Stormans v. Wiesman: Paths to Strict Scrutiny in Religious Free Exercise Cases

By Steven T. Collis

Note from the Editor:

This article is about *Stormans v. Wiesman*, a case from the 9th Circuit that has a petition for certiorari pending at the Supreme Court. Since the petition was filed on January 4, 2016, the case has been distributed for conference three times and rescheduled each time (most recently in late April).

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• Stormans, Inc. v. Weisman, 794 F.3d 1064 (9th Cir. 2015), *available at* http://www.scotusblog.com/wp-content/uploads/2016/03/Stormans-op.pdf.

• Washington State Respondents' Brief in Opposition to Certiorari, Stormans, Inc. v. Weisman, No. 15-862 (March 7, 2016), *available at* http://www.scotusblog.com/wp-content/uploads/2016/03/Stormans-State-BIO.pdf.

• James M. Oleske, Jr., *Lukumi at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Law*, 19 Animal L. 295 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216207.

• Ian Millhiser, *Court Smacks Down Pharmacy That Refused To Fill Prescriptions On Religious Grounds*, Think Progress (July 25, 2015), *available at* http://thinkprogress.org/justice/2015/07/25/3684270/court-pharmacy-religious-grounds/.

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Introduction

Currently pending on the docket of the United States Supreme Court is the case of *Stormans v. Wiesman*, No. 15-862, on petition for a writ of certiorari to the Ninth Circuit. At issue is whether the Free Exercise Clause of the United States Constitution compels the state of Washington to grant pharmacists a religious exemption from a regulatory obligation to fill all lawful prescriptions when the regulation already grants a number of secular exemptions. If the Court grants certiorari, the case will become just the third in the last thirty years to provide guidance on when, under the Free Exercise Clause, courts must apply the compelling interest test—rather than rational basis review—to a law or regulation that burdens the free exercise of religion.

A number of religious freedom cases in the Supreme Court have made headlines in recent years,[1] but almost all have arisen under the Religious Freedom Restoration Act ("RFRA"), which requires courts to apply compelling interest review to any law or regulation that puts a substantial burden on the free exercise of religion.[2] The federal RFRA, however, applies only to federal laws.[3] Thirty-two states have similar protections, either through legislation or through interpretations of their state constitutions, but many of those state RFRAs and equivalents are underenforced or relatively untested. *Stormans* stems from regulations passed by the state of Washington. Plaintiffs brought their claims under the Free Exercise Clause of the federal Constitution.

In contrast to RFRA, the Free Exercise Clause requires compelling interest review only when a law lacks neutrality or is not generally applicable. This was the holding of *Employment Division v. Smith*, which the Court applied in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*. Since those decisions, handed down in 1990 and 1993 respectively, the Supreme Court has not provided any additional insight into the meaning of the terms "neutral" and "generally applicable." As a result, a circuit split has arisen in the lower courts, and the justices now have an opportunity to provide much-needed clarity.

I. The Legal Backdrop

The First Amendment provides, "Congress shall make no law . . . prohibiting the free exercise" of religion.[4] This constitutional right applies to state and local governments through the

1 *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ____, 134 S. Ct. 2751 (2014); Little Sisters of the Poor Home for the Aged v. Burwell, No. 15-105 (argued March 23, 2016).

2 42 U.S.C. §2000bb–1(b). A number of other cases has also arisen under the Religious Land Use and Institutionalized Persons Act, which applies only in cases involving prisoners or religious land use. *See, e.g.,* Holt v. Hobbs, 574 U.S. ___, 135 S. Ct. 853 (2015).

3 City of Boerne v. Flores, 521 U.S. 507 (1997).

4 U.S. Const., amend. I.

Fourteenth Amendment.[5] The Supreme Court has interpreted the Free Exercise Clause in varying ways over the years,[6] but our current understanding derives from two cases with facts at opposite ends of a continuum—*Employment Division v. Smith*[7] and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[8]

Smith upheld the epitome of a neutral and generally applicable law. The state of Oregon passed an "across-the-board criminal prohibition" on possession of peyote.[9] Smith challenged whether the state could deny unemployment benefits to a person fired for violating that prohibition when he did so only as part of a religious ritual central to a traditional Native American religion.[10] The Supreme Court held that as long as a law is "neutral" and "generally applicable" it need not be justified by a compelling interest even if it fails to exempt religious exercise from its burdens.[11] The Court thus upheld the law under the Free Exercise Clause.[12]

Lukumi, in contrast, unanimously struck down a system of city ordinances gerrymandered to such an extreme degree that they applied only to the adherents of one religion "but almost no others."[13] Based on both Old Testament and West African traditions, the Santeria considered animal sacrifice a crucial part of their religious practice.[14] The City of Hialeah passed or adopted a series of ordinances and regulations banning the killing of animals, but the ban exempted so many forms of animal killing that it allowed almost everything but the Santeria sacrifices.[15] The Supreme Court struck down the ordinances, holding that they were not neutral because they targeted religion,[16] nor were they generally applicable because "the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others."[17]

In other words, the law in *Smith* applied to everyone; the law in *Lukumi* applied to people of one religion only and was designed to do so. In the quarter century since, how courts should treat laws that fall between these extremes has remained an open question. *Stormans v. Wiesman* provides the Court an opportunity to answer it.

