CASE SNAPSHOT
Stormans v. Wiesman

Case summary

Alliance Defending Freedom represents the Stormans, a family that has owned and operated Ralph's Thriftway, a small grocery store and pharmacy in Olympia, Wash., for four generations. Also represented are two pharmacists, Margo Thelen and Rhonda Mesler, who work elsewhere. The Stormans and the pharmacists are Christians, and their faith forbids them from participating in the destruction of human life. This includes the dispensing of Plan B or ella, two drugs which FDA guidelines have confirmed can destroy a human embryo. If Ralph's or the pharmacists receive requests for these drugs, they refer the customer to one of many nearby pharmacies that regularly stocks and dispenses them. For example, within just five miles of Ralph's are more than 30 pharmacies that stock and dispense Plan B. No patient in Washington has ever been denied timely access to any drug due to a pharmacist's objection, and the state of Washington has recognized that conscience-based referrals are a time-honored pharmacy practice that do not pose a threat to patients' timely access to medication. Ralph's and the pharmacists' referral practices are supported by the American Pharmacists Association, the Washington Pharmacy Association, and more than 30 other medical and pharmacy associations. Such referrals are legal in all 49 other states.

Background

In 2005, Planned Parenthood and Washington Governor Christine Gregoire began pressuring the Washington Pharmacy Commission to prohibit conscience-based referrals for Plan B. The commission resisted and unanimously agreed to continue supporting conscience-based referrals. Planned Parenthood and the governor continued to pressure the commission, threatening the members with personal liability under anti-discrimination laws if they voted in favor of such referrals. This culminated in the governor refusing to re-appoint the commission chairperson and, instead, appointing two new members that Planned Parenthood recommended. In 2007, the commission enacted the governor's rule requiring pharmacies to dispense Plan B and ella and making conscience-based referrals illegal; however, pharmacies were permitted to continue daily referrals for all kinds of other reasons.

After years of litigation, a 12-day federal trial began in 2012 that included approximately 800 exhibits and 22 witnesses, including 11 pharmacies and pharmacy owners with over 200 collective years of pharmacy experience. The court issued extensive factual findings, concluding that the anti-conscience regulations violated the First Amendment's Free Exercise Clause and finding that the regulations were "riddled with exemptions for secular conduct, but contain no such exemptions for identical religiously-motivated conduct." The court also concluded that the regulations "were not the product of a neutral, bureaucratic process based solely on pharmaceutical expertise," but rather, "a highly political affair, driven largely by the Governor and Planned Parenthood – both outspoken opponents of conscientious objections to Plan B." The court entered a permanent injunction in favor of the Stormans and the pharmacists that stopped the state's regulations from being applied to them.

The state appealed to the U.S. Court of Appeals for the 9th Circuit. In 2015, the 9th Circuit ruled against the Stormans and the two pharmacists, upholding the regulations that force pharmacists to dispense drugs contrary to their conscience, resulting in Washington being the only state in the country to make conscience referrals illegal.

Case status

On Jan. 4, 2016, Alliance Defending Freedom filed a petition for a writ of certiorari with the U.S. Supreme Court on behalf of the Stormans, Mesler, and Thelen. The case has generated a wide array of friend-of-the-court briefs in support of the Stormans and the pharmacists, including ones signed by 43 members of Congress; 13 state attorneys general; 29 notable legal scholars; more than 4,600 individual health care professionals; and 38 professional pharmacy associations, including the nation's largest, the American Pharmacists Association.

Issue

Whether a law prohibiting religiously motivated conduct violates the Free Exercise Clause of the First Amendment when the state permits the same conduct when done for a host of secular reasons, has been enforced only against religious conduct, and has a history showing an intent to target religion.

What Alliance Defending Freedom is arguing

This case centers around one fundamental issue: whether the state of Washington may discriminate against and prohibit the Stormans and the pharmacists from engaging in pharmacy referrals for reasons of conscience while permitting identical referrals for business, economic, and convenience reasons. Washington is the only state to make the conscience referrals of the Stormans and pharmacists illegal.

Pharmacies routinely decline to stock drugs for many reasons that range from inventory costs to insurance and contract restrictions. Similarly, pharmacies routinely make referrals each day, for a variety of reasons, even when a drug is in stock. In addition, pharmacies have long referred customers for reasons of conscience. Major health organizations such as the American Medical Association, the American Pharmacists Association, and others, recognize and support referrals, including conscience-based referrals. Almost all states allow pharmacists to make conscience-based referrals, and in those states that place restrictions on conscience referrals, the Stormans' referrals would be permitted. With the exception of Massachusetts, where the law is unclear, no state has gone as far as Washington in forcing pharmacies to stock and dispense Plan B. Ralph's – like most pharmacies – can only stock a small fraction (roughly 10 percent) of all approved drugs. The Stormans have engaged in referrals for many years, and the state admitted that the conscience-based referrals "do not pose a threat to timely access to lawfully prescribed medications," "includ[ing] Plan B." [2012 Federal District Court Decision: p. 32.]

The regulations have a direct impact on both the Stormans' and pharmacists' livelihoods and families, since they force them to either violate their faith's teachings and provide Plan B and ella, or to not distribute the drug and potentially jeopardize their business and jobs. Since both drugs can cause destruction of a human embryo, the Stormans and the pharmacists believe that distributing these drugs would constitute participating in the destruction of human life, something their conscience prohibits.

Accordingly, the regulations are a direct burden and severe impairment to the Stormans' and the pharmacists' protected freedom to exercise their religious beliefs. These regulations are neither neutral nor generally applicable to the public at large but, rather, target families like the Stormans who hold deep religious convictions about life-terminating drugs. As the American Pharmacists Association and 34 other pharmacy organizations have explained, the regulations are "truly radical" and "grossly out of step with state regulatory practice." These groups have also warned that a robust referral system serves the best interests of patients and is the standard in the health care industry.

