

**COURT OF APPEALS OF WISCONSIN  
DISTRICT III**

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NEIL NOESEN,

Petitioner-Appellant,

v.

Appeal No. 2006AP1110  
Circuit Court Case No. 2005CV212

STATE OF WISCONSIN, DEPARTMENT  
OF REGULATION AND LICENSING,  
PHARMACY EXAMINING BOARD,

Respondent-Respondent.

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Appeal from the Circuit Court for Barron County,  
Hon. James C. Babler, presiding

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**NONPARTY BRIEF OF THE AMERICAN CIVIL  
LIBERTIES UNION AND THE AMERICAN CIVIL  
LIBERTIES UNION OF WISCONSIN FOUNDATION**

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## INTRODUCTION

This case raises important questions about whether the Wisconsin Constitution's "free conscience clause" demands that the government accede to the religious objections of licensed professionals when doing so threatens to undermine the government's compelling interests in promoting public health, patient autonomy and gender equality.

The American Civil Liberties Union and the American Civil Liberties Union of Wisconsin Foundation, Inc., urge affirmance of the disciplinary action taken by the Department of Regulation and Licensing Pharmacy Examining Board (the Department or DRL) against pharmacist Neil Noesen for failing to adequately inform his employer of his religious objections to participating in a patient's effort to refill a legal and valid prescription for contraception and for his refusal to promptly transfer this prescription to another pharmacy after refusing to refill the prescription himself.

In 2002, Noesen, a devout Roman Catholic who believes that contraception is sinful, refused to refill a woman's valid prescription for contraceptive medication. (R.18:4) He thwarted the woman's efforts to have the prescription filled at another pharmacy by refusing to provide information necessary for the other pharmacy to dispense the prescription. *Id.* As a result, the woman missed a dose of her medication and was forced to use a back-up method of contraception. (R.18:5)

The DRL brought an administrative action against Noesen seeking to impose discipline. An Administrative Law Judge and the Pharmacy Examining Board determined that Noesen violated Wis. Adm. Code § PHARM 10.03 by "practicing in a manner which substantially departs from the standard of care ordinarily exercised by a pharmacist which harmed or could have harmed a patient." (R.18:1-2) The Department found that the "standard of care ordinarily exercised by a pharmacist requires that a pharmacist who

exercises a conscientious objection to the dispensing of a prescription must ensure that there is an alternative mechanism for the patient to receive his or her medication, including informing the patient of their [sic] options to obtain their [sic] prescription.” (R.18:10) A minimally competent pharmacist has “a duty to fully inform the pharmacy with which he is employed . . . what activities they [sic] will or will not participate in based on their conscience.” *Id.* The discipline required Noesen to clearly delineate to all employers the extent to which his religious beliefs limited his pharmacy practice, complete additional continuing professional education credits, and pay the costs of the disciplinary proceedings. (R.18:2).

On appeal, Noesen asserts several defenses. Among them is his claim that the disciplinary action violates his right to adhere to his religious beliefs as guaranteed by the Wisconsin Constitution, Art. I, § 18.<sup>1</sup> Although the Wisconsin Constitution protects individuals from government interference with their practice of religion, it does not confer an absolute right to disregard the rights or welfare of others. Rather, the Wisconsin Constitution requires the government to “strike a balance . . . between freedom of conscience and the state’s public safety interest.” *State v. Miller*, 202 Wis.2d

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<sup>1</sup> Noesen also asserts that the standard of care to which the DRL held him violates due process, because it is unconstitutionally vague or overbroad. As the Department has argued, this defense is foreclosed in the context of professional discipline by the reasoning of *Strigenz v. Dept’t of Regulation*, 103 Wis.2d 281, 307 N.W.2d 664 (1981). Noesen had also argued below that the disciplinary action violated his free exercise rights guaranteed by the First Amendment to the United States Constitution. He has apparently abandoned that argument on appeal, and it would not have succeeded in any event. Under *Employment Div. v. Smith*, 494 U.S. 872 (1990), the federal Free Exercise Clause “does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” *Id.* at 879 (citation omitted). The state’s discipline of Noesen for violating the standard of care applicable to all pharmacists does not infringe upon his religious liberty in violation of the Federal Constitution.