II. Facts and Background of *Stormans*

A. The District Court's Findings of Fact

In 2007, the Washington State Board of Pharmacy enacted regulations requiring pharmacists and pharmacies to dispense lawfully prescribed emergency contraceptives[18] even if they had a sincerely held religious belief that doing so terminates a human life.[19] The Board passed the regulations at the insistence of Planned Parenthood, the Governor, and the Northwest Women's Law Center.[20] The plaintiffs in *Stormans* refused to comply with the regulations, the Board launched a series of investigations, and the plaintiffs filed suit, arguing, among other things, that the regulations violated the Free Exercise Clause.[21]

After a twelve-week trial, the district court determined that "literally all of the evidence demonstrates that the 2007 rulemaking was undertaken primarily (if not solely) to ensure that religious objectors would be required to stock and dispense Plan B."[22] It also found that the burden of the regulations fell almost exclusively on religious objectors.[23] The Board exempted pharmacies from stocking and delivering contraceptives for a swarm of secular reasons: if the drug fell outside the pharmacy's business niche, had a short shelf life, was too expensive, required specialized training or equipment, was difficult to store, required additional paperwork, required the pharmacy to monitor the patient, would make the pharmacy a target for crime (with drugs like oxycodone or cough medicine), and other reasons.[24] When the Pharmacy Board actually applied the regulations, even more exceptions surfaced. The regulations only had a practical effect when the Board enforced them.[25] The district court found that the Board interpreted the regulations and responded to complaints in a way that ensured the burden of the regulations fell "almost exclusively on religious objectors."[26] Once all of the secular exemptions were applied, it became obvious that the regulations affected religious objectors and almost no one else.

B. The District Court and Ninth Circuit Rulings

Based on these findings, the district court ruled that the regulations were neither neutral nor generally applicable and thus violated the Free Exercise Clause.[27] The Ninth Circuit reversed, holding the district court clearly erred in finding discriminatory

5 Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

6 *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878); *Cantwell*, 310 U.S. 296; Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707 (1981).

7 494 U.S. 872 (1990).

8 508 U.S. 520 (1993).

9 494 U.S. at 884.

10 *Id.* at 874–875.

11 *Id.* at 886 & n.3.

12 *Id.*

13 508 U.S. at 536.

14 *Id.* at 524–25.

15 *Id.* at 536.

16 *Id.* at 542.

17 *Id.* at 536.

18 The contraceptives at issue were Plan B and *ella*, and the pharmacists in *Stormans* refused to dispense Plan B. Stormans, Inc. v. Selecky, 844 F. Supp. 2d 1172, 1176 (W.D. Wash. 2012).

19 *Id.* at 1175, 1181.

20 *Id.* at 1178.

21 *Id.* at 1175.

22 *Id.* at 1193.

23 *Id.* at 1188.

24 *Id.* at 1190.

25 *Id.* at 1194.

26 *Id.* at 1192.

27 *Id.* at 1193–94.

intent.[28] It also held that the laws were generally applicable because (1) they did not underinclude secular conduct;[29] (2) the secular exemptions they allowed were "necessary" because they allowed "pharmacies to operate in the normal course of business"; [30] and (3) the Pharmacy Board had not engaged in selective enforcement—it had merely responded to the complaints it received, and those had related only to religious objectors.[31] Because the Ninth Circuit determined the regulations were both neutral and generally applicable, it refused to apply the compelling interest test and upheld the regulations as being rationally related to a legitimate government purpose.[32]

III. What's at Stake: A Coherent and Consistent Understanding of What Triggers Strict Scrutiny Under the Constitution's Free Exercise Clause

Lukumi and *Smith* are both special cases, at opposite ends of a broad range. Many cases fall in the middle, involving laws that regulate religious conduct and some but not all analogous secular conduct. In the quarter century since *Smith* and *Lukumi*, the Supreme Court has provided no further guidance. The result is the circuit split detailed in the petition for a writ of certiorari in *Stormans*,[33] as well as the Ninth Circuit's failure to apply *Lukumi* to the Washington regulations, which fall at the *Lukumi* end of the continuum.

