



## ***CASE SNAPSHOT*** ***Stormans v. Wiesman***

### **Case Summary**

Alliance Defending Freedom, together with The Becket Fund for Religious Liberty; the Seattle law firm Ellis, Li & McKinstry; and former 10th Circuit Judge Michael McConnell represent the Stormans family, who have owned and operated Ralph's Thriftway, a small grocery store and pharmacy in Olympia, Wash., for four generations. Margo Thelen and Rhonda Mesler, two pharmacists who work at other Washington pharmacies, are also plaintiffs in the case, *Stormans v. Wiesman* (previously *Stormans v. Selecky*). The Stormans and the pharmacists are Christians whose faith forbids them from participating in the destruction of human life. This includes dispensing Plan B and *ella*, two drugs which the Food and Drug Administration confirms can destroy a human embryo. Thus, if a Ralph's Thriftway customer requested one of these drugs, they were referred to one of the dozens of nearby pharmacies that dispensed it. Not only did Washington law permit this practice for many years, the American Pharmacist Association and at least 34 other national and state pharmacy associations have approved this practice, and it remains legal in virtually every other state. Nonetheless, the Washington Board of Pharmacy issued regulations specifically designed to prohibit religiously motivated referrals while at the same time permitting pharmacies to refer for an almost unlimited variety of business, economic, and convenience reasons. This is in spite of the fact that the state has confirmed that the plaintiffs' referrals "do not pose a threat to timely access to lawfully prescribed medications . . . including Plan B." After a 12-day trial in federal district court, the court permanently enjoined the state's regulations because they violate the Stormans' and pharmacists' freedoms protected by the First Amendment.

### ***Timeline***

In 2006, Washington's governor and Planned Parenthood began pressuring the board to prohibit religiously motivated referrals for Plan B. The board resisted, and unanimously agreed to continue supporting referrals for religious reasons. The governor and Planned Parenthood continued to pressure the board, and the state Human Rights Commission threatened 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 board chair, and instead, appointing two new members recommended by Planned Parenthood. The legislature also scheduled a hearing to vote on whether to confirm board members for the day after the board was scheduled to vote on the regulations.

In 2007, the board enacted the governor's rule requiring pharmacies to dispense Plan B and making religiously motivated referrals illegal; however, pharmacies continued to refer customers for many other reasons. The district court granted the Stormans and the pharmacists a preliminary injunction, temporarily stopping the regulations from applying to them and others who engaged in religiously motivated referrals. The U.S. Court of Appeals for the 9th Circuit reversed the injunction, but noted that the evidentiary record was "sparse" at this preliminary stage. The trial court did not reconsider preliminary relief because the parties had entered a stipulation that the regulations would not be enforced against the Stormans and two pharmacists pending trial.

A 12-day bench trial concluded in 2012 and included approximately 800 exhibits and 22 witnesses, many of whom were responsible to design and enforce the regulations. That trial focused on how the regulations operate in practice. In 2012, the court issued extensive factual [findings and an opinion](#), concluding that the 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 [suspended](#) the state's regulation as applied to the Stormans and the pharmacists in the case. The court found the regulations "were not the product of a neutral, bureaucratic process based solely on pharmaceutical expertise" but were instead a "highly charged political" affair designed to target and "prohibit conscientious objections to Plan B." The state and attorneys for Planned Parenthood and Legal Voice appealed to the 9th Circuit.

### **Case Status**

**This snapshot and related resources are available at [www.adfmedia.org](http://www.adfmedia.org).**

Oral [arguments](#) are scheduled for Thursday, Nov. 20 before the 9th Circuit at 2 p.m. PST in Portland, Ore. Each side will be allotted 30 minutes to present its arguments.

### **What Alliance Defending Freedom Is Arguing**

This case centers around one fundamental issue: whether the state of Washington may discriminate against the Stormans and the pharmacists for engaging in pharmacy referrals for religiously motivated reasons while permitting nearly identical referrals for business, economic, and convenience reasons.

The state is forcing the Stormans to stock and distribute potentially life-ending drugs in violation of their religious beliefs. Further, this law would be the first of its kind as it requires health care providers to participate in the potential taking of human life over their objection. The United States has consistently refused to coerce people into taking life in every context it has arisen, ranging from military service to assisted suicide.

