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ARTICLE I, SECTION 11: A POOR "PLAN B" FOR WASHINGTON'S RELIGIOUS PHARMACISTS

Noel E. Horton*

Abstract: In *Stormans, Inc. v. Selecky*,[1] a group of Washington pharmacists contended their religious beliefs precluded them from dispensing the drug Plan B, a post-coital emergency contraceptive. They based their argument on rights conferred by the Free Exercise Clause of the First Amendment to the United States Constitution.[2] A United States District Court found in the pharmacists' favor and enjoined enforcement of rules issued by the Washington State Board of Pharmacy requiring pharmacies to deliver medications.[3] The Ninth Circuit reversed, finding that the district court erroneously applied a heightened level of scrutiny to a neutral law of general applicability.[4] Interestingly, the pharmacists did not bring a claim under the Washington State Constitution, a document that has been interpreted to confer greater protection for free exercise rights than the U.S. Constitution.[5] This Comment argues that even under the Washington State Constitution's heightened protection of free exercise, the pharmacists' position in *Stormans* would ultimately fail. The Board's rules protect public health and accommodate individual religious objections, thereby satisfying the Washington State Supreme Court's strict scrutiny test.

INTRODUCTION

Pharmacists play a critical role in our society. Our nation is one where medications have become intertwined with many people's daily lives.[6] When abused or misused, many of these prescription medications can create serious health problems.[7] To manage potential deleterious effects,

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1. 586 F.3d 1109 (9th Cir. 2009).

2. U.S. CONST. amend. I; *Stormans*, 586 F.3d at 1117, 1119.

3. Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1266 (W.D. Wash. 2007).

4. *Stormans*, 586 F.3d at 1113, 1142.

5. *See infra* Part III.

6. According to a report released by the U.S. Department of Health and Human Services, from 2003 through 2006, 46.9% of the population used at least one prescription medication over the course of a month. U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH, UNITED STATES, 2009: WITH SPECIAL FEATURE ON MEDICAL TECHNOLOGY 350 (Jan. 2010), *available at* http://www.cdc.gov/nchs/data/hus/hus09.pdf.

7. *See* Emma Ashburn, *Dramatic Rise in Painkiller Drug Abuse: U.S. Officials*, REUTERS (Jul. 15, 2010), http://www.reuters.com/article/idUSTRE66E66W20100715 (referencing a 400% increase over the past ten years in the number of Americans treated for prescription drug abuse).

states license professional pharmacists to handle and dispense medications.[8] Consequently, pharmacists have become society's gatekeepers to medicines that individuals can legally obtain from no other source. Many of these medications are controversial.[9] Because pharmacists are human beings with their own moral and religious convictions, the prospect of providing certain controversial medications may seem morally reprehensible to some of them. Some pharmacists have been placed in a position where their religious beliefs prohibit dispensing the very medications with which they have been entrusted.[10] The health consequences of such a scenario are especially serious when dealing with time-sensitive medications or patients with limited access to health care facilities.

The Washington State Board of Pharmacy found this state of affairs to be disconcerting; in 2006, it began drafting new regulations to address the issue.[11] The Board solicited numerous comments from pharmacists and advocacy groups.[12] Most of these comments concerned the controversial drug Plan B,[13] a post-coital emergency contraceptive.[14] In the end, the Board adopted two new regulations: (1) an amendment to an

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8. *See* Steven W. Huang, *The Omnibus Reconciliation Act of 1990: Redefining Pharmacists' Legal Responsibilities*, 24 AM. J.L. & MED. 417, 428–29 (1998) ("customer[s] rel[y] on the pharmacist because the pharmacist 'holds himself out as one having the peculiar learning and skill, and license from the state, to fill prescriptions.' This trust places not only the customer's health, but, at times, also his or her life in the hands of a pharmacist[] . . . .") (quoting Burke v. Bean, 363 S.W.2d 366, 368 (Tex. Civ. App. 1962)); Sarah J. Vokes, *Just Fill the Prescription: Why Illinois' Emergency Rule Appropriately Resolves the Tension Between Religion and Contraception in the Pharmacy Context*, 24 LAW & INEQ. 399, 411–12 (2006).

9. For a perspective on the controversy behind emergency contraception specifically, see Claire A. Smearman, *Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists*, 48 ARIZ. L. REV. 469, 490–91 (2006).

10. *See, e.g.*, Stormans, Inc. v. Selecky, 586 F.3d 1109, 1117 (9th Cir. 2009) ("[a]ppellees assert that their personal religious views do not permit them to dispense Plan B").

11. Brief for the Appellants at 10–11, Stormans, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009) (No. 07-36039, 07-36040) (describing the progression of the rulemaking process initiated by the Washington State Board of Pharmacy).

12. *Id.* at 11–12.

13. *Id.*

14. Plan B is composed of the drug levonorgestrel. The drug reduces the chance of pregnancy after unprotected sex or contraceptive failure. As of July 2009, Plan B was approved by the Food and Drug Administration (FDA) for over the counter use by women aged 17 years and older. Women younger than 17 may obtain the drug by prescription. Letter from Scott Monroe and Andrea Leonard-Segal, Center for Drug Evaluation and Research, to Michele G. Walsh, Clinical Regulatory Affairs (July 10, 2009) (on file with author), *available at* http://www.accessdata.fda.gov/drugsatfda_docs/appletter/ 2009/021998s000ltr.pdf.

existing regulation governing individual pharmacists,[15] and (2) a new regulation governing pharmacies.[16] The new rules allow individual pharmacists to refuse to distribute medications for religious reasons, but make the pharmacy responsible for ensuring that the drugs are nonetheless dispensed.[17]

The day before the rules took effect, a group of Washington pharmacists challenged the rules under the Free Exercise Clause of the U.S. Constitution's First Amendment.[18] The United States District Court for the Western District of Washington accepted their argument and enjoined enforcement of the rules in *Stormans, Inc. v. Selecky*.[19] On appeal, the Ninth Circuit Court of Appeals reversed, concluding that because the regulations were neutral and generally applied, the district court erroneously applied heightened scrutiny.[20]

The pharmacists in *Stormans* rested their free exercise argument solely on the First Amendment.[21] But what if they had based their argument on the Washington State Constitution? In the wake of the Board's recently announced decision to undertake a new rulemaking process,[22] the answer to this question is especially relevant. Washington courts have interpreted the Free Exercise Clause of the Washington State Constitution[23] to be more protective of free exercise rights than the First Amendment.[24] Under Washington's free exercise clause, article I, section 11 of the Washington State Constitution, the State must show that any action burdening free exercise—even those that are neutral and generally applied—serve a compelling interest and employ the least restrictive means to achieve that interest.[25] This Comment argues that an

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15. 07-14 Wash. Reg. 25 (July 26, 2007) (codified at WASH. ADMIN. CODE § 246-863-095 (2007)).

16. *Id.* (codified at WASH. ADMIN. CODE § 246-869-010 (2007)).

17. *See* Stormans, Inc. v. Selecky, 586 F.3d 1109, 1116 (9th Cir. 2009) (summarizing pharmacy and pharmacist responsibilities under the new rules).

18. *Id.* at 1116–17, 1119; Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1253 (W.D. Wash. 2007).

19. *Stormans*, 524 F. Supp. 2d at 1249, 1266.

20. *Stormans*, 586 F.3d at 1113.

21. Complaint at 16–17, Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245 (W.D. Wash. 2007) (No. C07-5374RBL).

22. Jordan Schrader, *A Reversal on Plan B: "Morning After" Pill: Rule Would Let Pharmacists Refuse to Dispense Drug*, THE OLYMPIAN, July 14, 2010, at A1.

23. WASH. CONST. art. I, § 11.

24. *See infra* Part III.

25. First Covenant Church v. City of Seattle, 120 Wash. 2d. 203, 226–27, 840 P.2d 174, 187 (1992).

article I, section 11 challenge by the pharmacists would ultimately fail. The interests served by the rules are sufficiently compelling, and the rules are narrowly tailored to achieve those interests.

Part I of this Comment provides a brief overview of free exercise law under the First Amendment. Part II shows how the Ninth Circuit's reasoning in *Stormans* is consistent with established First Amendment case law. Part III describes how the Washington State Supreme Court has interpreted article I, section 11 to be more protective than the First Amendment with respect to free exercise rights. Part IV depicts how Washington courts have consistently held that article I, section 11, even with its greater protection, generally does not shield citizens from state actions that promote public health, peace, and safety interests, such as laws promoting medical care. Finally, Part V argues that the pharmacy rules serve compelling public health interests and would thus be upheld in the face of an article I, section 11 challenge.

I. THE FIRST AMENDMENT DOES NOT REQUIRE HEIGHTENED SCRUTINY OF NEUTRAL AND GENERALLY APPLIED LAWS INHIBITING FREE EXERCISE

Under modern First Amendment jurisprudence, neutral and generally applicable laws burdening free exercise need only satisfy rational basis scrutiny.[26] This level of scrutiny requires the State to show merely that the law is a rational means to achieve a legitimate end.[27] To defeat a law under this standard, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . . ."[28]

The First Amendment provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[29] This provision embodies two distinct protections known conventionally as the Establishment and Free Exercise Clauses. Although these rights originally constrained only the federal government, they have been made applicable to the states through the Fourteenth Amendment.[30] Each of the religious protections

26. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879, 885 (1990); *see also infra* note 41.

27. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955).

28. Heller v. Doe by Doe, 509 U.S. 312, 320 (1993) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

29. U.S. CONST. amend. I.

30. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (Establishment Clause); Cantwell v. Conn., 310 U.S. 296, 303 (1940) (Free Exercise Clause).

guaranteed by the First Amendment has spawned its own intricate set of case law. Cases involving government interference with personal religious behavior or conduct typically implicate the Free Exercise Clause rather than the Establishment Clause.[31]

For example, in *Sherbert v. Verner*,[32] the Supreme Court held that the Free Exercise Clause requires application of the strict scrutiny test.[33] The Court determined that a Seventh Day Adventist could not be denied unemployment compensation because she refused to take a job that required her to work on her Sabbath.[34] Under strict scrutiny, a court must invalidate any government action that burdens the free exercise of religion unless such action serves a compelling state interest and uses the least restrictive means to achieve that interest.[35]

The Supreme Court modified the *Sherbert* test twenty-seven years later when it decided *Employment Division, Department of Human Resources of Oregon v. Smith.*[36] In that case, the Court upheld the denial of unemployment benefits to Native Americans who used peyote as part of their religious beliefs in violation of state law.[37] Justice Scalia, speaking for the majority, distinguished between laws whose purpose is to curtail free exercise of religion and those that are neutral and generally applied but have an incidental effect on religion.[38] The *Smith* majority reasoned that the First Amendment does not protect offenses against the latter type of law, noting that the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[39] Thus, a state may, without offending the First Amendment,

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31. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 3d Ed., § 12.3, 1247 (2006); *see also* 16A AM. JUR. 2D *Constitutional Law* § 443 (2010).

32. 374 U.S. 398 (1963).

33. *Id.* at 403.

34. *Id.* at 399–402.

35. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981).

36. 494 U.S. 872 (1990).

37. *Id.* at 874, 890.

38. *Id.* at 878.

39. *Id.* at 878–88. Justice Scalia's assertion, however, is not as straightforward as it might appear. In *Sherbert*, the Court struck down an unemployment compensation scheme because it conflicted with an individual's religious beliefs. 374 U.S. at 403–09. In *Wisconsin v. Yoder*, the Court held that the State could not enforce a law requiring children under 16 years old to attend public school against Amish children as it would unduly interfere with free exercise rights under the First and Fourteenth Amendments. 406 U.S. 205, 234–36 (1972). Justice Scalia distinguished these cases by noting that *Sherbert* "merely stand[s] 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," *Smith*, 494 U.S. at 884, and that *Yoder* "involved not the Free Exercise

enact a law that burdens free exercise of religion provided that the law is neutral and generally applicable.[40] Laws fitting into this category need only survive rational basis scrutiny.[41]

Although the Court in *Smith* discussed at length its reasons for exempting neutral and generally applied laws from strict scrutiny in free exercise cases, it did not elaborate on the meaning of the terms "neutral" and "generally applicable."[42] The Court provided additional insight on this point in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*.[43] Justice Kennedy, writing for the majority, acknowledged that "[n]eutrality and general applicability are interrelated," and "failure to satisfy one requirement is a likely indication that the other has not been satisfied."[44] Justice Kennedy then noted that each term had a distinct meaning in the free exercise context. Neutrality concerns whether "the object or purpose of the law is the suppression of religion or religious conduct."[45] At a minimum, the law must be "facial[ly] neutral[]"[46] toward religion, meaning that the law's text must not "refer[] to a religious practice without a secular meaning."[47] Additionally, even a law not couched in religious terms may be non-neutral if it "targets religious conduct for distinctive treatment."[48] In contrast, Justice Kennedy explained that general applicability relates to whether the law "selective[ly] . . . impose[s] burdens only on conduct motivated by

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Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." *Id.* at 881. Some commentators have criticized Justice Scalia's assertions on both fronts. *See, e.g.*, Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 191–92 (2002); Cedric Merlin Powell, *The Scope of National Power and the Centrality of Religion*, 38 BRANDEIS L.J. 643, 669–71 (2000); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1121–24 (1990).