Stormans presents the Court with an opportunity to clarify the free exercise doctrine it set forth in *Smith*, *Lukumi*, and the earlier precedents they reinterpreted: if a law is *either* (1) not neutral, *or* (2) not generally applicable, it triggers strict scrutiny.

A. Neutrality and General Applicability Are Independent Requirements with Distinct Tests for Triggering Strict Scrutiny

The first prong of the *Smith-Lukumi* test requires courts to determine whether a law is neutral. *Smith* held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'"[34] If a law is either not neutral or not generally applicable, it must be justified under strict scrutiny and the compelling interest test.[35] *Lukumi* is the only other Supreme Court case to apply this test and, in the decades since it was decided, lower courts have inconsistently construed it.

Lukumi addressed neutrality and general applicability as distinct requirements, and in separate sections of the opinion. The ordinances were not neutral, because they "target[ed]" Santeria, their "object" was to suppress Santeria sacrifice, and they were "gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings."[36] These words—target, targeting, object, and gerrymander—are pervasive in the neutrality section of the opinion.[37] But they do not even appear in the section on general applicability.[38] The neutrality section of the opinion also uses the language of equal protection and nondiscrimination law: "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue *discriminates against* some or all religious beliefs or regulates or prohibits conduct *because* it is undertaken for religious reasons."[39] These words—discriminate, discrimination, because—are also entirely absent from the general applicability section of the opinion. General applicability is a distinct requirement—not just another term for neutrality—as explained below.

The trial court in *Stormans* found that Washington state acted with anti-religious motive; the Ninth Circuit held that finding clearly erroneous. But determining that a law lacks anti-religious motive does not save it from strict scrutiny. Anti-religious motive is *sufficient* to trigger strict scrutiny, but it is not *necessary*.[40]

We know that anti-religious motive is not necessary to trigger strict scrutiny because nine Justices held the *Lukumi* ordinances unconstitutional (based on their application of strict scrutiny), while only two found bad motive.[41] Two said motive is irrelevant.[42] Three said that strict scrutiny should apply even to neutral and generally applicable laws in spite of the *Smith* decision from three years earlier.[43] Two more (Justices White and Thomas) did not write separately, but did not join the motive section of the opinion.[44] Motive added little in *Lukumi*, where there were so many other grounds for holding that the ordinances were not neutral and not generally applicable.

But the answer to whether anti-religious motive is sufficient to show lack of neutrality comes earlier in the opinion, where five justices concluded: "*At a minimum*, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[45] The Court uses the language of equal protection and nondiscrimination law to hold that an anti-religious motive would suffice to render a law non-neutral and therefore subject to strict scrutiny under the Free Exercise Clause. In equal protection and nondiscrimination law, it is settled that a plaintiff may prove either a facial classification or

28 Stormans, Inc. v. Weisman, 794 F.3d 1064, 1079 (9th Cir. 2015).

29 *Id.* at 1079–81.

30 *Id.* at 1080.

31 *Id.* at 1080–81, 1083–84.

32 *Id.* at 1084.

33 Pet. 22–38.

34 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

35 *Id.* at 884 (reaffirming *Sherbert*, 374 U.S. 398).

36 508 U.S. at 542.

37 *Id.* at 532-42.

38 *Id.* at 542-46.

39 *Id.* at 532 (emphases added).

40 Shrum v. City of Coweta, 449 F.3d 1132, 1144-45 (10th Cir. 2006) (collecting cases).

41 508 U.S. at 540-42 (Kennedy and Stevens, JJ.).

42 *Id.* at 558-59 (Scalia, J. and Rehnquist, C.J., concurring).

43 *Id.* at 565-77 (Souter, J., concurring); *id.* at 577-80 (Blackmun and O'Connor, JJ., concurring).

44 *See id.* at 522.

45 *Id.* at 532 (emphasis added).

that a facially neutral law is "a purposeful device to discriminate."[46] When a challenged rule is facially neutral, those claiming discrimination may show that the rule was adopted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[47] In *Hunter v. Underwood*, the Supreme Court unanimously held that a facially neutral provision of the Alabama Constitution was invalid because it had been "enacted with the intent of disenfranchising blacks."[48]

A lack of discrimination is the "minimum" requirement of neutrality.[49] Laws that burden religion must at least be free of anti-religious motive. Plaintiffs *may* prove, as a path to strict scrutiny, that a law was enacted with anti-religious motive and thus is not neutral. But they *need not* do so if a law is not generally applicable.

