



Written by [Steve Byas](#) on July 1, 2016

## Supreme Court Rejects Religious Liberty in Washington Pharmacy Case

A recent Supreme Court action is perhaps the clearest example yet that a majority of the justices have no respect for the concept of religious liberty. The First Amendment to the Constitution specifically bans laws that restrict “religious exercise,” yet the Court refused this week, by a vote of 5-3, to hear a case from Washington State in which the government there actually *targets* religious practice.



This leaves in place the ruling of the 9th Circuit Court of Appeals in San Francisco that regulations promulgated by a state board in Washington State may require pharmacies to fill an emergency contraceptive drug, regardless of the owners’ religious objections. In fact, the regulations adopted in the state specifically put religious objections in the crosshairs.

Justices Samuel Alito and Clarence Thomas, and Chief Justice John Roberts all voted to hear the case; however, it takes four members of the Court to grant a writ of certiorari — an order to the lower court to send the documents to them for review.

The drug in question is known as Plan B, an emergency contraception which is a high dose of the drug found in ordinary birth-control pills. It is reputed to lower the risk of pregnancy by almost 90 percent if taken within the first three days of unprotected sex. Proponents argue that it is not the same as RU-486, the “abortion pill,” because it has no effect on a woman who has already conceived.

The issue in this case is whether a law that *prohibits* religiously motivated conduct violates the Free Exercise Clause when it *exempts* the same conduct when done for a host of secular reasons, when it has been enforced against only religious conduct, and when it has a history showing an intent to target religion.

While pharmacies are required under the regulations to fill legal prescriptions, individual pharmacists with moral objections may choose to refer patients to another pharmacist — however, it has to be another pharmacist in the same store. This regulation is, of course, impractical and discriminatory, placing a greater burden on an independently-owned drugstore than a larger chain store, as most small drugstores have only one pharmacist on staff at a time.

And, as Associate Justice Alito noted in a 15-page dissent, “Washington State regulations ... are likely to make a pharmacist unemployable if he or she objects on religious ground to dispensing certain prescription medications.” Rather than hire an extra pharmacist to make sure the pills are dispensed, so as to respect the conscience of a pharmacist who will not dispense the drugs, most businesses, large or small, will simply not hire such pharmacists, as a rational business decision.

In addition to the attack upon religious liberty, the Washington State regulations represent yet another attack upon the ability of small business owners to make a living. Thirty-eight state and national pharmacy associations had supported the Supreme Court taking the case, arguing that it should be up



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to each drugstore owner to choose what products to stock.

One of the independent stores — Stormans, Incorporated, the owner of Ralph's Thriftway in Olympia, Washington, a grocery store that houses a pharmacy — sued, along with two pharmacists who said the rules required them to violate their religious beliefs against dispensing such a drug. The Stormans are a devout Christian family who contend that the "morning after" emergency contraceptive pills are a form of abortion.

Washington State Attorney General Bob Ferguson was pleased with the Supreme Court's refusal to take the case. "Patients should know that when they need medication, they won't be refused based on the personal views of a particular pharmacy owner," he asserted, adding, "The appeals court ruling upheld today protects that principle."

Not surprisingly, the American Civil Liberties Union, which has a well-deserved reputation of having an anti-Christian bias, also praised the action of the Court. The ACLU's Louis Melling stated, "When a woman walks into a pharmacy, she should not fear being turned away because of the religious beliefs of the owner or the person behind the counter."

But the attorney for the Stormans — Kristen Waggoner of the conservative Christian legal group Alliance Defending Freedom — offered a different viewpoint. "Americans should be free to peacefully live and work consistent with their faith without fear of unjust punishment, and no one should be forced to participate in the taking of human life," she declared.

Waggoner certainly had a sympathetic ear with Justice Alito, as evidenced by several remarks made in his stirring dissent, including: "The dilemma this creates for the Stormans family and others like them is plain: Violate your sincerely held religious beliefs or get out of the pharmacy business."

In fact, Alito charged that the state's regulations were adopted with "hostility to pharmacists whose religious beliefs regarding abortion and contraception are out of step with prevailing opinion in the state," with the explicit goal "to stamp out religious objectors."

In his dissent, Alito provided strong evidence for his assertion, noting that Ralph's employees would inform customers who asked for the drug that while their pharmacy did not carry the pills, there were other drugstores — more than 30 within five miles of Ralph's Thriftway — that did.

Alito contended that, in addition to protecting the rights of conscience, there was a "practical" side to such referrals. "Pharmacies can stock only a small fraction of the more than 6,000 FDA-approved drugs now available," he pointed out.

He noted that the District Court had held for the Stormans, before being overturned by the 9th Circuit, explaining: "The District Court found that the regulations were adopted with 'the predominant purpose' to 'stamp out the right to refuse' to dispense emergency contraceptives for religious reasons."

According to Alito, the District Court made that conclusion because, "After the [Pharmacy] Board initially voted to adopt rules allowing referrals for reasons of conscience, [Washington Governor Jay Inslee] not only sent another letter opposing the draft rules," but warned publicly he would remove any board members who did not adopt the rules excluding conscience objections.

Steven Saxe, the executive director of the board, was equally blunt. "The public, legislators and governor are telling us loud and clear that they expect the rule to protect the public from unwanted intervention based on the moral beliefs ... of a pharmacist." Saxe, who drafted what could be characterized as anti-Christian regulations, stated, "The moral issue is the basis of the concern," adding



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that his desire was “to draft language to allow facilitating a referral for *only these non-moral or non-religious reasons.*” [Emphasis added.]

Saxe allowed that there were other reasons to refuse to dispense certain drugs that were legitimate, such as “clinical, fraud, business, skill, etc.,” but that religious objections were *not* legitimate.

Judge Alito cited the findings of the District Court that the Pharmacy Board’s intent was to “target pharmacies that made referrals for religious or moral reasons.” The District Court also “considered the design of the regulations and concluded that they discriminated against religious objectors,” Alito said. He added, “The net result of these rules is that, so long as there is customer demand for emergency contraceptives, pharmacies like Ralph’s must stock and dispense them regardless of any religious or moral objections the owners may have.”

Other reasons that a pharmacy could give for refusal to dispense would include financial reasons, such as the additional paperwork required, a drug’s short shelf life, the possibility that the drug might attract crime, that the drug might require compounding, or even not wanting to stock medications that fall outside of the pharmacy’s niche, such as pediatrics, diabetes, or fertility. Pharmacies may also decline to dispense drugs that are on the shelf simply because they do not take Medicare or Medicaid or even a patient’s particular private insurance.

But religious or moral objections are not acceptable to the governor of Washington, the state’s attorney general, the state pharmacy board, the ACLU, the 9th Circuit Court of Appeals, and five members of the Supreme Court — despite the clear wording of the First Amendment protecting religious exercise.

This decision by the U.S. Supreme Court, which in effect puts its stamp of approval on what the 9th Circuit Court of Appeals and the state authorities in Washington did, leads to an obvious conclusion: Not only is religious practice not something in their worldview to be protected from infringement by the government, but it is now something to be specifically targeted for elimination by government laws and regulations, at both the state and federal levels.

Justice Alito declared that the Court’s decision not to hear this case was “an ominous sign” for the future of religious liberty claims.

*Steve Byas is a professor of history at Randall University in Moore, Oklahoma. His book History’s Greatest Libels is a challenge to unfair attacks upon certain historical figures such as George Washington, Christopher Columbus, Marie Antoinette, and Joseph McCarthy.*



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