No. 15-862

IN THE

Supreme Court of the United States

STORMANS, INC., DOING BUSINESS AS RALPH'S THRIFTWAY, RHONDA MESLER, AND MARGO THELEN,
PETITIONERS,
v.
JOHN WIESMAN, SECRETARY OF THE WASHINGTON STATE DEPARTMENT OF HEALTH, ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE BRUDERHOF AND THE NATIONAL COMMITTEE FOR AMISH RELIGIOUS FREEDOM IN SUPPORT OF PETITIONERS

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BRIEF OF THE BRUDERHOF AND THE NATIONAL COMMITTEE FOR AMISH RELIGIOUS FREEDOM AS *AMICI CURIAE* SUPPORTING THE PETITIONERS

Amici curiae, the Bruderhof and the National Committee for Amish Religious Freedom, respectfully submit that this Court should grant the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1]

INTEREST OF THE *AMICI CURIAE*

The Bruderhof is a Christian community stemming from the Anabaptist tradition. The Bruderhof was founded in 1920 in Germany in the aftermath of World War I. Like other religious communities in the peace-church tradition and other religious traditions, the Bruderhof advocates pacifism and nonviolent love. The way of peace in the Bruderhof tradition "demands reverence for all life, above all each human life, since every person is made in the image of God." Bruderhof, *Foundations of Our Faith & Calling* 12 (2012). These beliefs "absolutely forbid [the Bruderhof] to take human life for any reason, directly or indirectly, whether in war or self-defense,

[1] Pursuant to this Court's Rule 37.6, *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the filing of this brief, and letters of consent are on file with the Clerk's Office.

through the death penalty, or by any other means, including euthanasia or abortion." *Ibid.*

During Adolf Hitler's reign, the Bruderhof was targeted for its conscientious refusal to support Hitler's militaristic and genocidal policies. Eventually, the Bruderhof left their homes in Germany and fled to England before immigrating to Paraguay.

In 1954, the Bruderhof established its first U.S. community in New York. Today, the Bruderhof consists of over 2,700 members living in 23 locations, primarily in the United States, but also in the United Kingdom, Germany, Australia, and Paraguay. Given its history of suffering rejection and persecution, the Bruderhof was attracted to the United States because of the nation's founding principles of tolerance and liberty.

The National Committee for Amish Religious Freedom was founded in 1967 by non-Amish to preserve the religious liberty of the Old Order Amish (and related Anabaptist groups including Mennonites). It litigated *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), to prevent states from compelling the Amish to educate their children beyond the eighth grade. The Amish defendants' objection to post-primary education was inherently religious—they believed that such education endangered their salvation and that of their children. 406 U.S. at 209, 210-11. This Court held that requiring the Amish to send their children to school beyond the eighth grade violated the protections of the First and Fourteenth Amendments. 406 U.S. at 234. Since *Yoder*, the National Committee has continued to advocate for

religious liberty and seeks to ensure that the United States is a country "where all religions are free . . . to practice their religious way of life as long as they pose no grave dangers to themselves or others." Introduction to The National Committee for Amish Religious Freedom *available at* http://tinyurl.com/*AmishRelFreedom*.

The Amish are a Christian religious group that traces its history to Swiss Anabaptists in the fifteen and sixteenth centuries. The Amish were persecuted by Protestant and Catholic governments in Europe. A significant number of Amish fled this religious persecution by immigrating to Pennsylvania, where William Penn promised religious freedom. The Amish have thrived in the United States, but their religious beliefs have been threatened by the laws and regulations of modern society.

Amici's interest in this case arises from the beliefs of the Bruderhof and the Amish that a fundamental right exists to refrain from participation in ending a human life. Reverence for each human life is an integral part of each group's mission and religious convictions. And the decisions of the Amish and the Bruderhof to move to the United States, hundreds of years apart, was influenced in large part by this nation's devotion to freedom of choice and its widespread respect for each individual's deeply held religious beliefs.

