No. 12-35221, 12-35223

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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STORMANS, INC., DOING BUSINESS AS RALPH'S THRIFTWAY, *ET AL*,
*Plaintiffs–Appellees*,

v.

MARY SELECKY, *ET AL.*,
*Defendant-Appellants*,

and

JUDITH BILLINGS, *ET AL.*,
*Intervenors-Appellants*

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On Appeal from the United States District Court
for the Western District of Washington
No. 3:07-cv-05374-RBL – Hon. Ronald B. Leighton

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# BRIEF FOR APPELLEES

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## FRAP 26.1 CORPORATE DISCLOSURE STATEMENT

Stormans, Inc., is a privately-held corporation with no parent corporation. No publicly-held corporation owns 10% or more of its stock.

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## INTRODUCTION

Every day, pharmacies across Washington decide not to stock or deliver certain drugs, instead making thousands of referrals to nearby pharmacies. As the State has stipulated, referrals are "a time-honored pharmacy practice," they occur "for many reasons," and they "do not pose a threat to timely access to lawfully prescribed medications." SER 1619-20. But in recent years, one type of referral has become controversial: referrals for reasons of conscience. The question in this case is whether the State may prohibit Plaintiffs from engaging in referrals for reasons of conscience, while permitting identical referrals for a host of business, economic, and convenience reasons. The answer, under the Free Exercise Clause, is "no."

Plaintiffs are a family-owned pharmacy and two individual pharmacists, whose religious beliefs forbid them from dispensing Plan B or *ella*, both of which can destroy a human embryo. When Plaintiffs receive a request for either drug, they refer customers to one of dozens of nearby pharmacies that dispense it. Plaintiffs have engaged in this practice for many years, and no customer has ever been denied timely access to any drug. Indeed, the State has stipulated that Plaintiffs' referrals, and others like them, "do not pose a threat to timely access to lawfully prescribed medications . . . includ[ing] Plan B." SER 1620.

Nevertheless, in 2007, the Board of Pharmacy adopted new Regulations making Plaintiffs' actions illegal, while leaving every other traditional referral untouched. Plaintiffs challenged the Regulations, and the district court conducted a twelve-day bench trial, with almost 800 exhibits and twenty-two witnesses, including eleven pharmacists and pharmacy owners with over 200 years of pharmacy experience. Based on this evidence, the court issued 145 pages of factual findings and analysis, ultimately concluding that the Regulations violate the Free Exercise Clause.

The court found that the Regulations "are riddled with exemptions for secular conduct, but contain no such exemptions for identical religiously-motivated conduct." ER 37, 54. It found that the Regulations empower the Board to grant individualized exemptions "on an *ad hoc* basis, considering the individual justification offered by the pharmacy." ER 39 n.17; 39-40. It found that the Regulations have "never been enforced against any pharmacy" except Plaintiffs. ER 42. And it found that the Regulations were specifically designed to protect common business referrals while "ensur[ing] that religious objectors would be required to stock and dispense Plan B." ER 43.

On appeal, Defendants do not challenge *any* of the district court's factual findings as clearly erroneous. They do not dispute that pharma-

cies continue to refer patients every day for a host of business, economic, and convenience reasons. And they do not dispute that these referrals, in the words of the Board's own witnesses, create "a far more serious access problem" than referrals for religious reasons. SER 699; 226-27.

Instead, they ask this Court to ignore the twelve-day bench trial, and they pretend that this Court resolved the merits years ago in a preliminary injunction appeal—before the parties had exchanged a single document or deposed a single witness in discovery. But as this Court has repeatedly held, "decisions on preliminary injunctions do not constitute law of the case and 'parties are free to litigate the merits.'" *Golden State Transit Corp.* v. *City of Los Angeles*, 754 F.2d 830, 832 n.3 (9th Cir. 1985). That rule is controlling here.

Alternatively, Defendants simply ignore the trial record and launch baseless attacks on the good faith of the district judge. The tactic is unfortunate and unavailing. The district court's findings are abundantly supported by the Board's admissions and the testimony of twenty-two witnesses and almost 800 exhibits—often with the Board's own witnesses making the most telling concessions. The district court expressly attempted "to create as broad a public record as we can," and it admitted evidence from both sides with "equal liberality." SER 91-92. De-

fendants complain about this equal liberality only because it resulted in a devastating record.

Unable to escape the record, Defendants take an extreme view of the law, arguing that no plaintiff can prevail under the Free Exercise Clause "unless they show that a law targeted them *because of their religious beliefs*." Int. Br. 63; *cf.* State Br. 40-41. But that is not the law. Of course, a showing of discriminatory intent is *sufficient* to establish a free exercise violation, but it is not *necessary*. *See, e.g.*, *Sherbert* v. *Verner*, 374 U.S. 398, 401 (1963) (finding a free exercise violation in the absence of discriminatory intent).

Even if it were, the district court found ample evidence that the State has singled out religious conduct here. The Chairman of the Board publicly threatened to prosecute conscientious objectors "to the full extent of the law," SER 1139, and vowed never "to vote to allow religion as a valid reason for facilitated referral." SER 1204. The Board's spokesperson also admitted that "the object of the rule was ending refusals for conscientious objection." SER 349; *see also* SER 228, 804. Ultimately, the district court found as a fact that "the goal of the Board" was "to eliminate conscientious objection." ER 18.

Sadly, Defendants' own admissions show how needless this protracted conflict was. The State has *stipulated* that Plaintiffs' conduct "do[es]

not pose a threat to timely access to lawfully prescribed medications . . . includ[ing] Plan B." SER 1620. Yet Defendants have persisted in threatening Plaintiffs with the loss of their livelihood, solely because they will not participate in the destruction of human life in violation of their religious beliefs. That is why our nation has a Free Exercise Clause.

## STATEMENT OF JURISDICTION

Plaintiffs agree with Defendants' jurisdictional statements.

## STATEMENT OF ISSUES

1. Whether this Court's prior ruling in a preliminary injunction appeal constitutes the law of the case.
2. Whether Regulations requiring Plaintiffs to dispense Plan B in violation of their religious beliefs are "neutral" and "generally applicable" under the Free Exercise Clause.
3. Whether the Regulations can satisfy strict scrutiny or rational basis review.
4. Whether the Regulations violate Plaintiffs' fundamental right under the Due Process Clause to refrain from taking human life.

Pursuant to Circuit Rule 28-2.7, the Regulations at issue are reproduced in full in an addendum at the end of this brief.

# STATEMENT OF FACTS

## I. The Practice of Pharmacy

This case centers on the practice of pharmacy. At trial, the court heard testimony from eleven pharmacists and pharmacy owners with over 200 years of combined experience.[1] They testified in detail on common stocking and referral practices.

### A. Pharmacies decline to stock drugs for many reasons.

With over 6,000 drugs on the market, no pharmacy can stock them all. ER 62; SER 428, 1195, 749. Rather, pharmacies must make complex choices about which drugs to stock, based on a variety of factors:

***Inventory Costs.*** Inventory is one of a pharmacy's most significant costs. Drugs sitting on a shelf increase that cost. Thus, pharmacies try to turn over their inventory rapidly and avoid drugs that linger on the shelf.[2]

***Upfront Costs.*** Some drugs are "high cost yet low volume." ER 62; SER 1161. For such drugs, standard practice is to "call[] a neighboring pharmacy with the understanding that the patients[] needs can be met by a 'competitor.'" SER 1164.[3]

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[1] Addendum B identifies the witnesses and their positions.

[2] ER 62; SER 51-52, 569-70, 658-60.

[3] *See also* ER 62; SER 52-53, 1099, 28, 266, 660-61.

***Bulk Drugs.*** Many drugs are sold only in bulk, even when a patient needs much less. To avoid unused inventory, pharmacies often decline to stock bulk drugs.[4]

***Contract Restrictions.*** A pharmacy's supplier contracts often restrict the brands and types of drugs that may be purchased. Pharmacies do not stock drugs outside of their contracts. ER 63, 93; SER 575-76, 542-43, 707-08, 39-40, 412.

***Insurance Restrictions.*** Insurance companies often cover only one or two brands or strengths of a drug. Thus, pharmacies often decline to stock other brands or strengths. ER 63, 94; SER 54; 59, 300-01, 581, 661.

Similarly, some insurers reimburse generics and brand-name drugs at the same rate. Pharmacies respond by stocking only generics and referring patients with brand-name prescriptions. ER 94; SER 54, 300-03.

***Manufacturer Restrictions.*** Some drug manufacturers also limit the sale of their drugs to designated pharmacies. Pharmacies without the designation cannot stock the drugs. SER 849.

***Time Restrictions.*** Pharmacists typically earn over $100,000 annually, SER 69, and most pharmacies have only one pharmacist on duty.

[4] ER 63, 93; SER 53-54, 571-72, 851-53, 664, 549-50, 1099.

ER 105, 538; SER 69. Thus, pharmacies often avoid stocking drugs that require extra preparation or paperwork. ER 94; SER 311-13, 403-05, 1164.

***Niche Pharmacies.*** Many pharmacies specialize in a market niche—such as geriatric, pediatric, oncological, diabetes, HIV, home infusion, compounding, naturopathic, or fertility drugs. These pharmacies do not stock drugs outside their chosen niche. ER 63, 92; SER 38-39, 59, 96-98, 219, 355-56, 496-97.

As the district court found, pharmacies routinely decline to stock drugs for all of these reasons and more, and these stocking decisions have always been permitted under the Board's regulations. ER 16; ER 92-96.

### B. Pharmacies refer for many reasons.

Pharmacies also make referrals many times a day, for many reasons. ER 37-38, 42, 63-64, 94-95. One reason, as described above, is that the pharmacy chooses not to stock the drug. But drugs are often out of stock for other reasons, including unexpected demand, or failure to order enough supply.[5] When a patient requests an out-of-stock drug, standard practice is to refer the customer to another pharmacy. Witnesses agreed that referral is a time-honored practice that occurs at every pharmacy

[5] ER 95; SER 379-81, 482-83, 692-94, 749.

daily.[6] The State also stipulated that referral "is often the most effective means to meet the patient's request," SER 1619-20, because ordering the drug or borrowing from another pharmacy takes longer.

Pharmacies also routinely refer even when a drug is *in* stock. This occurs for a variety of business, economic, and convenience reasons. ER 95-96. For example, many pharmacies prefer to avoid simple compounding (*e.g.*, mixing two liquids) because it requires more pharmacist time. Thus, even when pharmacies have both components of a simple compound in stock, they routinely refer patients to compounding pharmacies. *See* n. 33, *infra*.

Similarly, pharmacies routinely refer patients elsewhere for unit dosing or "blisterpacking." Blisterpacking requires the pharmacy to put drugs into separate compartments for specific days of the week. SER 58. This takes extra time, and many pharmacies choose for business or convenience reasons not to do it. ER 96; SER 58; *see also* n. 34, *infra*. Instead, they refer the patient to pharmacies that do unit dosing on a regular basis.

Pharmacies also frequently refuse to accept certain forms of payment. For example, Walgreens no longer accepts Medicaid because it involves burdensome paperwork and lower reimbursement. *See* n. 30,

[6] ER 94-95; SER 829-30, 323-24, 470, 98, 547, 583, 81, 1161, 1164, 749, 180, 54-55.

*infra*. Other pharmacies refuse certain forms of insurance, even when reimbursement rates are high, because the pharmacy does not want to deal with burdensome audit requirements. ER 122-23; SER 51, 59, 572-73, 713-14.

As the district court found, referrals for these and other reasons "have been common both before and after enactment of the Regulations." ER 96; ER 37-38.

### C. Pharmacies have long referred for reasons of conscience.

Pharmacies have also long referred patients for reasons of conscience. ER 64. In 1995, Washington enacted the Basic Health Care Law, which provided that no health care entity, including pharmacists, may be required to participate in any service "if they object to doing so for reason of conscience or religion." RCW 48.43.065(2)(a); RCW 70.47.160(2)(a). The Board interpreted this law to protect individual pharmacists' right of conscience-based referral. ER 64; SER 922.

For many years, the Board recommended referral for conscience reasons including for Plan B.[7] Yet, as the district court found, "[t]he Board never identified a single incident in which a patient was unable to gain timely access to Plan B." ER 145; ER 84-85.

[7] ER 64-65; SER 300, 935-36, 922, 932, 80-81; ER 571.

### D. Major health organizations and every other state support referrals for reasons of conscience.

Conscience-based referrals are also endorsed by major health organizations and permitted in every other state. ER 64-65. In 1998, the 62,000-member American Pharmacists Association (APhA) adopted a policy endorsing referrals for reasons of conscience. SER 770-72. That policy "recognizes the individual pharmacist's right to exercise conscientious refusal," and supports expanding access to medication "without compromising the pharmacist's right of conscientious refusal." ER 920-21. Similar policies are endorsed by the American Medical Association,[8] American Society of Health-System Pharmacists,[9] National Community Pharmacists Association,[10] American Congress of Obstetricians and Gynecologists,[11] and Washington State Pharmacy Association,[12] among others. ER 65-66; SER 773.

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[8] SER 1251; AMA, *Principles of Medical Ethics* (2001), *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page (last visited November 13, 2012); AMA, *Code of Medical Ethics*, § 9.06 (1977), *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion906.page (last visited, November 13, 2012);

[9] ER 921; ASHP, *Pharmacist's Right of Conscience and Patient's Right of Access to Therapy* (2010), *available at* www.hosp.uky.edu/pharmacy/departpolicy/PH01-05.pdf (last visited November 13, 2012).

[10] ER 921.

[11] SER 1317; ACOG, *Committee Opinion, Number 385*, (Nov. 2007), *available at* http://www.acog.org/~/media/Committee%20Opinions/Committee%20on%20Ethics/co385.pdf?dmc=1&ts=20120801T0103205045 (last visited November 14, 2012).

[12] ER 911-30, 921.

Conscience-based referrals are also permitted in every other state (with the possible exception of Massachusetts). ER 64-66. Twenty-nine states have no law or regulation addressing the issue; there, the default rule, under both APhA policy and the common law, is that "[a] druggist is not obligated to fill any and all prescriptions, but may refuse to fill one for good reason." 28 Corpus Juris Secundum, Drugs and Narcotics § 100. Thirteen states expressly permit referrals, bringing the total to forty-two.[13]

Besides Washington, only seven states place restrictions on conscience-based referrals; but even in these states, Plaintiffs' referrals would be permitted:

- One state—California—permits referral "on ethical, moral, or religious grounds," as long as the pharmacy has "establish[ed] protocols" to ensure timely referral. Cal. Bus. & Prof. Code § 733(b)(3).
- Five states—New Jersey, Wisconsin, Maine, Nevada, and Massachusetts—require pharmacies or pharmacists to *dispense* drugs in a timely manner. N.J. Stat. Ann. § 45:14-67.1; Wis. Stat. Ann. § 450.095; 02-392 Me. Code R. ch. 19 § 11; Nev. Admin. Code § 639.753; 247 Mass. Code Regs. 6.02(4). But none requires pharmacies to *stock* Plan B.[14]

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[13] ER 65; *see also* National Women's Law Center, Pharmacy Refusals: State Laws, Regulations, and Policies (Apr. 24, 2012), http://www.nwlc.org/resource/pharmacy-refusals-state-laws-regulations-and-policies.

[14] The only possible exception is Massachusetts. It has a stocking rule, 247 Mass. Code Regs. 6.02(4), which the state pharmacy board has interpreted to require Wal-Mart to stock Plan B. Bruce Mohl, *State Orders Wal-Mart to Sell Plan B Contraceptive* BOSTON GLOBE, Feb. 14, 2006. But Wal-Mart has no conscientious objection to Plan B, so the ruling did not address pharmacies with conscientious objections.

The only state with regulations comparable to Washington is Illinois, which copied its regulations from Washington almost verbatim. 68 Ill. Admin. Code § 1330.500(e)-(h). But those regulations were struck down on free exercise grounds. *Morr-Fitz, Inc.* v. *Blagojevich*, 2011 WL 1338081, No. 2005-CH-000495 (Ill. Cir. Ct. Apr. 5, 2011). On appeal, Illinois then claimed that its regulations *permitted* conscience-based referrals. Oral Argument at 16:25-18:05, *Morr-Fitz, Inc.* v. *Quinn*, --- N.E.2d ----, No. 4-11-0398 (Ill. App. Ct. Aug. 7, 2012), *available at* http://www.state.il.us/court/media/appellate/4th_District.asp. Even then, the regulations were struck down under a state conscience statute. *Morr-Fitz, Inc.* v. *Quinn*, --- N.E.2d ----, 2012 WL 4320611 (Ill. App. Ct. Sept. 20, 2012).

Thus, no state has gone as far as Washington in requiring pharmacies to stock and dispense Plan B. With the possible exception of Massachusetts, where the law is unclear, Plaintiffs' conduct would be permissible in every other state. ER 65; SER 772-773; *see also* SER 1252-53; 1404-1408.

## II. The Development of the Regulations

In 2007, the Board of Pharmacy promulgated new Regulations requiring pharmacies to dispense Plan B. The district court found that the Regulations "were not the product of a neutral, bureaucratic process

based solely on pharmaceutical expertise," but were instead "a highly charged political affair," where the goal was "to prohibit conscientious objections to Plan B." ER 144-146; ER 17-19, ER 67-81.

The regulatory process began in 2005, when Planned Parenthood and the Governor's office contacted the Board of Pharmacy to request a new rule prohibiting conscience-based referrals for Plan B. ER 43, 67, SER 925, 122-123, 251-254, 954-55. The Board resisted these requests, agreeing unanimously to continue supporting conscience-based referrals.[15]

The Governor and Planned Parenthood then worked together "to increase pressure on the Board" (ER 69, 43)—appointing a Planned Parenthood member to the Board and threatening the Board members with personal liability under anti-discrimination laws if they voted in favor of conscience-based referrals. ER 68-69; SER 138, 131, 257, 939-41, 945, 971-83; 1097-98. They also sought to influence the two public rulemaking hearings by gathering "refusal stories" focused on conscientious objections to Plan B. ER 69, 86; SER 134-36, 256, 989-92. Still, after considering all of the evidence at the rulemaking hearings, the Board voted unanimously to protect conscience-based referrals. ER 70; SER 1059.

[15] ER 67-68, 1731; SER 78-81,127-130, 917-21, 925, 932-33, 935-36.

The Governor then publicly threatened to terminate the Board, ER 70, SER 997, and created a new taskforce to re-write the rule. ER 72; SER 272-74, 1070. She specifically asked her advisors to confirm that the new draft rule was "clean enough for the advocates [*i.e.*, Planned Parenthood] re: conscious/moral issues." ER 71; SER 1085, 276-77.

The new taskforce consisted of Planned Parenthood, the Governor's policy advisor, and three pharmacists. ER 72; SER 46, 230-31, 249-50. Although every pharmacist on the taskforce supported conscience-based referrals, the Governor and Planned Parenthood took conscience-based referrals off the table. ER 72; SER 55, 239-41. Instead, the taskforce discussed the many business, economic, and convenience reasons why pharmacies commonly refer patients elsewhere.[16] Ultimately, as the district court found, the taskforce agreed that the rule should "preserve referral for a variety of business, economic, convenience, and clinical reasons, but not for reasons of conscience." ER 72-75.[17] After the task-force meetings, Board members discussed the new draft rule, confirming that it protected referral for traditional business, economic, and convenience reasons.[18]

[16] ER 72-73; SER 10-11, 52-62, 172-73, 233-235, 290-91.

[17] ER 72-75; SER 62-64, 169, 237-38, 280, 282, 289-292, 1101, 1084-85.

[18] ER 75; SER 54-55, 709-721, 725-28, 489.

To guarantee final approval of the rule, the Governor personally called the Board Chair. ER 75, 883a. When he seemed resistant, and Planned Parenthood opposed his re-appointment, the Governor declined to re-appoint him to the Board. ER 76. Instead, the Governor appointed two new members recommended by Planned Parenthood. ER 76; SER 877-880, 174-76, 285. On April 12, 2007, the Board voted to approve the Governor's rule. ER 76. Plaintiffs filed suit the day before the Regulations took effect.

