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Reasonable Action: Reproductive Rights, The Free Exercise Clause, and Religious Freedom in the United States and the Republic of Ireland

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REASONABLE ACTION: REPRODUCTIVE RIGHTS, THE FREE EXERCISE CLAUSE, AND RELIGIOUS FREEDOM IN THE UNITED STATES AND THE REPUBLIC OF IRELAND

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INTRODUCTION

Each year, the United States Supreme Court denies thousands of petitions for certiorari.[1] For the vast majority of these petitions, the final words spoken on the case are terse. The denied petitions are listed underneath a bolded, fully-capitalized CERTIORARI DENIED heading and that is the last anyone hears of them.[2] Occasionally, however, one or more of the members of the Court feel strongly enough that a case should have been heard that they compose a dissent. *Stormans v. Wiesman* was one such case.

The *Stormans* dissent began dramatically: "This case is an ominous sign," wrote Justice Samuel Alito, joined by Chief Justice John Roberts and Justice Clarence Thomas.[3] Justice Alito went on to argue that denying certiorari imperiled the viability of future cases asserting rights to the free exercise of religion under the Constitution's Free Exercise Clause.[4]

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[1] *The Justices' Caseload*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/justicecaseload.aspx (last visited Feb. 27, 2018) (stating that of the 7,000-8,000 cases filed with the Court each year, only around 80 are granted plenary review and about 100 or more are disposed of without plenary review).

[2] Miscellaneous Order, 579 U.S. ___ (June 28, 2016), https://www.supremecourt.gov/orders/courtorders/062816zr_29m1.pdf

[3] Stormans, Inc. v. Wiesman, 136 S. Ct. 2433, 2433 (2016) (Alito, J., dissenting).

[4] U.S. CONST. amend. I, cl. 1.

Stormans involved an ongoing problem not unique to Washington State, where the case arose, or even to the United States generally. The Stormans family, through their closely held corporation, Stormans, Inc., owned a grocery store in Olympia, Washington.[5] Within this grocery store was a general pharmacy.[6] The Stormans family are devout Christians and ran their company in accordance with their beliefs.[7] They faced no issues in doing so until 2005, when the State of Washington passed new regulations that required pharmacies to stock and dispense the so-called "morning-after" and "week-after" pills.[8] The Stormans believe that these emergency contraceptives have the potential to cause an abortion, and since participating in an abortion would violate their religious beliefs, the Stormans declined to carry such drugs in their pharmacy.[9]

For its part, in passing these new regulations, the State of Washington was reacting to a nationwide movement in favor of broadening access to these drugs as part of a commitment to ensure citizens' full protection of their reproductive rights.[10] Critics have complained that it is unethical for pharmacists, medical professionals, to employ their individual moral beliefs on the job by refusing to provide emergency contraceptives.[11] The stage was set for a conflict involving sensitive issues and fundamental Constitutional rights. After the State of Washington issued the Stormans several citations for violating the new stocking and dispensing rules, the Stormans sued in federal court for an injunction preventing the State from enforcing the rules against them.[12]

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[5] *Stormans*, 136 S. Ct. at 2433.

[6] *Id.*

[7] *Id.*

[8] *Stormans v. Wiesman*, BECKET, http://www.becketlaw.org/case/stormans-v-wiesman/ (last visited Feb. 27, 2018).

[9] *Id.*

[10] Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 935 (W.D. Wash. 2012), *rev'd sub nom.* Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015).

[11] *Pharmacists Should Not Be Allowed To Opt Out Of Selling Morning After Pill On Ethical Grounds,* HUFFINGTON POST (Jan. 31, 2013), http://www.huffingtonpost.co.uk/2013/01/31/health-pharmacists-refuse-morning-after-pill-ethical-banned_n_2588021.html.

[12] *Stormans v. Wiesman*, BECKET, *supra* note 8.

The trial court found in favor of the Stormans on their Free Exercise Clause claim, but the United States Court of Appeals for the Ninth Circuit reversed.[13] By denying certiorari in the case, the Supreme Court missed an important opportunity to clarify the scope of the Free Exercise Clause, and to provide guidance to the states on how best to ensure that both free exercise rights and reproductive rights are respected.

This Note will argue that by denying certiorari in *Stormans v. Wiesman*, the Supreme Court missed an important opportunity to provide guidance to the states as to how the Free Exercise Clause applies to the kind of stocking and dispensing regulations adopted by the State of Washington. This Note will further argue from a policy perspective that the approach to these kinds of regulations adopted by the Republic of Ireland ("ROI") presents the best approach for states to adopt because it provides a balance in terms of respecting the free exercise rights of pharmacists and pharmacy owners with the reproductive rights of the general public. In Part I, this Note will survey the history of the Supreme Court's Free Exercise Clause jurisprudence, with particular emphasis placed on *Employment Division v. Smith* and the dramatic changes it made to existing jurisprudence at the time it was decided. In Part II, this Note will consider the *Stormans* case in detail from the decision of the trial court, through the Ninth Circuit's reversal, and the ultimate denial of certiorari over the dissent of three justices. In Part III, this Note will examine the approach to this problem taken by ROI, highlighting its relatively uncontroversial history and flexible standards. Finally, in Part IV, this Note will first argue that the Supreme Court should have taken and reversed the Ninth Circuit's decision as inconsistent with precedent and overly skeptical of the factual conclusions of the trial court. Then, it will propose that the ROI approach to these regulations is the best from a policy perspective because it provides the best balance of religious and reproductive rights.

I. THE HISTORY OF FREE EXERCISE JURISPRUDENCE

The Supreme Court's jurisprudence on the Free Exercise Clause has alternated between strict and loose interpretations of its breadth. One of the questions the Court has confronted most

[13] *Id.*

often is to what degree private individuals should be able to disregard generally applicable laws that conflict with their religious beliefs.

A. The Reynolds *Approach to Free Exercise Claims*

The Court addressed this question for the first time in 1878 in *Reynolds v. United States*.[14] *Reynolds* involved a challenge to the federal government's prohibition of bigamy in the territories, known as the Morrill Act for the Suppression of Bigamy.[15] Mormon church member George Reynolds, a bigamist and member of the Church of Jesus Christ of Latter-Day Saints, was convicted under the Act.[16] He appealed his case all the way to the Supreme Court, where he argued that bigamy was a required practice of his religion and therefore the Free Exercise Clause should protect him from legal punishment for engaging in it.[17]

In rejecting his Free Exercise claim, the Court spoke in absolute terms: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[18] The Court seemed dismissive even of the idea that one could avoid complying with generally applicable laws because of one's religious duty; the Chief Justice, writing for the majority, famously declared that to allow citizens to avoid conviction under such laws because of the right to free exercise would "permit every citizen to become a law unto himself."[19] While the Court did not define the meaning of the Free Exercise Clause per se, it did say what the Clause was not: a license to disregard laws that apply to everyone equally.