40. *Smith*, 494 U.S. at 879, 884–85.

41. Although Justice Scalia did not explicitly state that neutral and generally applicable laws burdening free exercise must be analyzed under rational basis scrutiny, lower courts have consistently interpreted *Smith* as so holding. *See, e.g.*, Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 649 (10th Cir. 2006); Miller v. Reed, 176 F.3d. 1202, 1206–07 (9th Cir. 1999); Brunson v. Dep't of Motor Vehicles, 85 Cal. Rptr. 2d 710, 712 (Cal. Ct. App. 1999); Horen v. Commonwealth, 479 S.E.2d 553, 557 (Va. Ct. App. 1997).

42. *Smith*, 494 U.S. at 879–81, 886 n.3 (discussing "neutral" and "generally applicable" laws without explicitly defining either term).

43. 508 U.S. 520 (1993).

44. *Id.* at 531. Justice Scalia in his concurring opinion stated that in his view the two terms—"neutrality" and "general applicability"—"are not only 'interrelated,' . . . but substantially overlap," making a clear distinction unnecessary. *Id.* at 557 (Scalia, J., concurring).

45. *Lukumi*, 508 U.S. at 533.

46. *Id.*

47. *Id.*

48. *Id.* at 534.

religious belief."[49] Therefore, if a law is substantially underinclusive in that it seems to disproportionately apply only to religious conduct, the law is not "generally applied."[50]

Thus, *Smith* currently sets the baseline standard for cases arising under the First Amendment's Free Exercise Clause.[51] Parties seeking heightened scrutiny of a law burdening free exercise of religion must demonstrate that the law is not neutral or generally applicable, as those terms are understood in light of *Lukumi*.

II. THE WASHINGTON PHARMACY RULES ARE NEUTRAL AND GENERALLY APPLICABLE AND SHOULD WITHSTAND RATIONAL BASIS SCRUTINY

In *Stormans, Inc. v. Selecky*,[52] the Ninth Circuit Court of Appeals was called upon to determine whether Washington's pharmacy rules are neutral and generally applicable.[53] The pharmacy rules impose upon pharmacies affirmative duties that could potentially clash with personal religious convictions.[54] Nonetheless, the Ninth Circuit held in *Stormans* that the rules do not target religion specifically, but rather apply neutrally to all pharmacists.[55] The court's analysis is consistent with *Smith*, as evidenced by similar cases interpreting the scope of the First Amendment's Free Exercise Clause.[56] Ultimately, the court noted that

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49. *Id.* at 543.

50. *Id.* (noting that the challenged ordinances are underinclusive to the ends of protecting public health and preventing cruelty to animals). The Court also declined to "define with precision the standard used to evaluate whether a prohibition is of general application" because in its view the challenged ordinances fell well below the standard. *Id.*

51. The Court has since reaffirmed its *Smith* holding despite legislative attempts to subvert it. In 1993, Congress responded to the Court's holding in *Smith* by passing the Religious Freedom and Restoration Act (RFRA). Pub. L. No. 103-141 (codified as amended at 42 U.S.C. § 2000bb-1–4 (1994)). This law sought to override *Smith* and restore the Court's prior free exercise analysis originally articulated in *Sherbert*. *See* 42 U.S.C. § 2000bb(a). The Court declared this act unconstitutional in *City of Boerne v. Flores*. 521 U.S. 507, 511 (1997). In this case, the Archbishop of San Antonio applied for a construction permit to make alterations to the St. Peter Catholic Church in Boerne, Texas. *Id.* at 512. The city denied the application relying on a recently passed historic landmark preservation ordinance. The Archbishop brought suit relying on the RFRA. *Id.* at 511–12. The Court held that the law exceeded Congress' enforcement powers under Section 5 of the Fourteenth Amendment. *Id.* at 532.

52. 586 F.3d 1109 (9th Cir. 2009).

53. *Id.* at 1127–28.

54. *See id.* at 1120–22.

55. *Id.* at 1113.

56. *See, e.g.*, N. Coast Women's Care Med. Grp., Inc. v. Superior Court, 189 P.3d 959, 965–68 (Cal. Sup. Ct. 2008); Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 81–89

the State's interests in the rules were legitimate and remanded the case to the district court to apply rational basis scrutiny.[57]

A. Washington's Requirement that Pharmacies Timely Deliver Lawful Medications May Burden Free Exercise of Religion

A rule requiring pharmacies to dispense medications despite religious objection has the potential to interfere with private free exercise. The Washington State Board of Pharmacy[58] no doubt acknowledged this fact when it adopted the rules. After receiving some queries on the subject, the Board, in August 2005, began to discuss what it could do about pharmacists who declined to dispense emergency contraceptives.[59] After concluding that existing statutes and regulations were unclear, the Board considered adopting new rules to clarify that such conduct would be deemed unprofessional and punishable with action against pharmacists' licenses.[60] To this end, the Board underwent a lengthy rule-adoption process, soliciting numerous comments from interested parties.[61] Most of the comments focused on whether pharmacists should be allowed to refuse to dispense a lawful prescription for the post-coital emergency contraceptive Plan B.[62] Eventually, the Board adopted two rules: (1) an amendment to an existing regulation governing individual pharmacists,[63] and (2) a new regulation governing pharmacies.[64] The new rules took effect July 26, 2007.[65]

(Cal. Sup. Ct. 2004); Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459, 463–65 (N.Y. Ct. App. 2006).

57. *Stormans*, 586 F.3d at 1137–38.

58. Washington State has established a state Board of Pharmacy to regulate, enforce laws, establish licensing qualifications, and promulgate rules pertaining to pharmacy practice within the state. *See* WASH. REV. CODE § 18.64.005 (1990).

59. The Board specifically discussed what, if any, disciplinary actions it could take against pharmacists who confiscate or destroy customers' prescriptions for emergency contraceptives. Brief for the Appellants, *supra* note 11, at 9–10.

60. *Id.* at 10.

61. The formal process began in January 2006. The Board went through six distinct drafts and, working with the Governor's office, consulted various groups including Planned Parenthood, the State Pharmacy Association, the Northwest Women's Law Center, and the Department of Health. *Id.* at 9–11.

62. *Id.* at 11–12.

63. 07-14 Wash. Reg. 25 (July 26, 2007) (codified at WASH. ADMIN. CODE § 246-863-095 (2007)).

64. *Id.* (codified at WASH. ADMIN. CODE § 246-869-010 (2007)).

65. *See* WASH. ADMIN. CODE §§ 246-863-095, 246-869-010 (2007).

Under the new rules, pharmacies have a duty to "deliver lawfully prescribed drugs or devices to patients and to distribute drugs and devices approved by the U.S. Food and Drug Administration for restricted distribution by pharmacies, or provide a therapeutically equivalent drug or device in a timely manner consistent with reasonable expectations for filling the prescription"[66] except in certain specified circumstances.[67] In a Concise Explanatory Statement[68] accompanying the regulations, the Board explained that a pharmacy may "accommodate" an individual pharmacist who has a religious or moral objection, but the pharmacy itself still has a duty to timely deliver lawfully prescribed medications.[69] A pharmacy may accommodate a pharmacist's personal objections in any way it considers appropriate, including having another pharmacist available in person or via telephone.[70] Moreover, both pharmacies and pharmacists are prohibited from destroying or refusing to return an unfilled lawful prescription; violating a patient's privacy; or unlawfully discriminating against, intimidating, or harassing a patient.[71] Pharmacies or pharmacists who violate these regulations face disciplinary action, including revocation of their state licenses.[72]

Though these rules are not framed in religious terms, they might, nonetheless, conflict with free exercise rights. As certain commentators have noted, many who object to the use of emergency contraception are guided by religious scruples.[73] Under the rules, Washington pharmacists

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66. WASH. ADMIN. CODE § 246-869-010(1) (2007).

67. *See* § 246-869-010(1)(a)–(e), (2) (2007) (exempting pharmacies from the general duty to deliver when the prescription cannot be filled due to lack of payment, because it may be fraudulent or erroneous, or because of declared emergencies, lack of specialized equipment or expertise, or unavailability of a drug despite good faith compliance with WASH. ADMIN. CODE § 246-869-150 (1991), which provides in part: "The pharmacy must maintain at all times a representative assortment of drugs in order to meet the pharmaceutical needs of its patients.").

68. Before adopting a proposed rule, a Washington State agency must prepare a concise explanatory statement of the rule. This statement must: (1) identify the reasons for adopting the rule; (2) describe differences between the text of the proposed rule as published in the register and the text of adopted rule, stating the reason for differences; and (3) summarize all comments received pertaining to the proposed rule and respond to those comments. WASH. REV. CODE § 34.05.325(6)(a)(i)–(iii) (2009).

69. *See* Stormans, Inc. v. Selecky, 586 F.3d 1109, 1116 (9th Cir. 2009).

70. *Id.*

71. *See* WASH. ADMIN. CODE §§ 246-863-095(4)(a)–(e), 246-869-010(4)(a)–(e) (2007).

72. WASH. REV. CODE § 18.64.165 (1995).

73. For instance, the official doctrine of the Catholic Church and some conservative Christian denominations holds that the use of emergency contraception, as well as other forms of birth control, amounts to an immoral taking of a human life. *See* Smearman, *supra* note 9, at 490–91.

or pharmacy owners who subscribe to such beliefs face a tension between faith and professional obligation. For example, pharmacy owners who, despite local demand, refuse to carry or distribute Plan B or a similar drug solely for religious reasons could lose their pharmacies.[74] Less directly—but no less significantly—an individual pharmacist who refuses to distribute medications based on religious beliefs may face a market where many employers are unable or unwilling to accommodate those beliefs.[75] These two situations demonstrate the potential conflict between the pharmacy rules and free exercise of religion.

B. In Stormans*, the Ninth Circuit Held that Washington's Newly Adopted Pharmacy Rules Are Neutral and Generally Applicable*

Although these rules might clash with religious beliefs, they do not violate the First Amendment's Free Exercise Clause if they are neutral and generally applicable.[76] In *Stormans*, the Ninth Circuit examined this issue and ultimately determined that the regulations neither expressly reference nor otherwise target pharmacists' religious beliefs.[77] The court also concluded that the rules do not "selective[ly] . . . impose[] burdens only on conduct motivated by religion."[78] Thus, the rules are neutral and generally applicable and need only withstand rational basis scrutiny.[79]

The day before the new regulations took effect, Stormans Inc., a business operating a pharmacy located in Olympia, Washington, and two individual pharmacists filed a lawsuit against the Board and other state representatives in federal court,[80] alleging that the rules violated the Free Exercise Clause of the First Amendment.[81] The plaintiffs, contending that their personal religious views did not permit them to dispense the

74. *See Stormans*, 586 F.3d at 1120–21; *see also* WASH. REV. CODE § 18.64.165 (1995); Complaint, *supra* note 21, 8–9.

75. *See Stormans*, 586 F.3d at 1121–22.

76. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

77. *Stormans*, 586 F.3d at 1130–34.

78. *Id.* at 1134 (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993)).

79. *Id.* at 1137–38.

80. Complaint, *supra* note 21, at 1–3.

81. *Id.* at 16–17. Plaintiffs also argued that the pharmacy regulations violated the Equal Protection Clause, id. at 13–15, the Supremacy Clause, id. at 15–16, and procedural due process, id. at 17.

drug Plan B,[82] sought a permanent injunction prohibiting enforcement of the new rules.[83]

District Court Judge Ronald B. Leighton granted the plaintiffs a preliminary injunction based solely on their federal free exercise claim.[84] Although he acknowledged that the newly-adopted regulations were neutral on their face, he nonetheless found that the regulations were neither neutral[85] nor generally applicable.[86] The court cited *Lukumi* for the principle that "[t]he Free Exercise Clause protects against government hostility which is masked, as well as overt."[87] After examining the background and legislative history of the regulations, Judge Leighton determined that the "overriding objective" of the rules was "to eliminate moral and religious objections from the business of dispensing medication."[88] He further maintained that because the "means" were not consistent with the "ends" advanced by the State, the regulations were not generally applicable but rather "target[ed] religious practice in a way forbidden by the Constitution."[89] Therefore, the district court applied strict scrutiny consistent with *Lukumi* and ultimately concluded that the regulations neither advance a compelling government interest nor are narrowly tailored to achieve that interest.[90]

The Ninth Circuit found Judge Leighton's analysis unpersuasive.[91] Circuit Judge Kim M. Wardlaw, writing for the unanimous three-judge panel,[92] reasoned that the regulations were neutral.[93] As Judge Wardlaw explained, the regulations "do not suppress, target, or single out the

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82. *Id.* at 2.