In 2010, after nearly three years of litigation, the Board briefly re-opened the rulemaking process. ER 78-79. The Board's stated rulemaking purpose was to amend the Regulations to allow referral for "any reason," including "for conscientious reasons." ER 78-79; SER 1182. But this new rulemaking provoked an immediate outcry from Planned Parenthood and the Governor. ER 80; SER 1166-67, 1191, 1193-94. Facing renewed opposition, the Board voted to end the rulemaking without changing the rule. ER 81. As Board Chair Linggi explained, there was no need to amend the Regulations because pharmacies were "routinely" referring patients elsewhere for business reasons, and "there was no evidence of a lack of timely access to drugs." ER 81.

## III. The Text of the Regulations

The relevant portions of the Regulations are codified at WAC 246-869-010 (the "Delivery Rule") and WAC 246-869-150(1) (the "Stocking Rule"). Promulgated in 2007, the Delivery Rule provides that "[p]harmacies have a duty to deliver lawfully prescribed drugs" subject to five enumerated exceptions. WAC 246-869-010(1)(a)-(e). The exceptions include situations where (a) the prescription is erroneous; (b) a national emergency affects drug availability; (c) a pharmacy lacks specialized equipment needed to dispense a drug; (d) the prescription is potentially fraudulent; or (e) the drug is out of stock. *Id.* The Delivery Rule also provides exemptions in any "substantially similar circumstances," *id.*, and when a customer cannot pay the pharmacy's "usual and customary" charge, WAC 246-869-010(2).

The Stocking Rule is incorporated by reference in the Delivery Rule. *See* WAC 246-869-010(1)(e). Promulgated in 1967, the Stocking Rule provides: "The pharmacy must maintain at all times a representative assortment of drugs in order to meet the pharmaceutical needs of its patients." WAC 246-869-150(1).

## IV. The Operation of the Regulations

The Delivery Rule has been in force for five years; the Stocking Rule for forty-five. Much of the evidence at trial described how the Regulations operate in practice.

### A. The Regulations allow pharmacies to refuse to stock for secular reasons.

Since the Board adopted the Regulations, pharmacies have continued to exercise broad discretion over stocking decisions, choosing not to stock drugs for all of the business, economic, and convenience reasons detailed above.

The district court identified sixteen common scenarios where pharmacies decline to stock. ER 92-94, 37. For example, for reasons of profitability, pharmacies decline to stock:

- Certain drugs with insufficient demand.[19]
- Certain expensive or "specialty" drugs.[20]
- Certain bulk drugs.[21]
- Certain brands or doses with lower profit margins.[22]

For reasons of convenience, pharmacies decline to stock:

- Certain drugs (such as Retin-A, Accutane, or Clozaril) that require a pharmacist to monitor the patient or register with the drug's manufacturer.[23]
- Certain narcotics that might attract criminals.[24]

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[19] ER 1686; SER 314-15, 27-28, 52, 61, 199-200, 656, 851-52, 1086, 1099, 1161, 32-33.

[20] SER 1161-64, 305, 774-80, 53, 1099, 1101, 1232, 242, 505-06, 728-30, 31-32.

[21] SER 53, 314-15, 549-551, 571-72, 664, 851-53, 779-80, 906-08, 1099, 1343-44.

[22] SER 300-01, 574, 27-28, 49-51, 59.

[23] SER 312-12, 57-58, 37-38, 503-05, 585-86, 547-49, 702, 716-17, 1343.

[24] SER 33-34, 59-61, 229, 303-04, 307, 491, 857-59, 1312.

- Certain drugs (such as Schedule V cough syrup or Class II narcotics) that involve additional paperwork, record-keeping, or unwanted clientele.[25]

For business reasons, pharmacies decline to stock:

- Drugs that fall outside their formularies or supplier contracts.[26]
- Drugs that require additional equipment or training.[27]
- Drugs that fall outside their chosen business niche.[28]

The Board continues to permit all of these stocking decisions (and more) under the Regulations. ER 94.

### B. The Regulations permit referral for a wide variety of secular reasons.

Even when a pharmacy has a drug in stock, the Regulations permit referrals for many reasons. The district court identified a dozen common scenarios. ER 95-96. Some involve payment issues, such as:

- Refusal to accept insurance because of low reimbursement rates.[29]
- Refusal to accept Medicaid, Medicare, or Washington Labor and Industries.[30]
- Refusal to accept any payment other than cash.[31]

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[25] SER 60-61, 313-14, 370, 1344, 717, 1311.

[26] SER 39-40, 542-43, 575-76, 661, 707-08.

[27] SER 503-05, 704-05, 585-86, 701-02, 716-17, 179, 1161, 1164, 1086.

[28] SER 355-56, 96-98, 17, 59, 219, 496-97, 1086, 1099.

[29] SER 105-06, 300-01, 50, 59, 321, 713.

[30] SER 105-06, 300-02, 488-89, 527, 572-74, 616, 714.

[31] SER 488-89, 426, 527; ER 1656.

Some involve matters of convenience, such as:

- Referral because the patient's insurance has burdensome paperwork or auditing requirements.[32]
- Referral for simple compounding.[33]
- Referral for unit dosing or blisterpacking.[34]

Some involve exemptions for particular types of drugs or devices, such as:

- Referral for syringes.[35]
- Referral for drugs used in assisted suicide. RCW 70.245.190(1)(d).[36]
- Referral for drugs used in an abortion (such as misoprostol). RCW 9.02.150.

All of these referrals (and more) are widely known and "have been common both before and after enactment of the Regulations." ER 96; 37-38.

### C. The Regulations have not been enforced against common stocking or referral practices.

Although Board witnesses acknowledged that referrals for business,

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[32] SER 51, 59, 62, 572-73, 1713-14.

[33] SER 14, 17, 35, 38-39, 56-57, 309-312, 484-88, 705-06, 726-27, 426-27, 549, 575, 1086, 1343.

[34] SER 58, 62, 408-09, 523-24, 574-575, 719-720, 726-27, 1343-44. Unit dosing can be referred to as Medi-Sets or blisterpacking.

[35] SER 490-91,715-17, 780-82.

[36] SER 62, 106-07, 308-09, 723-24, 802-03.

economic, and convenience reasons are widespread, some Board witnesses suggested that some of these referrals are nevertheless forbidden by the Regulations. According to these witnesses, the Board tolerates widespread "skirting" of the Regulations because it is "complaint-driven," and it cannot enforce its Regulations until a member of the public files a complaint.[37]

The trial court found this testimony "implausible and not credible." ER 102; 50-53. Instead, it found that the Board "has a wide variety of mechanisms available for promoting compliance," ER 102, including inspections, test-shopping, pharmacy publications, collaboration with the State Pharmacy Association, and Board-initiated complaints. ER 102-104. In fact, the court emphasized that "the Board initiated a complaint" against Plaintiffs in this case. ER 104. But the Board has not used any of these mechanisms to restrict common stocking or referral practices.

***Citizen Complaints.*** As the district court found, citizen complaints represent "only a small fraction of how the Board ensures compliance with its regulations." ER 103. Less than one percent of pharmacies have *ever* had a complaint, and even fewer are disciplined—roughly one pharmacy every three years. SER 623, 666, 690-91, 769.

[37] SER 5, 202-03, 357-58, 489, 624, 639.

***Inspection.*** The far more common method of ensuring compliance is through bi-annual inspections of every pharmacy in the state. SER 413, 679-80, 1335-38. Inspections involve a detailed review of everything from the cleanliness of the restrooms, to the condition of the drugs on the shelf, to the accuracy of pharmacy's prescription records. SER 1682-83. The Board also checks for compliance with every subsection of WAC 246-869-150 *except* the Stocking Rule. That is, inspectors check for expired drugs, contaminated drugs, proper labeling, unapproved drugs, and proper storage under WAC 246-869-150(2)-(6). But they do not check for a "representative assortment" of drugs under the Stocking Rule, WAC 246-869-150(1). SER 203, 209-10, 765-66.

Numerous witnesses testified that it would be easy to check for compliance with the Stocking Rule through various methods.[38] Yet the Board has made no effort to use the inspection process to curtail common stocking practices or referrals. SER 481, 379, 398-99, 685-87; 1682-83.

***Board-Initiated Complaints.*** In addition to inspections, the Board can file its own complaints, without waiting for a citizen to do so. It has done so when inspectors have reported violations, SER 34, 366-67, 603-06, 689-90, 836, when the Board has learned of violations from media

[38] SER 193-94, 205-06, 394-96, 398-99, 567-70, 685-87.

reports, SER 616, 688-89, or when insurance companies have reported violations. SER 602-03. The Board also filed its own complaint against Plaintiffs in this case.[39]

But in the forty-five years that the Stocking Rule has been in force, and the five years that the Delivery Rule has been in force, the Board has never filed a complaint against widespread referrals for business, economic, or convenience reasons.

***Test Shopping.*** The Board also has authority to send test shoppers to pharmacies to test for compliance. SER 603-04, 768. But the Board has made no effort to test-shop pharmacies for common business referrals. ER 51; SER 603-04, 768.

***Publications.*** The Board also publishes regular newsletters flagging compliance issues, such as rules on faxed prescriptions, SER 1289, rules on out-of-state prescriptions, SER 1311, and common inspection violations. SER 1341. It has never published any newsletters suggesting that widespread business referrals are prohibited.[40]

***State Pharmacy Association.*** The Board also works with the State Pharmacy Association to promote compliance, co-sponsoring a "new drugs, new laws" annual seminar and offering articles for the Associa-

[39] SER 34-35, 613-15, 1135, 1345-50, 1358-59.

[40] SER 31-34, 36, 679-83, 207-10, 366-67, 765, 1335.

tion's newsletters. SER 759-64. But the Board has never used this channel to inform pharmacists that common stocking or referral practices are illegal. *Id.*

### D. The Regulations prohibit referrals for reasons of conscience.

By contrast, Board witnesses repeatedly confirmed that the Regulations prohibit referrals for reasons of conscience.[41] The Board's designated spokesperson on the Regulations (SER 295) testified that prohibiting conscience-based referrals is the *only* effect of the Regulations:

> Q: Mr. Fuller, other than eliminating referral as an option for pharmacies which cannot stock Plan B for religious reasons, from a practical standpoint, nothing has changed after the enactment of these rules, correct? . . .
>
> A: Right.
>
> Q: The only change these rules have affected is that they can't [refuse to] stock Plan B for conscientious reasons, right?
>
> A: Right.

SER 356. He also agreed that "the object of the rule was ending refusals for conscientious objection." SER 349.[42]

The Board's public pronouncements also confirmed that the Regulations prohibit conscience-based referrals. ER 77. In its August 2005 meeting, it explained that the issue was referrals for "reasons of con-

[41] ER 97; SER 414-15, 166, 596-97, 651, 1139, 1248, 1326.

[42] *See also* SER 23-24, 119-20, 754-55, 1095, 1099.

science." ER 1731. In its October 2005 newsletter, it said the same thing. SER 935-36. In the document describing the purpose of the rule-making (the "CR-101"), it stated that "the issue" was "emergency contraception" and referrals based on "conscientious, moral, or religious grounds." SER 952-56, 643. In three research memos on the Regulations, it addressed "conscientious refusal" and "conscience clauses"—not referrals for common business reasons. SER 932-33, 984-88, 1004-54.

Similarly, in its public letters addressing the Regulations, the Board described the issue as the "conscience conflict." SER 960. In an email announcing the final Regulations to all Washington pharmacists, it titled its notice "**pharmacyplnB**103__001.pdf". SER 1143 (emphasis added). In that notice, it mentioned only one drug (Plan B) and only one reason for referral (conscience). *Id.* In its only newsletter addressing the Delivery Rule, the Board explained that the Regulations prohibit referral "due to moral or ethical objections." SER 1326. And the Board's formal Guidance Document warns pharmacist not to refer for "moral or ethical objections." SER 1248.

### E. The Regulations prevent pharmacies from accommodating conscientious objectors.

In practice, the Regulations have also prevented pharmacies from accommodating individual pharmacists with conscientious objections to Plan B. ER 105-07. During the rulemaking process, the Board consid-

ered three possibilities for dealing with conscientious objectors: (1) hiring a second pharmacist; (2) hiring an on-call pharmacist; or (3) terminating the conscientious objector.[43] Witnesses agreed that termination was the most likely option. SER 69, 332.

***Hiring a Second Pharmacist.*** Due to financial pressures and labor costs, most pharmacies cannot afford to have two pharmacists on duty at once. The cost of hiring a second pharmacist is at least $80,000, if not over $100,000, annually. SER 69, 509-10, 566, 583. As the Board's Pharmacist Consultant and State Pharmacy Association CEO testified, no employer would be willing to incur that cost to accommodate a conscientious objector. SER 69, 331-32.

***On-Call Pharmacist.*** Multiple Board witnesses also testified that hiring an on-call pharmacist was not a realistic alternative. On-call pharmacists must be paid more than a regular employee, must be paid for at least half a day, and need several hours or days of notice before a shift.[44] Waiting for an on-call pharmacist to arrive and dispense Plan B would also take longer than referring a patient to a nearby pharmacy.

***Telepharmacy.*** Board witnesses also rejected telepharmacy as an alternative. In telepharmacy, the remote pharmacist must counsel the

[43] SER 69-71, 111-12, 330-32, 247.

[44] ER 15, 106; SER 69-71, 331, 510-11, 535-37, 551-52, 564-65, 649, 1142.

patient and supervise the technician filling the prescription or selling the over-the-counter product by videolink. SER 71-72, 332-35, 363-65, 811-12, 816-17. Fuller, the Board's 30(b)(6) witness on telepharmacy, testified that the Board believes in-person consultations are better for patient safety than telephonic or video consultations; thus, the Board will not approve a telepharmacy arrangement unless there are no other pharmacies nearby. SER 360, 362, 809-10, 813-14, 815-18. Witnesses concluded that firing a conscientious objector was far more likely than telepharmacy approval. SER 69, 365.

## V. The State's Stipulations

After several years of discovery, the State entered binding factual stipulations on the issue of "facilitated referrals," including referrals "for conscientious reasons." SER 1619-20. These include:

(1) Facilitated referral "is a time-honored practice."

(2) Facilitated referral "continues to occur for many reasons."

(3) Facilitated referral "is often the most effective means to meet the patient's request when the pharmacy or pharmacist is unable or unwilling to provide the requested medication or when the pharmacy is out of stock of medication."

(4) Facilitated referral "improve[s] the delivery of health care in Washington, including when a drug is not cost-effective to order, the drug requires monitoring or follow-up by the pharmacist, and other reasons."

(5) "[P]harmacies and pharmacists should retain the ability to engage in facilitated referrals."

(6) Facilitated referrals "are often in the best interest of patients."

(7) Facilitated referrals "help assure timely access to lawfully prescribed medications . . . includ[ing] Plan B."

(8) Facilitated referrals "do not pose a threat to timely access to lawfully prescribed medications . . . includ[ing] Plan B."

SER 1619-20.

These stipulations were initially drafted by the State when it sought a stay of the litigation in 2010. Before these stipulations were entered, they were personally reviewed by the Secretary of Health, Assistant Secretary of Health, and the Executive Director of the Board.[45] They were accepted by the Board without objection, and Board witnesses confirmed that the Stipulations reflect current pharmacy practices. *Id.*

## VI. Access to Medication

At trial, the State argued that the goal of the Regulations was to increase timely access to medication. As the district court found, however, "the evidence at trial revealed no problem of access to Plan B or any other drug before, during, or after the rulemaking process." ER 81-82.

[45] ER 80; SER 750-52, 1195-96, 827-30, 748-49, 750-52, 471, 1175-76.

### A. Plan B is widely available.

Since 2006, Plan B has been available to anyone over sixteen without a prescription. It can be purchased at pharmacies, doctor's offices, government health centers, emergency rooms, Planned Parenthood, and through a toll-free hotline. ER 82. It is also available over the Internet for overnight delivery. ER 82.

Plan B is also widely available in Washington. Washington was the first state to allow pharmacists to prescribe Plan B, SER 944, the first state to allow pharmacy students to dispense Plan B, SER 944, 1082, and the first state to have a pharmacist-initiated program focused on providing Plan B to low income clients in rural communities. *Id.* Thus, "Washington has long had some of the highest sales of Plan B in the nation." ER 82; SER 1083, 124-25, 133-34, 925, 82, 86.

### B. Survey data confirms wide access to Plan B.

In 2006, the Board conducted a survey on access to Plan B. The survey intentionally over-sampled rural pharmacies in order to identify potential access problems. SER 339-340, 342, 125-26, 1686. According to the survey, 77% of all Washington pharmacies stock Plan B. ER 1686. Of the 23% that do not stock, 15% cited low demand, 4% cited status as a hospital or niche pharmacy, and 2% cited an easy alternative source. *Id.* Only 2% cited religious objections. *Id.* Thus, pharmacies are over ten

times more likely not to stock Plan B for business reasons than for reasons of conscience.

In 2006, the Washington State Pharmacy Association (WSPA) conducted its own survey, concluding that there was no problem of access to any medication. SER 82-83, 101, 1082. Rather, "there were adequate ways or means for a patient to get whatever they needed." SER 101. In a letter to the Board, the WSPA confirmed that "no one has reported an instance when a patient has been denied timely access to [a] legitimate medication request due to a moral, ethical, or religious objection by a pharmacies." SER 1080, 86.

The WSPA surveyed access again in 2008, reaching the same conclusion. SER 84-85. According to that survey, 86% of all pharmacies stock emergency contraceptives. *Id.* Of the 14% that do not, only 3% cited religious beliefs as the sole reason. *Id.* The WSPA also found that 98.3% of pharmacists either provide emergency contraception or have an established system to facilitate timely access. ER 84.

### C. Board testimony confirmed that there was no problem of access to Plan B.

At trial, Board witnesses confirmed that there was no problem of access to Plan B. Board Chair Harris, who served on the Board during both rulemaking processes, admitted that the Board "was not able to identify a single drug that was in Washington that was unable to be

obtained due to access issues." SER 757. Three former Board Executive Directors, the Board's pharmacist consultant, and former and current board members testified similarly. *See, e.g.*, SER 126 (Board "w[as]n't aware of any rural communities where there was a problem with access to Plan B or any other drug"); SER 337-40 (Board was "not aware of any area in Washington, rural or nonrural, for which there is an access problem for time-sensitive drugs"); SER 514-17, 601.

In fact, Defendants could not identify a single location in Washington with a problem of access to Plan B or any other drug.[46] And no Board witness could identify any person who had ever been denied timely access to any drug because of a conscientious (or any other) objection.[47] As the district court found, "the weight of the testimony at trial strongly supports the conclusion that there was no problem of access to Plan B or any other drug, either before or after the rulemaking process." ER 86.

### D. Intervenors' refusal stories demonstrated no problem of access to medication.

In the absence of any empirical evidence, Intervenors sought to develop anecdotal "refusal stories" in support of an access problem. During the rulemaking process, the Governor's staff urged Planned Parenthood

[46] SER 101, 126, 336-37, 600-02, 757, 132-33.

[47] SER 348 ("[T]here was no other refusal reason [other than conscientious] that the Board was considering…."); 74, 126, 336-37, 514-17, 600-02, 639-40, 700-01, 757, 1080.

to develop refusal stories to support the rules (SER 255-56); several abortion-rights groups launched campaigns soliciting refusal stories (ER 89-90; SER 86, 1250); and, as the trial court found, Planned Parenthood sent coordinated patrols of test shoppers looking for pharmacies that did not dispense Plan B. ER 89-90.[48]

Despite these efforts, Planned Parenthood developed only a handful of anecdotes. After hearing extensive testimony on these anecdotes, reviewing the rulemaking record, and reviewing documents submitted at trial, the district court found that these anecdotes "do not demonstrate a problem of access," but instead suggest "a concerted effort to manufacture an alleged problem of access where there isn't one." ER 90.

### 1. Refusal stories during the 2006-07 rulemaking

The Board held two main public hearings before its initial vote in favor of the Regulations—both in April 2006. Planned Parenthood offered four refusal stories, which were repeated throughout the process.[49] They involved (1) an abortion-related antibiotic at Swedish Medical Center; (2) prenatal vitamins in Yakima; (3) emergency contraception in Redmond, and (4) syringes sought by a man with gelled hair and tattoos. ER 86-87.

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[48] *See also* SER 76-77, 441, 458, 545, 561, 1264-66, 1303-11.

[49] SER 947-48, 974, 993, 998, 1117, 1384.