SUMMARY OF ARGUMENT

The right to refrain from actively participating in the termination of a human life has been entrenched in this nation's history and tradition in various forms since its founding. During the Revolution, George Washington recognized the right of religious objectors to be excused from military service. Corrections officers whose religious beliefs cause them to oppose the death penalty have been excused from carrying it out. More recently, states that allow assisted suicide have carefully crafted exceptions to allow doctors and institutions with religious objections to avoid participating.

Requiring an individual to participate in the death of another is fundamentally different from any other governmental imposition on religious exercise. The Ninth Circuit's decision opens the door for states to force individuals to carry out the states' views of what lives are worth living even if the individuals' religious beliefs dictate otherwise. The right to choose to refrain from participating in the termination of a human life for religious reasons is fundamental to the free exercise of religion. In each of these areas, people of faith or of no faith can reasonably disagree regarding whether the conduct at issue is ethical and moral. But the religious liberty protected by the First Amendment is an individual right that is not affected by whether other people agree with the individual's religious beliefs. Pharmacists and pharmacy owners should not be required by the government to choose between their religious exercise and their livelihood. The Court should grant the petition.

ARGUMENT

I. The Court should grant the petition because the Ninth Circuit's view of the First Amendment undercuts our historic commitment to conscientious objection.

The right to refrain from terminating a human life for religious reasons is woven throughout this nation's history. It has manifested itself in a number of different contexts, including: war, capital punishment, assisted suicide, and abortion. Indeed, "[i]t is precisely because a right not to kill has been recognized so widely – in so many different contexts, by so many different governments, in so many different times – that the right should be categorized as fundamental." Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121, 161 (2012).

A. Conscientious objection to war

The historic right to refrain from participating in the termination of a human life as a religious exercise is evidenced most powerfully in the treatment of conscientious objectors to war. As this Court has observed, "[g]overnmental recognition of the moral dilemma posed for persons of certain religious faiths by the call to arms came early in the history of this country." *United States* v. *Seeger*, 380 U.S. 163, 170 (1965). Since this nation's founding, individuals who believed they could not in good conscience participate in war earned the respect and protection of our nation's leaders. For instance, during the Revolutionary War, George Washington included in his conscription orders an exemption for those who could not serve as a matter of conscience.

Stephen M. Kohn, *Jailed for Peace: The History of American Draft Law Violators, 1658-1985*, at 10 (1986). Washington also assured the Quakers that

> "the conscientious scruples of all men should be treated with great delicacy . . . it is my wish and desire, that the laws may always be extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit."

Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), *in George Washington on Religious Liberty and Mutual Understanding* 11 (Edward Frank Humphrey ed., 1932)).

James Madison attempted to add an express provision for "free and equal rights of conscience" to the First Amendment and a specific exemption for religious conscientious objectors to the Second Amendment. *See, e.g.*, *Dist. of Columbia* v. *Heller*, 554 U.S. 570, 590, 665-70 (2008). He nearly succeeded in doing so. *Ibid.* The reason these provisions were not adopted, according to some commentators, is because the founders "assumed that such a right was implicit in the First Amendment." *See* Michael S. Satow, *Conscientious Objectors: Their Status, the Law and Its Development*, 3 Geo. Mason U. Civ. Rts. L.J. 113, 116 (1992). And that has been the experience of the American people ever since.

The states and the federal government have extended comparable protections to conscientious objectors since our nation's founding. Many early state constitutions had conscience-protection clauses

for religious objectors, including New York, Delaware, New Hampshire, Pennsylvania, Vermont, and Rhode Island. *See* Rienzi, *supra*, at 131. And beginning with the Civil War, the federal government also extended protections to conscientious objectors. The 1864 Draft Act exempted from the draft conscientious objectors who belonged to "religious denominations opposed to the bearing of arms and who were prohibited from doing so by the articles of faith of their denominations." *Seeger*, 380 U.S. at 171. By the mid-1900s, the Selective Service Act of 1940 also allowed an individual to avoid conscription based on his conscientious opposition to any participation in war rooted in a "belief in his relation to a Supreme Being." *Id.* at 173.