83. *Id.* at 18.

84. Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1266 (W.D. Wash. 2007).

85. *Id.* at 1257–60.

86. *Id.* at 1260–63.

87. *Id.* at 1258 (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993)).

88. *Id.* at 1259.

89. *Id.* at 1263.

90. *Id.* at 1263–64.

91. *See* Stormans, Inc. v. Selecky, 586 F.3d 1109, 1130–37 (9th Cir. 2009).

92. In the Ninth Circuit's first hearing of *Stormans*, Circuit Judge Clifton wrote a separate concurring opinion. 571 F.3d 960, 992 (9th Cir. 2009) (Clifton, J., concurring). Judge Clifton disagreed with the majority's original position that a court should not consider legislative history in assessing whether a law is neutral and generally applicable. *Id.* at 992. Upon a panel rehearing, the court issued a new unanimous opinion stating that the law is unclear as to whether legislative history is relevant to neutrality and general applicability. *Stormans*, 586 F.3d at 1113, 1131–34. The plaintiffs' petition for en banc review was denied. *Id.* at 1113.

93. *Id.* at 1131.

practice of any religion because of religious content."[94] Additionally, the court rejected the lower court's finding that the "object" of the rules was to "eliminate from the practice of pharmacy . . . those pharmacists who, for religious reasons, object to the delivery of lawful medications."[95] The court noted that the regulations' potential to disproportionately affect pharmacists with religious objections did not deprive the rules of their neutrality.[96] The Ninth Circuit further found that Judge Leighton overemphasized the rules' developmental history, stating that the district court's assessment of the history "reveals little about the Board's motivation in adopting the rules, and, to the extent it does reveal anything, it indicates that the Board's concern was to promote the public welfare, not to burden religious belief."[97] Thus, the rules are sufficiently neutral.

Turning to general applicability, the Ninth Circuit rejected the district court's "means/ends" approach, noting that the proper standard was one of "substantial underinclusiveness."[98] Under this standard, a law is generally applicable if it "selective[ly] . . . impose[s] burdens only on conduct motivated by religious belief."[99] Satisfied that "[t]he new rules apply to all lawful medications, not just those that pharmacies or pharmacists may oppose for religious reasons," the court held the pharmacy regulations to be generally applicable.[100] The court recognized that the rules did not punish *all* refusals to distribute medications because pharmacies could decline distribution for certain enumerated reasons, such as failure to pay or presentation of a potentially fraudulent prescription.[101] But, as the court recognized, the "absence of these exemptions would likely drive pharmacies out of business or, even more absurdly, mandate unsafe practices."[102] As such, these narrow exceptions do not impair the rules' general applicability.[103]

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94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1133–34. The court also highlighted its uncertainty on whether it was proper under *Lukumi* to consider a law's history when assessing a law's neutrality. *Id.* at 1131–34.

98. *Id.* at 1134.

99. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993).

100. *Id.* at 1134.

101. *See* WASH. ADMIN. CODE § 246-869-010(1)(a)–(e),(2) (2007); *see also Stormans*, 586 F.3d at 1134–35.

102. *Id.*

103. *Id.*

The Ninth Circuit recognized the regulations to be neutral and generally applicable, and remanded the case to the district court to apply rational basis review.[104] To withstand this level of scrutiny, the plaintiffs must negate "every conceivable basis which might support" the laws.[105] Given the Ninth Circuit's recognition that Washington's interest in "ensuring that its citizen-patients receive lawfully prescribed medications without delay" is legitimate, the plaintiffs' chances of success on this front appear relatively slim.[106]

C. Free Exercise Cases in Other Jurisdictions Are in Line with the Ninth Circuit's Conclusion that Washington's Pharmacy Rules Are Neutral and Generally Applicable

The Ninth Circuit's ruling in *Stormans* is consistent with those issued by other appellate courts in similar cases. In each of these cases, the respective court reached the same conclusions as the Ninth Circuit with regard to neutrality and general applicability.

In *Catholic Charities of Sacramento, Inc. v. Superior Court*,[107] the California State Supreme Court considered the constitutionality of the Women's Contraception Equity Act (WCEA),[108] which required certain employers to provide health and disability insurance covering prescription contraceptives.[109] The plaintiff, Catholic Charities, an independently incorporated nonprofit public benefit corporation with ties to the Catholic Church, argued that the statute violated the First

104. *Id.* at 1137–38.

105. *Id.* at 1137 (citing Heller v. Doe by Doe, 509 U.S. 312, 320 (1993)).

106. *Id.* This conclusion assumes that the pharmacy rules remain unchanged. In July 2010, the Board announced its intent to initiate a new rulemaking process with the apparent goal of allowing pharmacies to refuse to dispense Plan B provided they refer patients to another pharmacy. Schrader, *supra* note 22, at A1, A8. Based on this announcement, the district court ordered a stay of further proceedings for an indefinite period pending the outcome of the rulemaking process. Order Granting Motion for Trial Continuance, Stormans, Inc. v. Selecky, No. C07-5374RBL (W.D. Wash. July 12, 2010). The Office of the Governor, however, has not swayed from its original position. In a letter to the State Attorney General's Office, General Counsel for the Governor expressed "concern[] about whether rule changes would provide meaningful access to lawfully prescribed medications" and would seek "to ensure that the access now available is protected or enhanced." Letter from Narda Pierce, General Counsel, Office of Governor Christine Gregoire, to Rene Tomisser, Senior Counsel, and Joyce A. Roper, Senior Assistant Attorney General, Washington State Attorney General's Office (July 9, 2010) (on file with author).

107. 85 P.3d 67 (Cal. Sup. Ct. 2004).

108. This act comprises two laws, CAL. HEALTH & SAFETY CODE § 1367.25 (2002) and CAL. INS. CODE § 10123.196 (1999). *See Catholic Charities of Sacramento*, 85 P.3d at 73 n.1.

109. 85 P.3d at 73.

Amendment and the California constitution.[110] The WCEA exempted "religious employer[s]" from providing "contraceptive methods that are contrary to the . . . employer's religious tenets."[111] This exemption, however, did not extend to independent corporations like Catholic Charities.[112] In its First Amendment analysis, the Court concluded that the WCEA was a neutral law of general applicability.[113] The Court rejected the plaintiff's contentions that the law selectively targeted religious charitable organizations such as Catholic Charities.[114] Citing *Lukumi*, the Court concluded that because the WCEA applies to all nonreligious employers engaged in charitable work regardless of their personal religious ideologies, "no argument can logically be made that the WCEA imposes a burden on charitable social work only when performed for religious reasons."[115] Moreover, the exemption for certain religious employers, in the Court's view, did not defeat the rules' neutrality, but rather was a "justifiable . . . accommodation of religious exercise."[116]

A second example of a court rejecting a free exercise challenge to a state health services statute is *Catholic Charities of the Diocese of Albany v. Serio*.[117] In this case, the New York Court of Appeals considered the constitutionality of the Women's Health and Wellness Act (WHWA),[118] a statute very similar to California's WCEA.[119] Like the California State Supreme Court in *Catholic Charities of Sacramento*, the *Serio* court concluded that the statute was neutral and generally applied, noting that "[r]eligious beliefs were not the 'target' of the WHWA . . . ."[120] Rather, the act's "object was to make broader health

110. *Id.* at 73, 75.

111. CAL. HEALTH & SAFETY CODE § 1367.25(b) (2002); CAL. INS. CODE § 10123.196(2)(d) (1999).

112. *Catholic Charities of Sacramento*, 85 P.3d at 75.

113. *Id.* at 81–84.

114. *Id.* at 84–87.

115. *Id.* at 86.

116. *Id.* at 84. The Court added that, if anything, the WCEA benefits religions like the Catholic Church. *Id.* at 83–85 & n.9. Specifically, the Court stated "the WCEA refers to the religious characteristics of organizations in order to identify and *exempt* those organizations from an otherwise generally applicable duty." *Id.* at 83 (emphasis in original). This benefit, however, did not go so far as to offend the First Amendment Establishment Clause. *Id.* at 85 n.9.

117. 859 N.E.2d 459 (N.Y. Ct. App. 2006).

118. N.Y. INS. LAW §§ 3221(l)(16), 4303(cc) (2002).

119. Like California's WCEA, the WHWA requires an employer health insurance agreement to "include coverage for the cost of contraceptive drugs or devices." *Id.*

120. *Serio*, 859 N.E.2d at 464.

insurance coverage available to women and, by that means, both to improve women's health and to eliminate disparities between men and women in the cost of health care."[121]

Similarly, in *North Coast Women's Care Medical Group, Inc. v. Superior Court*,[122] the California Supreme Court scrutinized a health services law. In that case, the plaintiff was a lesbian who sought fertility treatment from the defendant North Coast Medical Group, Inc.[123] A physician employed by North Coast contended that her religious beliefs prevented her from conducting an intrauterine insemination on the plaintiff.[124] The plaintiff sued North Coast on multiple theories, including that the refusal amounted to discrimination based on sexual orientation in violation of California's Unruh Civil Rights Act.[125] North Coast argued that its refusal was protected by free exercise rights guaranteed by the federal and state constitutions.[126]

The California State Supreme Court stated that the Unruh Civil Rights Act is "a valid and neutral law of general applicability."[127] In its brief First Amendment free exercise analysis, the Court recognized that the Act posed at most "an incidental conflict with . . . religious beliefs," and, therefore, under *Smith* and *Lukumi* the Free Exercise Clause did not shield physicians from conforming with the Act's antidiscrimination requirements.[128]

The statutes at issue in *Catholic Charities of Sacramento* and *Serio* required private employers to provide a medical benefit to employees for

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121. *Id.*

122. 189 P.3d 959 (Cal. Sup. Ct. 2008).

123. *Id.* at 963.

124. *Id.*

125. *Id.* at 964. The Unruh Civil Rights Act's antidiscrimination provisions apply to business establishments that offer to the public "accommodations, advantages, facilities, privileges, or services." CAL. CIV. CODE § 51(b) (2005); *see also* Curran v. Mount Diablo Council of the Boy Scouts, 952 P.2d 218, 237–38 (Cal. Sup. Ct. 1998); Warfield v. Peninsula Golf & Country Club, 896 P.2d 776, 793 (Cal. Sup. Ct. 1995). California courts have held that a medical group providing medical services to the public is a business establishment for purposes of the Act. Leach v. Drummond Medical Group, Inc., 144 Cal. App. 3d 362, 369 (Cal. Ct. App. 1983).

126. *North Coast*, 189 P.3d at 964.

127. *Id.* at 966 (quoting Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990)).

128. *Id.* at 966–67. The Court subsequently went on to apply strict scrutiny to the Act based on its interpretation of California's Constitution. *Id.* at 968–69. The Court's analysis in this area is discussed in additional detail in a later section of this Comment. *See infra* Part V.B.4.

public health reasons.[129] In *North Coast*, the challenged statute imposed affirmative requirements on medical professionals to perform health services for the general public.[130] Recognizing public health (rather than religious meddling) to be the State's motivation, the highest courts of both New York and California, like the Ninth Circuit in *Stormans*, deemed those states' respective acts neutral and generally applied.[131] These cases demonstrate that the Ninth Circuit's ruling is in line with the Supreme Court's *Smith* and *Lukumi* decisions. As such, the pharmacy rules do not violate the First Amendment's Free Exercise Clause.

III. THE WASHINGTON STATE CONSTITUTION PROTECTS FREE EXERCISE RIGHTS MORE THAN THE FEDERAL CONSTITUTION

The First Amendment provides merely a national "floor" for free exercise rights.[132] An individual state may provide more protection through its own state constitution.[133] Although a state's neutral and generally applied law may be constitutional under the First Amendment, the same law may be invalid if it violates the state constitution.[134] The Washington State Supreme Court has interpreted its constitution in this manner, requiring the State to demonstrate that any law having a coercive effect on free exercise of religion satisfies strict scrutiny, in contrast to the rational basis scrutiny mandated by the First Amendment.[135]

A. The Washington State Supreme Court Has Held that the Washington State Constitution Protects Free Exercise Rights More Than the Federal Constitution

The Washington State Constitution has a distinct provision protecting free exercise of religion—article I, section 11. When compared to the

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129. Catholic Charities of Sacramento v. Sacramento, Inc. v. Superior Court, 85 P.3d 67, 74 (Cal. Sup. Ct. 2004); Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d, 459, 461 (N.Y. Ct. App. 2006).

130. *North Coast*, 189 P.3d at 965.

131. *Id.* at 966; *Serio*, 859 N.E.2d at 464; *Catholic Charities of Sacramento*, 85 P.3d at 82.

132. *See* G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 80 (1989).