B. A New Approach: Sherbert v. Verner

After *Reynolds*, the Supreme Court did not address the Free Exercise Clause again until it incorporated the Clause against the states in the 1940 case *Cantwell v. Connecticut*.[20] This set the stage for the Court to revisit the meaning of the Clause in

[14] *See* 98 U.S. 145, 161–62 (1878); DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 21 (2010).

[15] DRAKEMAN, *supra* note 14, at 26.

[16] *Id.* at 28.

[17] *Reynolds*, 98 U.S. at 161–62.

[18] *Id.* at 166.

[19] *Id.* at 167.

[20] Cantwell v. Connecticut, 310 U.S. 296 (1940).

1963 in *Sherbert v. Verner*. The plaintiff, Adell H. Sherbert, was a Seventh Day Adventist who lost her job at a textile mill after refusing to work on Saturdays, which the Seventh Day Adventist religion recognizes as the Sabbath.[21] The South Carolina Employment Security Commission found that she had been fired because she chose not to come to work voluntarily, and it disqualified her from receiving unemployment benefits for five weeks.[22] The Court first found that the disqualification imposed a burden on Sherbert's free exercise of her religion;[23] Justice William Brennan, writing for the majority, decried the "unmistakable" pressure exerted by the state on Sherbert to compel her to forego her religious practice: "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[24]

After finding that Sherbert's free exercise rights had been violated, it remained for the Court to determine whether or not the State's violation of her rights was constitutionally valid.[25] The Court applied a variety of strict scrutiny[26] which would come to be known as the "*Sherbert* test"[27] and determined that the State had failed to present the compelling government interest necessary for its action to be upheld.[28]

The *Sherbert* Court's approach represented a radical departure from that taken by the *Reynolds* Court. While the *Reynolds* Court focused its inquiry on the nature of the law being challenged, the *Sherbert* Court focused on the burden to the

[21] Sherbert v. Verner, 374 U.S. 398, 398–99, 399 n.1 (1963).

[22] *Id.* at 399–401, 400 n.3.

[23] *Id.* at 404.

[24] *Id.*

[25] In other words, the plaintiff must first show that his or her sincerely held religious beliefs are burdened by the government in some way in order to invoke *Sherbert*-style strict scrutiny. Kenneth Marin, Employment Division v. Smith: *The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1438 (1990).

[26] Strict scrutiny in the context of the Free Exercise Clause requires that the government actor base its action on a compelling government interest; once it has proven a compelling government interest, it must then show that the method it chose to advance the interest is the least restrictive means of advancing that interest. *Id.* at 1438–39.

[27] Lee Boothby, *Government Entanglement with Religion: What Degree of Proof Is Required?*, 7 PEPP. L. REV. 613, 615 (1980).

[28] *Sherbert*, 374 U.S. at 406–09.

individual challenging the violation of her rights. The tug-of-war between these two approaches did not end after the establishment of the *Sherbert* test.

The Court next applied the *Sherbert* test in a 1973 case, *Wisconsin v. Yoder*. The appellant in *Yoder*, an Amish man, challenged his conviction under a Wisconsin law requiring students to attend school through the high school level.[29] He had withdrawn his children from public school upon their completion of the eighth grade.[30] He argued that the Free Exercise Clause protected his right to withdraw his children from public school after the eighth grade because the Amish religion required him to more closely supervise their religious education at that point in their lives.[31] The Court accepted his argument, ruling that the Wisconsin law could not constitutionally be applied to him.[32] In so holding, the Court reaffirmed the principle it had enunciated in *Sherbert*: even "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[33]

C. Employment Division v. Smith*: The* Reynolds *Approach Revived*

The stated tension between supporters of the *Reynolds* approach to the Free Exercise Clause and supporters of the *Sherbert* test had not yet ended, however. Throughout the 1980s, the Supreme Court became increasingly skeptical of Free Exercise claims, often finding that asserted government interests were compelling while construing the interests of the religious objectors narrowly[34] This trend culminated in the 1991 *Employment Division v. Smith* decision, a watershed case that marked the Court's return to the *Reynolds* approach.

Employment Division v. Smith involved a set of facts similar to those which had resulted in the creation of the *Sherbert* test. Once again, plaintiffs challenged a state's denial of

[29] Wisconsin v. Yoder, 406 U.S. 205, 207–08 (1972).
[30] *Id.* at 207.
[31] *Id.* at 217–18.
[32] *Id.* at 234.
[33] *Id.* at 220 (citations omitted).
[34] Marin, *supra* note 25, at 1445.

unemployment benefits.[35] Alfred Smith and Galen Black, members of the Native American Church, worked for a private drug rehabilitation center in Oregon.[36] As employees, Smith and Black consumed peyote as part of a Native American Church ritual, despite the possession of the drug being illegal in Oregon.[37] Consequently, both men were fired from their jobs at the private rehab facility, and applied to the Employment Division for unemployment benefits.[38] The Employment Division determined that they were ineligible for unemployment benefits because they had been fired from their jobs due to work-related misconduct.[39]

The United States Supreme Court ruled on the case after the Oregon Supreme Court determined that the Oregon statute, which prohibited the use of peyote, as applied to the defendants, was unconstitutional under the Free Exercise Clause.[40] The majority opinion by Justice Antonin Scalia marked a return to the *Reynolds* approach to the Free Exercise Clause. Justice Scalia first noted that there was no question that if a state wanted to regulate conduct purely because it was engaged in for a religious reason, it could not do so.[41] He distinguished that circumstance, however, from that of a generally applicable state prohibition of conduct which only incidentally burdened the practice of religion.[42] In this second situation, Justice Scalia reasoned, the Supreme Court had never before struck down a state law as unconstitutional purely on the basis that it violated the Free Exercise Clause.[43] In other words, states can refuse to provide accommodations to neutral laws of general applicability without violating the Free Exercise Clause, subject to certain exceptions.[44]

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[35] Emp't Div., Dept. of Human Res. v. Smith, 494 U.S. 872, 874 (1990).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* at 876. *See also* Smith v. Emp't Div., 763 P.2d 146, 150 (Or. 1988), *rev'd sub nom.* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

[41] *Smith*, 494 U.S. at 877–78.

[42] *Id.* at 878–79.