After investigation, all four were found to be meritless. ER 87-89. The Board investigated the first two and found that both pharmacies had acted properly. SER 998, 1117, 735-39. Planned Parenthood investigated the third story and found that pharmacy properly referred the customer elsewhere because it was not permitted to dispense Plan B without a prescription. SER 743-44, 938. The fourth story was a hypothetical that was never corroborated, SER 744, 974, 1380, and would not have violated the Regulations. WAC 246-869-010(1)(d); RCW 70.115.050.

These four refusal stories constituted the advocates' best evidence of a problem of access to medication during the rulemaking process. However, Board members testified that these stories did not demonstrate an access problem. *See* pp. 31-32, *supra*. In fact, after hearing these stories, the Board voted unanimously on June 1, 2006, to adopt a rule that permitted referrals for reasons of conscience. SER 746-47, 947-48.

**2. Refusals during the 2010 rulemaking and trial**

Unable to demonstrate any problem of access during the 2006 rulemaking, Intervenors sought to introduce a handful of new refusal stories during the 2010 rulemaking and at trial. Like the first four stories, the district court examined these stories in detail and found that they "do not demonstrate a problem of access to medication." ER 87-90. As

the district court found, most involved conduct that was expressly permitted under the Regulations. ER 87-88. Others were "manufactured by an active campaign of test shopping," ER 89-90, and were "inaccurately reported." ER 88; ER 90, n. 125.

Three stories cited in Intervenors' brief are illustrative.[50] First, Intervenors state that "a woman experiencing a miscarriage . . . was forced to undergo surgery after a pharmacist refused to fill the prescription based on a mistaken belief that the drug was for an abortion." Br. 1. This story was thoroughly vetted at trial and found to be meritless. As Dr. Kate McLean explained on cross examination, the prescription at issue was for misoprostol, a drug used in medical abortions. SER 634, 1313. Based on the dosage, it would have been reasonable for the pharmacist to believe that the prescription was for an abortion. SER 634. Thus, under state law, the pharmacist had an absolute right not to participate. RCW 9.02.150.

Even then, Dr. McLean testified that the patient was not "refused" the medication; rather, she was asked if she would wait until another pharmacist returned from her lunch break. SER 629-32; 1313. This, too, is permissible under the Regulations. WAC 246-869-010(1). Unfortu-

[50] Intervenors may try to cite additional stories on reply. But the district court's findings already addressed all of the refusal stories raised below. ER 87-90.

nately, the customer chose not to wait and did not attempt to fill the prescription elsewhere.

Second, Intervenors say that a woman "was raped by her boyfriend and became pregnant after being refused emergency contraceptives by several pharmacies." Br. 1. But the woman actually testified that after calling several pharmacies where Plan B was out of stock, she promptly obtained Plan B from her physician without becoming pregnant. ER 899. A few months later, she testified that her boyfriend raped her again and that she chose not to contact any pharmacies or obtain Plan B from her physician. *Id.* While this account is tragic, it does not show any problem of access.

Third, Intervenors state that a patient was "denied HIV medication because of her perceived 'lifestyle.'" Br. 1. This is baseless. Intervenors cite portions of a video from the 2010 rulemaking, in which a gay rights activist testified that access to medication is important to persons living with HIV. ER 1228-32. But he did not say that he, or anyone else, had been denied medication. *Id.* In fact, two of the Intervenors who have been diagnosed with HIV or AIDS, Jeffrey Schouten and Judith Billings, testified that they had never been denied medication and that they were not aware of any HIV or AIDS patients who had ever been

denied medication for religious, moral, or personal reasons. SER 249, 371-72, 588. *See also* 292-93, 306-07, 348-40, 600.

Finally, none of the Intervenors who testified at trial said that they were ever denied timely access to medication because of a conscientious objection. Molly Harmon requested Plan B at a Seattle pharmacy, and the pharmacist informed her in a "pleasant" manner that Plan B is "not a form of birth control and that she could provide me with information about other forms of birth control that were out there." SER 591-92, 382. This is standard information included on the manufacturer's insert for Plan B. SER 592, 1245-46. Harmon then received the medication in compliance with the Regulations.

Similarly, Rhiannon Andreini requested Plan B at a pharmacy in 2005. Because Andreini did not have a prescription, it would have been illegal for the pharmacy to sell the drug to her. SER 667-68. Instead, the pharmacist directed her to a nearby pharmacy. SER 1331, 669. But Ms. Andreini chose to drive to another pharmacy near her college, where she obtained Plan B in a timely manner. SER 1331.

**VII. The Effect of the Regulations on Plaintiffs**

The Regulations have had a direct impact on Plaintiffs' livelihoods and families. ER 107-108. Plaintiffs are Christians who believe that life begins at conception, when the female ovum and male sperm unite. ER

12-13, 61; SER 530-31, 582, 1557. They believe that all of human life is inherently precious at every stage of development, and that to participate in the destruction of human life is an immensely grave evil. *Id.*

Plaintiffs also believe that dispensing Plan B or *ella* constitutes direct participation in the destruction of human life. This belief is based in part on Plaintiffs' review of the medical literature, FDA directives, and FDA-approved labeling on Plan B and *ella*—all of which confirm that Plan B and *ella* can destroy a fertilized egg. *Id.*; SER 1245-46 (Plan B information); 1567 (*ella* Patient Information). For Plaintiffs, dispensing Plan B or *ella* constitutes participation in an abortion.[51]

### A. Impact on Mesler and Thelen

Rhonda Mesler has practiced pharmacy in Washington for over twenty years. SER 559. Margo Thelen has practiced for nearly forty years. SER 529. Both are the only pharmacists on duty during their shifts. SER 530, 566. Both informed their employers when they were hired that they could not dispense Plan B for reasons of conscience. SER 539, 561.

[51] Citing a *New York Times* article, Intervenors insinuate that Plaintiffs' beliefs are unreasonable. Br. 14. But this suggestion is directly contrary to the medical literature, FDA directives, and the FDA-approved labeling. SER 1556-1591, 1245-46. It is also irrelevant. Even if there were doubts about the mechanism of action of Plan B and *ella*, Plaintiffs could not, in good conscience, dispense drugs with a significant risk of destroying human life.

Prior to the Regulations, their employers accommodated their religious beliefs. Mesler and Thelen referred customers seeking Plan B to one of dozens of nearby pharmacies that stock and dispense Plan B, and no customer ever failed to obtain Plan B in a timely manner. SER 532-33, 560-63.

After the Regulations were passed, Mesler's and Thelen's employers informed them that they could no longer be accommodated. Mesler's employer informed her that she would have to transfer to Oregon or Idaho if the Regulations are upheld. SER 586-87. Thelen's employer constructively discharged her as a direct result of the Regulations. ER 110-111; SER 553-54, 533, 536-38, 1261. She was forced to find another position that required later hours, a longer commute, less benefits, and a $16,000 pay cut. ER 110-111; SER 538, 540-41, 1142.

### B. Impact on the Stormans family

Plaintiff Stormans, Inc., is a fourth-generation family business owned by Ken Stormans and his three children. The family operates Ralph's Thriftway, an independent grocery store and pharmacy in Olympia, Washington. Ralph's was founded by Kevin Stormans' great grandfather in 1944 and has included a pharmacy in the store ever since. SER 420-21. Like most retail pharmacies, Ralph's stocks only a small fraction of all approved drugs—roughly 10%. SER 427-28.

Based on the family's religious beliefs, Ralph's also does not stock or dispense Plan B or *ella*. SER 429-31, 1557. When Ralph's receives a request for these drugs, it presents a list of nearby pharmacies that stock the drugs and offers to call those pharmacies on the customer's behalf. SER 431-33. Within five miles of Ralph's, there are over thirty pharmacies that stock and dispense Plan B. SER 431-33, 437-38, 1293. None of Ralph's customers has ever been denied timely access to Plan B.

When Ralph's position became public, abortion-rights groups organized a boycott and picketing of Ralph's.[52] Picketers stood on both sides of the entrance to Ralph's, yelling at customers and urging them to join the boycott. SER 434, 1294-96. The Stormans had to hire a security guard to patrol the grounds. SER 435. The Governor's office also joined in the boycott, canceling its account with Ralph's after sixteen years of doing business with it. SER 445-46; 1122.

Abortion-rights activists also targeted Ralph's for enforcement during and after the rulemaking process. On July 31, 2006, at least nine women filed complaints alleging that Ralph's did not stock Plan B. The complaints were filed at the behest of the Governor's "advocates," who contacted the Governor's office and the Department of Health before

[52] SER 430, 433-35, 438-41, 1086, 1088-89, 1090-92, 1136-37, 1294-97.

filing. SER 1100, 1297-99. The advocates also filed complaints against Walgreen's, Sav-On, and Albertson's, which, like Ralph's, referred patients to nearby providers. SER 377-78.

In response, the Board investigated each pharmacy. SER 1102-03, 377-380. Walgreen's, Sav-On, and Albertson's informed the Board that they had referred Plan B customers elsewhere because the drug was temporarily out of stock. In response, the Board closed the investigations. *Id*. Ralph's, however, informed the Board that it had a conscientious objection to dispensing Plan B. SER 446-48; 1120. In response, the Board has kept Ralph's under investigation to this day, and the State has taken the position that Ralph's is in "outright defiance" of the Stocking Rule.[53]

### C. History of complaints

At trial, Board witnesses testified that the Board has never investigated a pharmacy under the Stocking Rule until the 2006 Plan B cases.[54] And it has never investigated a pharmacy under the Delivery Rule except for failure to dispense Plan B. SER 370.

Since 2006, Ralph's has been the subject of twenty-four complaints. Twenty-one have been dismissed for procedural deficiencies; three re-

[53] SER 2, 6, 383-84, 389-90, 609-11, 788-89, 795-96; 1284-88, 1284-88, 1300-02, 1611.

[54] SER 1282, 1284-85, 213, 376, 612-13, 864.

main pending today. One of those was initiated by the Board itself under the Stocking Rule (SER 1135)—the only Board-initiated complaint in the forty-five year history of the Stocking Rule. Although the Board is permitted to dismiss these complaints if it finds no violation, it has not done so. It has never dismissed a complaint against Ralph's based on the merits.[55]

The history of complaints shows a disproportionate focus on Plan B and Ralph's. From 2006-2008, complaints involving Plan B accounted for 46% of all refusal complaints filed with the Board. ER 34, 739-47; SER 1284-88. Similarly, during that time period, Ralph's alone accounted for 33% of all complaints. *Id.* That means that Ralph's was 700 times more likely to be investigated than any other pharmacy. ER 739-47; SER 1284-88.

**VIII. The Proceedings Below**

Plaintiffs filed suit on July 25, 2007, the day before the Regulations became effective. Two days later, they filed a Motion for a Preliminary Injunction. ER 19. On November 8, 2007, the district court enjoined the Regulations on free exercise grounds. ER 643-69; ER 19. The court concluded that Plaintiffs were likely to prove that the Regulations "targeted the religious practices of some citizens" and were not neutral or gen-

[55] SER 786-87, 384-85, 609, 786-87, 791-99; 1138, 1284-88, 1368.

erally applicable. ER 658. The court enjoined the Regulations as to all pharmacists with conscientious objections to Plan B. ER 668.

On October 28, 2009, this Court reversed the preliminary injunction. *Stormans, Inc.* v. *Selecky*, 586 F.3d 1109 (9th Cir. 2009). It held that the district court had applied an erroneous legal standard in light of an intervening Supreme Court decision, failed to properly consider the balance of hardships, and entered an overbroad injunction by protecting non-parties who had similar conscientious objections. *Id.* at 1126-27, 1138, 1141. Based on the preliminary injunction record, the Court also found that the Regulations were likely to be neutral and generally applicable. *Id.* at 1130-37. However, the Court emphasized that the record was "sparse," *id.* at 1123, 1126, 1135, and instructed the parties to provide "more recent and comprehensive data" on remand, *id.* at 1114 n.2.

When the case was remanded to the district court, Defendants filed motions for summary judgment, arguing that this Court's ruling on the preliminary injunction was law of the case. The district court, however, denied those motions, concluding that there were "significant issues of fact" over "[h]ow [the Regulations] operate in reality, whether the exemptions are indeed narrow or not . . . [,] and [w]hether or not the accommodations are fanciful or real." SER 1644-45.

Contrary to Intervenors' suggestion (at 3), the district court showed no antipathy toward this Court's decision. It repeatedly explained that it wanted "to get it right," SER 1646, and that "if nothing in the record subsequently developed at trial constitutes substantially different evidence that might undermine the validity of the prior panel ruling of law, those rulings may be deemed law of the case." SER 1641-43.

The district court conducted a twelve-day bench trial that concluded on December 27, 2011. The court heard testimony from twenty-two witnesses (including deposition excerpts). Other than the three Plaintiffs and the former CEO of the Washington State Pharmacy Association, every witness was adverse to Plaintiffs. Most were pharmacists and half were state officials.

Consistent with its stated intent to provide this Court with a "full record," SER 1646-47, the court enforced liberal rules on admissibility. *See e.g.,* SER 91-92. For example, over Plaintiffs' objections, the court permitted Intervenors to introduce "refusal" stories from the 2010 rulemaking process—despite the parties' previous stipulation that new refusal stories could not be admitted. SER 1489, 1623. Over Plaintiffs' objections, Defendants introduced multiple trial exhibits that were not previously identified, and Intervenors called a surprise witness who had never been disclosed. SER 1488. The court also ruled against Plaintiffs

and Defendants on motions in limine and a motion for summary judgment. SER 1613-15, 1654-59.

On February 22, 2012, the Court issued an injunction supported by 97 pages of findings of fact and conclusions of law and a 48-page opinion. ER 9-155. The court concluded that the Regulations are not neutral or generally applicable and cannot satisfy strict scrutiny. ER 29-55, 115-150. This appeal followed. ER 1-3.

## STANDARD OF REVIEW

On appeal from a bench trial, conclusions of law are reviewed de novo, and factual findings are reviewed for clear error. *Zivkovic* v. *S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002).

Intervenors seek to evade this standard of review. Without ever mentioning the clearly erroneous standard, they claim that this Court must conduct "an independent review of the facts," reviewing all findings "*de novo*." Br. 25 (quoting *Rosenbaum* v. *City and County of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007)).

That is incorrect. As this Court has explained, independent factual review is appropriate only "[w]hen the district court *upholds* a restriction on speech as constitutional." *Lovell* v. *Poway Unified Sch. Dist.*, 90 F.3d 367, 370 (9th Cir. 1996) (emphasis added). This rule is based on "a special solicitude for claims that the protections afforded by

the First Amendment have been unduly abridged." *Id.* By contrast, "when the district court *strikes down* a restriction on speech, . . . this court reviews the findings of fact for clear error." *Id.* (emphasis added).

Here, the district court struck down the Regulations. Accordingly, its factual findings are reviewed for clear error. *See Caruso* v. *Yamhill County*, 422 F.3d 848, 855 (9th Cir. 2005) (applying clear error standard); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 542 (1993) (same); *United States* v. *Friday*, 525 F.3d 938, 950 (10th Cir. 2008) (noting circuit split).[56]

[56] Defendants may argue on reply that the district court's factual findings should be subject to closer scrutiny because the court adopted some of Plaintiffs' proposed findings verbatim. *Cf. Orantes-Hernandez* v. *Thornburgh*, 919 F.2d 549, 567 (9th Cir. 1990). But the district court "did not uncritically accept plaintiffs' proposals." *Id.* Rather, it added new findings (*e.g.*, FF ¶¶ 9, 63, 99, 106, 115, 165-67), deleted or modified others, and rejected two of Plaintiffs' three legal theories (FF ¶¶ 297-99). It also issued a separate, 48-page opinion with completely independent factual findings. *Cf. Jelinek* v. *Capital Research and Mgmt. Co.*, 2011 WL 3701742, at *1 (9th Cir. 2011) (district court "issued a 24-page minute order" independent of proposed factual findings). Thus, there is "no reason to subject those findings to a more stringent appellate review." *Anderson* v. *Bessemer City*, 470 U.S. 564, 573 (1985).

## SUMMARY OF ARGUMENT

I. This Court's preliminary injunction ruling is not "law of the case." As a general rule, "decisions on preliminary injunctions do not constitute law of the case and 'parties are free to litigate the merits.'" *Golden State*, 754 F.2d at 832 n.3. That rule applies here, where the issues are highly fact-intensive and the record is "dramatically different now than it was at the preliminary injunction stage." ER 114.

II. The Regulations are neither "neutral" nor "generally applicable" under the Free Exercise Clause for six independent reasons. First, the Regulations *categorically exempt* a host of secular conduct that undermines the State's interest in timely access to medication far more than Plaintiffs' religious conduct would. Second, the Regulations allow the Board to make *individualized exemptions* on a case-by-case basis depending on the reasons for the relevant conduct. Third, the Regulations have been *selectively enforced*, because they have never been enforced against any conduct except Plaintiffs'. Fourth, the Regulations have been *gerrymandered* to apply exclusively to referrals for religious reasons, without burdening any nonreligious conduct. Fifth, the Regulations were enacted with *discriminatory intent*. Sixth, the Board has ignored open violations of the Regulations by dozens of Catholic pharmacies, producing *differential treatment of religions*. Finally, the Regulations cannot satisfy any level of scrutiny because the Board has stipu-

lated that Plaintiffs' conduct "do[es] not pose a threat to timely access to lawfully prescribed medications . . . includ[ing] Plan B." SER 1620.

III. The Regulations also violate Plaintiffs' due process right to refrain from taking human life. This right has been consistently protected in every context in which it has arisen—whether in military service, assisted suicide, capital punishment, abortion, or abortifacient drugs. And this right is far more deeply rooted in our Nation's history than other due process rights recognized by the Supreme Court.

## ARGUMENT

### I. Intervenors' "Law of the Case" Argument is Meritless.

Intervenors first ask the Court to ignore the trial altogether, claiming that this Court already "found [the Regulations] neutral and generally applicable" in a prior preliminary-injunction appeal. Br. at 27-35. According to Intervenors, that prior ruling is the "law of the case." *Id.*

But the State does not join this argument, and the district court rejected it for four good reasons: (1) preliminary injunction rulings generally "do not constitute law of the case," *Golden State*, 754 F.2d at 832 n.3; (2) the issue here is "highly fact-intensive," ER 113; (3) the factual record "is dramatically different now than it was at the preliminary injunction stage," ER 114; and (4) this Court's preliminary-injunction opinion expressly contemplated "a full trial on the merits." ER 115.

Because "[a]pplication of the doctrine [of law of the case] is discretionary," this Court reviews for "abuse of discretion." *Hall* v. *City of Los Angeles*, --- F.3d ----, 2012 WL 4335936, *5 (9th Cir. 2012). Here, Intervenors cannot rebut the district court's analysis, much less prove abuse of discretion.

### A. As a general rule, decisions on preliminary injunctions do not constitute law of the case.

Intervenors concede, as they must, the "general rule" (Br. 30): "[D]ecisions on preliminary injunctions *do not constitute law of the case* and 'parties are free to litigate the merits.'" *Golden State*, 754 F.2d at 832 n.3 (emphasis added); *accord* 18B WRIGHT, MILLER & COOPER § 4478.5 (2d ed. 2002) ("Preliminary or tentative rulings *do not establish law of the case*.") (emphasis added).

This rule is common sense: At the preliminary injunction stage, the court assesses only "the plaintiff's *likelihood* of success on the merits, not whether the plaintiff has *actually* succeeded on the merits." *S. Or. Barter Fair* v. *Jackson County*, 372 F.3d 1128, 1136 (9th Cir. 2004) (emphasis added). The court also makes this prediction "on less than a full record." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am.* v. *USDA*, 499 F.3d 1108, 1114 (9th Cir. 2007). Thus, given the tentative nature of the ruling and the incomplete record, the lower court is free on remand to make "findings and conclusions to the contra-

ry based upon evidence which may be received at the trial on the merits." *Wash. Capitols Basketball Club, Inc.* v. *Barry*, 419 F.2d 472, 476 (9th Cir. 1969).

### B. This case is not an exception to the general rule, because it involves a mixed question of law and fact.

Intervenors try to escape the general rule by claiming that this case fits an "exception" for "[a] fully considered appellate ruling on *an issue of law*." Br. 31 (emphasis added). According to Intervenors, whether the Regulations are neutral and generally applicable is a "sufficiently legal issue" to be resolved on a preliminary injunction appeal. Br. 32.