133. *Id.*

134. *Id.*

135. *See* First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 226–27, 840 P.2d 174, 187 (1992); Munns v. Martin, 131 Wash. 2d 192, 199, 930 P.2d 318, 321 (1997).

language of the First Amendment, the text of article I, section 11 appears to provide more affirmative protection for religious freedom:[136]

> Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.[137]

In *First Covenant Church v. City of Seattle*,[138] the Washington State Supreme Court concluded that article I, section 11 is in fact more protective than the First Amendment.[139] In its analysis,[140] the Court determined that the free exercise language in the Washington State Constitution is stronger than that found in the First Amendment.[141] Specifically, article I, section 11 "absolutely" protects freedom of worship rather than limiting government action, guarantees that no person shall be "disturbed" on the basis of religion, and safeguards all religious conduct so long as it is not "licentious" or inconsistent with public "peace and safety."[142] The Court also noted structural and historical differences between the federal and state constitutions that justify broader protection of free exercise rights under article I,

136. *See First Covenant*, 120 Wash. 2d at 224, 840 P.2d at 186.

137. WASH. CONST. art. I, § 11.

138. 120 Wash. 2d 203, 840 P.2d 174 (1992). In this case, a church brought a free exercise challenge against a Landmarks Preservation Ordinance. The law required church officials, whose building had been declared a historical landmark, to obtain a certificate of approval from the city before it made any alterations to the church building's exterior. *Id.* at 208–09, 840 P.2d at 177–78.

139. *Id.* at 223–26, 840 P.2d at 186–87.

140. The comparison of federal and state constitutional provisions is generally referred to as the "dual sovereignty" approach and was expressly adopted by the Washington State Supreme Court in State v. Coe, 101 Wash. 2d 364, 378, 679 P.2d 353, 361 (1984). *See* Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMPLE L. REV. 1153, 1160 (1992). Under this approach, where state and federal constitutional protections are substantially different, the court must analyze both the state and federal constitutional provisions, even when the holding rests entirely on the state constitution. *See id.* To determine whether the state constitution provides different protections than analogous provisions of the U.S. Constitution, the Washington State Supreme Court in *State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986), articulated six key considerations: (1) the textual language of the state constitution, (2) significant differences in the texts of parallel provisions of the federal and state constitutions, (3) state constitutional and common law history, (4) preexisting state law, (5) differences in structure between the federal and state constitutions, and (6) matters of particular state interest or local concern. *Id.* at 61–62, 720 P.2d at 812–13.

141. *First Covenant*, 120 Wash. 2d at 224, 840 P.2d at 186.

142. WASH. CONST. art. I, § 11; *First Covenant*, 120 Wash. 2d at 224; 840 P.2d at 186 (explaining differences between First Amendment's Free Exercise Clause and Art. I, § 11).

section 11.[143] Furthermore, the Court reasoned that a broader interpretation was appropriate because the Washington State Constitution limits the "plenary power of the State to do anything not expressly forbidden by state constitution or federal law," in contrast to the U.S. Constitution, which "grant[s] . . . [the federal government] limited power . . . to exercise only those constitutionally enumerated powers that the States expressly delegate to it."[144] Thus, article I, section 11 more broadly protects free exercise rights than the First Amendment.

After concluding that article I, section 11 was generally more protective than the First Amendment with respect to free exercise rights, the Court in *First Covenant* expressly stated that "[a] facially neutral, even-handedly enforced statute that does not directly burden free exercise may, nonetheless, violate article 1, section 11, if it indirectly burdens the exercise of religion."[145] Consequently, *Smith*'s requirement of rational basis scrutiny would not guide a court's analysis in a free exercise challenge brought under the Washington State Constitution.[146]

B. If a Washington Law Has a Coercive Effect on Religion, the State Must Show It Has Adopted the Least Restrictive Means to Achieve a Compelling Interest

After recognizing that article I, section 11 is more protective than the First Amendment, the Washington State Supreme Court in *First Covenant* specified that any law burdening free exercise must satisfy strict scrutiny.[147] In *Munns v. Martin*,[148] the Court clarified this interpretation when it expressly stated that it had adopted the *Sherbert* standard for constitutionality.[149] Under that standard, the complaining

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143. *First Covenant*, 120 Wash. 2d at 224–25, 840 P.2d at 186.

144. *Id.* at 225, 840 P.2d at 186.

145. *Id.* at 226, 840 P.2d at 187 (citing Sumner v. First Baptist Church, 97 Wash. 2d 1, 7–8, 639 P.2d 1358, 1362 (1982); State *ex rel.* Bolling v. Superior Court, 16 Wash. 2d 373, 385–86, 133 P.2d 803, 809 (1943)).

146. *See First Covenant*, 120 Wash. 2d at 223–25, 840 P.2d at 185–86 (explaining that the Washington State Constitution provides greater protection for religious freedom, and noting that "we eschew the uncertainty of *Smith* II and rest our decision also on independent grounds under the Washington State Constitution").

147. *First Covenant*, 120 Wash. 2d at 226–27, 840 P.2d at 187.

148. 131 Wash. 2d 192, 930 P.2d 318 (1997). In this case, individual parishioners sought to enjoin church officials from demolishing a church-run school in Walla Walla. The church officials argued that any prohibition against their procuring a demolition permit violated free exercise protections under article I, section 11. *Id.* at 196–97, 930 P.2d at 319–20.

149. *Id.* at 199, 930 P.2d at 321.

party carries the initial burden to prove the state action has a "coercive effect" on religious practice.[150] Once a coercive effect is established, the burden of proof shifts to the State to show the action serves a compelling government interest and employs the least restrictive means to achieve that interest.[151]

Thus, the Washington State Supreme Court has effectively made *Smith* inapplicable to its free exercise jurisprudence, at least in the state constitutional context. A Washington law burdening the free exercise of religion—even one that is neutral and generally applied—withstands an article I, section 11 challenge only if it satisfies strict scrutiny.[152]

IV. A WASHINGTON LAW PROMOTING MEDICAL CARE OR TREATMENT WILL LIKELY WITHSTAND SCRUTINY UNDER ARTICLE I, SECTION 11

Although a party asserting a free exercise challenge must first demonstrate that a law has a coercive effect on religion, a review of the free exercise cases indicates that Washington courts have set the bar fairly low in this area, requiring the party merely to show the party has a "sincere" religious belief that is actually burdened by the law.[153] Provided a complainant makes this showing, the State must demonstrate that the law serves a compelling interest and employs the least restrictive means to achieve that interest.[154] Although this strict scrutiny standard is often difficult to meet,[155] it is by no means insurmountable. State actions that directly relate to public health, peace, or safety are particularly likely to withstand strict scrutiny even in free exercise cases.[156] Washington courts have recognized that promoting or advancing medical services is a valid public health interest.[157] Therefore, a

150. *Id.* (citing First United Methodist Church v. Hearings Exam'r for the Seattle Landmarks Pres. Bd., 129 Wash. 2d 238, 246, 916 P.2d 374, 378 (1996)).

151. *Id.*

152. *First Covenant*, 120 Wash. 2d at 226, 840 P.2d at 187.

153. *See infra* Part I.V.A.

154. *See supra* Part III.B.

155. Professor Gerald Gunther of Harvard Law School has described the standard as "'strict' in theory and fatal in fact," at least when applied by the U.S. Supreme Court in Equal Protection cases. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

156. *See First Covenant*, 120 Wash. 2d at 226–27, 840 P.2d at 187; City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 8–9, 639 P.2d, 1358, 1363 (1982).

157. *See* Backlund v. Bd. of Comm'rs of King Cnty. Hospital District, 106 Wash. 2d 632, 642, 724 P.2d 981, 987 (1986); State *ex rel.* Holcomb v. Armstrong, 39 Wash. 2d 860, 864, 239 P.2d 545, 548 (1952); State v. Norman, 61 Wash. App. 16, 23, 808 P.2d 1159, 1163 (1991).

Washington court would likely hold that narrowly tailored laws promoting medical care or treatment do not offend article I, section 11.

A. Although Washington Courts Have Set a Fairly Low Threshold for Showing a Burden on Free Exercise Rights, the Exact Parameters of This Threshold Remain Unclear

Before a court examines the nature of the State's interest in a free exercise case, the complainant must demonstrate a coercive effect on religion.[158] To satisfy this requirement, a party must show two things: (1) that the religious belief is sincere, and (2) that the government action burdens the exercise of religion.[159]

Washington courts have rarely dismissed a free exercise challenge based on the party's failure to demonstrate a sincere religious belief, suggesting a very low evidentiary threshold.[160] Courts have been somewhat less willing to find that state action actually burdens those sincerely held beliefs.[161] However, the ultimate standard for this prong is somewhat nebulous. The Washington State Supreme Court provided some insight on this issue in *City of Woodinville v. Northshore United Church of Christ*.[162] In holding that a city's refusal to consider a church's conditional land use permit unconstitutionally infringed upon free exercise rights, the Court stated that "a burden can be a slight inconvenience without violating article I, section 11, but the State cannot impose substantial burden on exercise of religion."[163] The Court did not,

158. First United Methodist v. Hearing Exam'r for the Seattle Landmarks Pres. Bd., 129 Wash. 2d 238, 246, 916 P.2d 374, 378 (1996).

159. Munns v. Martin, 131 Wash. 2d 192, 199–200, 930 P.2d 318, 321 (1997).

160. *See, e.g.*, *In re* Marriage of Jensen-Branch, 78 Wash. App. 482, 490 n.2, 899 P.2d 803, 808 n.2 (1995) (noting that "religious beliefs" should be interpreted broadly). *But see In re* Cook, No. 17123-0-III, No. 17842-1-III, 1999 Wash. App. LEXIS 1383, at *10 (Wash. Ct. App. July 27, 1999) (father failed to demonstrate sincere religious belief in challenging mother's decision to place child in Christian preschool and daycare).

161. *See, e.g.*, Open Door Baptist Church v. Clark Cnty., 140 Wash. 2d 143, 166–67, 995 P.2d 33, 46 (2000) (requiring a church to apply for a conditional use permit not a burden on free exercise); State v. Shaughnessy, No. 34506-4-II, 2007 Wash. App. LEXIS 1182, at *11–12 (Wash. Ct. App. May 22, 2007) (noting that there was no burden when defendant could not carry his Bible to sessions at a court-ordered sexual offender treatment program because the provider was a private actor); North Pacific Union Conference Ass'n v. Clark Cnty., 118 Wash. App. 22, 32–33, 74 P.3d 140, 145–46 (2003) (holding that denial of permit to build a church is not an unconstitutional burden).

162. 166 Wash. 2d 633, 211 P.2d 406 (2009).

163. *Id.* at 645, 211 P.2d at 411.

however, elaborate on what constitutes a "slight inconvenience" versus a "substantial burden."[164]

Although the Washington State Supreme Court has not defined the precise scope of its "coercive effect" requirement, its general interpretation of the requirement suggests a relatively low standard.[165] A party need only demonstrate that the government action poses more than a "slight inconvenience" to free exercise rights.[166] If a party adequately shows a coercive effect, the burden shifts to the government to justify its action with a compelling government interest.[167]

B. Washington Courts Have Recognized Public Health, Peace, and Safety to Be Compelling Interests in Free Exercise Cases

Article I, section 11 expressly notes that free exercise rights may not "justify practices inconsistent with the peace and safety of the state."[168] It has long been accepted that a state may invoke its general police powers to protect public health, peace, and safety.[169] Consistent with this maxim, the Washington State Supreme Court has recognized even in its early free exercise opinions that state interests serving public health, peace, and safety are sufficiently compelling.

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164. To illustrate the complexities, only nine years before *Northshore*, the Washington State Supreme Court rejected the argument that a county's requirement that a church procure a conditional land use permit burdened free exercise rights. *Open Door*, 140 Wash. 2d at 166–67, 995 P.2d at 46. Thus, a county's refusal to consider a church's land use permit application burdens free exercise, while a general requirement that the church acquire a permit does not.

165. Indeed, this view reflects the Washington Supreme Court's recognition in *First Covenant Church v. City of Seattle* that government involvement in a church's decision about "what is liturgy and what is a religious purpose . . . fosters exactly the kind of religious entanglement the [state] constitution seeks to avoid." 120 Wash. 2d 203, 221–22, 840 P.2d 174 184–85 (1992).

166. *See Northshore*, 166 Wash. 2d at 644–45, 211 P.2d at 411.

167. *See* First United Methodist Church v. Hearings Exam'r for the Seattle Landmarks Pres. Bd., 129 Wash. 2d 238, 246, 916 P.2d 374, 378 (1996).

168. WASH. CONST. art. I, § 11.

169. *See, e.g.*, Barbier v. Connolly, 113 U.S. 27, 31 (1885) (recognizing that no constitutional amendment "was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people . . . ."); Mayor of the City of New York v. Miln, 36 U.S. 102, 139 (1837) ("[I]t is not only the right, but the burden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends . . . ."); Brown v. Maryland, 25 U.S. 419, 443 (1827) ("[T]he police power . . . unquestionably remains, and ought to remain, with the States."); Gibbons v. Ogden, 22 U.S. 1, 203–04 (1824) ("Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State . . . remain subject to State legislation" and Congress has "no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its system of police."); *see also* Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 770–72, 782–85 (2007).