[43] *Id.*

[44] *Id.*

Justice Scalia went on to explain that neutral, generally applicable laws had only been struck down under the Free Exercise Clause in certain special circumstances.[45] He first spoke of the so-called "hybrid rights exception."[46] The hybrid rights exception, Justice Scalia explained, had been the basis of the decision in *Wisconsin v. Yoder* to strike down the neutral, generally applicable school attendance law as applied to the Amish objectors.[47] In that particular case, it had been the right to free exercise in combination with the right of parents to direct the education of their children which tilted the scales in favor of the Amish.[48]

Next, Justice Scalia discussed the "individual assessment exception." According to Justice Scalia, the individual assessment exception had been the rationale used by the court to find violations of the Free Exercise Clause in unemployment compensation cases like *Sherbert*.[49] The individual assessment exception means that if the government actor charged with enforcing a law is empowered to make exceptions to the law for individuals for secular reasons, it must grant exceptions for religious reasons as well.[50] Thus, Justice Scalia reasoned, the Court in *Sherbert* had correctly held for the plaintiff because the unemployment compensation administrator had the ability to decide whether an employee had quit work or refused available work for "good cause" and had determined that the plaintiff's refusal to work on Saturdays because of her religious convictions was not a "good cause."[51] He concluded that the Court's "decisions in the unemployment cases stand for the proposition that 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 compelling reason."[52]

[45] *Id.* at 881–84.

[46] Ryan S. Rummage, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L.J. 1175, 1184–85 (2015).

[47] *Smith*, 494 U.S. at 881.

[48] *Id.*

[49] *Id.* at 884.

[50] Brief of Religious Liberty Scholars as Amici Curiae Supporting Petitioners at 2–3, Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016) (No. 15-862).

[51] *Smith*, 494 U.S. at 884.

[52] *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

*D. Post-*Employment Division*: Further Developments in Free Exercise Jurisprudence*

For practical purposes, the *Sherbert* test is dead. The *Reynolds* approach with the exceptions laid out in *Smith* has become the law of the land. Congress attempted to revive the use of strict scrutiny to evaluate even neutral, generally applicable laws by passing the Religious Freedom Restoration Act in 1993.[53] The Act received overwhelming bipartisan support, including a rare 97-3 vote in the Senate.[54] Nevertheless, the Court struck it down as applied to the states in *City of Boerne v. Flores*, a 1997 case involving a Catholic archbishop's challenge to an unfavorable zoning decision.[55] The *Smith* approach remains the approach used to evaluate Free Exercise Clause claims involving neutral, generally applicable state laws.

The Court has subjected a facially neutral, generally applicable law to strict scrutiny under the Free Exercise Clause at least once since *Smith*. In *Church of the Lukumi Babalu Aye v. City of Hialeah*, the Court examined a Florida municipality's ordinance banning animal sacrifice.[56] Notably, there was extensive evidence that, while the law in question was facially neutral, it had been enacted specifically in response to the practices of the active Santeria religious community in the city.[57]

While a seven-justice majority agreed that the law ought to be subject to strict scrutiny and that it failed that test, they

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[53] Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[54] *Roll Call Vote 103rd Congress – 1st Session*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=103&session=1&vote=00331 (last visited Feb. 28, 2018).

[55] *See generally* City of Boerne v. Flores, 521 U.S. 507 (1997). At least thirty-two states have either passed their own laws similar to the Religious Freedom Restoration Act (either as statutes or as amendments to state constitutions) or have state court decisions on the books which provide similar protections. Juliet Eilperin, *31 States Have Heightened Religious Freedom Protections*, WASH. POST (Mar. 1, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/?utm_term=.fed3d02e8fcf; *State Religious Freedom Restoration Acts*, NAT'L CONF. OF ST. LEGISLATURES (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (stating that in 2015 Arkansas became the thirty-second state to enact a Religious Freedom Restoration Act-style provision).

[56] Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 520 (1993).

[57] *Id.* at 526–27.

disagreed widely as to why.[58] Six justices joined the parts of Associate Justice Anthony Kennedy's opinion which subjected the law to strict scrutiny and found that the city's regulations violated the Free Exercise Clause.[59] In a partial concurrence, Justice Scalia (joined by Chief Justice William Rehnquist) argued that Justice Kennedy should not have relied so heavily on legislative history to strike down the regulation, and further argued that had the town passed a facially neutral law with the intent to target the Santeria religion there would have been no violation.[60] Justice Souter wrote his own concurrence which encouraged his colleagues to reexamine the *Smith* decision and its effect on existing Free Exercise Clause jurisprudence.[61] Justice Harry Blackmun, joined by Justice Sandra Day O'Connor, openly challenged the *Smith* decision, arguing that it had been wrongly decided.[62]

II. *STORMANS V. WIESMAN*: A NEW CHALLENGE TO THE MEANING OF FREE EXERCISE

Commentators have noted the inherent tension between ensuring access to emergency contraceptives while also respecting the religious objections of pharmacists to stocking and dispensing them.[63] Critics on each side have accused the other of not giving due weight to their asserted interests.[64] The State of Washington moved to address the controversy in the mid-2000s.

[58] *See generally id.*

[59] *Id.* at 531–40, 542–47.

[60] *See generally id.* at 557–59 (Scalia, J., concurring in part and concurring in the judgment).

[61] *See generally id.* at 559–77 (Souter, J., concurring in part and concurring in the judgment).

[62] *See generally id.* at 577–80 (Blackmun, J., concurring in the judgment).

[63] *See* Dennies Varughese, Comment, *Conscience Misbranded!: Introducing the* Performer v. Facilitator *Model for Determining the Suitability of Including Pharmacists within Conscience Clause Legislation*, 79 TEMP. L. REV. 649, 651 (2006); *see also* Claire A. Smearman, *Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists*, 48 ARIZ. L. REV. 469, 471–72 (2006).

[64] Gene Veith, *Christian Pharmacists Must Stock Abortifacients*, CRANACH: THE BLOG OF VEITH (July 1, 2016), http://www.patheos.com/blogs/geneveith/2016/07/christian-pharmacists-must-stock-abortifacients/; *Pharmacists Should Not Be Allowed To Opt Out Of Selling Morning After Pill On Ethical Grounds, Argue Researchers;* HUFFINGTON POST, *supra* note 11.

A. Lead-up to the Passage of the Regulations

In 2005, in response to the passage of an Illinois law requiring pharmacies that stocked any kind of contraceptive to stock emergency contraceptives, pro-choice groups began to lobby Washington's governor, Christine Gregoire ("the Governor"), to push for similar regulations in Washington.[65] The State's Board of Pharmacy (occasionally referred to hereafter as "the Board") was responsible for regulating pharmacists in Washington.[66] The Board was receptive to the idea of passing some kind of regulation regarding emergency contraceptives, but the majority of board members thought that any such regulation should include a conscience opt-out for objecting pharmacists, which would instead require them to refer those seeking emergency contraceptives to pharmacies which carried the drugs.[67] This kind of referral process "has long been legal in all 50 states" and has been approved by the American Pharmacists Association.[68]

At a January 2006 meeting, a majority of board members indicated that they were in favor of adopting a regulation requiring pharmacies to stock emergency contraceptives, but the majority also agreed that the regulation should have a referral provision for pharmacists who objected to stocking the drugs on conscience grounds.[69] The Washington State Pharmacy Association ("WSPA") endorsed this approach.[70]

Public hearings on the proposed regulation were held in April 2006.[71] Pro-choice attendees related "refusal stories" of incidents in which women seeking emergency contraceptives were denied them by objecting pharmacists.[72] After the hearings, the Board of Pharmacy drafted two versions of the proposed regulation: one which prevented pharmacists from referring patients seeking emergency contraceptives if the drugs were in stock and the patient could pay for them; and a second which allowed pharmacists to refuse to carry the drug for a variety of

[65] Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 935–36 (W.D. Wash. 2012), *rev'd sub nom.* Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015).