Not so. As this Court pointed out before, whether the Regulations are neutral and generally applicable turns on a variety of factual matters—including whether the Regulations are "substantially underinclusive" in practice, *Stormans*, 586 F.3d at 1134; whether the Regulations "actually increase access to medications," *id.* at 1135; and whether the Regulations have been "fairly and evenly applied" in practice, *id.* In addition, the court must consider whether the Regulations permit "individualized exemptions" in practice, *Lukumi*, 508 U.S. at 537, and whether "the historical background" of the Regulations demonstrates an intent to suppress religious conduct. *Stormans*, 586 F.3d at 1131-32; ER 113-14. All of these factual questions are relevant to whether a law is neutral and generally applicable.

Unsurprisingly, Intervenors cannot cite a single case holding that neutrality and general applicability are pure questions of law. All authority is to the contrary.

In *Alpha Delta Chi-Delta Chapter* v. *Reed*, 648 F.3d 790, 804-05 (9th Cir. 2011), for example, the district court granted summary judgment on a free exercise claim, concluding that a university's nondiscrimination policy was neutral and generally applicable. But this Court "remand[ed] for further findings," concluding that the claim turned on whether the university "in fact exempted other student groups from the nondiscrimination policy, but refused to exempt Plaintiffs because of their religious beliefs." *Id.* Here, the factual question is the same: whether the Regulations "in fact" exempt referrals for secular but not religious reasons.

Other circuits uniformly treat neutrality and general applicability as mixed questions of law and fact:

- *Ward* v. *Polite*, 667 F.3d 727, 739-40 (6th Cir. 2012) (denying summary judgment because of factual disputes about "the implementation of [a no-referral] policy");
- *McTernan* v. *City of York*, 564 F.3d 636, 649 (3d Cir. 2009) ("remand[ing] for a jury determination" on the issue of "general applicability");
- *Axson-Flynn* v. *Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004) (reversing summary judgment because plaintiff "raised a genuine issue of material fact as to whether Defendants maintained

a discretionary system of case-by-case exemptions");

- *Peter* v. *Wedl*, 155 F.3d 992, 997–98 (8th Cir. 1998) (remanding "for a factual determination" because "[s]ummary judgment is notoriously inappropriate" on the issue of "religious animus").

In short, this Court's preliminary injunction ruling is not law of the case because the issues of neutrality and general applicability are not pure issues of law. *Cf. Mortimer* v. *Baca*, 594 F.3d 714, 721 (9th Cir. 2010) (declining to apply law of the case to a mixed question of law and fact).

Unable to find a free exercise case, Intervenors resort to cases from the antitrust, free speech, and Title IX contexts, claiming that courts have treated "far more fact-dependent determinations" as law of the case. Br. 32. But in each case, the court treated its prior ruling as law of the case only because there was no "substantially different evidence" on appeal. *Cohen* v. *Brown Univ.*, 101 F.3d 155, 169 (1st Cir. 1996).

In *Cohen*, the district court heard "fourteen days of testimony" *before* issuing a preliminary injunction. *Id.* at 161. When the case reached the Sixth Circuit for a second time, the court invoked law of the case because "nothing in the record subsequently developed at trial constitutes substantially different evidence." *Id.* at 169. Similarly, in *NHLPA* v. *Plymouth Whalers Hockey Club*, 419 F.3d 462, 471 (6th Cir. 2005), the Court emphasized that the plaintiff on remand offered no "substantially

different evidence." And in *Preminger* v. *Peake*, 552 F.3d 757, 765 (9th Cir. 2008), this Court addressed law of the case in a single sentence because the parties did not dispute it.[57]

Thus, these cases stand for the unremarkable proposition that where a litigant offers no "substantially different evidence" on remand, a prior appellate ruling is binding. But that is not the case here. As the district court found: "The factual record on [neutrality and general applicability] is dramatically different now than it was at the preliminary injunction stage." ER 113-14.

Finally, Intervenors claim that the issues are purely legal because "this Court explicitly found that 'the issues raised . . . do not require further factual development.'" Br. 31 (quoting *Stormans*, 586 F.3d at 1126). Intervenors repeat this quotation three times. Br. 25, 27, 31.

Unfortunately, the quotation is altered, truncated, and taken out of context. The full sentence is a quotation from another case on the standard for *prudential ripeness*, not free exercise: "'A claim is fit for decision if *the issues raised* are primarily legal, *do not require further*

[57] The cases in Intervenors' footnote (Br. 32 n.3) are equally irrelevant. *See Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (purely legal issue where there was no change of facts); *Cal. Pro-Life Council, Inc.* v. *Randolph*, 507 F.3d 1172, 1178 (9th Cir. 2007) (same); *Official Airline Guides, Inc.* v. *Goss*, 6 F.3d 1385, 1391 (9th Cir. 1993) (same); *Naser Jewelers, Inc.* v. *City of Concord, N.H.*, 538 F.3d 17, 19-20 (1st Cir. 2008) (plaintiff "offer[ed] no new evidence," but simply "repeat[ed] the [same] argument and exhibits").

*factual development*, and the challenged action is final.'" *Stormans*, 586 F.3d at 1126 (quoting *U.S. West Communications* v. *MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999) (emphasis added). The *only* place this Court found no need for further factual development was on "the requirements of prudential standing." 586 F.3d at 1126. For Intervenors to suggest otherwise is misleading.

### C. The factual record now is dramatically different than it was at the preliminary injunction stage.

Next, Intervenors claim that law-of-the-case doctrine applies because "none of the evidence on remand was 'substantially different' from what this Court had already considered." Br. 33. Maybe Intervenors were attending the wrong trial.

As both this Court and the district court observed, the record at the preliminary injunction stage was "thin." *Stormans*, 586 F.3d at 1131; ER 114. It consisted exclusively of "the text of the Regulations, the Board's survey on access to Plan B, a handful of public letters and meeting minutes, and some newspaper articles." *Id.* There was no evidence of widespread referrals for business, economic, or convenience reasons; no evidence of the Board's discretion to interpret the Regulations; and no evidence of how the Regulations operated in practice. *Id.* Indeed, there had been no discovery at all.

There has now been a twelve-day bench trial with twenty-two witnesses and almost eight hundred trial exhibits. ER 114. As the district court found, there is "voluminous new evidence on the scope and application of the Regulations; the effect of the Regulations; the Board's discretion to interpret and enforce the Regulations; the historical background of the Regulations; and the enforcement of the Regulations in practice." *Id*. The State has also entered "binding factual stipulations on key issues, including access to medication." *Id*. All of this evidence is relevant to the question of whether the Regulations are neutral and generally applicable. None of it was presented to this Court. *Id*.

Beyond the new facts, Plaintiffs have also asserted new legal claims. At the preliminary injunction stage, there was "no claim that the existing regulation . . . has not been fairly applied." 586 F.3d at 1135. Now there is. *See* Part II.B.3, *infra*. Similarly, there was no claim that the Regulations permitted "individualized exemptions" based on "the reasons for the relevant conduct." *Employment Division* v. *Smith*, 494 U.S. 872, 884 (1990). Now there is. *See* Part II.B.2, *infra*. Intervenors do not even attempt to explain how this Court's preliminary injunction ruling can be law of the case on legal issues that were never presented to it. It is not. *See United States* v. *Cote*, 51 F.3d 178, 181 (9th Cir. 1995) ("[T]he

law of the case acts as a bar only when the issue in question was actually considered and decided by the first court.").

### D. This Court's decision expressly contemplated further factual development and a trial on the merits.

Unable to rebut the district court's law-of-the-case analysis, Intervenors try two new labels—the "rule of mandate" and "law of the circuit." Br. 28-30, 34-35. Neither argument was "raised below." Br. 30 n.2. No matter. New labels do not improve the argument.

The basic thrust of Intervenors' "mandate" argument is that this Court "remand[ed] to the district court" with instructions to conduct "rational basis review," and therefore anything beyond conducting rational basis review violated the mandate. Br. 28. But this argument mischaracterizes the mandate. This Court ordered rational basis review *only* if the district court were to reconsider Plaintiffs' "likelihood of success on the merits" on a renewed motion for "preliminary relief." 586 F.3d at 1142. But a renewed motion for preliminary relief became unnecessary when the State stipulated to a stay of enforcement proceedings against Plaintiffs. SER 1649-50. So the question then became what to do with the full merits of the case.

On that question, this Court was clear: It expected a trial on the merits. At least seven times, the Court highlighted the "sparse" prelimi-

nary-injunction record.[58] It said that the district court should, "on remand," receive "more recent and comprehensive data" on access to Plan B. *Id.* at 1115 n.2. It said that Plaintiffs would suffer irreparable injury if "a trial on the merits shows that [the Regulations] violate[] their constitutional rights." *Id.* at 1138. And it said that any preliminary injunction should remain narrow "until the trial on the merits is complete." *Id.* at 1141. Thus, far from forbidding a trial on the merits, this Court invited one.[59]

## II. The Regulations Violate the Free Exercise Clause.

Turning to the merits, the Regulations violate the Free Exercise Clause because they are not neutral, not generally applicable, and fail any level of scrutiny.

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[58] *See*:

- *Stormans*, 586 F.3d at 1123 (record "is sparse.");
- *id.* at 1126 (record "is admittedly sparse");
- *id.* (record is "preliminary");
- *id.* at 1131 (record is "thin given the procedural posture of this case");
- *id.* at 1133 (questioning whether "the record indicates anything about the Board's motivation in adopting the final rules");
- *id.* at 1135 (record is "sparse");
- *id.* at 1141 (record is "undeveloped").

[59] Intervenors' "law of the circuit" argument fails for the same reason. Of course, any published opinion "constitutes binding authority." Int. Br. 34. But it is binding authority only for what the Court actually decided. Where a Court merely decides the likelihood of success on the merits, it "leaves open the final determination of the merits of the case." *Ranchers*, 499 F.3d at 1114.

### A. Overview of legal principles

Under the Free Exercise Clause a law burdening religious exercise is subject to strict scrutiny if it is not "neutral" and "generally applicable." *Employment Division* v. *Smith*, 494 U.S. 872, 880 (1990). Thus, the key question in this case is whether the Regulations are neutral and generally applicable.

Two Supreme Court cases define that phrase—*Smith* and *Lukumi*. *Smith* involved an across-the-board criminal ban on possession of peyote. Two Native Americans lost their jobs and were denied unemployment compensation because they violated that law as part of a religious ceremony. 494 U.S. at 874. The question before the Supreme Court was "whether that prohibition [on possession of peyote] is permissible under the Free Exercise Clause." *Id.* at 876. In a 6–3 decision, the Court upheld the law. According to the Court, the prohibition on peyote was neutral and generally applicable because it was "an across-the-board criminal prohibition on a particular form of conduct." *Id.* at 884.

The Court further elaborated on the meaning of "neutral and generally applicable" in *Lukumi*. There, a Santeria priest challenged four municipal ordinances that restricted the killing of animals. In a 9–0 decision, the Supreme Court struck down the ordinances. The ordinances were not "neutral" because they accomplished a "religious gerryman-

der"—that is, they burdened "Santeria adherents but almost no others." 508 U.S. at 535-38. And the ordinances were not "generally applicable" because they were substantially "underinclusive"—that is, they failed to prohibit nonreligious killing "that endanger[ed] [the government's] interests in a similar or greater degree" than Santeria sacrifice did. *Id.* at 543-44.

The parties in this appeal sharply dispute the meaning of *Smith* and *Lukumi*. According to Defendants, *Smith* occupies the entire field of free exercise law; *Lukumi* is just a very narrow exception. Thus, all laws are presumptively valid unless they are just as targeted as the laws struck down in *Lukumi*. Int. Br. 63; State Br. 40-41.

But that interpretation of *Smith* and *Lukumi* is wrong. *Smith* and *Lukumi* are not at odds with each other; instead, they are easy cases on opposite ends of the spectrum. *Smith* was an easy case for neutrality because it involved "an across-the-board criminal prohibition on a particular form of conduct," with no exceptions. 494 U.S. at 884. *Lukumi* was an easy case for *non*-neutrality because it involved ordinances riddled with exemptions that burdened "[religious] adherents but almost no others." 508 U.S. at 536. The question is how to evaluate all of the cases that fall in between *Smith* and *Lukumi*.

There is a broad range of such cases, and courts have found free exercise violations in many of them. One example is *Sherbert* v. *Verner*, 374 U.S. 398, 401 (1963), which involved the denial of unemployment compensation to a Seventh-day Adventist who refused to work on the Sabbath. Although there was no evidence of discrimination or targeting, the Supreme Court struck down the law, because it gave the government discretion to create "individualized exemptions" on a case-by-case basis. *Smith*, 494 U.S. at 884. Similarly, courts have struck down laws that had only narrow exemptions for secular conduct, *Mitchell County* v. *Zimmerman*, 810 N.W.2d 1 (Iowa 2012), laws that provided only occasional individualized exemptions, *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004), laws that were not enforced uniformly, *Tenafly Eruv Ass'n, Inc.* v. *The Borough of Tenafly*, 309 F.3d 144, 166-67 (3d Cir. 2002), and laws that had a combination of exemptions and administrative insensitivity toward religious conduct, *Rader* v. *Johnston*, 924 F. Supp. 1540 (D. Neb. 1996). In each case, the law was not neutral or generally applicable, even though the facts were "a very far cry from *Lukumi*." Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 35 (2000) (analyzing cases).

Based on *Smith* and *Lukumi*, lower courts have identified six independent ways to prove that a law is not neutral or generally applicable:

(1) **Categorical exemptions:** A law provides categorical exemptions for secular conduct, but not for similar religious conduct. *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999).

(2) **Individualized exemptions:** A law gives the government discretion to make individualized exemptions based on the reasons for the underlying conduct. *Blackhawk*, 381 F.3d at 211.

(3) **Selective enforcement:** A neutral and generally applicable law is selectively enforced against religious conduct. *Tenafly*, 309 F.3d at 166-67.

(4) **Religious gerrymandering:** A law is crafted in a way that it applies almost exclusively to religious conduct. *Lukumi*, 508 U.S. at 532-40.

(5) **Discriminatory intent:** A law was enacted with hostility toward religious conduct. *Id.* at 540-42 (opinion of Kennedy, J.).

(6) **Differential treatment among religions:** A law applies differently to two different types of religious conduct. *Id.* at 536.

Any one of these problems renders a law non-neutral or not generally applicable. Here, as the district court held, all six are present.

### B. The Regulations are not generally applicable.

Although neutrality and general applicability are "interrelated," they must be addressed separately. *Stormans*, 586 F.3d at 1130. Neutrality focuses on the "object or purpose of a law," *Lukumi*, 508 U.S. at 533; general applicability focuses on "unequal treatment"—in particular, whether the law treats religious conduct worse than nonreligious conduct that has a similar impact on the government's purpose. *Id.* at 542-43.

Here, three of the six problems with the Regulations render them not generally applicable: (1) categorical exemptions, (2) individualized exemptions, and (3) selective enforcement.

**1. The Regulations categorically exempt a wide variety of secular conduct that undermines the alleged governmental interest.**

One way to prove that a law is not generally applicable is to show that a law "creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection." *Fraternal Order of Police*, 170 F.3d at 365 (Alito, J.). *Lukumi* is an example. There, the government claimed that its ordinances furthered two interests: protecting public health and preventing animal cruelty. 508 U.S. at 543. But the ordinances "fail[ed] to prohibit nonreligious conduct that endanger[ed] these interests in a similar or greater degree than Santeria sacrifice d[id]." *Id.* In particular, many types of animal killing—such as hunting, fishing, and euthanasia of stray animals—were categorically exempted "by express provision." *Id.* at 543-44. This meant the ordinances weren't generally applicable.

*Lukumi*, however, was an easy case; the ordinances "f[e]ll well below the minimum standard necessary to protect First Amendment rights." 508 U.S. at 543. A more in-between case is then-Judge Alito's opinion in *Fraternal Order of Police*. There, in an effort to promote a "uniform ap-

pearance," a police department adopted a regulation prohibiting officers from growing beards. 170 F.3d at 366. There were only two exemptions: one for undercover officers, and one for beards grown for medical reasons. Two Muslim officers sued because they were forbidden to grow a beard for religious reasons.

The Third Circuit held that the no-beard rule was not generally applicable. The undercover-officer exemption did not negate general applicability because undercover officers were not held out to the public as police officers; thus, the exemption "d[id] not undermine the Department's interest in uniformity [of appearance]." *Id.* at 366. But the exemption for medical reasons undermined the government's interest in uniformity just as much as a religious exemption would. Thus, the medical exemption represented "a value judgment in favor of secular motivations, but not religious motivations," thus requiring strict scrutiny. *Id.*

The categorical exemptions rule is rooted in two concerns. First, as *Fraternal Order of Police* pointed out, selective exemptions represent a "value judgment" against religious conduct that the government is not permitted to make absent a compelling interest. 170 F.3d at 366. Second, part of the rationale for *Smith* is that religious individuals can be protected through "the political process." *Smith*, 494 U.S. at 890. But if

the government can make selective exemptions for favored political groups, the "vicarious political protection [for religious groups] breaks down." Laycock, 40 CATH. LAW. at 36. The law becomes "a prohibition that society is prepared to impose upon [religious adherents] but not upon itself," which is the "precise evil [that] the requirement of general applicability is designed to prevent." *Lukumi*, 508 U.S. at 545-46.

Thus, as Intervenors concede, the key question under the doctrine of categorical exemptions is whether the exemptions permit "non-religious conduct that threatens the government's 'interests in a similar or greater degree than' does the religious conduct." Br. 52 (quoting *Stormans*, 586 F.3d at 1134 (quoting *Lukumi*, 508 U.S. at 543)). If so, the law is not generally applicable.

Here, after twelve days of trial, the district court found that the Regulations "permit a wide variety of nonreligious referrals 'that endanger the government's interest in a similar or greater degree than' Plaintiffs' religiously motivated referrals." ER 119. To summarize the evidence, the district court provided a chart of twenty-seven different types of referrals that are commonly permitted under the Regulations:

| | Reason for Referral | Prohibited by the Regulations | Permitted Categorically | Permitted in Practice |
|---|---|---|---|---|
| 1 | Pharmacy does not stock or deliver Plan B or *ella* for reasons of conscience | X | | |
| 2 | Pharmacy does not deliver the drug because it is temporarily out of stock for business or convenience reasons | | X | |
| 3 | Pharmacy does not deliver the drug because it chooses not to accept the patient's insurance due to low reimbursement rates or administrative challenges | | X | |
| 4 | Pharmacy does not deliver the drug because it does not accept Medicaid or Medicare | | X | |
| 5 | Pharmacy does not deliver Plan B because the patient is under 17 and the pharmacist on duty is not part of a Collaborative Agreement Program | | X | |
| 6 | Pharmacy does not deliver the drug because the pharmacist believes the patient might be a drug seeker | | X | |
| 7 | Pharmacy does not deliver lethal drugs (assisted suicide) for reasons of conscience. RCW 70.245.190(1)(d). | | X | |
| 8 | Pharmacy does not deliver syringes because pharmacist was unable to satisfy herself that it is intended for legal use. RCW 70.115.050. | | X | |
| 9 | Pharmacy does not stock the drug because it falls outside the pharmacy's chosen business niche | | X | |
| 10 | Pharmacy does not stock the drug because it determines that it has insufficient demand to trigger the Stocking Rule | | X | |
| 11 | Pharmacy does not stock the drug because it does not want to obtain specialized equipment or expertise | | X | |
| 12 | Pharmacy does not stock the drug because it is forbidden to do so by a contract with its supplier | | X | |

| | | | | |
|---|---|---|---|---|
| 13 | Pharmacy does not deliver the drug because the pharmacist would have to perform simple compounding | | | X |
| 14 | Pharmacy does not deliver the drug because it declines to do unit dosing or blister packing | | | X |
| 15 | Pharmacy does not deliver the drug over the counter because it requires extra recordkeeping (*e.g.*, Sudafed) | | | X |
| 16 | Pharmacy does not deliver syringes over the counter because of clientele concerns | | | X |
| 17 | Pharmacy does not deliver the drug because the patient is disruptive, violates the store's dress code, or the pharmacy believes the patient may be a shoplifter | | | X |
| 18 | Pharmacy does not stock the drug because in the discretion of the pharmacy there is low demand | | | X |
| 19 | Pharmacy does not stock the drug because of its carrying costs (*e.g.*, the pharmacy must order more of the drug than the patient requires) | | | X |
| 20 | Pharmacy does not stock the drug because it has a short shelf-life | | | X |
| 21 | Pharmacy does not stock the drug because it lacks adequate shelf space to carry all drugs needed by patients | | | X |
| 22 | Pharmacy does not stock the drug because it is an expensive drug | | | X |
| 23 | Pharmacy does not stock the drug unless the patient calls to request the drug in advance | | | X |
| 24 | Pharmacy does not stock the drug because the pharmacist would have to monitor the patient (*e.g.*, Accutane) | | | X |
| 25 | Pharmacy does not stock Schedule V cough syrup or Schedule V pain-management drugs because of recordkeeping or clientele concerns | | | X |
| 26 | Pharmacy does not stock the drug because it would attract crime (*e.g.*, Oxycontin) | | | X |

| | | | | |
|---|---|---|---|---|
| 27 | Pharmacy does not stock a drug because it is not on the formulary list of the insurers primarily used by the pharmacy's patients | | | X |
| 28 | Pharmacy does not stock a drug because it is part of a larger chain, which concentrates all of that drug in one pharmacy in the region | | | X |

ER 119-21. Each row of the chart is supported by detailed findings of fact. ER 92-94; ER 95-96. Each referral has been "common both before and after enactment of the Regulations." ER 94; ER 96.

