.* at 987–89, 991.

⁴⁰ *Id.* at 992 (Clifton, J., concurring).

⁴¹ *Id.*

⁴² Chief Justice Rehnquist and Justice Scalia joined most of the majority’s opinion, but concurred to indicate their view that courts should refrain from inquiring into legislative motives, at least when assessing First Amendment claims. 508 U.S. 520, 558–59 (1993) (Scalia, J., concurring in part and concurring in the judgment). Justice Thomas did not join the portion of Justice Kennedy’s opinion addressing legislative history, but neither did he join Justice Scalia’s concurrence condemning its use. Justice Souter seemed to indicate that he viewed legislative history as an appropriate object of inquiry in a free exercise challenge. See *id.* at 562 & n.3 (Souter, J., concurring in part and concurring in the judgment). Justice Blackmun, joined by Justice O’Connor, argued that the Free Exercise Clause was concerned with the effects of a regulation rather than a particular discriminatory purpose. See *id.* at 577–78 (Blackmun, J., concurring in the judgment). Legislative history would be irrelevant to such an effects-based analysis.

⁴³ See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 29–37 (Amy Gutmann ed., 1997).

both worlds.⁴⁴ If anything, the theoretical critique that legislative history focuses on the intentions of the lawmakers rather than the meaning of the law is at its *weakest* in the free exercise context, where the goal is to determine whether “the object of a law is to infringe upon or restrict practices because of their religious motivation.”⁴⁵ If such history is relevant in any context (and Supreme Court precedent in related areas has held that it is⁴⁶), then surely it is relevant to determining the “object” — that is, the intent — of a particular regulation.

Other circuits have concluded that such history is relevant to *Smith* neutrality analysis.⁴⁷ In *St. John’s United Church of Christ v. City of Chicago*,⁴⁸ for example, the Seventh Circuit held that in order to determine whether a law “embodies a more subtle or masked hostility to religion,” the court “must look at available evidence that sheds light on the law’s object, including [its] ‘ . . . legislative or administrative history.’”⁴⁹ Instead of creating a two-track system in which evidence of unconstitutional bias in the administrative record is ignored in free exercise cases but utilized in other cases, the panel should have followed its sister circuits in examining the regulations’ history.

The second factor that the panel failed to consider properly was the existence of individualized exceptions to the general dispensing requirements. The Board’s final regulations provided several exemptions for nonreligious justifications offered by pharmacists for failing to dispense emergency contraception,⁵⁰ but withheld any such exemption for religious objectors. As the Court stated in *Smith*, “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 compel-

⁴⁴ While universal judicial rejection of administrative history might well produce net positive results, rejection only in certain contexts, with no rationale given for why it might be more or less appropriate in that particular context, is far more likely to create opportunities for abuse.

⁴⁵ *Lukumi*, 508 U.S. at 533 (citing *Employment Div. v. Smith*, 494 U.S. 872, 878–79 (1990)).

⁴⁶ See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977) (indicating that, in the context of an equal protection challenge, “[t]he legislative or administrative history may be highly relevant” in determining whether government actions were motivated by race, *id.* at 268), *cited in Lukumi*, 508 U.S. at 540 (plurality opinion).

⁴⁷ See Appellees’ Petition for Rehearing and Rehearing En Banc at 15–17, *Stormans, Inc. v. Selecky*, No. CV-07-05374-RBL (9th Cir. July 29, 2009) (reporting that the First, Sixth, Seventh, Eighth, and Tenth Circuits have used legislative history in free exercise cases).

⁴⁸ 502 F.3d 616 (7th Cir. 2007).

⁴⁹ *Id.* at 633 (quoting *Lukumi*, 508 U.S. at 540 (plurality opinion)).

⁵⁰ The two exceptions of interest in this case are for the “[l]ack of specialized equipment or expertise needed to safely produce, store or dispense [certain] drugs,” WASH. ADMIN. CODE § 246-869-010(1)(c) (Supp. 2008), and for the “[u]navailability of [the] drug . . . despite good faith compliance with WAC § 246-869-150,” *id.* § -010(e), which requires a pharmacy to “maintain at all times a representative assortment of drugs in order to meet the pharmaceutical needs of its patients,” WASH. ADMIN. CODE § 246-869-150(1) (2007).

ling reason.”⁵¹ Citing this language, the *Lukumi* Court noted that the city of Hialeah had carved out a series of exceptions, so that even if the ordinance had been neutral on its face, in operation it applied only to the frowned-upon religious practices.⁵² And in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*,⁵³ a Third Circuit panel applying *Smith* and *Lukumi* struck down a police uniform regulation that prohibited beards, because the regulation had provided individualized medical exemptions but not religious ones.⁵⁴