[66] *Id.* at 932.

[67] *Id.* at 937.

[68] *Stormans v. Wiesman*, BECKET, *supra* note 8.

[69] *Stormans*, 854 F. Supp. 2d at 937.

[70] *Id.* at 935.

[71] *Id.* at 938.

[72] *Id.* at 938.

reasons, both secular and religious- or conscience-based, and to refer patients to pharmacies which did.[73] At a June 1 meeting, the Board voted unanimously to adopt the latter regulation.[74]

Pro-choice groups presented the Governor with their own draft of the regulation one week after the June 1 vote.[75] Steven Saxe ("Mr. Saxe"), the executive director of the Board of Pharmacy, later testified that the primary difference between the rule passed on June 1 and the Governor's new draft was that the Governor's draft did not allow referrals for conscience reasons.[76] In fact, there was evidence that the draft was written that way on purpose—the Governor and her allies wanted to ensure that no conscience-based referrals would be allowed.[77] The Governor then convened a taskforce composed of representatives from pro-choice groups, the WSPA, and the Board in order to build support for her draft of the new rule.[78]

The taskforce ultimately reached a compromise: in exchange for the WSPA[79] dropping its proposal for a conscience-based referral exemption, the Governor's allies on the taskforce agreed to permit referrals for a variety of other non-conscience and non-religious reasons.[80] Additionally, the Board's counsel indicated to

[73] *Id.*

[74] *Id.*

[75] *Id.* at 939.

[76] *Id.*

[77] The trial court made findings of fact in regard to the following, among other evidence: a memo from the Governor to one of the supporters of the new rule asking "whether it was 'clean enough for the advocates [i.e., Planned Parenthood, NWWLC and NARAL] re: conscious/moral issues' "; an email from Mr. Saxe which "explained the Governor's primary issue with the June 1 rule . . . '[T]he moral issue IS the basis of the concern' "; and another email from Mr. Saxe which he wrote to the Department of Health on the subject of how to ensure the rule reflected the Governor's intent: " 'Would a statement that does not allow a pharmacist/pharmacy the right to refuse for moral or religious judgment be clearer? This would leave intact the ability to decline to dispense (provide alternatives) for most *legitimate* examples raised; clinical, fraud, business, skill, etc.' " *Id.* (emphasis in original).

[78] *Id.* at 940. No conscientious objectors or pro-life groups were invited to participate. *Id.*

[79] Rod Shafer of the WSPA had been the only member of the taskforce insisting on a conscience-based exemption. *Id.* at 941.

[80] *Id.* Interestingly, the taskforce also confronted the problem of conscientious objections to Washington's Death with Dignity Act, which legalized physician-assisted suicide. Members of the task force agreed to allow conscientious objection to the dispensing of lethal drugs. *Id.*

it that the Board would also have the power to make individual exemptions on a case-by-case basis.[81] The Board approved the Governor's final version of the regulations in April 2007.[82]

B. Proceedings in the Trial Court

Stormans, Inc. is a closely held corporation owned by the Stormans family.[83] At the time the pharmacy regulations relating to emergency contraceptives were passed, the corporation owned a grocery store with a general retail pharmacy.[84] Members of the Stormans family believe that life begins at conception, and therefore refuse to sell abortifacient drugs on the ground that they can "potentially cause an abortion."[85]

In July 2007, the family sued for an injunction to prevent the State of Washington from enforcing the new regulations against them.[86] The trial court, the United States District Court for the Western District of Washington, made extensive findings of fact with regard to the regulations after a twelve-day trial in 2012.[87] The court found that the rulemaking process had focused almost exclusively on the question of whether to allow conscience-based objections to the stocking of emergency contraceptives.[88] The court also found that the process had been political, and that the Governor had repeatedly pressured the Board not to include conscience exemptions in the final regulations; she had even threatened to remove Board members who would not agree.[89] Witnesses from the Board confirmed at trial that they had not yet been able to identify a case of any kind of drug that could not be accessed, either before the new rules were promulgated, or after.[90] The court rejected anecdotal stories of access problems provided by pro-choice groups, finding that the stories were

[81] *Id.* at 941–42.
[82] *Id.* at 942.
[83] *Id.* at 931.
[84] *Id.*
[85] *Stormans v. Wiesman*, BECKET, *supra* note 8; *Stormans*, 854 F. Supp. 2d at 932.
[86] *Stormans v. Wiesman*, BECKET, *supra* note 8.
[87] *See generally Stormans*, 854 F. Supp. 2d.
[88] *Id.* at 986.
[89] *Id.* at 987.
[90] *Id.* at 947.

either not relevant to the case or that they were the product of a test shopping campaign led by Planned Parenthood and other groups.[91]

The court did not focus exclusively on the rulemaking process; it also addressed the actual application of the rule.[92] The trial court found that after the new regulations were passed, referrals continued to be allowed for a wide variety of non-religious reasons.[93] While some Board witnesses asserted that the intent of the regulations was to allow referrals for only a small number of non-religious reasons, the court found that the Board had interpreted the exemptions broadly to cover a wide variety of business reasons.[94] Additionally, Board witnesses testified that in determining whether a given business reason fell within the exemptions allowed by the regulation, the Board would make determinations on a "case-by-case basis."[95]

The trial court found that the regulations were not neutral and generally applicable: "In short, the Regulations were adopted 'because of' conscientious objections to Plan B, not merely 'in spite of' them."[96] The court then proceeded to apply strict scrutiny to the regulations and found them both over and underinclusive,[97] meaning that they did not further the compelling state interest in ensuring access to medications.[98] The court also held that the regulations as applied to the Stormans family would actually harm the State's interest, as the Stormans family and other conscientious objectors would simply be forced to close their pharmacies or exit the pharmaceutical profession rather than dispense the drugs; this would make

[91] *Id.* at 950–51. The court found that Planned Parenthood and other groups posted advertisements on their websites soliciting women to call pharmacies to ask if they stocked emergency contraceptives and to go into pharmacies and see if pharmacists would actually dispense the drugs. *Id.* at 950.

[92] *Id*. at 987–88.

[93] The court found that referrals were permitted if a pharmacy was temporarily out of stock of a medication, if it did not take the patient's insurance, if the pharmacist believed the patient was a drug abuser, if the pharmacist would have to alter the drug in some way before dispensing it, if the pharmacist would have to keep extra records on purchases of the drug, etc. *See id.* at 955–56.