B. Regardless of Neutrality, Laws That Are Not Generally Applicable Must Be Reviewed with Strict Scrutiny

1. To Be Generally Applicable, a Law Must Treat Religious Conduct as Well as It Treats Analogous Secular Conduct

Smith's second requirement is that a law that burdens religion be generally applicable. Because the "across-the-board criminal prohibition" in *Smith* so clearly was generally applicable,[50] the Court did not explicitly define the boundaries of general applicability. But *Smith*'s understanding of that requirement appears in the Court's analysis of its earlier cases on unemployment compensation: *Sherbert v. Verner*[51] and *Thomas v. Review Board.*[52] *Sherbert* and *Thomas* applied compelling interest review to unemployment compensation statutes that denied benefits to claimants who refused work that conflicted with their religious practices.

Smith reaffirmed these precedents, explaining that strict scrutiny applied because the unemployment compensation law allowed individuals to receive benefits if they refused work for "good cause," thus creating "individualized exemptions" from the requirement of accepting available work.[53] Where the state enacts a system of individual exemptions, "it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[54] Individualized exemptions are one way in which a law can fail to be generally applicable. The statute at issue in *Sherbert* was not generally applicable because it allowed "at least some" exceptions.[55] There cannot be many acceptable reasons for refusing work and claiming a government check instead, but there were "at least some," and therefore the state also had to recognize religious exceptions or provide a compelling interest why it would not do so.

The Court elaborated on the new standard in *Lukumi*, where it struck down Hialeah's ordinances that prohibited the killing of animals only when the killing was unnecessary, took place in a ritual or ceremony, and was not for the primary purpose of food consumption.[56] As already explained, the Court separated neutrality from general applicability.[57] General applicability requires laws to apply to all the secular conduct that undermines the same state interests as the regulated religious conduct. General applicability concerns objectively unequal treatment of religious and secular practices, regardless of targeting, motive, or an improper object. The lack of general applicability in *Lukumi* was clear to the Court; the city narrowly prohibited selected conduct and provided categorical and individualized exemptions for analogous secular conduct,[58] resulting in a failure "to prohibit nonreligious conduct" that endangered the city's interests "in a similar or greater degree than Santeria sacrifice."[59]

Some courts, including the Ninth Circuit, appear to think that a law is generally applicable if it is not as bad as the ordinances in *Lukumi*.[60] The Supreme Court rejected that idea by identifying *Lukumi* as an extreme case. The ordinances were *not* at or near the borders of constitutionality; they fell "well below the minimum standard necessary to protect First Amendment rights."[61] It was therefore unnecessary for the *Lukumi* Court to "define with precision the standard used to evaluate whether a prohibition is of general application."[62] The circuit split that has followed the *Lukumi* decision, exacerbated by the Ninth Circuit's failure to appropriately apply *Lukumi* to a case that is just as bad, shows that the Court should provide a more precise definition of "general applicability." *Smith* and *Lukumi* already provide the framework: "The Free Exercise Clause 'protect[s] religious observers against unequal treatment.'"[63] "[F]irst and foremost, *Smith-Lukumi* is about objectively unequal treatment of religious and analogous secular activities."[64]

2. A Law Is Not Generally Applicable if Exceptions or Coverage Gaps Exempt Analogous Secular Conduct

A law is not generally applicable if, on its face or in practice, it fails to regulate some or all secular conduct that undermines the government interests allegedly served by regulating religion. It

46 Washington v. Davis, 426 U.S. 229, 246 (1976).

47 Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979).

48 471 U.S. 222, 228-29 (1985).

49 *Lukumi*, 508 U.S. at 532.

50 494 U.S. at 884.

51 374 U.S. 398 (1963).

52 450 U.S. 707 (1981).

53 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986) (plurality opinion)).

54 *Id.*

55 *Id.*

56 508 U.S at 535-37.

57 *Supra*, Section III.A.

58 508 U.S. at 543-44.

59 *Id.* at 543.

60 App.28a-29a.

61 508 U.S. at 543.

62 *Id.*

63 *Lukumi*, 508 U.S. at 542 (quoting Hobbie v. Unemp't App. Comm'n, 480 U.S. 136, 148 (1987) (Stevens, J., concurring) (alteration by the Court)).

64 Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 210 (2004).

does not matter whether there are good reasons for secular exceptions, whether secular exceptions are explicitly stated in the text of the challenged law, whether there are few such exceptions, or whether there is only one. What matters is whether a secular exception or gap in coverage undermines the state's asserted interests to the same or a similar degree as the burdened religious conduct.

a. Reasonableness of the Secular Exceptions Does Not Matter

The stocking and delivery rules in *Stormans* have been interpreted to prohibit failure to stock or deliver a drug for religious reasons, but they explicitly exempt several secular reasons for not stocking or delivering a drug, and implicitly exempt all or nearly all remaining secular reasons. The Ninth Circuit recognized that Washington's rules "carve out several enumerated exemptions,"[65] yet it held these rules to be generally applicable.[66] The Ninth Circuit decided that business reasons for not stocking or delivering drugs make sense, and therefore do not detract from the general applicability of the rules. According to the Ninth Circuit, "the enumerated exemptions are necessary reasons … that … allow pharmacies to operate in the normal course of business."[67] This reasoning implies that business reasons for not stocking a drug are more deserving of the state's respect than religious reasons.