During World War II, in *State* ex rel. *Bolling v. Superior Court*,[170] the Washington State Supreme Court considered a statute requiring school children to salute the American flag and recite the pledge of allegiance.[171] Some children who refused to follow the law for religious reasons were expelled and subsequently brought before a juvenile court as delinquent children.[172] The children's parents challenged the law based on free exercise rights guaranteed by the federal and state constitutions.[173] The Court stated that religious practice cannot be "directly hurtful to the safety, morals, health or general welfare of the community," and that the State may offend "religious scruples" only if it has a "clear justification . . . in the necessities of national or community life."[174] Nevertheless, the Court refused to enforce the statute.[175] Although the State has an interest in ensuring respect for the flag,[176] it had no compelling health or safety interest in penalizing children who decline to salute the flag or recite the pledge of allegiance for religious reasons.[177]

The Washington State Supreme Court found that a challenged state action furthered health and safety in *State* ex rel. *Holcomb v. Armstrong*.[178] In this case, a university student objected for religious reasons to a university's requirement that all students undergo tuberculosis screening.[179] The Court upheld the requirement.[180] Citing article I, section 11 and *Bolling*, the Court explained that the public interest in the health of the university's students and employees may lawfully be protected and that infringement of an individual student's

170. 16 Wash. 2d 373, 133 P.2d 803 (1943).

171. *Id.* at 374–75, 133 P.2d at 805.

172. *Id.* at 375, 133 P.2d at 805.

173. *Id.* at 377–78, 133 P.2d at 806.

174. *Id.* at 384–85, 133 P.2d at 808–09 (quoting Barnette v. West Va. State Bd. of Educ., 47 F. Supp. 251, 253–54 (S.D.W. Va. 1942)).

175. *Id.* at 387–88, 133 P.2d at 809–10.

176. *Id.* at 387, 133 P.2d at 809 ("Respect for our flag as a symbol of our country is part of our way of life, and disrespect to the flag constitutes an offense against our laws.").

177. *Id.*, 133 P.2d at 809–10. On the contrary, the Court recognized that "the children . . . by standing respectfully at attention during the exercises comprising the salute to the flag, will show due respect" for the flag and that excusing children who object to reciting the pledge based on religious beliefs "should impress not only those who claim the privilege of following their religious convictions, but all others, with the fact that the flag protects each citizen, and that the government of which it is the symbol guarantees to all religious liberty." *Id.*

178. 39 Wash. 2d 860, 239 P.2d 545 (1952).

179. *Id.* at 861, 239 P.2d at 546; *see also infra* Part V.B.2.

180. *Holcomb*, 39 Wash. 2d at 863–64, 239 P.2d at 548.

free exercise rights was necessary to prevent a "clear and present, grave and immediate" danger.[181]

Washington courts continue to recognize the State's police interest in public health, peace, and safety as compelling.[182] If the State can show that a law burdening free exercise directly advances this interest, the law would very likely survive scrutiny under article I, section 11.

C. Washington Courts Have Recognized that Providing Medical Care or Treatment Promotes Public Health, Peace, and Safety

One can readily assert that a particular law promotes public health, peace, or safety. Convincing a Washington court that this is so is another matter altogether. The precise limits of the State's police power have proven somewhat elusive. Even the U.S. Supreme Court has proven unable to define the power's limits.[183] The Washington State Supreme Court has taken a fairly broad view of the police power, generally requiring only that a law or regulation be "reasonably related" to public health, peace, or safety.[184] With this broad view, Washington courts have interpreted the power to cover a wide range of state actions.[185]

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181. *Id.*

182. *See* First Covenant Church v. City of Seattle, 120 Wash. 2d. 203, 226–27, 840 P.2d 174, 187 (1992); Sumner v. First Baptist Church, 97 Wash. 2d 1, 8, 639 P.2d 1358, 1363 (1982); State v. Norman, 61 Wash. App 16, 24, 808 P.2d 1159, 1163 (1991).

183. *See* Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 387 (1926) ("The line which . . . separates the legitimate from the illegitimate assumption of [the police] power is not capable of precise delimitation."); Eubank v. City of Richmond, 226 U.S. 137, 142 (1912) ("[The police power] is not susceptible of circumstantial precision.").

184. *See* Pretsel, Inc. v. Cnty. of King, 77 Wash. 2d 144, 154, 459 P.2d 937, 942 (1969) ("[A]ny legislation under the police power must be reasonably necessary in the interest of public health, safety, morals, and the general welfare."); Shea v. Olson, 185 Wash. 143, 153, 53 P.2d 615, 619 (1936) ("[T]he only limitation upon [the police power] is that it must reasonably tend to correct some evil or promote some interest of the state, and not violate any direct or positive mandate of the constitution."); Patton v. City of Bellingham, 179 Wash. 566, 572, 38 P.2d 364, 366 (1934) ("The grant of police power to a city carries with it the necessary implication that its exercise must be reasonable."). For a historical analysis of the use of the police power in Washington, see Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 WASH. L. REV. 495 (2000).

185. *See, e.g.*, Weden v. San Juan Cnty., 135 Wash. 2d 678, 684, 695, 958 P.2d 273, 276, 282 (1998) (interpreting permitting regulation of personal watercraft); CLEAN v. State, 130 Wash. 2d 782, 806, 928 P.2d 1054, 1066 (1996) (allowing for construction of a publicly owned baseball stadium); Lenci v. City of Seattle, 63 Wash. 2d 664, 672, 388 P.2d 926, 932 (1964) (upholding screening around auto wrecking yards); *see also* Spitzer, *supra* note 184, at 505–06. For some examples in the free exercise context, *see, e.g.*, State v. Key, No. 16415-2-III, 1999 Wash. App. LEXIS 546, at *7–8 (Wash. Ct. App. Mar. 30, 1999) (justified a requirement that defendant felon as part of conditional release be required to submit to random urinalysis tests which interfered with his religious fast); State v. Balzer, 91 Wash. App. 44, 50, 65–67, 954 P.2d 931, 934, 941–42 (1998) (justified making marijuana a Schedule I controlled substance despite marijuana's use in religious

Washington courts' treatment of the proper scope of the police power has been a bit erratic in free exercise cases, but their stance is clearer in certain specific areas such as historic landmark preservation[186] and child safety.[187] Washington courts have generally maintained that in exercising its police powers, the State may enact laws promoting medical care or treatment without offending article I, section 11.

The Washington State Supreme Court's decision in *Holcomb* in 1952, discussed previously, stands as one example of a state court determining that public medical interests supersede personal religious convictions.[188] Decades later, in *State v. Norman*,[189] a Washington court again faced the task of balancing the State's interest in medical care against personal free exercise rights. For religious reasons, a father refused to allow medical treatment for his child, who suffered from juvenile diabetes. The child's condition worsened, and he later died.[190] After being convicted of first degree manslaughter, the father appealed his conviction arguing that his inaction was protected under article I, section 11.[191] The Washington Court of Appeals affirmed the conviction.[192] After noting the State's general interest in child safety,[193] the court specifically noted that "*failure to acquire medical care* to an ailing child was an act which was inconsistent with the peace and safety of the state."[194] Thus, the court in

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prayer ceremonies); State v. Clifford, 57 Wash. App. 127, 130–34, 787 P.2d 571, 573–75 (1990) (upheld justified driver's license requirement despite belief that the requirement violates religious convictions).

186. Washington courts have been reluctant to find that a law furthers legitimate public health, peace, or safety where the state's interest is limited to landmark preservation. *See* Munns v. Martin, 131 Wash. 2d 192, 201, 930 P.2d. 318, 322 (1997) (quoting *First Covenant*, 30 Wash. 2d at 222, 840 P.2d at 185) ("Preservation ordinances further cultural and aesthetic interests, but they do not protect public health or safety."); *accord* First United Methodist Church v. Hearings Exam'r for the Seattle Landmarks Pres. Bd., 129 Wash. 2d 238, 250, 916 P.2d 347, 380 (1996).

187. Laws protecting children will generally be interpreted by Washington court as compelling. *See* State v. Motherwell, 114 Wash. 2d 353, 365, 788 P.2d 1066, 1072 (1990) ("[T]he State's interest in the protection of children is unquestionably of the utmost importance."); Sumner v. First Baptist Church, 97 Wash. 2d 1, 8–9, 639 P.2d 1358, 1363 (1982) ("[T]here is a valid state interest in applying reasonable health, fire and safety standards to private, religious schools."); State v. Meacham, 93 Wash. 2d 735, 741, 612 P.2d 795, 799 (1980) ("[T]he State has a compelling interest" in "safeguard[ing] the constitutional rights of a child.").

188. *See supra* notes 178–181 and accompanying text.

189. 61 Wash. App. 16, 808 P.2d 1159 (1991).

190. *Id.* at 19–20, 117 P.2d at 1160–61.

191. *Id.* at 18, 117 P.2d at 1160.

192. *Id.*

193. *Id.* at 23, 117 P.2d at 1163 (citing Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944)).

194. *Id.* (citing People v. Pierson, 68 N.E. 243, 246–47 (N.Y. App. 1903)) (emphasis added).

Norman explicitly recognized the State's compelling interest in providing medical care, at least in certain circumstances.[195]

The Washington State Supreme Court considered an article I, section 11 claim brought by a medical professional in *Backlund v. Board of Commissioners*.[196] In that case, an orthopedic surgeon refused to purchase professional liability insurance contrary to the public hospital's policy.[197] The surgeon contended that his religious beliefs precluded him from carrying any insurance.[198] Though the hospital board determined the surgeon's beliefs were "sincerely held," it nonetheless terminated the surgeon's hospital privileges.[199] The surgeon appealed the board's decision to the Superior Court for King County, contending that the board's ruling violated his free exercise rights.[200] The court reversed the board's decision, but on review, the Washington State Supreme Court reinstated the board's original ruling.[201] After stating that "health and welfare regulations curtailing the free exercise of religion are justified,"[202] the Court emphasized that hospitals have a duty to "adequately provide compensation to patients injured through the negligence of the hospital and the hospital staff . . . ."[203] The Court also highlighted the board's findings that rescinding the insurance requirement would negatively affect the hospital.[204] Those findings, the Court reasoned, "amply support the conclusion that there is a compelling governmental interest involved."[205] So, in *Backlund*, a Washington court again determined the State has a strong interest in furthering medical care.

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195. *Id.*

196. 106 Wash. 2d 632, 724 P.2d 981 (1986).

197. *Id.* at 634–35, 724 P.2d at 982–83.

198. *Id.*

199. *Id.* at 635–37, 724 P.2d at 983–84.

200. *Id.* at 637, 724 P.2d at 984.

201. *Id.* at 634, 724 P.2d at 982.

202. *Id.* at 644, 724 P.2d at 988. The Court also specifically recognized health and safety interests that other jurisdictions found sufficient to overcome free exercise claims, including: vaccinations, *id.* at 642, 724 P.2d at 987 (citing Jacobsen v. Massachusetts, 197 U.S. 11 (1905)); blood transfusions for a child over the parents' religious objections, *id.* (citing Jehovah's Witnesses v. King Cnty. Hosp., 278 F. Supp. 488 (W.D. Wash 1967)); and requiring a child to undergo cancer treatment over parents' objections, *id.* (citing *In re* Hamilton, 657 S.W.2d 425 (Tenn. Ct. App. 1983)).

203. *Id.* at 645, 724 P.2d at 989.

204. *Id.* at 644–45, 724 P.2d at 988–89.

205. *Id.* at 645, 724 P.2d at 989.

Holcomb, *Norman*, and *Backlund* involved very different government actions. But each of those actions furthered legitimate medical interests: preventing the spread of disease,[206] providing medical care to children,[207] promoting efficient hospitals, and ensuring adequate malpractice compensation.[208] Due to their importance in preserving public health, Washington courts found the interests in each of these cases compelling. Thus, these cases demonstrate that when the State elects to use its police power in the medical arena, Washington courts tend to find that the State's actions do not violate article I, section 11.

D. Using the Least Restrictive Means Requires the State to Reasonably Accommodate Free Exercise Rights, Unless Doing So Would Unduly Burden Its Compelling Interests

Under the Washington State Constitution, where a law burdens free exercise, it must employ the least restrictive means to achieve the State's interest.[209] This is so even if the law furthers public health, peace, or safety.[210] Although the exact standard in this area is somewhat vague, the gist is that if using alternative means more accommodating to free exercise rights would not overly hinder the State's interest, Washington courts expect the State to use those alternative means.[211]

In the past, when a Washington court has found a compelling state interest burdening free exercise rights, it has generally determined that the State has employed the least restrictive means to achieve that interest.[212] One notable exception is *Sumner v. First Baptist Church*,[213] in which the Washington State Supreme Court determined that the record did not sufficiently show the challenged building code and zoning ordinance employed the least restrictive means to achieve the compelling interest in the safety of children at a private religious

206. State *ex rel.* Holcomb v. Armstrong, 39 Wash. 2d 860, 863–64, 239 P.2d 545, 548 (1952).

207. State v. Norman, 61 Wash. App. 16, 23, 117 P.2d 1159, 1163 (1991).

208. *Backlund*, 106 Wash. 2d at 644–45, 724 P.2d at 988–89.