[94] *Id.* at 957.

[95] *Id.* at 958.

[96] *Id.* at 987 (citing Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 540 (1993).

[97] *Id.* at 989–90.

[98] *Id.*

access to medications more difficult, not less.[99] The court entered judgment in the form of a permanent injunction preventing Washington from applying its regulations to the Stormans family.[100]

C. The State of Washington's Appeal to the Ninth Circuit

The State of Washington appealed the decision to the Ninth Circuit Court of Appeals.[101] The Ninth Circuit found that the regulations' delivery requirement "applie[d] to *all* objections to delivery that do not fall within an exemption, regardless of the motivation behind those objections."[102] Additionally, the Ninth Circuit panel disagreed with the trial court's conclusion that the rule-makers had the impermissible motivation of targeting religious objectors specifically.[103] Absent discriminatory intent or application, the Ninth Circuit held that the regulations were neutral for the purposes of analysis under *Smith*.[104]

The Ninth Circuit proceeded to consider whether the rules were generally applicable. The court held that while the practices that were the subjects of the unwritten exemptions had in fact occurred, the Commission had not permitted them; rather, it had simply not received complaints about them.[105] Although the trial court had heard testimony from members of the Commission about how they believed the Commission would act if it did receive a complaint regarding the unwritten exemptions, the Ninth Circuit held that this was not the same as the Commission collectively giving an official interpretation of the rule.[106]

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[99] *Id.* at 990.

[100] *Id.* at 991–93.

[101] *Stormans v. Wiesman*, BECKET, *supra* note 8.

[102] Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1077 (9th Cir. 2015) (emphasis in original). The Ninth Circuit opinion seems to flatly contradict the factual findings of the trial court, which found precisely the opposite of what the Ninth Circuit did. The trial court found that the regulations do not operate neutrally because the Commission allows referrals for a wide variety of reasons not specifically mentioned in the regulation itself. *Stormans*, 854 F. Supp. 2d at 955–56. Additionally, the opinion included speculation about access problems if facilitated referrals were allowed. *Stormans*, 794 F.3d at 1078. This speculation was included despite the fact that Board witnesses could not identify a single case of an access problem caused by a facilitated referral regime in the trial court. *Id.* at 947.

[103] *Stormans*, 794 F.3d at 1078.

[104] *Id.* at 1079.

[105] *Id.* at 1080–81.

[106] *Id.* at 1081.

The Ninth Circuit also addressed the Stormans family's contention that the regulations as written empowered the Commission to make individualized exemptions to the rules.[107] The court found that any discretion the Commission could exercise was tied to the objective, business-based criteria explicitly set out in the text of the regulation.[108] The court again rejected the testimony of individual commission members on the subject and looked instead to the Commission's official commentary, which rejected both religious-based exemptions and some business-based exemptions.[109]

Finally, the court considered the Stormans family's dual claims: (1) that the rules had been enforced against them but not against Catholic hospitals, and (2) that religiously-motivated violations were punished but secularly-motivated violations were not.[110] The court held that the evidence merely showed that the enforcement process was complaint-driven, and that since no complaints had been received against Catholic hospitals or against secular refusals to dispense the drugs, there could be no claim of selective enforcement.[111] The court proceeded to apply rational basis review, rather than strict scrutiny,[112] and concluded that the plaintiff's free exercise claim lacked merit.[113]

D. The Stormans Family Petitions the Supreme Court for Certiorari

The Stormans family's saga was not yet over, as they proceeded to petition the Supreme Court of the United States for a writ of certiorari.[114] The eight-member court rejected the petition 5-3 in June 2016; Justice Alito, joined by Chief Justice Roberts and Justice Thomas, strongly dissented from the decision

[107] *Id.*

[108] *Id.* at 1081–82.

[109] *Id.* at 1082. Specifically, the Commission had issued official commentary stating that a pharmacy could not object to delivering drugs because they are too expensive. *Id.*

[110] *Id.* at 1083.

[111] *Id.*

[112] Under *Smith*, courts apply rational basis review if the law is neutral, generally applicable, and does not fall under one of the *Smith* exceptions. Heather M. Good, *"The Forgotten Child of Our Constitution": The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Children*, 54 EMORY L.J. 641, 654 (2005).

[113] *Stormans*, 794 F.3d at 1085.

[114] *Stormans v. Wiesman*, BECKET, *supra* note 8.

to deny review: "There are strong reasons to doubt whether [Washington's] regulations were adopted for—or that they actually serve—any legitimate purpose."[115] He continued, "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."[116] Justice Alito went on to catalogue the findings of the trial court in regard to the discriminatory motivation of the regulation, noting in particular the emails of Mr. Saxe which referred explicitly to the Governor's desire to penalize conscience-based objections.[117] Justice Alito also pointed out that the trial court had concluded that the regulations as designed accomplished a "religious gerrymander," which had been one of the reasons the Court struck down the regulations at issue in *Church of Lukumi Babalu Aye*.[118]

Justice Alito also criticized the Ninth Circuit for ignoring evidence that the problem the State asserted it had an interest in fixing did not actually exist.[119] Specifically, Justice Alito pointed to the State's own stipulation that " 'facilitated referrals do not pose a threat to timely access to lawfully prescribed medications,' and indeed 'help assure timely access to lawfully prescribed medications . . . includ[ing] Plan B.' "[120] Finally, Justice Alito asserted that the numerous state pharmacy associations which had filed briefs encouraging the Court to review the decision showed the importance of providing Supreme Court review of the issue.[121]

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[115] Stormans, Inc. v. Wiesman, 136 S. Ct. 2433, 2433 (2016) (Alito, J., dissenting).

[116] *Id.*

[117] *Id.* at 2434–35.

[118] *Id.* at 2435 (citations and internal quotations omitted).

[119] *Id.*

[120] *Id.*

[121] *Id.* Specifically, Justice Alito cited the pharmacy associations' contention that the Ninth Circuit's decision had " 'upheld a radical departure from past regulation of the pharmacy industry' that 'threatens to *reduce* patient access to medication by forcing some pharmacies—particularly small, independent ones that often survive by providing specialty services not provided elsewhere—to close.' " *Id.* (quoting Brief for Nat'l and State Pharmacists' Ass'ns. as Amici Curiae Supporting Petitioners at 4–5, Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016) (No. 15-862)) (emphasis in original).