These protections have continued to the present day. Currently, the Department of Defense defines a conscientious objector as someone who has "[a] firm, fixed, and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and/or belief," which includes "solely moral or ethical beliefs even though the applicant may not characterize these beliefs as 'religious' in the traditional sense, or may expressly characterize them as not religious." U.S. Dep't of Def., Inst. No. 1300.06 (May 5, 2007), *available at* http://tinyurl.com/zvd3d6y. A qualifying conscientious objector is entitled to an administrative discharge. *See ibid.*

B. Conscientious objection to capital punishment

Conscientious objectors to capital punishment have also been granted strong protections for their decision to avoid the role of executioner. The broad

scope of protections provided to conscientious objectors in this area illustrate how the right to refuse to participate in the termination of a human life for religious reasons is well-established.

For instance, several states and the federal government have enacted laws that protect individuals from being forced to participate in executions against their will. *See, e.g.*, 18 U.S.C. § 3597(b) (2012); Cal. Penal Code § 3605(c) (West 2015); Ga. Code Ann. § 17-10-38(d) (2015); La. Rev. Stat. Ann. § 15:569(c) (2012). Current federal protections exempt federal employees from participation in an execution if "such participation is contrary to the moral or religious convictions of the employee." 18 U.S.C. § 3597(b) (2012). "[P]articipation" includes "personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities." *Ibid.* Like the later-developed laws for conscientious war objectors, this statute is broad and morally inclusive by exempting employees from both active and passive participation in executions.

Similarly, of the 31 states that administer the death penalty, ten have enacted express conscience protections for employees who do not wish to participate in executions.[2] *See* Ala. Code § 15-18-

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[2] Connecticut also adopted a policy honoring conscientious objections to executions. Conn. Dep't of Corr., Directive Number 6.15: Administration of Capital Punishment (2014), *available at* http://tinyurl.com/jckj375. This policy is now moot. *Connecticut* v. *Santiago*, 122 A.3d 1, 9 (Conn. 2015) (declaring death penalty unconstitutional under Connecticut's constitution).

82.1(i) (2015); Ariz. Dep't of Corr., Dep't Order 710: Execution Procedures 9 (2015), *available at* http://tinyurl.com/z8qrrvc; Cal. Penal Code § 3605(c) (West 2015); Fla. Stat. § 922.105(9) (2015); Ga. Code Ann. § 17-10-38(d) (2015); 501 Ky. Admin. Regs. 16:320 (2010); La. Rev. Stat. Ann. § 15:569(c) (2015); Okla. Dep't of Corr., OP-040301: Execution of Offenders Sentenced to Death 5, *available at* http://tinyurl.com/gucuv4q; Or. Admin. R. 291-024-0005(3)(b) (2015); Wash. Dep't of Corr., Policy Number DOC 490.200: Capital Punishment 7 (2014), *available at* http://tinyurl.com/h9yman3. For example, Arizona and California make employee participation in executions voluntary—even without a specific reason—and expressly prohibit repercussions for an employee's refusal to participate in an execution. *See* Ariz. Dep't of Corr., Dep't Order 710: Execution Procedures 9 (2015), *available at* http://tinyurl.com/z8qrrvc ; Cal. Penal Code § 3605(c) (West 2015). *Accord* Ga. Code Ann. § 17-10-38(d) (2015).

Furthermore, ten other states that impose the death penalty interpret their state constitutional protection of religious freedom to require strict scrutiny of any burdens on religion or have adopted statutes that require strict scrutiny for such burdens. *See State* v. *Blackmon*, 719 N.E.2d 970, 974 & n.3 (Ohio Ct. App. 1998); *In re Browning*, 476 S.E.2d 465, 467 (N.C. Ct. App. 1996); Ark. Code § 15-123-404 (2015); Ind. Code § 34-13-9-8 (2015); Kan. Stat. 60-5303 (2015); Miss. Code § 11-61-1 (2014); Mo. Rev. Stat. § 1.302 (2015); 71 Pa. Cons. Stat. Ann. §§ 2401-07 (2012); S.C. Code Ann. § 1-32-40 (2014); Tex. Civ. Prac. & Rem. Code Ann. §§110.001-.012 (West 2015). In these states, an objector may refuse to participate in executions as long as the parti-

cipation would impose a substantial burden on his or her religious beliefs. Again, these laws are far-reaching and comprehensive in their applicability.