56, 68, 549 N.W.2d 235, 240 (1996); *see also Peace Lutheran Church & Academy v. Sussex*, 2001 WI App. 139, ¶¶22, 246 Wis.2d 502, 631 N.W.2d 229.

In this case, protecting public health, assuring patient autonomy, and promoting gender equity are compelling governmental interests that can only be achieved through a scheme of professional regulation that ensures that patients are able to obtain prescribed medications in a timely manner.

## ARGUMENT

### I. THE WISCONSIN FREE CONSCIENCE CLAUSE REQUIRES A BALANCING OF THE STATE'S INTERESTS IN REGULATING HEALTH PROFESSIONS AGAINST THE RIGHTS OF LICENSED PROFESSIONALS TO EXERCISE RELIGIOUS BELIEFS

Article I, section 18 of the Wisconsin Constitution provides, in relevant part: “The right of every person to worship almighty God according to the dictates of conscience shall never be infringed; . . . nor shall any control of, or interference with, the rights of conscience be permitted.” This “free conscience clause” provides greater protection against indirect burdens on religious practice than does the Free Exercise clause of the Federal Constitution. *See Peace Lutheran Church*, 2001 WI App 139, ¶14.

In *Miller*, the Wisconsin Supreme Court held that the “compelling state interest/least restrictive alternative test” must be applied in evaluating state constitutional challenges to facially neutral laws that burden religious practices.” 202 Wis.2d at 68-69 (adopting “principles and analytical framework developed by the United States Supreme Court in *Sherbert [v. Verner]*, 374 U.S. 398 (1963), *Wisconsin v. Yoder*[, 406 U.S. 205 (1972)] and *Thomas [v. Review Bd.]*, 450 U.S. 707 (1981)].”). In applying this test, the

plaintiff challenging the government's application of law "carries the burden to prove: (1) that he or she has a sincerely held religious belief, (2) that is burdened by application of the state law at issue. Upon such proof, the burden shifts to the State to prove: (3) that the law is based on a compelling state interest, (4) which cannot be served by a less restrictive alternative." *Id.* at 66. Although the "compelling state interest/least restrictive alternative" language in *Miller* echoes a common formulation of the "strict scrutiny" test, this level of scrutiny is "not 'strict in theory, but fatal in fact.'" *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (in equal protection analysis).

In the religious liberty context, the test amounts to a mechanism for balancing the extent of the burden on religious liberty against the importance of the interest asserted by the state to justify that burden. In *Miller*, the Court stated that the compelling state interest/least restrictive alternative concepts "provide guidance as we seek to strike a balance under the [state] Constitution between freedom of conscience and the state's public safety interest." 202 Wis.2d at 68. In *State v. Yoder*, 49 Wis.2d 430, 182 N.W.2d 539 (1971), the Court similarly held that "[t]he determination of whether a law infringing on religious liberty is justified requires the weighing of the burden on free exercise of one's religion and the importance of the state's interest asserted in justification . . . ." *Id.* at 434.

In *Peace Lutheran Church*, this Court applied the *Miller* test, 2001 WI App. 139, ¶15, and upheld a safety regulation that required a sprinkler system in certain buildings against a church's assertion that the regulation imposed a burden on their freedom to worship. The Court concluded that even if the regulation "substantially burdened" the church's sincerely held religious beliefs, this burden was outweighed by the government's compelling interest in saving lives and property, which could not be adequately served by the alternatives advanced by the church. *Id.* at ¶22.

Courts from other jurisdictions applying similarly heightened scrutiny have upheld the application of neutral government rules

advancing public health and safety, despite claims that the rules imposed burdens on religious beliefs or practices. For example, the California Supreme Court held that a statute requiring certain employers to cover contraceptives in employee drug benefit plans despite religious objections satisfied strict scrutiny. *Catholic Charities of Sacramento v. Superior Court*, 23 Cal.4<sup>th</sup> 527, 562-66, 85 P.3d 67, 91-94 (Cal. 2004).<sup>2</sup> The court held that the state’s compelling interest in “eradicating gender discrimination” outweighed the burden on the employer’s religious liberty. *Id.* at 564-66.