Justice Alito then gave a preliminary assessment of the regulations' neutrality and general applicability under *Smith*.[122] Justice Alito gave great weight to the trial court's determinations that the real operation of the rules almost exclusively burdened those with religious and not secular objections to providing emergency contraceptives.[123] He pointed out that the secular exceptions have just as much potential to harm patient access as do the proposed religious exceptions, and yet the secular exceptions were allowed while the religious exceptions were not.[124] Justice Alito went on to suggest that the Ninth Circuit's determination that the Board itself did not actually permit the refusals for secular reasons was an improper usurpation of the trial court's fact-finding function.[125] Unlike the judges on the Ninth Circuit panel, Justice Alito did not find persuasive the fact that the Board's enforcement mechanism was complaint-based.[126]

Justice Alito also wrote on the regulations' underinclusivity. Disagreeing with the Ninth Circuit panel, Justice Alito would have found that the regulations as written were substantially underinclusive.[127] Specifically, he found that the exemption allowing pharmacies to refuse to dispense drugs to customers who could not pay explicitly allowed pharmacies to reject customers whose insurance the pharmacy did not accept.[128] Justice Alito pointed out that this included Medicare and Medicaid insurance and that therefore a pharmacy could deny access to all prescription drugs for certain customers.[129] Since customers with Medicare or Medicaid are presumably the least able to travel to other pharmacies to fill their prescription drug

[122] *Stormans*, 136 S. Ct. at 2436–40.

[123] *Id.* at 2437–38.

[124] *Id.* at 2438.

[125] "I think it likely that the Court of Appeals failed to accord the District Court's findings appropriate deference. 'If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.' " *Id.* (quotng Anderson v. Bessemer City, 470 U.S. 564, 573–74 (1985)).

[126] "[T]he point remains that the Board tolerates widespread secular refusals while categorically declaring religious ones verboten. That supports the District Court's finding that the real operation of the regulations is to uniquely burden religiously motivated conduct." *Id.* at 2438–39 (internal quotations omitted).

[127] *Id.* at 2439.

[128] *Id.*

[129] *Id.*

needs, the regulation was substantially underinclusive.[130] Justice Alito also gave significant weight to the appellant's contention that some pharmacy owners would rather close entirely than dispense medications that their beliefs forbid:

> 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.[131]

In conclusion, the hotly-contested nature of the court proceedings at all three levels of the federal court system (including numerous amicus briefs on both sides at the Supreme Court level)[132] suggests that the Supreme Court should have granted the writ of certiorari in order to provide guidance to the rest of the states as to the constitutionality of Washington's regulations.

III. THE REPUBLIC OF IRELAND'S APPROACH TO PHARMACISTS' CONSCIENCE REGULATIONS

While the State of Washington provides one example of an approach to ensuring access to emergency contraceptives, this is not the only approach that a government has taken to solving the problem. The ROI also confronted the problem of how to ensure access to emergency contraceptives while also respecting the conscience rights of pharmacists, and its approach appears to better balance the competing religious freedom and reproductive rights at issue.

In 2007, ROI passed the Pharmacy Act of 2007.[133] The Pharmacy Act of 2007 reconstituted the Pharmaceutical Society of Ireland ("PSI") and vested it with the authority to create a comprehensive code of conduct for pharmacists operating in the country.[134]

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[130] *Id.*

[131] *Id.* at 2240.

[132] *Stormans, Inc. v. Wiesman*, SCOTUSBLOG: SUPREME COURT OF THE UNITED STATES BLOG, http://www.scotusblog.com/case-files/cases/stormans-inc-v-wiesman/ (last visited Feb. 28, 2018).

[133] Pharmacy Act 2007 (Act No. 20/2007) (Ir.), http://www.irishstatutebook.ie/eli/2007/act/20/enacted/en/pdf

[134] CODE OF CONDUCT FOR PHARMACISTS (PHARM. SOC'Y OF IR. 2009), http://www.thepsi.ie/Libraries/Publications/Code_of_Conduct_for_pharmacists.sflb.a

In 2008, the PSI consulted extensively with several stakeholders as it worked to draft its regulations before submitting the completed Code of Conduct to the Irish parliament in 2009.[135] The Code the PSI ultimately submitted, and which was ratified by the Irish parliament, is based on a six-principle system defining pharmacists' duties.[136] Failure to discharge one's duties is considered professional misconduct and subjects the pharmacist to discipline.[137]

The most important of the six principles for the subject at hand is Principle 1 and its accompanying commentary. Principle 1 acts as a foundational principle with reference to which all other enumerated principles must be interpreted.[138] It states: "The practice by a pharmacist of his/her profession must be directed to maintaining and improving the health, wellbeing, care and safety of the patient. This is the primary principle and the following principles must be read in light of this principle."[139] Thus, Principle 1 immediately establishes the importance of ensuring patient access to drugs legitimately sought; this is similar to Washington's asserted interest in ensuring patient access to all lawful medications.[140]

The divergence between the Washington and ROI approaches becomes clear in the commentary to Principle 1. The commentary provides pharmacists with information on how they can be sure they have discharged their obligations under the Principle; it states in part that in order to fulfill one's obligations under the Principle, the pharmacist should "[e]nsure that in instances where they are *unable to provide* prescribed medicines or pharmacy services to a patient they must take *reasonable action* to ensure these medicines/services are provided and the

shx ("The Pharmacy Act 2007 ('the Act') requires and enables pharmacists to practise in their profession in a regulated, controlled and safe environment in a manner that is focussed on the safety and interests of their patients.").

[135] *Id.* Contrast this approach with that of the State of Washington, which only consulted with members of the pharmaceutical profession through the Governor's task force, which included a roughly equal number of pro-choice advocates and pharmacists. Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 940 (W.D. Wash. 2012), *rev'd sub nom.* Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015).

[136] CODE OF CONDUCT FOR PHARMACISTS, *supra* note 134.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Stormans*, 854 F. Supp. 2d at 972.

patient's care is not jeopardised."[141] Thus, Principle 1, when read in conjunction with its commentary, establishes that in certain situations a pharmacist may be "unable" to provide prescribed medicines or pharmacy services. A document providing specific guidance for supplying an emergency contraceptive drug establishes that a pharmacist may be "unable" to dispense the drug because the pharmacist harbors moral objections to doing so.[142]

But what about the pharmacist's duty to take "reasonable action" to ensure that the patient can access the drug he or she needs? The Irish courts have not spoken on what "reasonable action" entails. The PSI's own guidance on the subject is vague,[143] but it seems that course of practice has established that facilitated referrals satisfy the obligation.[144]

As a matter of policy, the ROI's method strikes the proper balance between ensuring patient access to emergency contraceptives while also respecting the conscience rights of pharmacists. The absence of lawsuits disputing the effectiveness of the system of facilitated referrals is telling. The fact that the pharmaceutical profession itself created the rules[145] supports the arguments made by state pharmaceutical associations in the United States that the already-existing system of facilitated referrals is an adequate solution to the problem of ensuring access to contraceptives.[146]

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[141] CODE OF CONDUCT FOR PHARMACISTS, *supra* note 134 (emphasis added).