Most of these referrals are expressly permitted under the Delivery Rule, which includes six categorical exemptions. Three of these exemptions are unobjectionable—namely, exemptions for erroneous prescriptions, fraudulent prescriptions, or national emergencies. ER 122 (discussing WAC 246-869-010(1)(a),(b),(d)). But the other three exemptions—for specialized equipment, customary payment, and out-of-stock drugs—permit a wide variety of referrals that undermine the government's alleged interest in timely access to medication far more than Plaintiffs' religious conduct. *Id.*

The "specialized equipment" exemption applies when a pharmacy lacks "specialized equipment or expertise needed to safely produce, store, or dispense drugs or devices." WAC 246-869-010(1)(c). As the district court found, this exemption means that "pharmacies are under no obligation to *stock* drugs that require specialized equipment or exper-

tise." ER 122.[60] Thus, "even though a pharmacy might receive numerous requests for a particular drug, and even though it might be the only pharmacy in a rural area, it has no obligation to purchase the specialized equipment and begin stocking the drug." *Id.*

The "customary payment" exemption permits pharmacies to deny lawfully prescribed drugs unless they receive "payment of their usual and customary or contracted charge." WAC 246-869-010(2). The exemption protects not just against non-payment, but applies "broadly to allow referrals for all sorts of business decisions that have nothing to do with non-payment." ER 122-123. For example, it allows pharmacies:

- To refuse insurance plans "for any reason at all"—even when "the reimbursement rates are just as high as those of other insurance plans." ER 122-23.[61]
- To refuse insurance for the elderly, disabled, or poor—namely, Medicare, State Labor and Industries, and Medicaid. ER 95-96, ¶ 112 & n.146.[62]
- To refuse insurance altogether, which is what many compounding pharmacies do. SER 713, 426, 311, 487-88.

In all of these circumstances, pharmacies are categorically permitted to turn patients away—no matter how time-sensitive the drug, and no

[60] *See also* SER 403-05, 704-05, 1, 35-39, 179, 547-49, 503-05, 701-02, 716-17, 585-86; 1161, 1164, 1086, 312-13.

[61] *See also* SER 51, 59, 713-15, 488.

[62] SER 17, 13-14, 105-06, 300-02, 488, 527, 572-74, 616, 714.

matter how harmful the effect on patient health. Indeed, under the customary payment exception, the pharmacy is "not even required to refer the patients to another pharmacy." ER 124; SER 699.

As several Board witnesses testified, all of these refusals can create *far more serious* barriers to access than referrals for religious reasons. As the former Executive Director of the Board testified:

> Q. Let's assume that you have a totally different pair of pharmacies and both . . . are willingly stocking [Plan B], okay? . . .
>
> A. Okay.
>
> Q. Let's assume that a patient comes to the first pharmacy and attempts to pay for Plan B with insurance that the pharmacy does not accept. The pharmacy declines to deliver the drug . . . , [and] this particular patient can't find Plan B and becomes pregnant. You would agree that this would be a serious access issue, wouldn't you?
>
> A. That would be an access problem.
>
> Q. But you would also agree with me that it's permissible under [the "customary payment" exemption] of the delivery rule, right?
>
> A. Yes.
>
> Q. Let's assume a different patient comes to the second pharmacy and . . . there's a lone pharmacist on duty who has a conscientious objection to dispensing Plan B. The pharmacist provides a facilitated referral to one of a dozen nearby pharmacies and the patient obtains the drug in a few minutes without any problem. You'd agree that this actually is a violation of the delivery rule, right?
>
> A. Yes.

> Q. But you would also agree with me that the scenario where the woman is denied access to Plan B and becomes pregnant is a *much more serious access issue* than the woman who received the drug within five minutes, right?
>
> A. Yes.

SER 225-27 (emphasis added). In short, turning a patient away for insurance reasons (without a referral) is permissible, even when it undermines access to medication; but providing a facilitated referral for religious reasons is illegal, even when it does not. As the district court held, "this is a straightforward concession that the Regulations permit nonreligious referrals 'that endanger the government's interests in a similar or greater degree' [than] Plaintiffs religiously motivated referrals." ER 123-24 (quoting *Lukumi*, 508 U.S. at 543) (alterations omitted). The same concession was made by the Board Chair. *See*, *e.g.*, SER 697-99 (conceding that "a woman who never gets Plan B [because of insurance issues] faces a far more serious access problem than a woman who [receives a conscience-based referral and] gets it 10 minutes later").

In addition to the "specialized equipment" and "customary payment" exemptions, the "out-of-stock" exemption provides that a pharmacy can refer a patient elsewhere whenever a drug is out of stock—as long as the pharmacy is in "good faith compliance" with the Stocking Rule. WAC 246-869-010(1)(e). Given the many reasons that a drug can be out of stock, this is the broadest exemption of all.

The district court highlighted sixteen common scenarios where "pharmacies routinely decline to stock." ER 92-94. These include when a drug is *unprofitable* to stock—such as when a drug is in low demand, has a short shelf life, or must be ordered in bulk. It includes when a drug is *inconvenient* to stock—such as when a drug would require the pharmacist to monitor the patient or comply with recordkeeping requirements. And it includes when a pharmacy makes a *business decision* not to stock—such as when a pharmacy limits its formulary or specializes in a particular business niche. In all of these circumstances, "pharmacies are permitted to refer patients elsewhere, regardless of the effect on access to medication." ER 124-25.

Thus, a pharmacy can choose not to stock clozapine (a schizophrenia drug for patients who are suicidal) because it finds it inconvenient to monitor the patient's blood work. SER 312-13, 503-05, 716-17, 726-27. A pharmacy can choose not to stock Lovenox (a blood thinner for patients at risk of heart attack), Acetylcysteine (used to treat lung disease and seizures), and Kayexalate (used to regulate heart rhythm) because it believes it would have to order more of the drug than it would be able to sell. SER 779-80; 549-50. And a pharmacy can choose not to stock Plan B because it has chosen to focus on a geriatric or pediatric niche.[63] A

[63] SER 17, 59, 96-98, 219, 355-56, 496-97, 1099.

pharmacy can make each of these decisions even when it undermines access to time-sensitive drugs.

In addition to refusing to stock a drug at all, pharmacies often run out of drugs that they *do* stock—whether because the pharmacy is "trying to reduce its inventory to become more profitable," or because the pharmacy simply "does a poor job of managing inventory." ER 125. In all of these scenarios, too, a pharmacy is permitted to refer patients elsewhere, regardless of the effect on access to medication.

Again, several Board witnesses conceded that referrals under the out-of-stock exemption create "a far more serious access problem" than referrals for religious reasons. SER 699. The following exchange with the Chairman of the Board is illustrative:

> Q. . . . [Suppose] a pharmacy has a new inventory system and there's several common drugs that they mess up on and don't keep in stock because of this new system. If that were to occur, would you agree with me that it's still good faith compliance with the stocking rule?
>
> A. Yes, because you are trying to get the drug.
>
> * * *
>
> Q. . . . But let's say that that woman doesn't get [Plan B] and she gets pregnant. That's not a violation of the pharmacy responsibility rule on behalf of the pharmacy, right?
>
> A. No.
>
> * * *

> Q. So let's assume that a woman goes into Ralph's Thriftway which doesn't stock Plan B for reasons of conscience[.] . . . Ralph gives her a facilitated referral, . . . and the woman gets Plan B in 10 minutes down the street, that's a violation of the regulations under this delivery rule, right?
>
> A. Yes.
>
> Q. You would agree that a woman who never gets Plan B faces a far more serious access problem than a woman who gets it 10 minutes later, wouldn't you?
>
> A. Yes.

SER 693-99. In short, referring a patient elsewhere because of poor inventory management is permissible, even when the patient does not get Plan B and gets pregnant; but providing a facilitated referral because of religious reasons is illegal, even when the patient gets Plan B minutes later. *See also* SER 225-27. Again, this is a straightforward admission that the Regulations permit nonreligious referrals "that endanger[] [the government's] interests in a similar or greater degree" than Plaintiffs' religiously motivated referrals. *Lukumi*, 508 U.S. at 543. Again, the same concession was made by multiple witnesses.[64]

Thus, as the district court concluded, this case is "significantly stronger than *Fraternal Order of Police*." ER 126-27. There, the police

[64] *See, e.g.*, SER 325 (Fuller) ("Q. From [the patient's] standpoint it's no different that she's referred because the pharmacy [doesn't have] the drug because of conscience reasons or because the pharmacy doesn't have the drug because they just happen to be temporarily out of it? A. Yes. Q. She has to be referred to a nearby pharmacy, right? A. Yes. Q. And that's something that happens every day, isn't it? A. Yes.").

department's prohibition on beards included only one exemption for a narrow slice of secular conduct that undermined the government's interest—beards grown for medical reasons. All other secular beards that might undermine the government's interest were prohibited. But here, the Regulations include multiple exemptions for a vast swath of secular conduct—including all sorts of referrals for business, economic, and convenience reasons. And government officials have conceded that these referrals undermine access to medication far more than a narrow exemption for conscience would. SER 697-99, 224-27.

Numerous other cases have held that categorical exemptions rendered a law not generally applicable, even when the exemptions were far less sweeping than those at issue here. *See*, *e.g.*:

- *Ward* v. *Polite*, 667 F.3d 727, 738-40 (6th Cir. 2012) (prohibition on referring counseling patients was not generally applicable where it exempted "multiple types of referrals" for secular reasons, but not religious reasons);
- *Blackhawk*, 381 F.3d at 211 (3d Cir. 2004) (Alito, J.) (wildlife permitting fee was not generally applicable where it exempted zoos and circuses, but not Native Americans);
- *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1234-35 (11th Cir. 2004) (zoning code was not generally applicable where it exempted private clubs, but not synagogues);
- *Canyon Ferry Rd. Baptist Church of E. Helena, Inc.* v. *Unsworth*, 556 F.3d 1021, 1035 (9th Cir. 2009) (Noonan, J., concurring) (campaign finance requirements were not generally applicable where they exempted newspapers, but not churches);

- *Mitchell County* v. *Zimmerman*, 810 N.W.2d 1 (Iowa 2012) (prohibition on steel wheels was not generally applicable where it exempted school buses, but not Mennonite tractors).

Defendants cannot distinguish these cases. Nor do they confront the district court's factual findings about how the Regulations operate in practice. Instead, they offer a hodgepodge of arguments, none of which has merit.

First, Intervenors repeat their law-of-the-case argument, claiming that "many of the 'exemptions' cited by the district court were already rejected by this Court." Br. 53. But as explained above, the evidence on these exemptions was unavailable at the preliminary-injunction stage. Intervenors cannot simply wish the twelve-day trial away.

Second, Intervenors twist the district court's ruling. For example, they claim that "the district court repeatedly found it unacceptable that pharmacies could decline to fill prescriptions where the patient's insurance (including Medicare) *has reimbursement rates below the pharmacy's normal charge for the drug*." Br. 53 (emphasis added). But that is not what the district court said. Rather, it found that pharmacies can reject insurance "*for any reason at all*," even when "*the reimbursement rates are just as high as those of other insurance plans*." ER 123 (emphasis added). That finding is critical. It is one thing for a pharmacy to turn away a patient who refuses to pay; it is quite another for a phar-

macy to turn away all Medicaid patients (as Walgreens does), to turn away all insurance entirely (as many compounding pharmacies do), or to turn away full reimbursement from an insurance plan the pharmacy simply finds inconvenient.

Third, Intervenors claim that "many" of the exemptions cited by the district court "are based on nothing more than rank speculation." Br. 54. But Intervenors cite just one: the exemption for pharmacies that "decline to carry drugs (like Sudafed) that are used in manufacturing methamphetamine." *Id.* And this exemption was supported by abundant evidence. Fuller, the Board's spokesperson, unequivocally testified that "declin[ing] to stock methamphetamine precursors . . . doesn't violate the stocking rule." SER 307. Boyer agreed that some pharmacies "have decided not to carry Sudafed over the counter." SER 466. And the Board itself published a newsletter stating that pharmacies "may wish to limit the stock available" of drugs like Sudafed. SER 1311, 467. So the only "rank speculation" is that of Intervenors, who assume without support that this common practice is illegal.

Fourth, Intervenors claim that "[o]ther exemptions" cited by the district court "do not threaten the Board's 'interests in a similar or greater degree than' does the exemption Plaintiffs demand." Br. 54. Again, Intervenors offer only one: the exemption for pharmacies that decline to

dispense syringes "where the pharmacy believes they are intended for illegal use." *Id.* According to Intervenors, this exemption merely avoids "unsafe practices." *Id.* But the district court found multiple reasons why pharmacies are permitted to deny syringes—not just because of illegal use, but also because the pharmacy "dislike[s] the clientele they associate with the product," ER 16, or because the pharmacy wants to avoid inconvenient "recordkeeping." ER 95-96. An exemption for "clientele" or "recordkeeping" concerns is not about "unsafe practices"; it is about a pharmacy's image and convenience.

More importantly, the syringe example is one of dozens of secular referrals discussed by the district court. Intervenors selectively criticize one example because they have no answers for the other twenty-six.

Fifth, Intervenors claim that three of the cases relied upon by the district court are distinguishable, because the exemptions in those cases "undermined the government's interests in precisely the same way as the rejected religious exemptions," whereas in this case they don't. Br. 55 (citing *Blackhawk*, 381 F.3d at 211; *Tenafly*, 309 F.3d at 166-67; *Fraternal Order of Police*, 170 F.3d at 366). But several Board witnesses said just the opposite, candidly admitting that secular referrals are permitted even when they create "a far more serious access problem" than referrals for religious reasons. SER 699, 225-27, 325. And as the

district court found, this case is far stronger than *Fraternal Order of Police* or *Blackhawk*, because the exemptions here are more numerous, broader, and undermine the government's alleged interest more than the exemptions in those cases. ER 126-27.

Sixth, Intervenors claim that the district court "misunderstood the law as to the importance of exemptions," because it "seemed to think that *any* exemption undermined the rationale for the Delivery Rule." Br. 55 (emphasis added); *cf.* State Br. 47. This is silly. The district court said precisely the opposite at least seven times, repeatedly emphasizing that an exemption was relevant *only* when it "endangers the government's interests in a similar or greater degree than the prohibited religious conduct." ER 117, 118, 119, 123-24, 125 (alterations omitted); *see also* ER 44, 54. It also went out of its way to say that three of the exemptions in the Delivery Rule were not problematic at all. ER 122.

Seventh, Intervenors claim that exemptions are irrelevant unless the law applies "*only* against conduct with a religious motivation." Br. 55-56 (quoting *Lukumi*; alteration in brief). But that is not what *Lukumi* said. It said that the ordinances burdened religious adherents "but *almost* no others." 508 U.S. at 536 (emphasis added). No circuit has held that the law must burden "only" religious adherents.

Rather, courts have repeatedly found that a law was not generally applicable *even when the law still applied to a wide variety of secular conduct*. In *Fraternal Order of Police*, for example, the ban on beards applied to *numerous* secular reasons for wearing a beard—whether fashion, personal preference, or convenience. 170 F.3d at 365. In *Blackhawk*, the wildlife permitting fee applied to *numerous* secular reasons for keeping wild animals—whether curiosity, hobby, or love of wild animals. 381 F.3d at 211. And in *Midrash*, the zoning code applied to *numerous* secular uses—whether "educational institutions," "museums," or "public utilities." 366 F.3d at 1234-35. Yet in *every* case, the courts found that the laws were not generally applicable.

The State's brief is even less responsive on the issue of categorical exemptions. First, the State claims that "[n]o situation . . . has been identified in which religious objection is not allowed, but a similar secular reason is allowed." Br. 47. But the district court identified twenty-seven such "situation[s]"—*i.e.*, where pharmacies are *routinely* permitted to refer patients elsewhere for business, economic, or convenience reasons, but not for reasons of conscience. ER 119-21. The State does not address any of them.

Second, the State argues that "the district court would have a point" only if the Regulations permitted referral "based upon personal biases,

dislikes, or prejudices." Br. 47. In other words, the State believes that referrals for business, economic, and convenience reasons are "legitimate," (SER 1087, 1099, 1095, 1104; ER 71-72, 18), while referrals for religious reasons—like other "prejudices"—are not. But treating religious belief like "prejudice" is precisely the sort of "value judgment" that the State is not permitted to make absent strict scrutiny. *Blackhawk*, 381 F.3d at 208.

Finally, the State argues that it should make no difference that "the Board has not found it necessary to discipline a [pharmacy]" for common business, economic, and convenience referrals. Br. 48. According to the State, as long as the Regulations are on the books, "they are the law of the land for all [pharmacies] and are 'in force' as to all [pharmacies] and medication." Br. 48. But the question under *Lukumi* is not what the Regulations might mean in the mind of the State's lawyers. The question is "the effect of [the Regulations] in [their] real operation." 508 U.S. at 535. Here, it is undisputed that pharmacies refer patients elsewhere for a host of secular reasons, and no pharmacy has ever been disciplined for doing so. Beyond that, numerous Board witnesses confirmed that the Regulations are specifically designed to *protect* such referrals. ER 97-102.

In sum, because the Regulations permit a host of referrals for business, economic, and convenience reasons, and because those referrals undermine access to medication far more than Plaintiffs' referrals for reasons of conscience, the Regulations are not generally applicable.

**2. The Regulations create individualized exemptions.**

Aside from categorical exemptions, a second independent way to show that a law is not generally applicable is to show that it gives the government discretion to make "individualized exemptions" on a case-by-case basis. *Lukumi*, at 537. The Supreme Court's decision in *Sherbert* is illustrative.

There, a state law denied unemployment benefits to any person who refused a job "without good cause." 374 U.S. at 401. Under this provision, the state denied benefits to a Seventh-day Adventist who refused to work on the Sabbath. *Id.* at 408-09. Applying strict scrutiny, the Supreme Court struck down the law. As the Court has explained, the "good cause" language triggered strict scrutiny because it created a mechanism for "individualized exemptions" based on an "individualized governmental assessment of the reasons for the relevant conduct." *Smith*, 494 U.S. at 884. The same rule applied in *Lukumi*, where a law prohibited killing that was "unnecessary," 508 U.S. at 537, and in *Blackhawk*, where the law permitted fee waivers for animal-keeping

that was "consistent with sound game or wildlife management," 381 F.3d at 205. In each case, the relevant provision was not called an "exemption"; it sufficed that there was open-ended language giving government officials discretion to make exemptions.

The rationale for the individualized exemptions doctrine is simple. When the government applies an "across-the-board" prohibition, as in *Smith*, there is little risk that it is discriminating against religious conduct. 494 U.S. at 884. But when an open-ended law lets government officials exempt conduct on a case-by-case basis, there is a risk that the law will be "applied in practice in a way that discriminates against religiously motivated conduct." *Blackhawk*, 381 F.3d at 209 (citing *Smith*). That risk justifies strict scrutiny. *Id.*

Here, the Regulations include three open-ended provisions giving the Board discretion to make individualized exemptions. First is the catch-all provision in the Delivery Rule. After enumerating five categorical exemptions, the Delivery Rule provides that the Board can grant additional exemptions in any "substantially similar circumstances." WAC 246-869-010(1). As several witnesses testified, the "substantially similar circumstances" language was added precisely to give the Board "wiggle room" to grant individualized exemptions for secular conduct.[65] To apply

[65] SER 21, 94-95, 236-37, 239, 63-64, 169, 210-11, 290, 303, 491, 1161-64, 1086-87.

this exemption, as the district court found, the Board "must examine the underlying reasons for the pharmacy's conduct on a case-by-case basis" to determine whether it is "substantially similar" to other exempted conduct. ER 129. This is a quintessential individualized exemption.