This is precisely the preference for secular reasons for an exemption over religious reasons that *Smith* and *Lukumi* prohibit. In *Smith*, the Court said that *Sherbert* and *Thomas* stand for the "proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[68] That proposition does not turn on whether secular reasons are "better" than religious ones, a judgment that government is generally not permitted to make. In *Sherbert*, the narrow exemption for "good cause"[69] was a perfectly sensible exemption to the general requirement of accepting available work. But this narrow and justified secular exemption still required a corresponding religious exemption—or a compelling reason for lacking one. It was not the bad policy of the secular exemption that mandated a religious exemption; it was the secular exemption's mere existence.

Similarly in *Lukumi*, the city argued that its permitted secular reasons for exemptions from the ban on killing animals were "important," "obviously justified," and "ma[de] sense."[70] But the quality of the secular exceptions did not make the ordinances generally applicable. Secular exceptions defeat general applicability no matter how important, justified, or sensible they are. And when a law is not generally applicable, it must pass strict scrutiny. If the government thinks it has a good reason for treating secular acts more favorably than analogous religious acts, it must present that reason as part of the compelling interest analysis. In *Stormans*, the Ninth Circuit erroneously moved that potential issue from the back of the case to the front—from compelling interest to general applicability—and applied an unspecified but much lower standard of review.

The Ninth Circuit also said that the state's exemptions for business reasons were "necessary."[71] The flipside of this reasoning is an assumption that religious reasons are unnecessary—even if the religious practice is absolutely necessary to the believer. The necessity argument flouts a specific holding in *Lukumi*. The ordinances in that case prohibited only unnecessary killings. The city argued that most secular killings were necessary but that religious killings were not.[72] The Court rejected this necessity standard: "[T]he ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons."[73] Yet the Ninth Circuit applied the same necessity test that the Supreme Court invalidated in *Lukumi*.

The regulations at issue in *Stormans* are subject to strict scrutiny under *Sherbert*, *Thomas*, *Smith*, and *Lukumi*, regardless of how the secular exceptions compare in judicially perceived value to religious exceptions. The presence of exemptions for analogous secular conduct, no matter how important, precludes a finding that the rules are generally applicable. The Ninth Circuit failed to understand that it could not dismiss religious exercise—a core constitutional right—as unnecessary.

b. Whether Exempted Secular Conduct Is Analogous Depends on the State's Asserted Interests, Not on the Reasons for the Conduct

The requirement that analogous religious and secular conduct be treated equally depends on the identification of analogous secular conduct. Because the whole point of the general applicability standard is to treat religious reasons for acting equally with secular reasons, judges cannot identify analogous conduct by assessing the comparative merits of religious and secular reasons. *Lukumi* clearly stated what makes religious and secular conduct analogous: that the "nonreligious conduct … endangers these [state] interests in a similar or greater degree" than the burdened religious conduct.[74]

The many exempted business reasons not to stock or deliver a drug affect the state's asserted interests in the same way as a religious decision to the same effect: whatever the pharmacy's reasons, the drug is not stocked or delivered, and customers cannot get the drug at that particular pharmacy. Cumulatively, business reasons endanger the state's interests to a vastly greater degree than religious reasons because the state accepts such a wide range of business reasons (including reasons the district court viewed as mere matters of convenience)[75] and because so many more pharmacies act on business reasons. Even with respect to the drugs at issue in *Stormans*, the vast majority of pharmacies that

65 794 F.3d at 1080.

66 *Id.* at 1079–84.

67 *Id.* at 1080.

68 494 U.S. at 884.

69 374 U.S. at 400-01.

70 508 U.S. at 544.

71 794 F.3d at 1080.

72 508 U.S. at 537.

73 *Id.*

74 *Id.* at 543.

75 844 F. Supp. 2d at 1190.

choose not to stock emergency contraception do so for secular reasons, not religious reasons.[76]

c. Secular Exceptions Make a Law Not Generally Applicable, Even if They Are Not Stated in the Law's Text

Unequal treatment of religious and secular conduct requires strict scrutiny, whether or not that inequality is reflected in the text of the challenged law. *Lukumi* expressly rejected the city's contention that judicial "inquiry must end with the text of the law at issue."[77] In addition to evaluating the text of the ordinances, the Court reviewed an array of other sources to identify analogous secular conduct left unregulated.[78]