C. Conscientious objection to abortion

In the arena of abortion, protections have again become prominent for conscientious objectors. In *Roe* v. *Wade*, 410 U.S. 113, 130-39 (1973), the Court provided a detailed overview of the historical treatment of abortion. This overview confirms that an unwilling participant could not be forced to perform an abortion since its inception in this country. *See ibid.* Indeed, among states where abortion was lawful before *Roe*, several had explicit conscience protections for both individuals and institutions that did not wish to perform abortions. *See* N.Y. Civ. Rights Law § 79-I (McKinney 2009); 1970 Ala. Sess. Laws 103-1; 1968-69 Ark. Acts 179; 1967 Colo. Sess. Laws 285; 57 Del. Laws 411 (1970); 1972 Fla. Laws 610; 1968 Ga. Laws 1436; 1970 Haw. Sess. Laws 1; 1969 Kan. Sess. Laws 452; 1968 Md. Laws 875.

Shortly after *Roe* was decided, Congress enacted the Church Amendment, which prohibits courts and government agencies from requiring individuals or facilities to perform abortions in violation of conscience. *See* 42 U.S.C. § 300a-7. Violation of the Church Amendment is penalized by a loss of federal funding. *Id.* This Court has observed that such provisions provide "appropriate protection" for individuals and religious institutions. *See Doe* v. *Bolton*, 410 U.S. 179, 197–98 (1973).

In the wake of the Church Amendment, 47 states and the District of Columbia have enacted conscience-protection provisions in the abortion

context. *See* Rienzi, *supra*, at 149 n.133 (collecting state statutes). In addition, Congress enacted additional conscience protections through the Danforth Amendment in 1996 and the Hyde–Weldon Amendment in 2005. 42 U.S.C. § 238n; Consolidated Appropriations Act, Pub. L. No. 108-447, § 508(d) (2004). These acts prohibit federal discrimination against conscientious objectors to abortion and prohibit the provision of federal funding to institutions that discriminate against any healthcare provider for refusing to participate in what they believe to be abortions.

Since abortion has been legal, freedom of conscience in choosing not to perform abortions has been the norm. Thus, the right not to be compelled by the state to participate in abortions is as deeply rooted in our tradition as the right to choose abortion without undue interference from the state. Further, while this nation is deeply divided about the legality of abortion, this Court has consistently recognized that personal beliefs regarding abortion must not be "formed under compulsion of the State." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 851 (1992). Until Washington's adoption of the regulations at issue here, the nation had consistently refrained from compelling religious objectors to participate in abortions.

D. Conscientious objection to assisted suicide

The incongruous nature of the State of Washington's effort to drive out pharmacies and pharmacists who object to dispensing certain pharmaceutical products because of sincerely held religious belief that the products induce abortions is

highlighted by the recognition of the right of medical professionals to decline to participate in assisted suicide. *See*, *e.g.*, App. 58a-60a, 69a-70a. Assisted suicide is a relatively new area in which the termination of human life has become permissible. Protections for those who do not wish to assist in suicides are developing apace with permission for those who do. These protections are further expanding by shielding objectors at both the individual and the institutional level.

As the district court in this case aptly noted, "[in] the wake of [*Washington* v.] *Glucksberg* [,521 U.S. 702 (1997)] and the Death with Dignity Act, it is clear that [a state] can *bar* medical providers from assisting in taking life, and it can *allow* them to participate in taking a life." App. 69a. Based on the developing trend for assisted suicides—and consistent with this nation's tradition in other contexts—it is apparent that a state cannot compel participation in the termination of a human life through assisted suicides.