209. Munns v. Martin, 131 Wash. 2d 192, 200, 930 P.2d 318, 321 (1997) (citing First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 226–27, 840 P. 2d 174, 187 (1992)).

210. *Id.*

211. *See* State v. Motherwell, 114 Wash. 2d 353, 365, 788 P.2d 1066, 1072 (1990); Sumner v. First Baptist Church, 97 Wash. 2d 1, 10, 639 P.2d at 1364.

212. *See, e.g.*, *Motherwell*, 114 Wash. 2d at 366, 788 P.2d at 1073; *Backlund*, 106 Wash. 2d .632, 646, 724 P.2d 981, 989 (1986); State v. Balzer, 91 Wash. App. 44, 64–65, 954 P.2d 931, 941 (1998); State v. Clifford, 57 Wash. App. 127, 133–34, 787 P.2d at 571, 575 (1990); *cf.* State v. Meacham, 93 Wash. 2d 735, 741, 612 P.2d 795, 799 (1980).

213. 97 Wash. 2d 1, 639 P.2d 1358 (1982).

school.[214] Adopting the U.S. Supreme Court's language in *Wisconsin v. Yoder*,[215] the Court stated that a trial court must "searchingly examine" the government's asserted interest and consider the effect of specific exemptions or deviations.[216] The Court further noted that "accommodation between the competing interests must be the goal," and "[o]nly if such accommodation is not possible should one legitimate interest override another."[217]

The court in *Sumner* was not entirely forthcoming on exactly when "accommodation is not possible."[218] In a later case, however, the Court provided some clarifying language. In *State v. Motherwell*,[219] the Court declared that the State need not accommodate private religious interests where those interests "unduly interfere with the fulfillment of the governmental interest."[220] This statement suggests that, in the Court's view, accommodation is not possible where such accommodation would unduly burden the State's interest. Taken together, these cases present a somewhat clearer threshold standard for when the State has employed the least restrictive means.

As this section has shown, the government faces a fairly difficult task in Washington free exercise cases, at least when compared to the complainant. But if the State can persuade the court that its law promotes an interest related to public health, peace or safety—such as medical care—and that further accommodation would unduly burden its interests, it will likely prevail over the party challenging the law.

V. WASHINGTON COURTS WOULD LIKELY NOT HOLD THE RECENTLY ADOPTED PHARMACY RULES INVALID UNDER ARTICLE I, SECTION 11

Washington courts have interpreted article I, section 11 to give substantial deference to individual free exercise rights.[221] The question remains whether this degree of deference requires a state court to declare the recently-adopted pharmacy rules unconstitutional. As noted in *Stormans*, at least some Washington pharmacists and pharmacy owners

214. *Id.* at 9–10, 639 P.2d at 1363–64.

215. 406 U.S. 205 (1972).

216. *Sumner*, 97 Wash. 2d at 10, 639 P.2d at 1363.

217. *Id.*, 639 P.2d at 1364.

218. *Id.*

219. 114 Wash. 2d 353, 788 P.2d 1066 (1990).

220. *Id.* at 365, 788 P.2d at 1072 (quoting United States v. Lee, 455 U.S. 252, 259 (1982)).

221. *See supra* Part III.

have a persuasive argument that the rules burden free exercise rights.[222] Do the regulations withstand strict scrutiny as required by *First Covenant* and its progeny? This Comment argues that a court applying Washington State Supreme Court precedent would likely uphold the rules. As this Part explains, the regulations facilitate medical treatment and therefore fall within the State's police power to promote public health, peace, and safety. Moreover, the State cannot further accommodate free exercise of religion without seriously undermining its interest in assuring patients receive lawful medications in a timely manner.

A. The New Pharmacy Regulations Have a "Coercive" Effect on Pharmacists' Free Exercise Rights

To successfully assert an article I, section 11 claim, a complainant must first demonstrate that the challenged law has a coercive effect on free exercise.[223] The challenging party must show both a sincerely held religious belief and that the government action burdens free exercise rights.[224] Pharmacies or pharmacists similarly situated to the *Stormans* plaintiffs satisfy both conditions.

The Ninth Circuit did not question the sincerity of the plaintiffs' religious beliefs; it accepted that the objections were based on religion in concluding that the plaintiffs had standing to assert free exercise rights.[225] In their complaint, the pharmacy and pharmacists expressly stated that their refusal to distribute Plan B was guided by religious beliefs.[226] The pharmacy was so firm in its convictions that it was willing to face sanctions from the Board.[227] In addition, one plaintiff-pharmacist left her employment and the other expected to be fired at the time the complaint was submitted.[228] Although the plaintiffs could have been motivated by moral beliefs apart from religion, Washington courts have chosen to interpret the scope of religious beliefs broadly and typically give the challenging party the benefit of the doubt.[229]

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222. Stormans, Inc. v. Selecky, 586 F.3d 1109, 1120–22 (9th Cir. 2009).

223. *See* First United Methodist Church v. Hearings Exam'r for the Seattle Landmarks Pres. Bd., 129 Wash. 2d 238, 246, 916 P.2d 347, 378 (1996).

224. Munns v. Martin, 131 Wash. 2d 192, 199–200, 930 P.2d 318, 321 (1997).

225. *See Stormans*, 586 F.3d at 1120–21.

226. Complaint, *supra* note 21, at 8–12.

227. *Stormans*, 586 F.3d at 1117.

228. *Id.* at 9–12.

229. *See In re* Marriage of Jensen-Branch, 78 Wash. App. 482, 490 n.2, 899 P.2d 803, 808 n.2 (1995) (noting that "religious beliefs" should be interpreted broadly).

Similarly, a Washington court would likely find that the regulations burden the *Stormans* plaintiffs' free exercise rights under article I, section 11. In *Stormans*, the Ninth Circuit acknowledged the significance of the plaintiffs' injuries in its standing analysis.[230] A pharmacy that refuses to dispense medications for religious reasons faces sanctions, such as fines or even the loss of its state-issued license.[231] Because not all pharmacies can afford to accommodate pharmacists with religious objections, the rules similarly hinder individual pharmacists' ability to refuse distribution for religious reasons. As stated above, one of the plaintiff-pharmacists had already lost her job, and both faced termination in the future.[232] The plaintiffs' existing and potential injuries appear significant enough to exceed the "slight inconvenience" threshold of *Northshore*.[233] Thus, a court applying Washington's free exercise case law would likely hold that the rules have a coercive effect on religious beliefs.

B. Washington Has a Compelling Interest in Ensuring that Pharmacies Distribute Lawful Medications, Including Plan B, in a Timely Manner

Because the pharmacy regulations potentially burden free exercise of religion, under *First Covenant* a Washington court must determine that the regulations satisfy strict scrutiny to comport with article I, section 11.[234] Strict scrutiny first requires the State to show a compelling interest in the rules.[235] Washington's interests in the regulations are sufficiently compelling. Contrary to the District Court's findings in *Stormans*, the pharmacy regulations are an exercise of the State's long-recognized police authority to regulate public health because they relate directly to promoting medical treatment. This objective has been

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230. *Stormans*, 586 F.3d 1109, 1120–22 (describing the injuries of the pharmacy and pharmacists as "concrete and particularized," "actual or imminent, not conjectural or hypothetical," and "fairly traceable" to the new rules (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180 (2000)).

231. *See id.* at 1120–21; *see also* WASH. REV. CODE § 18.64.165 (1995); Complaint, *supra* note 21, 8–9.

232. *See Stormans*, 586 F.3d at 1121–22; Complaint, *supra* note 21, at 9–12.

233. Compare the burden of the loss of one's business and livelihood with a city's refusal to consider a conditional land use permit, which was held to burden free exercise in *City of Woodinville v. Northshore United Church of Christ*. 166 Wash. 2d 633, 644–45, 211 P.2d 406, 411 (2009).

234. *See supra* Part III.B.

235. *See id.*

recognized as a compelling state interest in prior free exercise cases both inside and outside of Washington.

1. The State's Interest in Ensuring Access to Lawful Medications Relates Directly to Public Health and Is, Therefore, Compelling

The Western District of Washington and the Ninth Circuit both discussed and ultimately disagreed on the precise nature of the State's interest in promulgating the pharmacy regulations. The dispute centered on whether the State's interest was limited to ensuring access to the drug Plan B or to prescription drugs more generally.[236] The Board of Pharmacy initiated the rulemaking process largely due to concerns over the drug Plan B,[237] a point recognized by both the district court[238] and the Ninth Circuit.[239] But as the process evolved, the Board, working with the Governor's office,[240] broadened its interest to prescription drugs generally.[241] The scope of the final rules is thus not limited to Plan B or emergency contraceptives, but to all prescription drugs.[242] In a post-adoption letter interpreting the new regulations, the Board emphasized that the regulations responded to a need to "define standards of patient care and professional conduct when a pharmacist's personal objections conflicted with the patient's access to legally prescribed medications."[243] One of the principal interests expressly relied upon by the Board in *Stormans* was "promoting health by ensuring access to Plan B (*and other medications*) in a timely manner."[244] The Ninth Circuit in turn framed the State's interest in more broad terms: "ensuring that all citizens have timely access to lawfully prescribed medications."[245]

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236. *See* Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1260 (W.D. Wash. 2007).

237. Brief for Appellants, *supra* note 11, at 9–10.

238. *Stormans*, 524 F. Supp. 2d at 1260.

239. Stormans, Inc. v. Selecky, 586 F.3d 1109, 1114 (9th Cir. 2009).

240. Governor Gregoire was actively involved with the rule-making process, openly stating her firm opposition to a draft which would have allowed pharmacies to refuse to distribute medications. In fact, at a press conference held shortly after a more lenient version of the rules was proposed, the Governor acknowledged that she had the authority to remove the entire board with the legislature's consent. *Stormans*, 524 F. Supp. 2d at 1251. Judge Leighton emphasized the Governor's threats in concluding that the true "target" of the rules was pharmacists opposing Plan B for religious reasons. *Id.* at 1259. The Ninth Circuit apparently did not agree with Judge Leighton's assessment.

241. *Stormans*, 586 F.3d at 1115 n.4.

242. *See* WASH. ADMIN. CODE §§ 246-863-095, 246-869-010 (2007).

243. *Stormans*, 524 F. Supp. 2d at 1253.

244. *Id.* at 1263 (emphasis added).

245. *Stormans*, 586 F.3d at 1139.

Ensuring access to lawful medication relates to the State's interest in public health. Prescription medications are prescribed to patients for health reasons. Medications available over the counter further similar ends.[246] As recognized by the Ninth Circuit, improper denial of Plan B, or any other lawful drug, presents a legitimate public health concern.[247] Because the rules implicate valid public health concerns, a court properly applying Washington free exercise jurisprudence would likely hold the State's interest in the rules sufficiently compelling.

2. The State's Interests in the Pharmacy Rules Are Closely Aligned with Those Recognized as Compelling in Cases Involving Medical Care or Treatment

In prior free exercise cases, Washington appellate courts found medical interests to be sufficiently compelling.[248] The interests advanced in these prior cases are very similar to those furthered by the pharmacy regulations.

For example, in *Holcomb*, the plaintiff refused for religious reasons to acquiesce to a state university's requirement that he undergo tuberculosis screening.[249] Like the rules adopted by the Board of Pharmacy, the screening policy at issue in *Holcomb* was adopted for the purpose of protecting the health of the broader community.[250] By shielding the campus populace from a contagious disease, the screening requirement strengthened the community's overall health. The new pharmacy rules serve an analogous function by protecting the general population's access to medications—medications that, among other things, combat disease and promote personal health.

Similarly, in *Norman*, the Court of Appeals refused to allow a parent to use free exercise rights to avoid criminal punishment for his refusal to provide medical care for his ailing child.[251] By permitting the criminal prosecution of the defendant father, the court recognized the compelling nature of the State's interest in ensuring that parents do not block their children's access to needed medical treatment.[252] Through the new

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246. Plan B is available over the counter for women aged 17 years or older, and may be prescribed to women aged younger than 17 years. *See* Letter from Monroe and Leonard-Segal, *supra* note 14.

247. *Stormans*, 586 F.3d at 1139.

248. *See supra* Part IV.C.

249. State *ex rel.* Holcomb v. Armstrong, 39 Wash. 2d 860, 861, 239 P.2d 545, 546 (1952).

250. *See id.* at 863–64, 239 P.2d at 548.