The Ninth Circuit departed from this precedent by making selective and inconsistent use of the drafting, interpretive, and enforcement history of the regulations in *Stormans*. When considering whether the regulations would prohibit conscience-based refusals to stock and deliver emergency contraception, the court rightly went beyond the bare text of the regulations and relied on the history of the regulations and the law's "effect … in its real operation."[79] But when considering whether the regulations allowed secular exemptions, the court myopically focused on the bare text of the regulations, attempting to explain away the interpretation revealed by the enforcement history,[80] and refusing to consider the overwhelming evidence of the drafting history.[81] Had the Ninth Circuit followed the Supreme Court's example and gone beyond the bare text, it would have concluded—as did the district court in careful and detailed findings of fact and conclusions of law—that the regulations prohibit conscience-based refusals to stock and deliver drugs, but almost nothing else.[82]

The Ninth Circuit said it was irrelevant that the rules had never been enforced against anyone but the plaintiffs because the Pharmacy Board followed a policy of "complaint-driven enforcement."[83] There had been "many complaints" against plaintiff, and no complaints against anyone else.[84] This reasoning provides a formula for discriminatory enforcement. If governments can write vague rules that leave accepted understandings unstated, or that leave much to the discretion of enforcement authorities or activists among the public, and courts then ignore the extra-textual understandings and the actual or intended exercise of discretion, government would be completely free to treat religious and secular practices unequally. The Free Exercise Clause would protect only against unsophisticated governments that explicitly state what they are doing. *Lukumi* made clear that the reach of the Free Exercise Clause is not so limited.

d. Rules That Apply to Some But Not All Analogous Secular Conduct Are Not Generally Applicable

Many laws burden some but not all analogous secular conduct. If the exempted secular conduct undermines the state's interest to the same degree as the burdened religious conduct, such a law is not generally applicable, notwithstanding the fact that some secular conduct is also burdened.

An illuminating example of this principle is *Rader v. Johnston*, one of the early cases to apply the *Smith-Lukumi* test.[85] *Rader* was a challenge to the University of Nebraska-Kearney's rule that freshmen were required to live in the dormitory.[86] Rader sought permission to live in a Christian group house instead, because alcohol, drugs, and pre-marital sex were prevalent in the dormitories.[87] He was denied an exemption from the rule.[88] The rule contained categorical exemptions for students older than nineteen, married students, and students living with their parents.[89] These categorical exemptions had a sound basis, but they treated students' secular needs more favorably than Rader's religious needs. There was also an explicit exception for individual hardship that was generously interpreted in secular cases, but not in Rader's case.[90] Discovery revealed that there were additional individualized exceptions in unwritten administrative practice.[91] When all exceptions were accounted for, only sixty-four percent of freshmen were actually required to live in the dormitory.[92] Although the rule still burdened a majority of freshmen, the court held that the rule was not generally applicable because the state had created a "system of 'individualized government assessment' of the students' requests for exemptions," but "refused to extend exceptions" to freshmen desiring to live outside the dormitories "for religious reasons."[93] There are other decisions to similar effect, both in the Ninth Circuit[94] and elsewhere.[95]

76 *Id.*

77 508 U.S. at 534.

78 *See id.* at 526, 537, 539, 544-45 (considering numerous sections of Florida statutes); *id.* at 543 (fishing); *id.* at 544-45 (garbage from restaurants).

79 794 F.3d at 1076 (quoting *Lukumi*, 508 U.S. at 535 (ellipsis by Ninth Circuit)).

80 *Id.* at 1080–81.

81 *Id.* at 1079.

82 844 F. Supp. 2d at 1190.

83 794 F.3d at 1083.

84 *Id.*

85 924 F. Supp. 1540 (D. Neb. 1996).

86 *Id.* at 1543.

87 *Id.* at 1544-46.

88 *Id.* at 1548.

89 *Id.* at 1546.

90 *Id.* at 1546-47

91 *Id.* at 1547.

92 *Id.* at 1555.

93 *Id.* at 1553.

94 *See* Alpha Delta Chi v. Reed, 648 F.3d 790, 804 (9th Cir. 2011) ("[G]iven the evidence that San Diego State may have granted certain groups exemptions from the policy, there remains a question whether Plaintiffs have been treated differently because of their religious status."); Canyon Ferry Road Baptist Church v. Unsworth, 556 F.3d 1021, 1035 (9th Cir. 2009) (Noonan, J., concurring) (concluding that restrictions on church's speech on referendum issue were not neutral and generally applicable where there were exceptions for newspapers, magazines, and broadcasters).