Similarly, the New York Court of Appeals found that the state’s interest in remedying gender discrimination in employment outweighed the burden on religion posed by the state’s contraceptive equity law. *Catholic Charities of the Diocese of Albany v. Serio*, 7 N.Y.3d 510, 525, \_\_ N.E.2d \_\_ (N.Y. 2006). The New York high court has “held that when the State imposes ‘an incidental burden on the right to free exercise of religion’ we must consider the interest advanced by the legislation that imposes the burden, and that ‘[t]he respective interests must be balanced to determine whether the incidental burdening is justified.’” *Id.* (citations omitted). Applying this test, the court upheld the law requiring employers, even those with religious objections, to cover contraceptives in prescription drug benefits offered to employees, because “the State’s substantial interest in fostering equality between the sexes and in providing women with better health care” outweighed the employer’s “interest in adhering to the tenets of their faith” with regard to birth control. *Id.* at 528.

The Alaska Supreme Court upheld the application of a statute prohibiting housing discrimination based on marital status to a landlord who objected on religious grounds to renting to an

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<sup>2</sup> The California court did not decide whether the California constitution *required* the application of strict scrutiny, but held that, if the constitution did require such scrutiny, the statute in question satisfied that level of scrutiny. *Id.* at 562.

unmarried couple. *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280-81 (Alaska 1994). The court held that the government's interest in providing equal access to housing and "abolishing improper discrimination" outweighed the landlord's "interest in acting on his religious beliefs." *Id.* at 282.

Applying the *Miller* balancing test, Noesen must first prove that he has a sincerely held religious belief that is substantially burdened by requiring him to comply with the general standard of care for pharmacists with religious objections: clearly informing employers of practice limitations and ensuring that there is a mechanism for patients to get prescriptions filled. Noesen sincerely believes that it would violate the principles of his Catholic faith to participate in the dispensing of contraceptives or facilitating their dispensing by another pharmacy. This burden is not great enough, however, to outweigh the state's interest in protecting public health, assuring patient autonomy, and promoting gender equity. Assuming that the burden imposed in this case is sufficient to trigger heightened scrutiny under Art. I, § 18, the Department's enforcement of the standard of care survives that scrutiny.

## **II. THE STANDARD OF CARE SERVES COMPELLING STATE INTERESTS IN PUBLIC HEALTH, PATIENT AUTONOMY AND GENDER EQUALITY**

The Department's disciplinary action enforces a standard of care that requires a pharmacist "who exercises a conscientious objection to the dispensing of a prescription [to] ensure that there is an alternative mechanism for the patient to receive his or her medication." (R.18:10) Accordingly, a pharmacist has a duty to fully inform employers of his or her limitations on practice arising out of his or her religious beliefs. *Id.* This neutral professional standard protects the public health, enhances patient autonomy and promotes the equality of women.

The ability of patients to obtain prescription medication is crucial to advancing the state's compelling public health interests, as Noesen concedes. Appellant's Br. at 43 ("Noesen acknowledges that the State has a compelling interest in public health and safety, and that this interest includes ensuring that legally prescribed drugs are not improperly withheld from those for whom they have been prescribed."). A pharmacist's refusal to transfer a prescription can effectively prevent patients from obtaining the medical treatment that their physicians have prescribed.

The pharmacist's standard of care also protects patients' autonomy and liberty interests in controlling health-care decision-making. The duty to respect patient autonomy is a fundamental ethical principle in the health professions. See Tom Beauchamp & James Childress, *Principles of Biomedical Ethics* at 120-145 (4<sup>th</sup> Ed. 1994). This principle of autonomy is related to "the fundamental notion of the right to bodily integrity: '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.'" *Martin v. Richards*, 192 Wis.2d 156, 169, 531 N.W.2d 70 (1995). Without information about their health and treatment options, patients cannot make meaningful decisions about their care. A health care provider's failure to inform patients of limitations on practice – including religiously motivated limitations – may be a basis for malpractice liability. See *Matter of Jobes*, 529 A.2d 434, 450 (N.J. 1987) (religious nursing home could not refuse to honor a directive to remove a patient's feeding tube where the nursing home failed to inform the family of its religious objections prior to the decision to admit the patient).

Indeed, autonomy in making health care decisions – including decisions about reproductive health – enjoys constitutional protection. "Our law affords constitutional protection to personal decisions relating to . . . procreation [and] contraception . . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth

Amendment.” *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (citations omitted); *see also Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990) (assuming liberty interest in refusing unwanted medical treatment protected by Due Process Clause).