Significantly, Plan B is widely available in the state, and commission testimony at trial confirmed that no problem of access for those who seek it exists. Indeed, within five miles of Ralph's, more than 30 pharmacies stock and dispense Plan B.

This case presents clean vehicle for Supreme Court to resolve critical question of law and national importance

In reversing the trial court's decision, the 9th Circuit ignored well-established case precedent, specifically the Supreme Court's unanimous decision in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520 (1993). There, the Supreme Court clearly stated that governments may not pass laws that target religious conduct for negative treatment while exempting the same conduct when done for nonreligious reasons.

However, the 9th Circuit has upheld such a rule here. In ignoring the district court's extensive factual findings, the 9th Circuit applied an alarmingly narrow interpretation of the Free Exercise Clause that says any law can satisfy that clause, no matter how clearly the law targets religious conduct *in practice*, as long as it might also be applied to nonreligious conduct *in theory*.

Further, the 9th Circuit's departure from *Lukumi* also creates stark conflicts with other circuits warranting review by the Supreme Court. Its decision upsets a longstanding consensus on an issue of immense national importance: conscience protections in health care. For more than 40 years, Congress and all 50 states have protected the right of pharmacists, doctors, nurses, and other health professionals to step aside when asked to participate in abortion. The 9th Circuit's decision authorizes a dangerous intrusion on this right that can only exacerbate intense cultural conflict over these issues.

Is this case like *Hobby Lobby*?

On June 30, 2014, the U.S. Supreme Court held in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751(2014) that the religious freedom of business owners extends to their closely held, for-profit businesses. The 9th Circuit ordered supplemental briefs addressing whether this ruling had any effect on the case at hand. Indeed, it does, in that *Hobby Lobby* affirmed that closely held corporations like Ralph's Thriftway have standing to raise a free exercise claim, and that the regulations impair the ability of the Stormans and the pharmacists to freely live out their faith, because an already implemented and time-honored alternative exists: facilitated referral – referrals that are already permitted, except in the case of conscience. Though decided under a different governing statute, the Religious Freedom Restoration Act, *Hobby Lobby* confirmed that religious freedom includes "the right to express [religious] beliefs and to establish one's religious (or non-religious) self-definition in the political, civic, and economic life of our larger community." [Justice Kennedy's Concurrence, p.2)]

Sample of authorities (Complete list, iv-xii)

***Church of the Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520 (1993):** In *Employment Division v. Smith*, 494 U.S. 872, 880 (1990), the Supreme Court found that, under the Free Exercise Clause, a law burdening religious exercise is subject to strict scrutiny if it is not "neutral" and "generally applicable." Strict scrutiny is the highest level of review and places the burden on the government to prove they have a compelling interest in enacting the law at issue. That law must be narrowly tailored, and there must be no other less restrictive alternative available in achieving the purpose of the law. In *Lukumi*, the Supreme Court further elaborated on the meaning of "neutral and generally applicable" and found that ordinances are not neutral when they accomplish a religious gerrymander – that is, burdening a specific religious group when burdening almost no others.

***Tenafly Eruv Association, Inc. v. Borough of Tenafly,* 309 F.3d 144 (3d Cir. 2002):** The U.S. Court of Appeals for the 3rd Circuit considered a city ordinance that banned the placement of any materials on public utility poles. It was undisputed that this ordinance was neutral and generally applicable on its face, but, in practice, the city had not enforced the ordinance absent a complaint. The city had done nothing to prohibit common directional signs, lost animal signs, or holiday decorations, but reacting to "vehement objections" from local residents, the city prohibited lechis placed by Orthodox Jews. The court held that the government's "invocation of the often dormant Ordinance" against religious items triggered strict scrutiny. *Id.* at 168.

***Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234-35 (11th Cir. 2004):** The U.S. Court of Appeals for the 11th Circuit considered a zoning ordinance that limited the types of permissible uses in a business district in order to create "retail synergy." The zoning code included an exemption for nonprofit clubs and lodges, but not for houses of worship. The court held that exempting clubs and lodges but not houses of worship "violates the principles of neutrality and general applicability because private clubs and lodges endanger [the town's] interest in retail synergy as much or more than churches and synagogues." *Id.* at 1235.

***Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012):** The U.S. Court of Appeals for the 6th Circuit considered a free exercise challenge to a policy that limited the ability of counseling students to refer clients to other counselors. The policy "permit[ted] referrals for secular—indeed mundane—reasons," such as when a client could not pay or wanted end-of-life counseling. *Id.* at 739. But it did not permit referrals for religious reasons. The 6th Circuit held that this "exemption-ridden policy" was "the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny." *Id.* at 740.

Bottom line

This case points to a much larger issue: the future of freedom for all Americans to live according to their faith and conscience at the workplace. Facilitated referrals are an existing, recognized, workable, and already implemented alternative that the state regularly permits for a host of non-religious reasons, and nationally respected pharmacy associations and the majority of states fully support the use of that alternative for religious reasons. The state has agreed that the Stormans' referrals cause no harm. The 9th Circuit decision against the Stormans and the two pharmacists upsets decades of settled pharmacy practice. If that decision stands, it will be the first time that health care professionals have been forced to participate in what they consider to be an abortion. Thus, the U.S. Supreme Court has a strong foundation upon which to stop the state from forcing the Stormans and the pharmacists to choose between their livelihood and their faith and ensure that all Americans retain the freedom to peacefully live consistent with their religious beliefs and conscience.