Strangely, despite the district court's detailed findings, conclusions, and opinion on the "substantially similar circumstances" provision, (SER 98-99, 101, 129-30, 131; ER 16, 39-40), Defendants never even discuss it.

Second is the exemption for "good faith" compliance with the Stocking Rule. WAC 246-869-010(1)(e). As the district court pointed out, a pharmacy can be in "good faith" compliance even when it categorically refuses to stock a drug (as in the case of a niche pharmacy), and "'good faith' compliance must be assessed on a case-by-case basis depending on the reasons for the relevant conduct." ER 130. As Board Chair Harris testified:

> Q. You would agree that whether a pharmacy's made a good faith effort to comply under the stocking rule, that that's a case by case analysis the Board goes through, right?
>
> A. Yes, it is.
>
> Q. And it depends, at least in part, on the reasons why the pharmacy has chosen not to stock the drug, doesn't it?
>
> A. Yes.

SER 677-78. This is a straightforward admission that the Delivery Rule permits individualized exemptions. *See also* SER 660-62 ("good faith" exemption depends on the reasons for not stocking), SER 18-20, 323, 1086. Again, despite the district court's extensive discussion of the "good faith" exemption, Defendants never mention it.

Third is the wording of the Stocking Rule itself: "The pharmacy must maintain at all times a representative assortment of drugs in order to meet the pharmaceutical needs of its patients." WAC 246-869-150(1). As the district court found, this provision gives the Board virtually unlimited discretion to create "*ad hoc*" and "unwritten exemptions" based on a flexible interpretation of "representative assortment" and "patient." ER 39-40; *see also* ER 130.

Although the Stocking Rule has been on the books for forty-five years, no pharmacy has ever been found to be in violation of it—except Ralph's.[66] The Board has never defined "representative assortment" or "patients," and it has never issued any guidelines or policy on how to interpret the Stocking Rule. SER 318 ("Board has never tried to even implement the stocking rule"), 177-78, 379, 476, 684-85. At trial, the Board's witnesses were all over the map.

[66] SER 213, 376, 612-13, 864, 1282, 1284-85.

On the definition of "patient," Doll and Fuller testified that a "patient" is any customer who walks into a pharmacy, whether she has been there before or not. SER 382, 315-16. The State's trial brief, by contrast, said that someone becomes a "patient" only after she has already "established a relationship with a particular pharmacy." SER 1506. Boyer and Fuller rejected that definition at trial. SER 479-80, 322. So did Saxe and Board Chair Harris, who defined "patient" more broadly to include any members of the surrounding community who might come to the pharmacy. SER 27, 673. The confusion was so obvious that, after trial, the State felt compelled to file a separate brief arguing that rule was not "void for vagueness"—even though Plaintiffs never raised a vagueness challenge. SER 1426-29.

In addition to "patient," witnesses further disagreed over how many times patients must request a drug before a pharmacy must begin to stock it, how far into the future the duty to stock continues, and how the Stocking Rule applies to various common business practices. SER 317-18, 479-80. In the end, the only thing the witnesses agreed on was that the Stocking Rule must be applied on a case-by-case basis, depending on the reasons for not stocking the drug:

> Q. How would a pharmacy make a determination as to how much of a particular drug to keep in stock, under the stocking rule?

> A. Again, it would probably depend on what the order is, how many days' supply the physician has written the drug for, things like that. They would look at the patient and their situation.
>
> Q. So it's dependent on the patient and it's a case-by-case basis; is that right?
>
> A. I would say yes.

SER 104-05. Every witness to address this question agreed.[67]

Thus, the Stocking Rule gives the Board broad discretion to approve of common stocking practices on a case-by-case basis. It can decide that a small pharmacy's decision not to stock an expensive drug is permissible,[68] that an inner-city pharmacy's decision not to stock oxycontin is permissible[69] and that a geriatric pharmacy's decision not to stock Plan B is permissible.[70] At the same time, it can decide that a religious deci-

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[67] *See, e.g.*:

- SER 316 (Fuller) ("case-by-case process of deciding [whether a pharmacy must stock a drug] . . . based on, obviously, patient need, but also business factors as well");
- SER 477-78 (Boyer) ("panel decides on a case-by-case basis");
- SER 525 (Boyer) ("It's difficult to answer [how the Stocking Rule would apply in] that scenario. Again, this is a case-by-case basis.");
- SER 210 (Saxe) (Board has the flexibility within the Stocking Rule to adopt "a strict interpretation or a not-so-strict interpretation");
- SER 19 (Saxe) ("Board has to look at the issue of need [under the Stocking Rule] on a case-by-case basis . . . considering all the circumstances involved");
- SER 703 (Harris) ("[E]very case [under the Stocking Rule] is looked at on a case-by-case basis.").

[68] SER 1086, 305, 1161, 1164, 1210-12, 53, 242, 778, 1099, 1101.

[69] SER 59, 61, 569, 303-04, 307, 229, 33-34, 857-59; 491-93, 1311-12.

[70] SER 38, 59-61, 96-98, 219, 355-56, 496-97.

sion not to stock Plan B is illegal. This sort of unfettered discretion is precisely why the doctrine of individualized exemptions requires strict scrutiny.

Intervenors offer two arguments in response. First, they claim that "all sorts of laws" require "individualized determinations"; thus, "the fact that a law requires individualized application does not mean it automatically faces strict scrutiny." Int. Br. 56-57. This argument simply reflects antipathy toward *Sherbert* and *Smith*. It also misapprehends what an "individualized exemption" is. As the Tenth Circuit explained, there is a difference between a "limited yes-or-no inquiry" required under any law, and "the kind of case-by-case system envisioned by [*Smith* and *Sherbert*]." *Axson-Flynn* v. *Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004). In particular, the doctrine of individualized exemptions applies only when "case-by-case inquiries are *routinely made*, such that there is an 'individualized governmental assessment of *the reasons for the relevant conduct*.'" *Id.* at 1297 (quoting *Smith*, 494 U.S. at 884) (emphasis added).

That is exactly what the Regulations require—not just a "limited yes-or-no inquiry" about whether conduct is prohibited or not, but a case-by-case assessment of whether religious conduct is "substantially similar" to other conduct, WAC 246-869-010(1), whether it was undertaken in

"good faith," WAC 246-869-010(1)(e), and whether it complies with an open-ended Stocking Rule that has never been enforced against any other pharmacy. That is just like "good cause" under *Sherbert*, "unnecessary" under *Lukumi*, and "consistent with sound game or wildlife management activities" under *Blackhawk*. In each case, the law requires an "individualized governmental assessment of the reasons for the relevant conduct." *Smith*, 494 U.S. at 884.

Next, Intervenors argue that it is not enough to show that a law permits individualized exemptions; the plaintiff must also show that "the government applies [the individualized exemptions] in a discriminatory way." Br. 57. But that is not the law. Indeed, it would render the doctrine of individualized exemptions superfluous, because "appl[ying] [the law] in a discriminatory way" merits strict scrutiny regardless of whether the law includes individualized exemptions or not. To the contrary, many cases have applied the individualized exemption rule without any showing of discrimination. *See, e.g.*, *Sherbert*, 374 U.S. 398, 420 (1963) (Harlan, J., dissenting) (criticizing the majority for striking down a system of individualized exemptions, when "in no proper sense can it be said that the State discriminated against the appellant on the basis of her religious beliefs"); *Blackhawk*, 381 F.3d at 205 (striking down a system of individualized exemptions in the absence of discrimination);

*Stinemetz* v. *Kansas Health Policy Authority*, 252 P.3d 141, 155 (Kan. Ct. App. 2011) (same).

Even if discrimination were required, Plaintiffs have shown discrimination here. Most tellingly, no pharmacy has ever been found to be in violation of the Stocking Rule for forty-five years—until the State took the position that Plaintiffs are in "outright defiance" of it. SER 2, 6. Beyond that, the Chairman of the Board, who sits on several of the pending complaints against Plaintiffs, has vowed that he will recommend prosecuting all religiously objecting pharmacies "to the full extent of the law." SER 1139. And the district court specifically found that the Board "has interpreted the rules to ensure that the burden falls squarely and almost exclusively on religious objectors." ER 39.

Thus, this case is far stronger than *Sherbert*, *Blackhawk*, or *Stinemetz*, where there was not even a hint of discrimination. It is on all fours with *Lukumi*, *Axson-Flynn*, 356 F.3d at 1299 ("pattern of ad hoc discretionary decisions"), and *Rader*, 924 F. Supp. at 1552 (exemptions "in a broad range of circumstances not enumerated in the rule"). Again, Defendants do not even attempt to brief these cases.

### 3. The Regulations have been selectively enforced.

A third, independent way to prove a free exercise violation is to show that a facially neutral and generally applicable law has "been enforced

in a discriminatory manner." *Blackhawk*, 381 F.3d at 209 (Alito, J.). The leading case is the Third Circuit's decision in *Tenafly*.

There, a local ordinance broadly banned the placement of any signs or other materials on any public utility poles. 309 F.3d at 151. In practice, the government did nothing to enforce the ordinance against common house number signs, lost animal signs, or directional signs. But in response to "vehement objections" by local residents, the government enforced the ordinance against Orthodox Jewish *lechis* (thin black strips of plastic demarcating the area within which Orthodox Jews may carry objects on the Sabbath). *Id.* at 151-53. Although the ordinance was plainly neutral and generally applicable on its face, the Court struck it down because the government's "selective, discretionary application of [the ordinance]," in response to citizen complaints, "'devalues' Orthodox Jewish reasons for posting items on utility poles by 'judging them to be of lesser import than nonreligious reasons.'" *Id.* at 168 (quoting *Lukumi*); *see also Alpha Delta*, 648 F.3d at 804-05 (9th Cir. 2011) (holding that strict scrutiny would apply if a policy had been applied selectively against religious groups).

Here, as the district court found, "the evidence at trial establishes that the Regulations have been selectively enforced." ER 133. The selective enforcement takes two forms. First, the Delivery Rule has been on

the books for five years, but no conduct has ever been found to be in violation of it—except Plaintiffs' religiously motivated referrals for Plan B. Second, the Stocking Rule has been on the books for *forty-five* years, but no pharmacy has *ever* been found to be in violation of it—except Plaintiffs. Indeed, no pharmacy had even been *investigated* for violating it, until the Board opened an investigation against Plaintiffs *sua sponte*. As in *Tenafly*, the Board's "invocation of the often-dormant [Stocking Rule] against conduct motivated by [religious] beliefs is 'sufficiently suggestive of discriminatory intent,' that [the Court] must apply strict scrutiny." 309 F.3d at 168 (internal citation omitted).

Defendants offer five arguments in response. *First*, they dispute the controlling legal standards. Citing equal protection cases, they claim that Plaintiffs must prove *both* "that enforcement had a discriminatory effect" *and* "[that] the Board was motivated by a discriminatory purpose." State Br. 49; *see also* Int. Br. 60. But that is not the law. As the district court pointed out, it confuses the requirements under the Equal Protection Clause with the requirements under the Free Exercise Clause. ER 135. Defendants' argument was also squarely rejected in *Tenafly*, which held that a court can find selective enforcement under

the Free Exercise Clause "without examining the responsible officials' motives." *Id.* at 168 n. 30 (emphasis added).[71]

Even if a showing of discriminatory intent were required, the district court rightly found that Plaintiffs made that showing here. ER 53. The Chairman of the Board publicly announced his intent to prosecute conscientious objections (and no others) "to the full extent of the law." SER 1139; 787-88. He wrote in an internal email that "I for one am never going to vote to allow religion as a valid reason for facilitated referral." SER 1204. He further testified that even if conscientious objectors could

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[71] For the same reason, Defendants' reliance on *Rosenbaum*, 484 F.3d at 1153, and *Wayte* v. *United States*, 470 U.S. 598, 608 (1985), is misplaced. Both were decided under a different legal standard than is applicable here. ER 135; ER 52-53. Moreover, as the district court pointed out, both are factually distinguishable. *Id.* In *Rosenbaum*, the noise ordinance had been enforced against numerous citizens in the past; it had been the basis for complaints against a wide variety of nonreligious speech; and it was subject to guidelines limiting the government's enforcement discretion. *Rosenbaum*, 484 F.3d at 1149-50; ER 136. Here, the Stocking and Delivery Rules have never been enforced against any pharmacy except Ralph's; there have been no complaints under those rules except with respect to Plan B; and there are no guidelines limiting the Board enforcement discretion.

Similarly, in *Wayte*, the passive enforcement system was grounded on the government's traditionally broad power of prosecutorial discretion over enforcement of criminal laws, 470 U.S. at 607; it was supported by the government's unparalleled interest in national security, *id.* at 611-12; it was only an "interim solution" because there were no alternatives for an active enforcement system, *id.* at 613; and it was exercised only against those who "in effect selected themselves for prosecution," *id.* at 610. Here, the supposedly complaint-driven enforcement system has nothing to do with the traditionally broad power of prosecutorial discretion; it is not supported by a compelling interest; it is not just an "interim solution," even though it would be easy to have an active enforcement system; and Plaintiffs have not "selected themselves," but have been selected by an active and hostile campaign of test-shopping by opponents of conscientious objections to Plan B. SER 1303, 1309.

be accommodated without undermining access to Plan B, he would not support accommodation. SER 800-01. Rather, he asserted that those who refer patients for reasons of conscience are engaging in "sex discrimination," which is "immoral," SER 798, and that "there are always consequences for conscientious objectors," such as "jail time" or "mov[ing] to Canada." SER 1334, 800-01. All of this comes from the Chairman of the Board, who sits on the pending enforcement investigations against Plaintiffs. If this is not evidence of discriminatory intent, it is difficult to imagine what would be.

*Second*, Defendants claim that there can be no selective enforcement claim because Plaintiffs have not yet "been disciplined by the regulatory body." State Br. 51. But that is only because the disciplinary proceedings against Plaintiffs have been stayed pending this litigation. No Board witness testified that Plaintiffs are in compliance with the Regulations or can avoid punishment. All of the evidence is to the contrary. The Board has taken the position that Plaintiffs are in "outright defiance of the stocking rule" (SER 2, 6); two Board witnesses testified that Plaintiffs are acting illegally (SER 610, 384-85, 788-89, 795-96); and after a detailed examination of the Board's sanction guidelines, the Chairman of the Board testified that the Board's "only option" is "revok-

ing [the] license of [Plaintiffs'] pharmacy." SER 795-96; *see also* SER 1369-79.

*Third*, the State claims that several complaints against Plaintiffs were "dismissed," and that other complaints might have been dismissed if the district court had not "ordered the Board to stop processing complaints involving [Plaintiffs]." Br. 51. But this is disingenuous. The only complaints that have been dismissed were dismissed on technicalities—either because the Delivery Rule had not been enacted yet, or because the complainant refused to sign a confidentiality waiver. ER 136. No complaint has *ever* been dismissed on the ground that Plaintiffs are in compliance with the Regulations. SER 786-87; ER 1007-1011. The remaining complaints could have been dismissed by the Board at any time, but the Board has not done so. ER 46, n. 22. In fact, the Board took the unprecedented step of initiating *its own complaint* against Plaintiffs under the Stocking Rule—the *only* Board-initiated complaint under the Stocking Rule in forty-five years.[72]

*Fourth*, the State argues that there is no selective enforcement because it is has adopted a "complaint-driven system" of enforcement. Br. 52. According to this argument, the reason the Board has never enforced the Stocking Rule in forty-five years is that it has never had a

[72] SER 213, 376, 612-13, 864, 1282, 1284-85.

citizen complaint until now. But this theory was thoroughly tested at trial and rejected by the district court for multiple reasons. ER 102-05, 133-37.

Most importantly, the district court found *as a fact* that enforcement of the Board's Regulations "is not exclusively complaint-driven," and "is not even primarily complaint-driven." ER 133. Testimony to the contrary was "implausible and not credible." ER 102. Although this is a factual finding, the State has not even attempted to challenge it as clearly erroneous.

As numerous witnesses confirmed, citizen complaints are "only a small fraction of how the Board ensures compliance with its Regulations," with less than one percent of pharmacies ever having a complaint filed against them. ER 103; SER 666, 690. Far more important are the Board's powers of "inspection and education." ER 103. For example: "[T]he Board inspects pharmacies every two years; it can initiate its own complaints; it can send out its own test-shoppers when it reasonably suspects violations; it publishes regular newsletters flagging important compliance issues for pharmacies; and it works with the State Pharmacy Association to raise compliance issues with individual pharmacists." ER 102-03.

Despite all of these tools for promoting compliance with its regulations, "the Board has made no effort to promote compliance with a strict interpretation of the Stocking Rule." ER 104. It has never issued guidance informing pharmacies that common stocking practices are illegal; it has never initiated its own complaint under the Stocking Rule (except against Plaintiffs); and it has never worked with the State Pharmacy Association to address stocking issues. *See* pp. 21-25, *supra*. Indeed, Board inspectors testified that they check for compliance with every subsection of WAC 246-869-150 *except* the Stocking Rule—even though it would not be difficult to do so. ER 103-04. In short, for forty-five years, the Board showed no interest in enforcing a strict interpretation of the Stocking Rule—until it filed the first-ever *sua sponte* complaint under the Stocking Rule against Plaintiffs.

Moreover, even if the Board were primarily complaint-driven—and it is not—the district court found that relying on citizen complaints in this case "has only made the selective enforcement problem worse." ER 134. *See also* ER 104-05. Specifically, the evidence demonstrated that Planned Parenthood and other abortion-rights activists conducted "an active campaign to seek out pharmacies and pharmacists with religious objections to Plan B and to file complaints with the Board." ER 104-05. As a result, from 2006-08, "complaints involving Plan B accounted for

46% of all refusal complaints filed with the Board," and "Ralph's alone accounted for one-third of all complaints." ER 105. That means Ralph's was over 700 times more likely than the average pharmacy to be the subject of a complaint. SER 621; ER 1012-13. This, as the district court found, "resulted in a severely disproportionate number of investigations directed at religious objections to Plan B," ER 134, further demonstrating selective enforcement. *Cf. Tenafly*, 309 F.3d 151-53 (finding selective enforcement when an ordinance was enforced in response to "vehement objections" from neighbors); *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 448 (1985) (striking down an ordinance that was enforced in response to the "negative attitudes" and "fear" of neighbors).

*Fifth*, the State claims that there is no selective enforcement of the Stocking or Delivery Rules because it has enforced *other* regulations against nonreligious conduct. Specifically, it points to "170 complaints" it received from 1995 to 2008, five of which resulted in enforcement action. Br. 54. But this argument is a *non sequitur*, because none of the five cases involved the Delivery Rule or Stocking Rule. ER 739-747. Rather, they involved violations of *other* rules, such as "refus[ing] to provide patient counseling," "mislabel[ing] of [a] drug," or "not transfer[ring] [prescription] records to another [pharmacy] in [a] timely manner." ER 742-744. In other words, it is as if the city in *Tenafly* were

claiming that there was no selective enforcement of its utility-pole regulation because it was evenhandedly enforcing a regulation against jaywalking.

### C. The Regulations are not neutral.

In addition to failing the requirement of general applicability, the Regulations also fail the requirement of neutrality for three independent reasons: (1) They accomplish a religious gerrymander; (2) they were enacted "because of" conscientious objections to Plan B; and (3) they produce differential treatment among religions.

#### 1. The Regulations accomplish a religious gerrymander.

One way to prove that a law is not neutral is to follow the plaintiffs in *Lukumi*—namely, to show that "the effect of [the] law in its real operation" is to accomplish a "religious gerrymander." 508 U.S. at 535. As noted above, *Lukumi* was an easy case; it was a unanimous decision, and the Court said that the ordinances fell "well below" the minimum constitutional standard. *Id.* at 543. But *Lukumi* still offers helpful guidance on how to prove a religious gerrymandering claim.