Noesen’s refusal to inform his employers of his religious objections to transferring prescriptions and to inform patients of their options for obtaining contraceptives elsewhere directly interferes with the patient’s autonomy. As the California Supreme Court has stated: “We are unaware of any decision in which this court, or the United States Supreme Court, has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties.” *Catholic Charities*, 32 Cal.4<sup>th</sup> at 565.

Holding Noesen accountable for his unprofessional conduct furthers the state’s interest in remedying gender discrimination in the pharmacy. Noesen refuses to participate in the provision of *contraception*, medication used exclusively by women to prevent pregnancy, a condition that affects only women’s health. A standard of care that ensures that women are able to obtain contraceptives in the face of a religious refusal promotes equality for women. Access to contraceptives gives women control of their fertility, enabling them to decide whether and when to become a parent. Contraception allows women to make educational and employment choices that will benefit themselves and their families.

The elimination of discrimination is certainly a compelling governmental interest. *See Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984) (“State’s strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order.”); *Grutter*, 539 U.S. at 328 (remedying race discrimination sufficiently compelling to justify race-conscious affirmative action); *Catholic Charities*, 32 Cal.4<sup>th</sup> at

564 (“eradicating gender discrimination” sufficiently compelling to justify statute requiring employers to cover contraception).

### **III. THE STANDARD OF CARE IS NARROWLY TAILORED**

In seeking to fulfill the compelling objectives of protecting the health and autonomy of patients, as well as remedying gender discrimination in the pharmacy, the Department enforced a standard of care that ensures that patients are able to obtain prescription medications when Noesen refuses to fill them. The Department requires that Noesen truthfully inform his employers of his religious objections and make arrangements to accommodate the needs of patients whom Noesen is unwilling to serve. The standard of care balances the religious interests of the pharmacist against the health, autonomy and equality interests of the government.

Noesen’s proffered alternatives for balancing the interests at stake in this case would not advance public health, preserve patient autonomy or eradicate gender discrimination, because they would fail to ensure that patients can access their prescriptions. Noesen suggests that the Department “could establish standards for accommodating the religious and moral beliefs of pharmacists (by requiring pharmacies to have in place staffing policies and procedures that would avoid the moral dilemma in which Noesen was placed here).” Appellant’s Br. at 43. Although standards that facilitate a patient’s access to their prescriptions and accommodate individual religious belief wherever possible are good policy, such policies are meaningless unless the pharmacist is required to inform his employers of his objections so those policies can be followed when he is on duty, as the standard of care requires. Moreover, the state’s interest in ensuring that patients’ medications are not effectively kept out of their reach cannot be achieved if the pharmacist does not have to arrange for such prescriptions to be filled elsewhere. Noesen’s suggestion that the State could “adopt policies regarding access to prescription records” (Appellant’s Br. at

43) is vague. Assuming Noesen is suggesting that Wisconsin create a centralized database of all prescriptions so that any pharmacist can access them, such a database would be extremely costly and would risk the privacy of patients' medical information.

Noesen does not seek a reasonable accommodation of his religious beliefs. He seeks to impose his own theological principles by preventing access to legal medications. The Wisconsin Constitution does not demand such subordination of the public good to Noesen's conscience.

### CONCLUSION

For the reasons above, the ACLU and ACLU of Wisconsin Foundation urge this Court to affirm the decision of the Circuit Court.

Dated this \_\_\_\_\_ day of February, 2007.

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**FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a nonparty brief produced with a proportional serif font. The length of this brief is 2,750 words.

Dated this \_\_\_\_\_ day of February, 2007.

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Jacqueline E. Boynton

**CERTIFICATE OF FILING**

I hereby certify that on February 5, 2007, I caused the original and 10 copies of the Nonparty Brief of the American Civil Liberties Union and the American Civil Liberties Union of Wisconsin Foundation, Inc., to be deposited in the United States mail for delivery to the Clerk of the Wisconsin Court of Appeals by first-class mail, postage pre-paid, thereby effectuating filing on this date pursuant to Wis. Stat. § 809.80(3)(b)1.

Dated this \_\_\_\_\_ day of February, 2007.

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Jacqueline E. Boynton

**CERTIFICATE OF SERVICE**

I hereby certify that on February 5, 2007, I caused three copies of the Nonparty Brief of the American Civil Liberties Union and the American Civil Liberties Union of Wisconsin Foundation, Inc., to be served by U.S. mail upon:

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