95 *See, e.g.,* Ward v. Polite, 667 F.3d 727, 738-40 (6th Cir. 2012) (Sutton, J.) (holding that rule preventing counseling student from referring gay

e. A Law Is Not Generally Applicable if It Contains Even a Single Secular Exception That Undermines the State's Regulatory Purpose

A single secular exception triggers strict scrutiny if it undermines the state interest allegedly served by regulating religious conduct. This is the holding of a well-reasoned opinion by then-Judge Alito, writing for the Third Circuit in *Fraternal Order of Police v. City of Newark*.[96] In *Newark*, two Muslim police officers whose religious beliefs required them to grow beards challenged a city policy requiring officers to be clean shaven. Though touted as a "zero tolerance" policy, it had two exemptions—one for officers with medical conditions, and one for officers working undercover. The undercover exemption did not trigger strict scrutiny, because the department's interest in a uniform appearance did not apply to undercover officers.[97] Indeed, uniform appearance would have wholly defeated the purpose of having undercover officers. But the medical exemption made the rule not generally applicable because it undermined the city's interest in the uniform public appearance of its police officers in the same way as would a religious exemption.[98]

The Eleventh Circuit reached a similar result in *Midrash Sephardi, Inc. v. Town of Surfside*,[99] which applied compelling interest review to a zoning ordinance excluding religious assemblies from the business district. The stated goal of the ordinance was protecting "retail synergy" in the business district.[100] The court found that a single exemption for lodges and private clubs "violates the principles of neutrality and general applicability because private clubs and lodges endanger Surfside's interest in retail synergy as much or more than churches and synagogues."[101]

The unemployment compensation cases—*Sherbert* and *Thomas*—can also be viewed in this light: a single exception for "good cause" required strict scrutiny of the state's failure to provide a religious exception. *Newark* and *Midrash Sephardi* each involved a single categorical exception; the unemployment cases involved a single provision for individualized exceptions. Just one of either kind of exception, if it undermines the state's asserted interests, results in unequal treatment of persons who need a religious exception.[102] The question is not how many secular analogs are regulated. The question is whether a single secular analog is *not* regulated. Under *Smith* and *Lukumi*, the constitutional right to free exercise of religion includes a right to be free from regulation of religious conduct to the same extent that the most favored analogous secular conduct is free from regulation (or the government must show a compelling interest it is achieving by treating religion differently and that the different treatment of religion is the only way to achieve it). Treating religious exercise like the least favored, most heavily regulated secular conduct does not satisfy the First Amendment.

3. There Are Important Reasons for Strictly Interpreting and Enforcing the General Applicability Requirement

These rules about the general applicability requirement, including the rule that a single secular exception defeats general applicability, are not arbitrary. They are deeply rooted in the underlying rationale of the general applicability requirement.

a. Secular Exceptions Without Religious Exceptions Imply a Value Judgment About Religion

The *Newark* opinion reasoned that the medical exception "indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not."[103] The Eleventh Circuit adopted this reasoning in *Midrash Sephardi*.[104] This point about value judgments also appears in *Lukumi*, which said that the ordinances' necessity test "devalues religious reasons for killing [animals] by judging them to be of lesser import than nonreligious reasons."[105]

The point deserves further elaboration. The prohibition against value judgments does not only apply to cases in which the state makes an explicit value judgment, or where state officials consciously compare religious and secular conduct and deem the secular conduct more worthy—although both

counselee to another counselor was not neutral and generally applicable where referrals were permitted for other values conflicts and for failure to pay); Blackhawk v. Pennsylvania, 381 F.3d 202, 206-12 (3d Cir. 2004) (Alito, J.) (holding that a permit fee for keeping wild animals, with exceptions for zoos, circuses, hardship, and extraordinary circumstances, was not generally applicable); Axson-Flynn v. Johnson, 356 F.3d 1277, 1297-99 (10th Cir. 2004) (Ebel, J.) (holding that one exception given to student of another faith, and earlier exceptions given to plaintiff, raised triable issue of whether defendant maintained a system of individualized exceptions); Mitchell County v. Zimmerman, 810 N.W.2d 1, 15-16 (Iowa 2012) (unanimously holding that prohibition of buggies with steel protuberances on wheels was not neutral and generally applicable where county failed to prohibit other devices that also damaged roads); *see also* Horen v. Commonwealth, 479 S.E.2d 553, 556-57 (Va. Ct. App. 1997) (holding that ban on possession of certain bird feathers was not neutral, where it contained exceptions for taxidermists, academics, researchers, museums, and educational institutions); Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 885-86 (D. Md. 1996) (holding landmarking ordinance subject to strict scrutiny where it had exceptions for substantial benefit to city, financial hardship to owner, and best interests of community).

96 170 F.3d 359 (3d Cir. 1999).

97 *Id.* at 366.

98 *Id.* at 364-66.

99 366 F.3d 1214, 1235 (11th Cir. 2004).

100 *Id.* at 1234-35.

101 *Id.* at 1235.