251. State v. Norman, 61 Wash. App. 16, 18, 808 P.2d 1159, 1160 (1991).

252. *Id.* at 23, 117 P.2d at 1163.

pharmacy regulations, the State similarly endeavors to prevent certain individuals from obstructing general access to medical treatment.

The issues in *Stormans* are particularly analogous to those presented in *Backlund*.[253] The public hospital regulation challenged in *Backlund* imposed an affirmative requirement on medical professionals to procure liability insurance.[254] The hospital's purpose in adopting the new policy was to decrease its liability expenses and liability exposure.[255] Such a decrease would enhance hospital efficiency, thereby increasing the hospital's ability to serve the community's medical needs.[256] In this respect, the recently-adopted pharmacy regulations are quite similar to the hospital rule in *Backlund*. The pharmacy rules' purpose is to serve community health needs: they remove certain barriers to access to lawful medications by regulating the conduct of a discrete class of medical professionals. In so doing, the regulations increase the reliability and accessibility of the state's pharmacy system.[257]

Holcomb, *Norman*, and *Backlund* all stand as examples of cases where Washington courts determined that the government's interests in medical care and treatment were sufficient to defeat the plaintiffs' free exercise claims. Although not identical, the State's interests in promulgating the new pharmacy rules closely parallel those advanced in each of these cases. These similarities support the contention that a Washington state court would find the rules serve a compelling interest.

3. The District Court's Conclusion in Stormans *Is Not Consistent with Washington's Free Exercise Cases*

In *Stormans*, the federal district court for the Western District of Washington ordered a preliminary injunction against enforcement of the new pharmacy rules because it determined that the State's interests were not compelling.[258] Ultimately, the Ninth Circuit reversed the district court's judgment because the regulations were deemed neutral and generally applicable, and, therefore, not subject to strict scrutiny.[259]

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253. Backlund v. Bd. of Comm'rs, 106 Wash. 2d 632, 724 P.2d 981 (1986).

254. *Id.* at 634–35, 724 P.2d at 983.

255. *Id.* at 644–45, 724 P.2d at 988–89.

256. *Id.*

257. The Ninth Circuit bolstered this conclusion when it discussed how many people will benefit from the new rules: "Whatever that number, it will not be smaller than the number of pharmacists or pharmacies affected by the regulation, so it cannot be shrugged off as insignificant." Stormans, Inc. v. Selecky, 586 F.3d 1109, 1135 (9th Cir. 2009).

258. Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1263–64 (W.D. Wash. 2007).

259. *See supra* Part II.B.

Thus, the Ninth Circuit had no cause to directly counter the district court's compelling interest analysis.[260] Nonetheless, the district court's analysis would not be consistent with Washington's free exercise jurisprudence for two major reasons.

First, the district court overemphasized the historical background of the administrative regulations. Rather than relying on the text of the new rules, the court looked largely to the history of the rules' development.[261] The court's approach is understandable given it was considering whether the regulations "infringe upon or restrict" religion in a manner inconsistent with the First Amendment.[262] But in so doing, the court went too far and concluded that the true "focus" of the law was Plan B.[263]

Washington courts generally have not significantly scrutinized the history of a challenged law when examining the State's interest in free exercise cases.[264] Rather, Washington courts tend to emphasize the broader purposes of the challenged law.[265] In *State v. Balzer*,[266] the Washington Court of Appeals took some note of the history behind the

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260. As explained in this section, however, several portions of the Ninth's Circuit opinion undermine the district court's compelling interest analysis.

261. *Stormans*, 524 F. Supp. 2d at 1260–61. The Ninth Circuit in its subsequent opinion stated that it was unclear whether the district court was permitted to examine the historical background of the ordinances, noting that "the law is unsettled regarding the scope of its consideration in the free exercise arena." 586 F.3d at 1131.

262. *Stormans*, 524 F. Supp. 2d at 1258.

263. *Id.* at 1260.

264. *See, e.g.*, First United Methodist Church v. Hearings Exam'r for the Seattle Landmarks Pres. Bd., 129 Wash. 2d 238, 250, 916 P.2d 347, 380 (1996) (characterizing the city's interest in landmark preservation ordinance generally as "landmark preservation" with no examination of legislative history); First Covenant Church v. City of Seattle, 120 Wash. 2d. 203, 222–23, 840 P.2d 174, 185 (1992) (describing a city's interest in landmark preservation ordinance as "further[ing] cultural and esthetic interests" with no discussion of the ordinance's historical development); State v. Motherwell, 114 Wash. 2d 353, 365, 788 P.2d 1066, 1072 (1990) (framing State's interest in child abuse reporting statute broadly as "the protection of children" without examining legislative history); State v. Clifford, 57 Wash. App. 127, 132–33, 787 P.2d 571, 574–75 (1990) (recognizing without reference to legislative history that the State's interest in a driver's license requirement is "to make highways as safe as possible" and "protecting the safety of . . . highway users"); *cf.* State v. Norman, 61 Wash. App. 16, 21–23, 808 P.2d 1159, 1162–63 (1991) (referencing the history of common law in rejecting defendant's arguments that the history supported his failure to provide his child medical treatment, but ultimately acknowledging that the common law was superseded by statute). *Contra* Backlund v. Bd. of Comm'rs, 106 Wash. 2d 632, 644–45, 724 P.2d 981, 988–89 (1986) (reviewing hospital board's findings of fact before concluding its interest in requiring liability insurance was compelling).

265. *See Stormans*, 524 F. Supp. 2d at 1260.

266. 91 Wash. App. 44, 954 P.2d 931 (1999).

drug statute at issue.[267] But in so doing, the court afforded great deference to the broader interests advanced by both the state legislature and by Congress.[268] Even if one assumes that a law's history is an important factor in a compelling interest analysis, the history of the pharmacy rules is not as clear as the district court ultimately concluded in *Stormans*. As the Ninth Circuit expressly emphasized:

> While the Board's deliberative process may have been initiated over concerns regarding Plan B, the administrative history hardly reveals a single design to burden religious practice; rather, it is a patchwork quilt of concerns, ideas, and motivations. The record reveals that the draft rules morphed and evolved throughout the deliberative process, as did the concerns raised both by rulemakers and the public participants. . . . To the extent the record indicates anything about the Board's motivation in adopting the final rules, it shows the Board was motivated by concerns about the potential deleterious effect on public health that would result from allowing pharmacists to refuse to dispense lawfully prescribed medications based on personal, moral objections (of which religious objections are a subset).[269]

A Washington state court would likely take a similarly broad and somewhat skeptical view of the legislative history, at least in free exercise cases.

Second, the district court mischaracterized the nature of the State's interest. The district court rejected the State's position that the purpose of the pharmacy regulations was to promote the health and welfare of its citizenry.[270] Rather, in examining the historical record, the court concluded "that the interests promoted by the regulations have more to do with convenience and heartfelt feelings than with actual access to certain medications."[271] The court appears to have undervalued the very real potential consequences at issue. A person's failure to get lawful medication promptly could have serious health ramifications. Plan B

267. *Id.* at 58, 954 P.2d at 938.

268. *Id.* at 59, 954 P.2d at 938 (stating that "we take judicial notice of marijuana's effects and harmfulness as evidenced by the legislative assessments expressed in both state and federal case law").

269. Stormans, Inc. v. Selecky, 586 F.3d 1109, 1133 (9th Cir. 2009).

270. *Stormans*, 524 F. Supp. 2d at 1263.

271. *Id.*

itself has a very limited window of effectiveness.[272] Thus, the benefits of Plan B could be completely negated by a pharmacist refusing distribution for religious reasons, particularly in smaller communities where other pharmacies are less accessible.[273] The health implications could be even more dire with other medications.[274]

The district court discarded this point, noting that the same result could occur for reasons "wholly acceptable under the regulations," such as "lack of money, the drug is not in stock, no one has previously requested it, or the store is closed on Sunday."[275] But unlike a religious refusal, these "wholly acceptable" reasons for refusal[276] are reasonable restrictions essential to the continued operation of a pharmacy as an effective business.[277] As noted by the Ninth Circuit, "the absence of these exemptions would likely drive pharmacies out of business or . . . mandate unsafe practices. Therefore, the exemptions actually *increase access* to medications by making it possible for pharmacies to comply with the rules, further patient safety, and maintain their business."[278] These reasonable exceptions simply do not detract from the compelling nature of the State's interest.[279]

The pharmacy regulations are to some degree about the convenience of those entitled to lawful medications, just as the hospital regulation challenged in *Backlund* was convenient for the hospital administration. But the key question in Washington free exercise analysis is whether the State's interests serve public health, peace, or safety, or are otherwise compelling.[280] The Board's pharmacy rules serve broader public health

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272. Plan B is most effective within the first 12 to 24 hours after sexual intercourse and becomes less effective with each subsequent hour. It should be taken no more than 72 hours after intercourse and has no effect beyond 120 hours. *Stormans*, 586 F.3d at 1114.

273. *See id.* at 1139 (noting that "unreasonable delay . . . may render the drug [Plan B] ineffective in preventing an unwanted pregnancy").

274. For instance, the treatment for HIV recommended by the U.S. Department of Human Services is the highly active antiretroviral therapy (HAART), which involves a regimen of three different types of medication. Some of these medications must be taken several times a day at specific times. U.S. Department of Health and Human Services, *Starting Anti-HIV Medications* (Dec. 2009), *available at* http://aidsinfo.nih.gov/ContentFiles/StartingAnti-HIVMeds_FS_en.pdf.

275. *Stormans*, 524 F. Supp. 2d at 1263.

276. The reasons are expressly laid out in the regulation. *See* WASH. ADMIN. CODE §§ 246-863-095(4)(a)–(e), 246-869-010(4)(a)–(e) (2007).

277. *Stormans*, 586 F.3d at 1135.

278. *Id.* (emphasis added).

279. One might argue that these exemptions demonstrate that the rules do not employ the least restrictive means to achieve the State's interest. But as will be discussed later, this argument ultimately fails. *See infra* Part V.C.

280. *See supra* Part IV.B.

ends.[281] Thus, the district court's basis for concluding that the rules do not advance a compelling state interest would likely be rejected by a Washington court interpreting article I, section 11.

4. A Finding of a Compelling Interest Would Be Consistent with Similar Opinions in Other Jurisdictions

Some states, such as Washington, have expressly interpreted their state constitutions to provide greater protection than the First Amendment with regard to free exercise rights. For example, Maine, Massachusetts, Montana, and Oregon have all departed from the First Amendment's *Smith* standard and adopted a strict scrutiny approach in free exercise cases.[282] A survey of the case law in these jurisdictions, however, reveals few free exercise cases where the State's interest relates to public health.[283] These cases considered issues very different from those presented in *Stormans*. Apart from the courts' general recognition of the government's compelling interest in public health, these cases do little to explain how a Washington court would rule in applying strict scrutiny to a pharmacy regulation.

Although the California State Supreme Court has not expressly held its state constitution to be more protective of free exercise rights than the First Amendment, it has acknowledged that its constitution *may* be more protective.[284] And, as discussed earlier in this Comment,[285] the California State Supreme Court has decided two cases examining public

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281. *See supra* Part V.B.2.

282. *See* Tracey Levy, *Rediscovering Rights: State Courts Reconsider the Free Exercise Clauses of Their Own Constitutions in the Wake of* Employment Division v. Smith, 67 TEMP. L. REV. 1017, 1019 (1994).

283. *See, e.g.*, Am. Lithuanian Naturalization Club v. Bd. of Health, 844 N.E.2d 231, 242–43 (Mass. 2006) (upholding town no-smoking ordinance because plaintiffs demonstrated no burden on free exercise rights); Norwood Hospital v. Munoz, 564 N.E.2d 1017, 1022–25 (Mass. 1991) (state's interest in protecting life, preventing suicide, ensuring integrity in the medical profession, and protecting dependent children outweighed by adult patient's right to refuse medical treatment); *In re* McCauley, 565 N.E.2d 411, 413–14 (Mass. 1991) (upholding lower court's order to give child a blood transfusion despite parents' religious objections given the serious health implications for the child); Sagar v. Sagar, 781 N.E.2d 54, 59 (Mass. App. Ct. 2003) (recognizing that interest in protecting child's health and safety may justify court enforcement of one parent's religious preferences to the detriment of the other parent's free exercise rights); State v. Soto, 537 P.2d 142, 143–44 (Or. Ct. App. 1975) (defendant's conviction for possession of mescaline affirmed despite free exercise challenge on the grounds that the state had a compelling interest in the preservation of health and safety).

284. *See* N. Coast Women's Care Med. Grp., Inc. v. Superior Court, 189 P.3d 959, 968 (Cal. 2008); Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 91–92 (Cal. 2004).