Rather than asking whether the exemptions were “individual,” however, the *Stormans* panel focused on the fact that they were “narrow” and “reasonable.”⁵⁵ If the panel had focused on the relevant constitutional question of individualization, it would have concluded that at least two of the exemptions were individualized. The first concerned the lack of equipment or expertise necessary to safely dispense certain drugs.⁵⁶ The applicability of this exemption depends on individual characteristics, such as how much specialized training a pharmacist has received. The second exception essentially provided that pharmacies need only stock drugs for which there is sufficient demand; where only a small number of a pharmacy’s patients ever require a particular drug, the pharmacy would not be required to stock it.⁵⁷ Again, this exception is individualized depending on demand at each pharmacy. Moreover, the exception’s requirement of “good faith compliance” with the general obligation to stock drugs for which there is sufficient demand resembles somewhat the individualized “good cause” exceptions provided for in the unemployment statutes at issue in *Sherbert v. Verner*⁵⁸ and *Thomas v. Review Board*.⁵⁹ As the Court observed in *Smith*, those exceptions “invite consideration of the particular circumstances behind” a party’s decision,⁶⁰ whether they be economic or religious ones. Even if such a system of particularized inquiry is not required, having provided one, the Board may not “deval-

⁵¹ *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990) (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality opinion)).

⁵² *Lukumi*, 508 U.S. at 537–38.

⁵³ 170 F.3d 359 (3d Cir. 1999).

⁵⁴ *Id.*; see also *Blackhawk v. Pennsylvania*, 381 F.3d 202, 208–10 (3d Cir. 2004) (evaluating an animal captivity statute under strict scrutiny because it could allow individualized exceptions for conduct that promoted commerce, recreation, or education, but not for religious reasons).

⁵⁵ *Stormans*, 571 F.3d at 985.

⁵⁶ See WASH. ADMIN. CODE § 246-869-010(1)(c) (Supp. 2008).

⁵⁷ See *id.* § -010(1)(e); *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245, 1262 (W.D. Wash. 2007) (observing that, “for the vast majority of drugs legally available to the public, market conditions will continue to guide the decision whether or not to stock”).

⁵⁸ 374 U.S. 398 (1963).

⁵⁹ 450 U.S. 707 (1981).

⁶⁰ *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990) (citing *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality opinion)).

ue[] religious reasons . . . by judging them to be of lesser import than nonreligious reasons.”⁶¹ This is especially true in light of a study showing that economic considerations were more likely than religious considerations to thwart the Board’s asserted interest in increasing access to emergency contraception.⁶² That the Board acted reasonably in accommodating an anticipated economic objection in certain individualized circumstances does not relieve it from the resulting obligation to accommodate religious objections as well.

Taken together, the two factors that the panel failed to consider properly would have been sufficient to require strict scrutiny. Had the court properly analyzed the administrative history and background of the regulations, it would have concluded that they were enacted specifically to prevent religiously and morally motivated refusals to dispense particular drugs.⁶³ The Board itself acknowledged that emergency contraception and birth control were the focus of public comment during the rulemaking,⁶⁴ and there was no evidence that the Board was responding to any conduct not motivated by religion. Inasmuch as the regulations were passed to respond to a perceived problem caused only by religious and moral objections, they clearly “targeted” those religiously motivated actions; these actions were not mere incidental casualties of a neutral rule that was intended to affect conduct more broadly. While the administrative history alone might not have been sufficient to establish that the objectors were targeted specifically *because* of their religious and moral motives, the “religious gerrymander”⁶⁵ accomplished by the exceptions for nonreligious justifications provided additional strong support for a finding of antireligious discrimination.

By failing to evaluate properly whether the regulations in question were neutral and generally applicable, the Ninth Circuit erroneously determined that only rational basis review was required. Because the regulations were specifically targeted at religiously and morally motivated behavior and did not apply to more disruptive nonreligious justifications, the panel should have affirmed the use of strict scrutiny.

⁶¹ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537–38 (1993).

⁶² Of the 121 pharmacies the Board surveyed, two reported they did not stock emergency contraception because of religious objections, while eighteen reported they did not stock it because of low demand. *Stormans*, 524 F. Supp. 2d at 1260. In *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), the court noted that “[a] law fails the general applicability requirement if it burdens . . . religiously motivated conduct but exempts . . . a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree.” *Id.* at 209 (citing *Lukumi*, 508 U.S. at 543–46).

⁶³ See *Stormans*, 524 F. Supp. 2d at 1250–51.

⁶⁴ *Id.* at 1250.

⁶⁵ *Lukumi*, 508 U.S. at 535 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)) (internal quotation marks omitted).