102 *Smith* is consistent as well. At first glance, it appears that Oregon permitted a secular exception by allowing possession of a "controlled substance" pursuant to a doctor's prescription. 494 U.S. at 874. But "controlled substance" covers a wide range of drugs, and Oregon confirmed that the exception did not apply to Schedule I drugs, including peyote, Brief for Petitioner 14, 14 n.6, which is presumably why the Supreme Court described the prohibition as "across-the-board," 494 U.S. at 884. The case concerned the prohibition of peyote, and there were no secular exceptions. It is therefore unnecessary to consider whether medical use under a physician's supervision would have undermined the state's interests to the same extent as religious use.

103 170 F.3d at 366.

104 366 F.3d at 1235.

105 508 U.S. at 537.

Washington and the Ninth Circuit did that in *Stormans*.[106] More commonly, the value judgment emerges from a series of separate comparisons. In *Newark*, the exemption for medical needs showed that the city considered medical needs more important than its interest in uniformity. And the refusal to exempt religious obligations showed that the city considered its interest in uniformity more important than its officers' religious obligations. The transitive law applies; if medicine is more important than uniformity, and uniformity is more important than religion, then medicine is more important than religion. Whether explicit or implicit, that is the value judgment that is suspect under the Free Exercise Clause and that will therefore trigger strict scrutiny.

In the same way, the Ninth Circuit held that Washington could decide that business and convenience needs are more important than its interest in making emergency contraception available in every pharmacy, but that emergency contraception in every pharmacy is more important than the religious needs of conscientiously objecting pharmacists. With or without a conscious or direct comparison, both Washington and the Ninth Circuit deemed business and convenience needs more important than religious needs.[107] This is precisely the kind of value judgment condemned by *Lukumi*, *Newark*, and *Midrash Sephardi*.

b. Requiring General Applicability Provides Vicarious Political Protection for Religious Minorities

The requirement that burdensome laws and regulations be generally applicable is an implementation of Justice Jackson's much-quoted observation that "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."[108] Regulation that "'society is prepared to impose upon [religious groups] but not upon itself'" is the "precise evil the requirement of general applicability is designed to prevent."[109] Small religious minorities will rarely have the political clout to defeat a burdensome law or regulation. But if that regulation also burdens other, more powerful interests, there will be stronger opposition and the regulation is less likely to be enacted. Burdened secular interests provide vicarious political protection for small religious minorities.

"Even narrow secular exceptions rapidly undermine" this vicarious political protection.[110] If secular interest groups burdened by the regulation get themselves exempted, they have no reason to oppose the regulation, and religious minorities are left standing alone. That is plainly what happened in Washington: the groups seeking to suppress conscientiously objecting pharmacies were careful at every stage not to threaten any other pharmacy's secular reasons for failing to stock and deliver drugs. With its secular interests protected, and with the Pharmacy Board threatened into submission by the governor's office, the industry abandoned its defense of the few pharmacies with objections based on conscience. This concern with vicarious political protection is the deepest rationale for the rule that even a single secular exception, if it undermines the asserted reasons for the law, undermines general applicability and therefore triggers strict scrutiny.

IV. Conclusion

The Ninth Circuit treated the *Stormans* case as unremarkable, finding that the challenged regulations had just some secular exemptions, and then holding that if there were good reasons for the secular exemptions, they did not undermine the regulations' general applicability. This result is not only wrong, it is in conflict with results reached by other circuit courts. The *Stormans* case is therefore a proper vehicle for the Supreme Court to give guidance to lower courts.

The Ninth Circuit's opinion referenced one fact that by itself should have put this case far down the path to strict scrutiny: "The rules require pharmacies to deliver prescription medications, but they also carve out several enumerated exemptions."[111] Yet instead of asking whether any of these exemptions undermined the state's interest in delivery of drugs, the Ninth Circuit engaged in a lengthy effort to explain away those secular exemptions, concluding at one point that "the rules' delivery requirement applies to *all* objections to delivery that do not fall within an exemption."[112] The court's italicized "all" is entirely circular; it just means the law applies to everything it applies to. And because the court intended to refer only to explicit exemptions, the statement is also inaccurate. The district court found that there were many exemptions not stated in the regulations' text.[113]

Courts need not engage in such mental gymnastics. An unambiguous ruling from the Supreme Court, setting forth more explicitly what it indicated in *Smith* and *Lukumi*, will ensure that they do not. A quarter century after *Smith* and *Lukumi*, it is time.

106 *Supra,* Section IV.B.2.a.

107 794 F.3d at 1080.

108 Railway Express Agency v. City of New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

109 *Lukumi*, 508 U.S. at 545-46 (quoting Florida Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring)).

110 Laycock, *supra* note 64 at 210.

111 794 F.3d at 1080.

112 *Id.* at 1077 (emphasis in original).

113 844 F. Supp. 2d at 1194.