There, the Court explained that there are "many ways of demonstrating" a religious gerrymander. *Id.* at 533. It focused on three considerations: (a) whether "the burden of the [law], in practical terms, falls on [religious objectors] but *almost* no others" (*id.* at 536 (emphasis added));

(b) whether "the interpretation given to the [law] by [the government]" favors secular conduct (*id.* at 537); and (c) whether the laws "proscribe more religious conduct than is necessary to achieve their stated ends" (*id.* at 538). Although not all three problems were necessary in *Lukumi*, all are present here.

*a. The burden of the Regulations*

The first question is whether "the burden of the [Regulations], in practical terms, falls on [conscientious objectors] but almost no others." *Id.* at 536. Defendants do not dispute that the Regulations burden pharmacies and pharmacists with conscientious objections to Plan B. Plaintiff Thelen lost her job because of the Regulations; Plaintiff Mesler has been told that she will lose hers if the Regulations are upheld; and the Stormans family faces the loss of their pharmacy license. SER 553-58, 533-41, 586-587, 449-52, 455. So the question is whether the Regulations, "in practical terms," *also* burden pharmacies *without* conscientious objections to Plan B.

The answer, as the district court found, is "no." ER 92-97, 137-139. First, although the Delivery Rule has been in effect for five years, and the Stocking Rule has been in effect for forty-five years, *no pharmacy* has *ever* been found to be in violation of those Regulations—except

Ralph's.[73] Thus, it is undisputed that the "the burden of the [Regulations]," as they have been enforced in practice, has fallen on conscientious objectors alone. 508 U.S. at 536.

Second, Board witnesses were unable to identify *any* real-world burden on nonreligious conduct. For example, when asked to identify "[a]ny change in how people's behavior was altered" by the Regulations, Ms. Boyer demurred; she said only that the four-year-old Regulations "are fairly new," and, "It's a great question, yeah." SER 520-21. Board Chair Harris candidly admitted that the Regulations burden only conscientious objectors:

> Q. [S]ince you are not a conscientious objector, I take it that the [delivery] rule has not changed your practice or that of the [pharmacy] in which you work, right?
>
> A. No.
>
> Q. And you aren't aware of the [delivery] rule changing the practice of pharmacies for anyone else either, other than conscientious objectors, right?
>
> A. Um, no. As far as I know, we're all complying with the rule.

SER 804. As the Board's spokesperson admitted: "The only change these rules have [e]ffected" was to "eliminat[e] referral as an option for pharmacies which cannot stock Plan B for religious reasons." SER 356. *See also* SER 23-24, 119-20, 639, 754-55, 1095, 1099, 1326.

[73] SER 2, 6, 370, 1282, 1284-88, 683, 789, 795-96, 610.

Defendants offer four arguments in response. *First*, the State asks this Court to ignore most of the evidence of how the Regulations have operated in practice; instead, it argues that this Court must "determine[] the 'real operation' [of the Regulations] by examining the texts of the [Regulations]" alone. State Br. 37. But that is directly contrary to *Lukumi*, which said that courts must examine the operation of the law "[a]part from the text." *Id.* at 535. Accordingly, the Court in *Lukumi* considered a variety of evidence—including the district court's factual findings after a nine-day bench trial, *id.* at 539 (citing district court findings); portions of the city's brief explaining how the ordinances applied in practice, *id.* at 537 (citing Brief for Respondent at 22); state-court cases showing how the law had been applied in practice, *id.* at 537 (citing *Kiper* v. *State*, 310 So. 2d 42 (Fla. Dist. Ct. App. 1975)); and even responses to hypothetical questions posed at oral argument, *id.* at 538-39 (citing Tr. of Oral Arg. 45). Here, the testimony of government officials charged with enforcing the Regulations is even more probative of how the Regulations operate in practice.

*Second*, contradicting its request to rely on text alone, the State cites a survey conducted before enactment of the Delivery Rule, claiming that the survey "shows a greater number of pharmacies being impacted by the rules that are not religious objectors." Br. 44. But the State failed to

raise this argument below, and with good reason: The survey shows no such thing. At trial, Board witnesses admitted that when they sent out the survey, they included *the wrong regulation*. That is, they asked pharmacies how they would be affected by the *Pharmacist Responsibility Rule*—not the Stocking or Delivery Rules. SER 353-54. Thus, the survey results say nothing about the effect of those rules. Beyond that, the survey was conducted *before* the Regulations took effect.

*Third*, the State argues that the Delivery Rule applies to all "200 time sensitive medications currently on the market," and applies any time a "time-sensitive medication . . . is sitting right on the shelf and the patient needs it." Br. 45. But that is simply false. If Plan B is "sitting right on the shelf" and the pharmacy doesn't accept Medicaid, the patient can be turned away. *See* n. 30, *supra*. If the two ingredients of a time-sensitive simple compound are "sitting right on the shelf" and the pharmacy doesn't do simple compounding, the patient can be turned away. *See* n. 33, *supra*. And if a time-sensitive drug is "sitting right on the shelf" and the pharmacy doesn't do unit dosing as the prescription requires, the patient can be turned away. *See* n. 34, *supra*.

*Finally*, Defendants claim that the Regulations burden pharmacies that might turn patients away for hypothetical "personal" reasons—such as "discriminatory prejudices" or "personal distaste for a patient."

Int. Br. 38-39 (quoting *Stormans*, 586 F.3d at 1131). But this argument is triply flawed. First, after months of rulemaking hearings, years of discovery, and a twelve-day bench trial, Defendants have yet to identify a single real-world example of a so-called "personal objection" that has ever served as a basis for refusing to dispense a drug. ER 138.[74] Second, even if a pharmacy did refuse a drug for personal reasons—such as "discrimination based on sexual orientation" (Int. Br. 40 n.4)—such discrimination is *already* prohibited by *other* antidiscrimination rules apart from the Regulations. *See* RCW 49.60 (Washington Law Against Discrimination). Finally, even if Defendants could identify a handful of real-world "personal" objections, that would not defeat a religious gerrymandering claim under *Lukumi*; it is enough for Plaintiffs to show that conscientious objections are "*almost* the only conduct subject to [the ordinances]," 508 U.S. at 535 (emphasis added), which they have certainly done here.

The same is true of Defendants' argument at trial, now abandoned on appeal, about hypothetical "moral" objections. As the district court found, "Defendants offered no evidence of any pharmacies or pharmacists that have [a nonreligious moral] objection." ER 138. Even if there were some "moral" objections, it is just as constitutionally problematic

[74] SER 114, 121, 263, 701, 639, 209-10, 336-37, 599, 904-905.

to target "moral" objections as it is to target religious objections. *See Welsh* v. *United States*, 398 U.S. 333 (1970) ("purely ethical or moral" beliefs qualified as "religious" for purposes of the conscientious objector statute). And, in any event, a handful of "moral" objections could not defeat a claim of targeting, because Plaintiffs have at least demonstrated that religious objections are "*almost* the only conduct subject to [the ordinances]." *Lukumi*, 508 U.S. at 535 (emphasis added).

*b. The interpretation of the Regulations*

In addition to the practical burden of the Regulations, *Lukumi* found evidence of targeting in "the interpretation given to [one of the ordinances] by [the government]." 508 U.S. at 537. Specifically, one of the four ordinances punished any person who "unnecessarily . . . kills any animal." *Id.* Although this was "the epitome of a neutral prohibition" on its face, the city deemed killings for religious reasons to be unnecessary, and killings for most nonreligious reasons to be necessary. *Id.*

The same is true here. The Board has "broad discretion to interpret the Regulations on a case-by-case basis." ER 139. And as the district court found, it has interpreted the Stocking and Delivery Rules to permit referrals for "widespread business, economic, and convenience reasons," but not for "conscientious objections to Plan B." ER 139; *see also* ER 97-101.

In response, Intervenors claim that the Board has applied the Regulations "both to pharmacies that refused to stock Plan B for religious reasons *and* to pharmacies that failed to carry it for non-religious reasons." Br. 41 (citing ER 133). But the evidence they cite shows precisely the opposite—namely, when pharmacies have been temporarily out of stock of Plan B for business reasons, the Board has deemed that to be "good faith" compliance with the Stocking Rule and closed the investigation; but when pharmacies have been out of stock for religious reasons, the Board has deemed that to be unlawful and kept the investigations open. ER 133.[75]

*c. The overbreadth of the Regulations*

Lastly, *Lukumi* found "significant evidence" of improper targeting because the ordinances were overbroad—that is, they "prohibit[ed] Santeria sacrifice even when it d[id] not threaten the city's interest in the public health." 508 U.S. at 538-39. The same is true here, for several reasons.

[75] Intervenors also cite the Board's "concise explanatory statement" and "final significant analysis" of the Regulations, claiming that these "make very clear" that the Regulations are not limited to religious conduct. Br. 41; *cf.* State Br. 14. But the district court specifically found that "these documents are not inconsistent with the Board's focus on conscientious objections to Plan B," ER 77, and the Board employee who authored the final significant analysis testified the only effect of the Regulations is to prohibit conscience-based referrals. SER 349-50, 356, 295, 300.

First, the State has *stipulated* that Plaintiffs' conscience-based referrals *do not* threaten its interest in timely access to medication. SER 1618. It has stipulated that facilitated referral "is a time-honored practice," and it "do[es] not pose a threat to timely access to lawfully prescribed medications . . . includ[ing] Plan B." SER 1619-20.

Second, it is undisputed that Plaintiffs' conscience-based referrals have *never* impeded timely access to Plan B. ER 82-83. Within five miles of Ms. Mesler's pharmacy, there are thirteen pharmacies that dispense Plan B; within five miles of Ralph's, there are over thirty pharmacies that dispense Plan B; and within twenty-five miles of Ms. Thelen's pharmacy, there are sixty pharmacies that dispense Plan B. *Id*. When presented with a request for Plan B, they help patients obtain the drug at one of dozens of nearby pharmacies. As the district court found: "[T]here is no evidence that any of Plaintiffs' customers have ever been unable to obtain timely access to emergency contraceptives or any other drug."*Id*.

Third, referrals for reasons of conscience have been permitted in Washington for many years, and "the State has offered no evidence that they have impeded timely access to medication." ER 140. Rather, the Board's 30(b)(6) designee and former Executive Director testified that the Board was acting prophylactically—to prevent a problem before it

has arisen. *See, e.g.,* SER 595. But that is "the essence of overbreadth." ER 140.

Fourth, the Regulations are overbroad "in light of the laws of other states." ER 140. As noted above (at 13-15), *no state* has gone as far as Washington in forcing pharmacies to stock and dispense Plan B. All of those states have the same interest as Washington in timely access to medication; yet none violates conscience. *Id.*

Fifth, the Regulations are overbroad in light of the testimony of Board witnesses, who uniformly conceded that there was no problem of access to Plan B or any other drug. As the Chairman of the Board testified: "Q. Four years after the rule-making process began and you completed that 2010 process, the board still was not able to identify a single drug that was in Washington that was unable to be obtained due to access issues, right? A. As far as I know, we have no cases." SER 757; *see also* ER 83-86.

Finally, the Regulations are overbroad because they punish religious conduct even when doing so *undermines* the government's stated interest. As the district court found, if Plaintiffs are forced to dispense Plan B, "they will be forced to close their pharmacy" or "leave the profession." ER 140, 110-11. But "[s]hutting down pharmacies and driving conscien-

tious pharmacists from the profession does not enhance timely access to medication; it undermines it." ER 140.

The State does not even attempt to respond to the district court's finding of overbreadth. Intervenors fare no better, baldly asserting that the only way the Board could "ensure patient access to medications" was to "violate some citizens' religious beliefs." Br. 42. But this ignores all of the evidence above, including the Stipulations, which confirm that conscience-based referrals do not threaten timely access to Plan B. It also ignores other options that would increase access without violating anyone's religious beliefs—such as limiting refusals to stock Plan B for business reasons or refusals to dispense Plan B to Medicaid patients. Instead, the State has chosen to punish religiously motivated conduct even while stipulating that that conduct does not undermine its interests. As in *Lukumi*, "a law which visits 'gratuitous restrictions' on religious conduct" is not neutral. 508 U.S. at 538.

**2. The Regulations were enacted "because of" conscientious objections to Plan B.**

Aside from religious gerrymandering, a second way to prove that a law is not neutral is to show that it was "enacted 'because of', not merely 'in spite of,' [its] suppression of [religious conduct]." *Lukumi*, 506 U.S. at 540. Although "the law is unclear" on how a plaintiff can prove discriminatory intent—in particular, whether a plaintiff may rely on the

"historical background" of the challenged law, *Stormans*, 586 F.3d at 1131-32—the best approach is to permit courts to consider historical background, for several reasons.

First, this Court, in *dictum*, has approved of the portion of *Lukumi* relying on legislative history. *See San Jose Christian College* v. *City of Morgan Hill*, 360 F.3d 1024, 1030 n.4 (9th Cir. 2004) ("The Supreme Court has approved reference to equal protection jurisprudence."). Second, every circuit to address the issue has found it permissible to consider the historical background of a law in a free exercise challenge.[76] Third, both the Establishment Clause and the Equal Protection Clause permit courts to consider a law's historical background,[77] and it makes no sense to treat the Free Exercise Clause differently. Thus, the district court rightly held that it could "carefully consider the historical background of the Regulations, taking into account the inherent limitations in legislative history." ER 143. Defendants do not challenge this ruling on appeal.

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[76] *See* ER 142 (citing *St. John's United Church of Christ* v. *City of Chicago*, 502 F.3d 616, 633 (7th Cir. 2007) (court must consider historical background) (quoting *Lukumi*); *Prater* v. *City of Burnside*, 289 F.3d 417, 429-30 (6th Cir. 2002) (relying on historical allegations and legislative history); *Wirzburger* v. *Galvin*, 412 F.3d 271, 281-82 (1st Cir. 2005) (considering historical background)).

[77] *See, e.g.*, *Cammack* v. *Waihee*, 932 F.2d 765, 774 (9th Cir. 1991) (court may consider historical background under the Establishment Clause); *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 489 (1997) (court may consider historical background under the Equal Protection Clause).

Here, based on extensive evidence of the historical background of the Regulations, the district court found that the "rulemaking was undertaken primarily (if not solely) to ensure that religious objectors would be required to stock and dispense Plan B." ER 43, 18, 144. This finding "on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal." *Hernandez* v. *New York*, 500 U.S. 352, 353 (1991).

First, the district court found that "the focus of the regulatory process, from beginning to end, was on conscientious objections to Plan B." ER 144. Specifically:

- The rulemaking process began when Planned Parenthood contacted the Governor's office, and then both contacted the Board about "conscientious objections to emergency contraception." ER 67, 144; SER 925-26, 930, 939.
- The Board's internal deliberations "focused on conscientious objections to Plan B." ER 144, 68-69; *see, e.g.*, SER 932, 984, 1095, 1099, 1059, 1087, 1139, 1200, 1204, 1333, 917, 922.
- The Board's public meetings and rulemaking hearings "focused overwhelmingly on conscientious objections to Plan B." ER 144, 68-69; *see, e.g.*, SER 86, 989-92; ER 936-37, 952-54.
- The Governor and her advocates, both internally and when communicating with the Board, "focused overwhelmingly on conscientious objections to Plan B." ER 144, 70-72; *see, e.g.*, SER 930, 934, 939, 941, 946, 963, 1104.
- The Governor specifically asked her advisors to confirm that the draft rules were "clean enough for the advocates [*i.e.*, Planned Parenthood] re: conscious/moral issues." SER 1085.

- The Executive Director of the Board repeatedly suggested that the Regulations would be "clearer" if they simply prohibited "the right to refuse for *moral or religious judgment*." SER 1095 (emphasis added), 155. But he admitted that "the difficulty is trying to draft language to allow facilitating a referral for only . . . non-moral or non-religious reasons." SER 1099; *see also* SER 1087.

- The "task force" meetings, in which the final text of the Delivery Rule was developed, focused on designing a rule that would "permit referrals for business and convenience reasons, but not for reasons of conscience." ER 75; *see e.g.*, SER 55, 240-41, 169, 237, 280, 282, 1101, 1094.

- After the Regulations were approved, the Board's survey on access to medication "dealt almost exclusively with conscientious objections to Plan B." ER 144, 1684-87; SER 348-49.

- The Board's public communications, including the CR-101, memoranda, and newsletters, "were dominated by emergency contraception and conscientious objection to Plan B." ER 77; SER 953-54, 1326, 960, 1139, 1143, 1247-48, 1270.

- The Board's formal guidance document, which the Board provided to all pharmacies to explain the Regulations, "referred to Plan B and no other drug," and "singled out only one reason for referral that was prohibited: conscientious objection." ER 77; SER 1247.

In short, although the State claims that the Board "consistently focused on timely access to all medications," Br. 20, the district court specifically rejected this argument as contrary to the evidence: "[T]he weight of the evidence supports the conclusion that the Board's regulatory focus was on requiring onsite delivery for Plan B and forbidding referral for reason of conscience—not as Defendants contend, on access to all drugs and all non-clinical reasons for refusing to deliver them."

ER 78. Defendants have not rebutted this factual finding, much less shown that it is clearly erroneous.

Second, the district court found evidence of targeting in the fact that the Regulations "were not the product of a neutral, bureaucratic process based solely on pharmaceutical expertise," but were instead "a highly political affair, driven largely by the Governor and Planned Parenthood—both outspoken opponents of conscientious objections to Plan B." ER 144-145. The evidence on this point is overwhelming:

- In 2005, before rulemaking began, the Board unanimously supported referrals for reasons of conscience. ER 67-68; *see e.g.*, SER 932-33, 127-30, 78-81.
- In June 2006, after multiple letters from Planned Parenthood and the Governor, a threat from the Human Rights Commission, and public hearings on the rules, the Board *still* supported referrals for reasons of conscience, voting *unanimously* to reject the Governor's rule and protect referrals for reasons of conscience. ER 68-70; *see e.g.*, SER 1059, 1063, 971-83, 946, 131, 256-57, 138, 1097, 1263, 1268, 969.
- After the Board unanimously rejected the Governor's preferred rule, the Governor publicly threatened to remove Board members, tasked Planned Parenthood with re-writing the rule, and shifted authority over the drafting process from Board staff to her own task force. ER 70-72; *see, e.g.*, SER 997, 271-74, 1070, 1085, 266.
- Within the task force, every pharmacist supported referral for reasons of conscience; but the Governor and Planned Parenthood "insisted that referrals for reasons of conscience were off the table." ER 72; *see, e.g.*, SER 55, 239-41.

- Ultimately, the task force compromised: The pharmacists "agreed to yield on the request to accommodate referrals for reasons of conscience; the Governor, Planned Parenthood, and the advocates agreed to permit referrals for business, economic, and convenience reasons." ER 72-74; *see, e.g.*, SER 62-64, 169, 237-38, 1121, 280, 282, 289-91, 1101, 1085-86.

- To guarantee passage of her rule, the Governor personally called the Board Chair days before a preliminary vote, telling him to "do the right thing"—even though the Governor had previously instructed her staff that calling Board members "would be illegal." ER 75; SER 883a, 283.

- The Governor also replaced two Board members who voted against her rule with candidates recommended by Planned Parenthood. ER 76; SER 887-88, 174-76, 285, 1141.

In sum, far from being based on a neutral, evidence-based assessment of the needs of pharmacies and patients, the Regulations were pushed through by the Governor and Planned Parenthood—over the objections of the Board and State Pharmacy Association, against the advice of State and national pharmacy associations, and without any evidence of a problem of access to Plan B or any other drug. Again, Defendants do not refute any of these factual findings, much less show that they are clearly erroneous.

The State offers no response to the district court's findings on the historical background of the Regulations. Intervenors offer three, none of which has merit. *First*, they re-argue law of the case (again), asserting that "[t]his Court already considered that [historical background]

evidence" and held that it showed no discriminatory intent. Int. Br. 43 (citing *Stormans*, 586 F.3d at 1133). But as explained above, the preliminary injunction record contained almost no evidence on the historical background of the Regulations.

*Second*, Intervenors claim that the Regulations were not enacted to suppress conduct *because it is religious*, but because the religious conduct causes "harm." Br. 45. But the government made the same argument in *Lukumi*, claiming that animal sacrifice threatened public health and constituted animal cruelty. 508 U.S. at 538-39. The Supreme Court rejected that claim as pretextual, because the ordinances "prohibit[ed] Santeria sacrifice even when it does not threaten the city's interest in the public health." *Id.* The same is true here. Indeed, the State has *stipulated* that Plaintiffs' religiously motivated referrals cause *no harm*.