[142] *See Guidance for Pharmacists on the Safe Supply of Non-Prescription Levonorgestrel 1500mcg for Emergency Hormonal Contraception*, PHARMACY PRACTICE GUIDELINES: GUIDANCE ON THE SAFE SUPPLY OF MEDICINE (Pharm. Soc'y of Ir., Dublin, Ir.), Dec. 4, 2016, at 6. http://www.thepsi.ie/Libraries/Folder_Pharmacy_Practice_Guidance/03_5_PSI_Guidance_for_Pharmacists_on_the_Safe_Supply_of_Non-Prescription_Levonorgestral_1500mcg_for_Emergency_Hormonal_Contraception.sflb.ashx

[143] *Id.* ("If supply to a patient is likely to be affected by the personal moral standards of a pharmacist, he or she must inform their superintendent and supervising pharmacist, who must ensure that suitable policies and procedures are in place to ensure patient care is not jeopardised and the patient is facilitated in accessing the information or service required to meet their needs.").

[144] *Our Campaign*, RE(AL)-PRODUCTIVE HEALTH, https://realproductivehealth.com/our-campaign-2/ (last visited Feb. 28, 2018).

[145] CODE OF CONDUCT FOR PHARMACISTS, *supra* note 134.

[146] Brief of Nat'l and State Pharmacists' Ass'ns as Amici Curiae Supporting Petitioners at 16, Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016) (No. 15-862).

Additionally, the "reasonable action" standard is sufficiently flexible to cover situations in which a facilitated referral will not ensure patient access to the drug. If the facilitated referral process will not work to ensure patient access to the drug, the pharmacist will be bound by the explicit words of Principle 1 that enshrine a patient-centered model of providing care.[147] Thus, pharmacists who work at pharmacies that truly represent the only means of accessing drugs in their communities will not be able to shirk their obligations by referring patients to other pharmacies inaccessible to them. The fact that a case alleging such a situation has not arisen in the Irish court system suggests that the current system is adequately meeting the needs of patients. Calls to dispense with the facilitated referral system[148] are much like the State of Washington's stocking and dispensing regulations: a solution without a problem.

IV. PROPOSED SOLUTION TO THE *STORMANS V. WIESMAN* PROBLEM

In the mid-2000s push to ensure access to emergency contraceptives, the State of Washington went too far. While ensuring access to these drugs can be considered a compelling state interest,[149] there were alternative methods the State could have used that would have better protected the conscience rights of pharmacists who believe in good faith that they cannot dispense these drugs without violating their religion. By denying certiorari in *Stormans v. Wiesman*, the Supreme Court missed an important opportunity to clarify the meaning of the Free Exercise Clause by striking down Washington's regulations, which are inferior as a matter of policy to the ROI's "reasonable action" approach.[150]

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[147] CODE OF CONDUCT FOR PHARMACISTS, *supra* note 134.

[148] *Our Campaign*, *supra* note 144.

[149] Sch. of the Ozarks, Inc. v. U.S. Dep't of Health & Human Servs., 86 F. Supp. 3d 1066, 1074–76 (W.D. Mo. 2015).

[150] This Note does not argue that the ROI approach is the only constitutional approach to regulations on stocking and dispensing emergency contraceptives, but only that the regulations passed by Washington are unconstitutional and that the ROI approach would represent the best policy for the state to adopt as an alternative. In other words, the Supreme Court could have used the *Stormans* case to suggest the ROI approach in *dicta*, since the only justiciable question which the *Stormans* case would have presented to the Court is whether the specific regulations adopted by Washington are constitutional as applied to the Stormans family and other religious objectors.

A. Washington's Regulations Are Unconstitutional under Smith *and* Church of Lukumi Babalu Aye

Washington's regulations violate the Free Exercise Clause because they are not neutral laws of general applicability. As an initial matter, the Ninth Circuit was incorrect in finding that the regulations at issue were "neutral" for *Smith* purposes.[151] As the Supreme Court explained in *Church of Lukumi*, a regulation is not neutral if it accomplishes a "religious gerrymander"; that is, if the regulations are neutral on their face but only touch religiously-based conduct.[152] As Justice Alito noted in his dissent from the decision to deny certiorari, the trial court found plentiful evidence in the form of emails and other communications between those responsible for drafting Washington's regulations to show that they intended them primarily to stamp out religious-based objections to the dispensing of emergency contraceptives while leaving objections for secular reasons untouched.[153] This is just the kind of evidence that was present in *Church of Lukumi* and that Justice Kennedy found persuasive in his assessment of whether or not the regulation was neutral.[154]

Furthermore, the Washington regulations are not generally applicable. The trial court correctly found that the Washington regulations fell under one of the exceptions to *Smith*: laws that give an administrator the discretion to make an individualized assessment are by definition not "generally applicable."[155] While the Ninth Circuit concluded that the Board itself was not permitting exceptions other than those specifically enumerated,[156] Justice Alito countered that the Ninth Circuit had not given appropriate deference to the trial court's conclusion of fact on the subject.[157]

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[151] Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1079 (9th Cir. 2015).

[152] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 535–36 (1993) (citations and internal quotations omitted).

[153] Stormans, Inc. v. Wiesman, 136 S. Ct. 2433, 2434–35 (2016).

[154] *Lukumi Babalu Aye*, 508 U.S. at 526–27.

[155] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 884 (1990).

[156] *Stormans*, 794 F.3d at 1080–81.

[157] Stormans, Inc. v. Wiesman, 136 S. Ct. at 2438. Specifically, the trial court had found persuasive the testimony of individual board members that the Board *as a unit* was allowing these exemptions to occur; the Ninth Circuit independently concluded that the testimony of individual board members could not substitute for the entire Board's official commentary. *Id.*(citations omitted).

Since the regulations are neither neutral nor generally applicable, they must be subjected to *Sherbert*-style strict scrutiny.[158] The Court has previously assumed, without deciding, a compelling government interest in ensuring that citizens have access to contraception.[159] Because the State of Washington asserted a related interest in passing the regulations,[160] the first element of strict scrutiny may be satisfied. The problems arise in the application of the second part of the test.

After the government has proved a compelling interest, it must show both that the action being challenged actually advances the interest, and that it is the least restrictive means of advancing that interest.[161] The Washington regulations satisfy neither requirement. First, the trial court, reinforced by Justice Alito, had already made a compelling argument that the regulations are underinclusive with respect to the advancement of its interest in providing access to contraceptives.[162] Specifically, the regulations are underinclusive in the sense that they allow exemptions for a wide variety of secular reasons, both explicitly in the regulations and as established in practice.[163] This causes the regulations not to advance the State's interest in that citizens still will not be able to access contraceptives as long as the pharmacy can provide a valid secular reason for not stocking or dispensing them.[164]

Second, the regulations also do not advance the state interest in the sense that they leave religious objectors with only one option: getting out of the pharmacy business.[165] As Justice Alito explained, this would leave the entire community served by that pharmacy without a way of accessing *any* medications at all;[166] this directly contradicts Washington's asserted interest in ensuring access to all medications, including contraceptives.[167]

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[158] Marin, *supra* note 25, at 1438.