Only five states allow assisted suicide: California, Montana, Oregon, Vermont, and Washington. *See* A.B. 15, 2015-2016 Leg., 2d Extraordinary Sess. (Cal. 2015); *Baxter* v. *State*, 224 P.3d 1211, 1222 (Mont. 2009) (legalizing assisted suicide through a judicial opinion); Or. Rev. Stat. § 127.805 (2015); Vt. Stat. Ann. tit. 18, § 5281 *et seq.* (2015); Wash. Rev. Code. Ann. § 70.245.020 (2015). Not one forces health care providers to participate in assisted suicides against their will. *See* A.B. 15, 2015-2016 Leg., 2d Extraordinary Sess. (Cal. 2015); Mont. Code Ann. § 50-9-103(5); Or. Rev. Stat. § 127.885(2) & (4); Vt. Stat. Ann. tit. 18, § 5285; Wash. Rev. Code Ann. § 70.245.190. In addition, in several states,

institutions that object to assisted suicide as a matter of institutional policy are allowed to sanction employees who assist in a suicide contrary to the institution's policy. *See* Or. Rev. Stat. § 127.885(5)(a); Vt. Stat. Ann. tit. 18, § 5286; Wash. Rev. Code. Ann. § 70.245.190.

Protections for those who object to participating in assisted suicide demonstrate yet another pattern of respect for the right to refrain from active participation in the termination of human life.

II. The free exercise guaranteed by the First and Fourteenth Amendment includes the right not to dispense pharmaceuticals an individual believes will cause an abortion.

The Amish and the Bruderhof came to this country because of its tradition of religious freedom, including the freedom to refrain from violence and to avoid taking human life in all its forms.

The Ninth Circuit's decision renders ephemeral the protection historically provided to conscientious objectors. Under the Ninth Circuit's analysis, the First Amendment's protection of free exercise is at its nadir when applied to Washington's regulations. According to the Ninth Circuit, the historic tradition of protecting conscientious objection to human life is a matter of legislative grace with only the barest of constitutional implications. *See* App. 41a (concluding Washington's regulation must only meet rational-basis review). Applying the same rationale, there is no constitutional barrier to the federal government requiring all citizens serving in the military, whether conscripts or volunteers, to kill the country's enemies, regardless of religious scruples.

And there is nothing in the Constitution to prevent the state and federal governments from requiring those who, for religious reasons, are opposed to the death penalty, to be forced to execute those whom the state has condemned to death. More closely analogous to this case, the Ninth Circuit's reasoning means there is nothing to prevent states, through licensing boards, from requiring physicians who are religiously opposed to abortion and euthanasia to perform abortions and assist patients to commit suicide.

This case arises at the intersection of two unique aspects of human experience: religion and death. The exercise of religion is singled out for protection in the Bill of Rights. *See Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 707 (2012). This Court has acknowledged in the context of the Eighth Amendment that death's irrevocable finality makes it different and deserving special constitutional consideration. *Harmelin* v. *Michigan*, 501 U.S. 957, 994-96 (1991). The scope of the First Amendment's protection of religious exercise should accordingly be at its apex rather than its nadir when applied to conscientious objection to participating in the death of another.

The Ninth Circuit's decision departs from the experience of the American people since the Revolution. The country was well-served by George Washington's assurance that the conscientious scruples of all people would be respected. The liberty to refrain from terminating a human life for religious reasons is not a mere perk of citizenship subject to the will of the legislature or judiciary, but it is a right protected by the First Amendment, and is woven into the fabric of our nation.

CONCLUSION

This nation's founding tenants of freedom of conscience and respect for other's sincere convictions attracted many pacifist groups, including the Amish and the Bruderhof, to this country. This nation has a rich tradition of not only respecting, but protecting, individuals whose deepest moral and religious beliefs require them to refrain from terminating the life of another. *Amici* respectfully request that this Court grant the petition for certiorari and reverse the decision of the Ninth Circuit.

Respectfully submitted,

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