*Third*, without ever mentioning the clear error standard, Intervenors claim that "the legislative history shows that the Board acted not solely in response to religious objections to dispensing Plan B; rather, the Board heard evidence about pharmacies and pharmacists refusing to dispense a variety of drugs for a variety of reasons." Br. 46. But this simply mischaracterizes the record. To be sure, the Board heard "several anecdotal 'refusal stories.'" ER 86-87. But Board members themselves

admitted that these stories did not demonstrate a problem of access to any drug. ER 84-86; SER 757, 126, 337-40, 514-17, 601. And each story was thoroughly vetted at trial and found lacking in probative value. ER 86-90. In fact, the district court found that "the refusal stories show a concerted effort to manufacture an alleged problem of access where there isn't one"—further contributing to the finding of discriminatory intent. ER 90.

At the end of the day, the district court's factual finding of discriminatory intent is just that: a finding of fact. The district court weighed the evidence on both sides and "f[ound] that the weight of the evidence supports the conclusion" that the alleged focus on "harm" was pretextual. ER 78, 146. This is no different from a finding of pretext in an employment discrimination or equal protection case, where the fact-finder receives great deference. *See, e.g.*, *Beck* v. *United Food & Commercial Workers Union, Local 99*, 506 F.3d 874, 882 (9th Cir. 2007) ("A finding of discriminatory intent is a finding of fact reviewed for clear error," and cannot be set aside "[s]o long as the district court's findings are 'plausible.'"). Yet Defendants have not even begun to rebut this finding, much less demonstrate that it is clearly erroneous.

### 3. The Regulations produce differential treatment among religions.

A third way to prove that a law is not neutral is to show that it produces "differential treatment of two religions." *Lukumi*, 508 U.S. at 536. In *Lukumi*, for example, the Court said an exemption for kosher slaughter created "differential treatment of two religions," which could constitute "an independent constitutional violation." *Id.* Similarly, in *Larson* v. *Valente*, 456 U.S. 228, 246 n.23 (1982), the court struck down registration and reporting requirements that created differential treatment between "well-established churches" and "churches which are new and lacking in a constituency." *Cf. Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432-37 (2006) (requiring exemption under RFRA for one religion where exemption was granted for another).

Here, the district court found that the Regulations, in practice, have produced differential treatment of Plaintiffs vis-à-vis Catholic pharmacies. ER 147, 46-54. Specifically, although the Board is aware "that Catholic pharmacies do not and will not stock or deliver Plan B" in violation of the Regulations, ER 48, the Board has "consciously chosen" not to enforce the Regulations against them. ER 52. As the district court found, the reason for this is simple: "[T]he Board does not object to shutting down a small, independent pharmacy like Ralph's, . . . [b]ut

the Board recognizes that shutting down Catholic pharmacies would have a devastating impact on access to health care." ER 147.

This is problematic for two reasons. First, as in *Larson* and *Lukumi*, it produces differential treatment of two religions: "well-established churches" are ignored, while "small, independent conscientious objectors" face enforcement. ER 147 (quoting *Larson*, 456 U.S. at 246 n.23). Second, it further demonstrates that the Regulations are not generally applicable. Indeed, when the Board winks at open violations of the Regulations by dozens of pharmacies for over four years, while initiating its own complaint against a small, independent pharmacy that engages in the same conduct, the result is the antithesis of a generally applicable law.

In response, Defendants say that they have ignored Catholic pharmacies because of the Board's allegedly "complaint-driven system" of enforcement. State Br. 53; *cf.* Int. Br. 48. But as explained above (at 22-25, 95-97), this theory was examined exhaustively at trial, and the district court found it to be "implausible and not credible." ER 102, 133-134, 236. Rather, as multiple Board witnesses testified, "[r]esponding to complaints is only a small fraction" of how the Board enforces its regulations. ER 103. Even then, the Board has authority to initiate its own complaints. SER 606. It has done just that when it learned of rule viola-

tions in response to "media reports," "information received from insurance companies," or the Board's own "biannual inspections." ER 51.[78] It even initiated a complaint against Ralph's. Thus, nothing is stopping the Board from enforcing the Regulations against Catholic pharmacies; but as the district court found, it has "consciously chosen not to do so." ER 52.

Intervenors claim that such selective enforcement is fine, because the "'discrimination' is based not on religion, but rather on the secular goal of avoiding 'a devastating impact on access to health care.'" Br. 49 (quoting ER 147). In other words, Intervenors believe the Board can exercise complete discretion, on an *ad hoc* basis, "to exempt some pharmacies [from the Regulations] because of their importance to the healthcare system." Br. 49-50. But if that is the law, our legal system is in a sorry state.

Fortunately, it is not the law. Free exercise plaintiffs do not have to uncover a smoking gun showing that the government was motivated exclusively by anti-religious animus. Rather, the court can find that a law is not generally applicable based on "the objective effects of the selective exemptions at issue *without examining the responsible officials' motives*." *Tenafly*, 309 F.3d at 168 n.30 (emphasis added). That is just

[78] SER 34, 366-67, 602-06, 616, 688-90, 836.

what the court did in *Tenafly*, where churches were "tacitly allowed to post permanent directional signs" on utility poles, but a Jewish *eruv* was removed in response to "vehement" citizen complaints. *Id.* at 151, 153. The same rule controls here. *See also Sherbert*, 374 U.S. at 420 (Harlan, J., dissenting) (law was struck down because of individualized exemptions, even when "in no proper sense c[ould] it be said that the State discriminated against the appellant on the basis of her religious beliefs").

**D. The Regulations implicate hybrid rights.**

Finally, the Regulations are also subject to strict scrutiny because they involve "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." *Smith*, 494 U.S. at 881. The Regulations not only infringe Plaintiffs' rights under the Free Exercise Clause, but also their right under the Due Process Clause to refrain from taking human life. *See* Part III, *infra*. Such a claim of "hybrid rights" receives strict scrutiny even when a law is neutral and generally applicable. *See Smith*, 494 U.S. at 881-82.

Although this Court has noted the criticism of hybrid rights doctrine, *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 440 n. 45 (9th Cir. 2008), it has held that a plaintiff can prevail on a hybrid-rights claim by making out "a colorable claim that a companion right has been violat-

ed—that is, a fair probability or a likelihood, but not a certitude, of success on the merits." *San Jose Christian College*, 360 F.3d at 1032 (quoting *Miller* v. *Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999). Here, Plaintiffs have shown not only a "colorable claim" that their right to refrain from taking human life has been violated, but an independently viable one. *See* Part III, *infra*. Thus, their hybrid rights claim merits strict scrutiny.

### E. The Regulations cannot satisfy strict scrutiny.

Because the Regulations are not neutral or generally applicable, they must satisfy strict scrutiny. That is, Defendants must demonstrate that the Regulations (1) "advance interests of the highest order" and (2) are "narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (quotations omitted). This is "the most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997). It requires the court to "look[] beyond broadly formulated interests justifying [the law]" and instead "scrutinize[] the asserted harm of granting *specific* exemptions to *particular* religious claimants." *Gonzales*, 546 U.S. at 431 (emphasis added).

As the district court found, the Regulations fail strict scrutiny for four reasons. Most importantly, although the State claims it has an interest in "ensuring that patients receive their medications in a timely

manner," Br. 59, the State has stipulated that Plaintiffs' conduct *does not undermine that interest*—conceding that facilitated referrals "do not pose a threat to timely access to lawfully prescribed medications . . . includ[ing] Plan B." SER 1619. Thus, as applied to Plaintiffs, the Regulations further no governmental interest at all.

Second, under strict scrutiny, the State must show with "particularity" that its interests would be harmed by "granting *specific* exemptions to *particular* religious claimants." *Gonzales*, 546 U.S. at 431 (emphasis added). Here, it is undisputed that Plaintiffs refer patients to dozens of nearby pharmacies that dispense Plan B, and "[n]one of Plaintiffs' customers has ever been denied timely access to emergency contraception." ER 61.

Third, the Regulations fail strict scrutiny because they are "underinclusive in substantial respects." *Lukumi*, 508 U.S. at 546. That is, the government permits pharmacies to refer patients elsewhere for a wide variety of business, economic, and convenience reasons—even when doing so would undermine the government's interest in timely access to medication. *See* Part II.B.1, *supra*. This demonstrates both that the Regulations are not narrowly tailored, *id.* at 546, and that the alleged interest is not compelling—because "a law cannot be regarded as pro-

tecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 547.

Finally, the Regulations fail strict scrutiny because, as applied to Plaintiffs, "they actually *undermine* the government's alleged interest." ER 150. If Plaintiffs are forced to stock and dispense Plan B in violation of their religious beliefs, they will be forced to shut down their pharmacy or leave the profession. *Id.* But "[s]hutting down pharmacies and reducing the number of practicing pharmacists will not increase access for anyone." *Id.* Thus, as applied to Plaintiffs, the Regulations reduce access to medication.

### F. The Regulations cannot satisfy rational basis review.

For similar reasons, even assuming the Regulations were neutral and generally applicable, they fail rational basis review. To satisfy rational basis review, the Regulations must be "rationally related to a legitimate governmental purpose." *Stormans*, 586 F.3d at 1137. Under this standard, "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *In re Levenson*, 587 F.3d 925, 931 (9th Cir. 2009).

Here, the only interest asserted by the State is "ensuring that patients receive their medications in a timely manner." Br. 59. But the

State has *stipulated* that "facilitated referrals do not pose a threat to timely access to lawfully prescribed medications." SER 1620. Thus, the only purpose served by applying the Regulations to Plaintiffs is "to harm a politically unpopular group." *Cleburne*, 473 U.S. at 446-47. Accordingly, the Regulations fail both traditional rational-basis review and "the type of 'active' rational basis review employed by the Supreme Court in [*Cleburne*]." *Pruitt* v. *Cheney*, 963 F.2d 1160, 1165-66 (9th Cir. 1991); *see also Witt* v. *Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008) (applying heightened review).

**III. The Regulations Violate the Due Process Clause.**

The Regulations also violate Plaintiffs' fundamental right to refrain from taking human life. To receive protection under the Due Process Clause, a right must be: (1) "objectively, 'deeply rooted in this Nation's history and tradition, and 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [it were] sacrificed,'" and (2) subject to a "'careful description' of the asserted fundamental liberty interest." *Washington* v. *Glucksberg*, 521 U.S. 702, 720-21 (1997). In this inquiry, the "crucial guideposts for responsible decisionmaking" are the nation's "history, legal traditions, and practices." *Id.* (internal quotations and citations omitted).

Here, the fundamental liberty interest is the right to refrain from taking human life. This right has long been recognized in every context where the taking of human life has been permitted—whether military service, assisted suicide, capital punishment, abortion, or abortifacient drugs. *See generally* Mark Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121 (forthcoming 2012) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2025281.

In the context of military service, the right to refrain from taking human life was recognized by the majority of colonies and the Continental Congress before the Revolutionary War,[79] by President Lincoln during the Civil War,[80] and by Congress starting with World War I.[81] In the context of assisted suicide, it has been recognized by both states that permit assisted suicide by statute. ORS 127.885(4); RCW 70.245.190(1)(d). And in the context of capital punishment, it has been recognized by the federal government and numerous states. 18 U.S.C. § 3597(b); Rienzi, *supra*, at 139-42 (collecting state laws).

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[79] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1468 (1990); Louis Fischer, *Congressional Protection of Religious Liberty* 11-12 (2003).

[80] J. G. Randall & Richard Nelson Current, *Lincoln the President,* 172-75 (1999)

[81] Rienzi, *supra*, at 113. Although the Supreme Court once rejected a constitutional claim of conscientious objection *in dictum*, *United States* v. *Macintosh*, 283 U.S. 605 (1931), it did not deny that conscientious objection was a fundamental right; rather, it said that Congress may have a compelling interest in overriding it. *Id.* at 623-34; *accord Gillette* v. *United States*, 401 U.S. 437, 461-62 (1971).

The right to refrain from taking human life is also uniformly protected in the context of abortion—even amidst deep social conflict over whether abortion constitutes the taking of human life. Just weeks after *Roe* v. *Wade*, 410 U.S. 113 (1973), Congress overwhelmingly passed the Church Amendment, which prohibits the government from requiring anyone to assist in an abortion. 42 U.S.C. § 300a-7(b)-(c)(1). That amendment has been joined by many other federal laws expanding the right. Rienzi, *supra*, at 147-52 (collecting examples). It has also been joined by conscience protections in forty-seven of fifty states, many of which provide full exemptions to any health care practitioner who conscientiously refuses to "participate," "refer," "assist," "arrange for," "accommodate," or "advise" in an abortion. Rienzi, *supra*, at 152.

The right to refrain from taking human life is equally recognized in the context of abortifacient drugs, such as Plan B and *ella*. As noted above (at 13-15), forty-two of fifty states either expressly permit conscience-based referrals or have no law restricting them. In the other seven states, with the possible exception of the ambiguous law in Massachusetts, Plaintiffs' conduct would still be accommodated. *Id.* Thus, forty-nine of fifty states effectively protect the right to refrain from taking human life.

Given this uniform protection—across many contexts, in multiple jurisdictions, and over two centuries—the right to refrain from taking human life is far more "objectively, 'deeply rooted in this Nation's history and tradition'" than other due process rights recognized by the Supreme Court. *Washington*, 521 U.S. at 720-21. Although modern substantive due process jurisprudence has been subject to criticism, the "sturdie[st] basis" for invalidating a law under the Due Process Clause is when the law is an outlier among states. Akhil Amar, *The Unwritten Constitution* 118 (2012). That was the main problem in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), where Connecticut was the only state to make contraception use a crime. Amar at 118; *see also* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1796 (2012) (noting that "the result in *Griswold*" can be defended on the ground that "Connecticut was an outlier"). It is also the problem here, where Washington is the only state to compromise the right to refrain from taking human life.

There is no question that this right has been compromised here. The Regulations force Plaintiffs to choose between participating in taking human life or losing their pharmacy licenses and their livelihoods. Nor can the Regulations satisfy strict scrutiny. As explained above, the State has stipulated that Plaintiffs' referrals "help[s] assure timely ac-

cess to lawfully prescribed medications." ER 79; SER 1620. Thus, the Regulations compel Plaintiffs to participate in the destruction of human life without furthering any legitimate purpose at all.

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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## STATEMENT OF RELATED CASES

Plaintiffs are aware of Case Number 12-35224, in which Legal Voice (formerly the Northwest Women's Law Center), a non-party to the litigation, appeals the district court's orders related to discovery produced by Legal Voice. *Legal Voice* v. *Stormans, Inc., et al.,* No. 12-35224. Legal Voice represents Intervenors in this case. The issues presented in Case Number 12-35224 are unrelated to the merits presented in these consolidated appeals.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

This brief complies with the type-volume limitation of Fed. R. App. P 32(a)(7)(B) because this brief contains 27,534 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P 32(a)(5) and the type style requirements of Fed. R. App. P 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-Point Century Schoolbook style.

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# ADDENDUM A

## WAC 246-869-010 ("Delivery Rule")

## Pharmacies' responsibilities.

(1) 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, except for the following or substantially similar circumstances:

(a) Prescriptions containing an obvious or known error, inadequacies in the instructions, known contraindications, or incompatible prescriptions, or prescriptions requiring action in accordance with WAC 246-875-040.

(b) National or state emergencies or guidelines affecting availability, usage or supplies of drugs or devices;

(c) Lack of specialized equipment or expertise needed to safely produce, store, or dispense drugs or devices, such as certain drug compounding or storage for nuclear medicine;

(d) Potentially fraudulent prescriptions; or

(e) Unavailability of drug or device despite good faith compliance with WAC 246-869-150.

(2) Nothing in this section requires pharmacies to deliver a drug or device without payment of their usual and customary or contracted charge.

(3) If despite good faith compliance with WAC 246-869-150, the lawfully prescribed drug or device is not in stock, or the prescription cannot be

filled pursuant to subsection (1)(a) of this section, the pharmacy shall provide the patient or agent a timely alternative for appropriate therapy which, consistent with customary pharmacy practice, may include obtaining the drug or device. These alternatives include but are not limited to:

(a) Contact the prescriber to address concerns such as those identified in subsection (1)(a) of this section or to obtain authorization to provide a therapeutically equivalent product;

(b) If requested by the patient or their agent, return unfilled lawful prescriptions to the patient or agent; or

(c) If requested by the patient or their agent, communicate or transmit, as permitted by law, the original prescription information to a pharmacy of the patient's choice that will fill the prescription in a timely manner.

(4) Engaging in or permitting any of the following shall constitute grounds for discipline or other enforcement actions:

(a) Destroy unfilled lawful prescription.

(b) Refuse to return unfilled lawful prescriptions.

(c) Violate a patient's privacy.

(d) Discriminate against patients or their agent in a manner prohibited by state or federal laws.

(e) Intimidate or harass a patient.

**WAC 246-869-150 ("Stocking Rule")**

**Physical standards for pharmacies — Adequate stock.**

(1) The pharmacy must maintain at all times a representative assortment of drugs in order to meet the pharmaceutical needs of its patients.

(2) Dated items -- All merchandise which has exceeded its expiration date must be removed from stock.

(3) All stock and materials on shelves or display for sale must be free from contamination, deterioration and adulteration.

(4) All stock and materials must be properly labeled according to federal and state statutes, rules and regulations.

(5) Devices that are not fit or approved by the FDA for use by the ultimate consumer shall not be offered for sale and must be removed from stock.

(6) All drugs shall be stored in accordance with USP standards and shall be protected from excessive heat or freezing except as those drugs that must be frozen in accordance with the requirements of the label. If drugs are exposed to excessive heat or frozen when not allowed by the requirements of the label, they must be destroyed.

# ADDENDUM B

## IDENTIFICATION OF WITNESSES

| Witness | Description |
|---|---|
| Rhiannon Andreini | Defendant-Intervenor |
| Asaad Awan | Former Board of Pharmacy member; former Chair of the Board of Pharmacy; licensed pharmacist |
| Kathy Baros-Friedt | Chair of Washington Human Rights Commission |
| Elizabeth Berendt | Fed. R. Civ. Pro. 30(b)(6) designee for Washington Insurance Commissioner |
| Judith Billings | Defendant-Intervenor |
| Susan Teil Boyer | Former Board of Pharmacy member; former Executive Director of Board of Pharmacy (2009 to 2012); licensed pharmacist |
| Alto Charo | Defendant-Intervenors' Expert Witness |
| James Doll | Pharmacist Investigator for the Department of Health (21 years); licensed pharmacist |
| Timothy Fuller | Board of Pharmacy Pharmacist Consultant (19 years); licensed pharmacist |
| Dana Blackman Gigler | Assistant Attorney General for Washington State Attorney General's Office; test-shopped Plaintiffs' pharmacy on behalf of Planned Parenthood |
| Molly Harmon | Defendant-Intervenor |

| Witness | Description |
|---|---|
| Gary Harris | Board of Pharmacy member from 2005 to present; former Chair of the Board of Pharmacy; licensed pharmacist |
| Lisa (Salmi) Hodgson | Assistant to Board of Pharmacy; Interim Executive Director of Board of Pharmacy from July 2006 to August 2007 |
| Christina Hulet | Former Governor's Executive Health Policy Advisor |
| Al Linggi | Former Chair of the Board of Pharmacy; former Board of Pharmacy member; licensed pharmacist (50 years) |
| Katherine McLean | OB/GYN; Defendant-Intervenors' witness |
| Rhonda Mesler | Plaintiff; Pharmacy manager; licensed pharmacist (21 years) |
| Steven Saxe | Supervisor in Department of Health Director of Health Professions and Facilities; Executive Director of Board of Pharmacy from 2004 to 2006 and 2008 to 2009; licensed pharmacist |
| Rod Shafer | Chief Executive Officer of the Washington State Pharmacy Association (1994 to 2008); licensed pharmacist and pharmacy owner (32 years) |
| Jeffrey Shouten | Defendant-Intervenor |
| Kevin Stormans | Plaintiff; pharmacy owner (over 25 years) |
| Margo Thelen | Plaintiff; licensed pharmacist (39 years) |

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 14, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kristen K. Waggoner

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