[159] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2780 (2014).

[160] *Stormans*, 794 F.3d at 1071.

[161] Sherbert v. Verner, 374 U.S. 398, 406–09 (1963).

[162] Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 955–56 (W.D. Wash. 2012), rev'd sub nom. Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015).

[163] *Id.*

[164] *Id.* at 969–70.

[165] Stormans, Inc. v. Wiesman, 136 S. Ct. 2433, 2435 (2016) (citations omitted).

[166] *Id.* at 2440.

[167] *Stormans*, 854 F. Supp. 2d at 942.

Finally, the Washington regulations are not the least restrictive means of advancing the state's asserted interest. At trial, the witnesses from the Board of Pharmacy were unable to identify a *single* instance of a person being denied access to a drug because of the system of facilitated referral,[168] and the State itself even admitted that such referrals are "often the most effective means to meet the patient's request when a pharmacy or pharmacist is unable or unwilling to provide the requested medication."[169] The Stormans family's pharmacy itself is located within a five-mile radius of thirty other pharmacies which stock and dispense the emergency contraceptives that the Stormans family were unwilling to dispense.[170] In sum, because the Washington regulations are neither neutral nor generally applicable, and since they cannot pass the *Sherbert* test, Washington should adopt an alternative method for ensuring access to emergency contraceptives that does not violate the Free Exercise Clause. The ROI approach provides the best alternative from a policy perspective.

B. The ROI Approach is the Best Alternative from a Policy Perspective

Had the Court exercised its opportunity to clarify the meaning of the Free Exercise Clause by striking down Washington's regulations, the state would have been forced to craft new ones. The ROI's "reasonable action" standard, with its focus on facilitated referrals, represents the best option from a policy perspective for a multitude of reasons.

First, the ROI approach was created by the pharmacy industry's own self-regulatory body in Ireland,[171] meaning that it best reflects the opinions of those in the industry on how the problem should be addressed. Because pharmacists themselves are in the best position to determine both what steps are necessary to ensure access—since they actually perform the services that are being accessed—and whether and how to draw the line between encouraging and compelling pharmacists to perform their function in the community—since they themselves must abide by the regulations they choose—their opinions on the

[168] *Id.* at 947–48.
[169] *Id.* at 934.
[170] *Stormans v. Wiesman*, BECKET, *supra* note 8.
[171] CODE OF CONDUCT FOR PHARMACISTS, *supra* note 134.

subject should be given special weight. Notably, the ROI approach comports with the position taken by the over thirty U.S. state pharmacist associations which together filed an amicus brief to the Stormans family's petition for certiorari.[172] In sum, the pharmacists themselves have decided that the facilitated referral approach is the best way to deal with the access problem.

The second reason that the ROI approach represents the best policy approach to this problem is that it has engendered little to no judicial controversy in Ireland. As an initial matter, although the ROI and the United States may not be similar from a demographic perspective,[173] both countries have long grappled with similar problems of balancing religious rights with rapidly changing societal attitudes toward reproductive rights.[174]

There has not been a single judicial challenge to the "reasonable action" standard of facilitated referrals, and this alone should carry great weight in evaluating its effectiveness. While critics have asserted that problems do exist,[175] these alleged problems have not manifested themselves as tangible challenges to the effectiveness of facilitated referrals. This comports with Washington's own experience and that of the many other states which provide conscience exemptions; an access problem with facilitated referrals has simply not been shown to exist.[176] In the absence of such a problem, it defies reason to craft a solution which compels pharmacists to violate their most basic beliefs.

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[172] Brief of Nat'l and State Pharmacists' Ass'ns as Amici Curiae Supporting Petitioners at 1, Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016) (No. 15-862).

[173] For example, about 84% of Ireland's population identifies as Catholic, Paul Hyland, *Number of Catholics at Record High, Despite Lowest Percentage Ever*, THE JOURNAL IE, Oct. 18, 2012, http://www.thejournal.ie/regious-statistics-census-2011-640180-Oct2012/, while only 20% of Americans do, *Religious Landscape Study*, PEW RESEARCH CENTER, http://www.pewforum.org/religious-landscape-study/ (last visited Feb. 28, 2018).

[174] *See generally* Dean van Nguyen, *Why Ireland Has Lagged Behind the Rest of Europe on Reproductive Rights*, THE ATLANTIC (May 3, 2013), http://www.theatlantic.com/international/archive/2013/05/why-ireland-has-lagged-behind-the-rest-of-europe-on-reproductive-rights/275542/; *and* Stephanie Russell-Kraft, *The Right to Abortion—and Religious Freedom*, THE ATLANTIC (Mar. 3, 2016), http://www.theatlantic.com/politics/archive/2016/03/abortion-rights-a-matter-of-religious-freedom/471891/.

[175] *Our Campaign*, *supra* note 144.

[176] Stormans, Inc. v. Wiesman, 136 S. Ct. 2433, 2435 (2016).

The third and final reason that the ROI approach represents the best policy choice is that its "reasonable action" standard is flexible enough to advance the state's interest in solving access problems once they do arise. Washington could adopt the standard while including, in a commentary to the rule, a stipulation that reasonable action might require an individual pharmacy to stock and dispense emergency contraceptives if that pharmacy is actually the only option reasonably available to members of the community in which it exists.

Notably, this option would satisfy the "least restrictive means" element of the *Sherbert* test—it would only require that objectors stock and dispense emergency contraceptives when there is no other option available to the people of the community. While this might cause some smaller rural pharmacies to close their doors rather than sell the drugs, Justice Alito acknowledged that the marketplace would likely act to fill these gaps.[177]

CONCLUSION

Despite the decline of adherence to organized religion in America generally,[178] there is no doubt that the Free Exercise Clause still has an important role to play in protecting the rights of religious individuals not to be compelled to act against their fundamental beliefs. When the Supreme Court does not provide review of state court decisions that likely violate its substance, it leaves the states without the guidance necessary to fashion their laws in compliance with it.

At the same time, there is no doubt that attitudes in the United States toward the use of contraceptives will continue to evolve. As long as these competing aspirations—to safeguard religious liberty and to protect the right of citizens' access to the medications they need—continue to conflict with one another, the Court must exercise its power to protect important constitutional rights. By choosing not to grant certiorari in the *Stormans* case, the country's highest court has thrown the viability of future Free Exercise claims into doubt. Given the availability of a workable alternative to Washington's regulations in the form of

[177] *Id.* at 2440.

[178] *See generally* Mark L. Movsesian, *Defining Religion in American Law: Psychic Sophie and the Rise of the Nones*, ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES (Feb. 1, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2399470.

the "reasonable action" approach, the Court's decision not to strike down Washington's regulations is particularly troubling. The current state of affairs is unacceptable to people like the Stormans, and there is a compelling argument to be made that it should not be acceptable to those who value the protections of the rights of the minority which have characterized this country throughout its existence.