285. *See supra* Part II.C.

health issues similar to those presented in *Stormans*. In both cases the Court not only recognized the potentially greater protection provided by its state constitution, but also adopted a strict scrutiny analysis similar to that utilized by Washington courts interpreting article I, section 11.[286]

In *Catholic Charities of Sacramento*,[287] considering a statute requiring employers to provide insurance coverage for prescription contraceptives, the California State Supreme Court recognized the State's compelling interest in eliminating a form of gender discrimination in the provision of health care benefits.[288] The Court emphasized the additional health costs women would incur without the coverage.[289] Similarly in *North Coast*, the California State Supreme Court recognized the State's compelling interest in ensuring "full and equal access to medical treatment" when it held that the state Civil Rights Act could prohibit private medical practitioners from refusing to treat patients on the basis of sexual orientation.[290] These recognized interests are closely analogous to the primary goal advanced by the State in *Stormans*—ensuring equal access to medications.

In scrutinizing two different health-related statutes,[291] the California State Supreme Court concluded that the public health interests advanced by the State were compelling. In so concluding, the Court employed a strict scrutiny approach very similar to Washington's.[292] And although states with free exercise jurisprudence similar to Washington's have not examined an analogous issue to that presented in *Stormans*, these states have recognized that public health interests justify burdening free exercise rights, at least under certain conditions.[293] These cases further support a finding that the pharmacy rules serve a compelling state interest.

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286. *See North Coast*, 189 P.3d at 968; *Catholic Charities of Sacramento*, 85 P.3d at 91–92.

287. 85 P.3d 67 (Cal. 2004).

288. *Id.* at 92–94.

289. *Id.* at 92–93.

290. *North Coast*, 189 P.3d at 968.

291. California's Civil Rights Act is, of course, not limited to health services. CAL. CIV. CODE § 51(b) (2005); *see also id*. at 965. But given its treatment by the California State Supreme Court in *North Coast*, the Act can fairly be characterized as a health services law for the purpose of analyzing similar cases involving constitutional protections of religious free exercise.

292. *See id.*; *Catholic Charities of Sacramento*, 85 P.3d at 91–92.

293. *See supra* note 283 and accompanying text.

C. The Board's Regulatory Scheme Imposes the Least Restrictive Means Available to Ensure Pharmacies Distribute Medications

Demonstrating a compelling interest is only half of the State's requirement under *Munns* and *First Covenant.* The challenged law must also employ the "least restrictive possible means" to achieve the interest.[294] Washington jurisprudence requires a fact-specific approach when determining if a particular regulation employs the least restrictive means to achieve a compelling interest. A court must balance the competing interests and "[o]nly if . . . accommodation is not possible should one legitimate interest override another."[295] Washington pharmacists have undeniably strong personal interests, but in this instance, the State went to great lengths to accommodate those interests.[296] Consequently, a Washington court would likely find that the rules invoke the least restrictive means available.

As the Ninth Circuit recognized, the Board took sixteen months developing the rules.[297] The Board drafted several proposed regulations, attempting to balance the public need for lawful medication with the rights of individual pharmacists.[298] In its brief, the *Stormans* plaintiffs advanced certain alternatives to the pharmacy regulations recommended by the American Pharmacists Association (APhA).[299] These alternatives included: proactively directing prescribers and patients to pharmacies that sell the drug, setting up a telephone hotline and website informing patients of pharmacies that sell the drug, notifying patients and the Board in advance that a pharmacy does not sell the drug, and encouraging health-care providers to maintain inventories of drugs not stocked by local pharmacies.[300] Although the APhA's alternatives seem reasonable on their surface, they are deficient in numerous respects.

For these alternatives to be effective, the patient must overcome certain barriers to actually receiving the information about the drug's availability. Plan B is available over the counter to certain patients,[301] so not every patient will have consulted a health-care provider before

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294. Munns v. Martin, 131 Wash. 2d 192, 200, 930 P.2d 318, 321 (1997).

295. Sumner v. First Baptist Church, 97 Wash. 2d 1, 10, 639 P.2d 1358, 1364 (1982).

296. *See* Stormans, Inc. v. Selecky, 586 F.3d 1109, 1113–16 (9th Cir. 2009).

297. *Id.* at 1114.

298. *See id.* at 1116.

299. Brief for the Appellee-Plaintiffs at 53–54, Stormans, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009) (No. 07-36039, 07-36040).

300. *Id.*

301. Letter from Monroe and Leonard-Segal, *supra* note 14.

attempting to acquire it. The hotline or website would be essentially useless if the patient lacked reliable access to a telephone or computer or if the patient did not know the hotline telephone number or web address. Moreover, even a patient with access to the hotline or website may not have available transportation to get to another nearby pharmacy. Nor can the hotline or website prevent a recommended pharmacy or pharmacist from having a change of heart and refusing to distribute the drug. These alternatives present the very real possibility that some patients, if not denied access altogether, will encounter significant delays in receiving medication—delays that are at best inconvenient, but are substantially more problematic where the drug is time sensitive like Plan B.[302] Simply put, the practical effect of the APhA's proposed system is that some patients will almost certainly be denied timely distribution of lawful medication,[303] thus unduly burdening the State's ultimate interest in promulgating the current pharmacy rules.

One might argue—as did the district court in *Stormans*—that if the State is truly serious about ensuring access to medications, it should reform the rules to eliminate many of the existing exemptions.[304] But as the Ninth Circuit noted, these exceptions, unlike religious-based refusal, are reasonable restrictions that are essential to a pharmacy's economic viability.[305] Abandoning these reasonable barriers is simply not feasible and would again unduly burden the State's ultimate interest.

Further, the rules as they stand accommodate free exercise rights to a certain degree. The pharmacy must assure that legal drugs are timely distributed, but individual pharmacists may individually refuse to dispense drugs based on religious objections.[306] A pharmacy can accommodate an objecting pharmacist in any way it sees fit, such as by having another pharmacist available in person or by telephone.[307] The rules ensure patients get their medications while simultaneously respecting personal religious beliefs. This approach is far more deferential to personal free exercise rights than the hospital regulation

302. *See supra* Part V.B.3.

303. *See* Kelsey C. Brodsho, *Recent Developments: Patient Expectations and Access to Prescription Medications Are Threatened by Pharmacist Conscience Clauses*, 7 MINN. J. L. SCI. & TECH. 327, 334–35 (2005).

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

305. Stormans, Inc. v. Selecky, 586 F.3d 1109, 1135 (9th Cir. 2009).

306. *See id.* at 1116.

307. *See id.*

considered in *Backlund*,[308] which imposed upon the challenging physician an *absolute* requirement to procure liability insurance.[309]

The current pharmacy rules achieve the very degree of balancing and accommodation that Washington courts have required in free exercise cases. The Board's rules do not go beyond the limits that are necessary to further its compelling interest in public health. Thus, the rules represent the least restrictive means to achieve a compelling interest as those terms are understood in light of cases interpreting article I, section 11.

D. Given the Nature of the Profession, Pharmacists Should Understand that Professional Obligations Might Conflict with Their Personal Religious Convictions

Although pharmacists have constitutional rights, they also choose to be members of a profession dedicated to providing health services to the public, and, therefore, should be prepared to encounter regulations that place public needs at odds with personal religious beliefs.[310] One should not join the armed forces if one's religious beliefs forbid the exercise of violence.[311] By the same token, one should not choose pharmacy as a profession if one feels compelled to withhold certain medications for religious reasons. Pharmacists' core function is to facilitate, and not hinder, access to medication. Society expects them to fulfill this role.[312] The Code of Ethics for Pharmacists adopted by the APhA states that a pharmacist "respects the autonomy and dignity of each patient" and "serves individual, community, and societal needs."[313] Pharmacists take a professional oath to "apply [their] knowledge, experience, and

308. Backlund v. Bd. of Comm'rs, 106 Wash. 2d 632, 724 P.2d 981 (1986).

309. *Id.* at 634, 724 P.2d at 983.

310. *See* Vokes, *supra* note 8, at 411–12 (a pharmacist's professional obligations dictate that "when the pharmacist's beliefs are in direct conflict with the patient's decision, a pharmacist ought to fill the prescription against his or her own beliefs out of respect for the patient's beliefs").

311. This is not to say that no U.S. military service members ever raise religious or otherwise moral objections that preclude them from serving in combat. Such "conscientious objectors," however, face almost certain discharge from military service. *See* Joseph B. Mackey, *Reclaiming the In-Service Conscientious Objector Program: Proposals for Creating a Meaningful Limitation to the Claim of Conscientious Objection*, 2008 ARMY LAW. 31, 35 (2007); *see also* DEPARTMENT OF DEFENSE INSTRUCTION 1300.06 §§ 4.1–4.2 (2007).

312. *See* Brodsho, *supra* note 303, at 328–29; Vokes, *supra* note 8, at 406–07, 411–12.

313. *Code of Ethics for Pharmacists*, AMERICAN PHARMACISTS ASSOCIATION (APhA), http://www.pharmacist.com/AM/Template.cfm?Section=Search1&template=/CM/HTMLDisplay.cfm&ContentID=2903 (last visited Oct. 3, 2010). Although this code of ethics is not binding, it outlines "the principles that form the fundamental basis of the roles and responsibilities of pharmacists." *Id.*

skills . . . to assure optimal outcomes for . . . patients" and to "embrace and advocate changes that improve patient care."[314] Given these professional realities, pharmacists should expect that the State would permit them to refuse to dispense medications to which a patient is entitled.

Although not expressly adopting it as a required consideration in cases interpreting article I, section 11, the Washington State Supreme Court on at least one occasion examined the characteristics of the challenger's profession in assessing the validity of a free exercise argument. In *Backland*, upholding a policy requiring a physician to procure liability insurance, the Court noted:

> [Appellant] freely chose to enter into the profession of medicine. Those who enter into a profession as a matter of choice necessarily face regulation as to their own conduct and their voluntarily imposed personal limitations cannot override the regulatory schemes which bind others in that activity. [Appellant's] practice is open to the public. He enjoys the economic benefits of his practice. . . . The Board's decision not to grant an exemption [to the insurance requirement] is supported by the findings and does not impinge upon Dr. Backlund's right to believe as he chooses, only upon his practice of those beliefs when such practice can be to the detriment of others.[315]

Each of these facts highlighted by the Court in *Backlund* is equally applicable to Washington pharmacists. They are voluntary members of a heavily regulated profession[316] providing health services to the general public. Pharmacists receive economic benefits from their arrangement with the State.[317] And the pharmacy rules do not regulate religious beliefs but rather conduct that negatively impacts third parties.[318]

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314. *Oath of a Pharmacist*, AMERICAN PHARMACISTS ASSOCIATION (APHA), http://www.pharmacist.com/AM/Template.cfm?Section=Oath_of_a_Pharmacist&Template=/CM/HTMLDisplay.cfm&ContentID=18306 (last visited Oct. 3, 2010).

315. Backlund v. Bd. of Comm'rs, 106 Wash. 2d 632, 638, 724 P.2d 981, 990 (1986).

316. For a detailed summary of the Washington regulations applicable to the pharmacy industry, *see generally* WASH. STATE BD. OF PHARMACY, PHARMACY LAWS AND RULES (Apr. 2010), *available at* http://www.doh.wa.gov/hsqa/professions/pharmacy/documents/2010LawBook.pdf.

317. A report published by IMS Health, a market intelligence provider for the pharmaceutical and health industries, has placed the total sale of prescription drugs in the U.S. to $300.3 billion in 2009. Gary Gatyas, *IMS Health Reports U.S. Prescription Sales Grew 5.1 Percent in 2009, to $300.3 Billion*, IMS HEALTH (Apr. 1, 2010), http://www.imshealth.com/portal/site/imshealth/menuitem.a46c6d4df3db4b3d88f611019418c22a/?vgnextoid=d690a27e9d5b7210VgnVCM100000ed152ca2RCRD&cpsextcurrchannel=1.

318. *See* Stormans, Inc. v. Selecky, 586 F.3d 1109, 1131 (9th Cir. 2009) (acknowledging that the

Pharmacists are professionals licensed by the State to provide a critical public health service, specifically distributing medications. The underlying nature and realities of the profession undermine the expectation that free exercise rights allow pharmacists to withhold lawful medications from patients who need them. A Washington state court, particularly in light of the closing comments in *Backlund*, would likely consider these facts in assessing the scope of a pharmacist's free exercise rights.

CONCLUSION

Because Washington's recently adopted pharmacy regulations withstood a First Amendment attack, the *Stormans* plaintiffs or other similarly situated pharmacists may seek shelter under the Washington State Constitution's article I, section 11. But considering the current state of Washington's free exercise law, it is unlikely that this provision would provide any reprieve for religious pharmacists or their supporters. The Washington State Constitution does protect free exercise rights to a greater extent than the First Amendment, and one can never predict with absolute certainty how any given court will decide an issue. Nevertheless, the rules' public health impact and degree of religious accommodation strongly suggest that they would survive scrutiny under article I, section 11.

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regulations "do not suppress, target, or single out the practice of any religion because of religious content").