Pharmacies routinely decline to stock and sell drugs for many reasons that range from desiring to focus on a particular niche practice, declining to stock or sell certain medications based on the clientele involved, or preferring not to hassle with extra paperwork. Similarly, pharmacies routinely make referrals many times each day, for a variety of reasons, even when a drug is in stock. In addition, pharmacies have long referred customers for reasons of religion and/or conscience. Major health organizations such as the American Medical Association, the American Pharmacists Association, and at least 34 other national and state pharmacy associations, recognize and support conscience-based referrals. Virtually every state allows pharmacists to make religiously motivated referrals.

The regulations have had a direct impact on both the Stormans' and the pharmacists' livelihoods and families by forcing them to either violate their faith's teachings and provide Plan B and *ella*, or decline to dispense the drug and lose their business and jobs. Since both drugs can cause destruction of a human life, the Stormans and the pharmacists believe dispensing these drugs constitutes participation in an immoral act that their faith prohibits; therefore, 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 toward religion nor generally applicable, but rather, specifically target pharmacies and pharmacists who hold deep religious convictions against providing life-terminating drugs.

The regulations lack neutrality and general applicability for six separate reasons:

- 1) The regulations categorically exempt a wide range of nonreligious-based referrals.
- 2) The regulations give the board unfettered discretion to make individualized exemptions on a case-by-case basis.
- 3) The regulations have only been selectively enforced, i.e., only against the religious-based conduct of the Stormans and two pharmacists.
- 4) The regulations have been gerrymandered to apply exclusively to referrals for religious reasons.
- 5) The regulations were enacted with discriminatory intent.
- 6) The board has declined to pursue action against certain Catholic pharmacies in the state, resulting in differential and preferential treatment of religions.

The district court found that Plan B is widely available in the state, and board members testified at trial that there was no problem of access to any drug in any area within Washington. In fact, more than 30 pharmacies regularly stock Plan B within five miles of Ralph's.

### ***The effect of Hobby Lobby***

On June 30, 2014, the U.S. Supreme Court held in *Burwell v. Hobby Lobby Stores* 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 Stormans case. The Stormans' brief pointed out that *Hobby Lobby* affirms that closely-held corporations like Stormans, Inc., 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, as a time-honored alternative exists: facilitated referral – referrals that are already permitted, except when the referral is religiously motivated. Though decided under a federal statute, the Religious Freedom Restoration Act, rather than the Free

Exercise Clause of the First Amendment, *Hobby Lobby* confirms that religious freedom includes “the right to express [religious] beliefs and to establish one’s religious (or non-religious) self-definition in the political, civil, and economic life of our larger community.” *Id.* at \*28 (Kennedy, J., concurring).

**Sample of Authorities** (Complete [list](#), vi-xiii)

*Employment Division v. Smith*, 494 U.S. 872, 880 (1990): In *Smith*, the U.S. Supreme Court held that under the Free Exercise Clause, a law burdening religious exercise must pass strict scrutiny if it is not “neutral” to religion and “generally applicable” to religious adherents and non-adherents alike. Strict scrutiny is the highest level of review and places the burden on the government to prove it has a compelling interest in enacting the law at issue. The means chosen to achieve that interest must be narrowly tailored to its ends, and there must be no other less restrictive alternative available to achieve the purpose of the law.

*Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993): The Supreme Court further elaborated on the meaning of “neutral and generally applicable,” finding that ordinances were not neutral when they accomplished a religious gerrymander, that is, burdening a specific religious group but almost no others.

### **Bottom Line**

The Stormans case points to a much larger issue – whether the government can make the value judgment that religiously motivated conduct is not worthy of protection while at the same time protecting nearly identical conduct motivated by non-religious reasons. Here, the state has stipulated that facilitated referral does not impair access to Plan B, and the trial court made very specific factual findings that demonstrate the state regularly permits that alternative for a host of non-religious reasons. Also, Washington’s law is an outlier. At least 35 state and national pharmacy associations have approved the use of that alternative for religious reasons. Thus, the 9th Circuit should affirm the district court based on the overwhelming record that confirms the government impermissibly sought to compel the Stormans and the pharmacists in this case to choose between their religious convictions and their vocations and livelihood. As James Madison, the “Father of the Constitution,” aptly wrote, “We hold it for a fundamental and undeniable truth that religion, or the duty which we owe our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence. The religion, then, of every man must be left to the conviction and conscience of every man: and that it is the right of every man to exercise it as these may dictate.”