NO. _____

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 a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Luke W. Goodrich
Hannah C. Smith
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave., Ste. 700
Washington, D.C. 20036
(202) 955-0095

Steven T. O'Ban
ELLIS, LI & MCKINSTRY PLLC
2025 First Ave., Pent. A
Seattle, WA 98121-3125

Kristen K. Waggoner
Counsel of Record
David A. Cortman
Rory T. Gray
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
kwaggoner@ADFlegal.org

Michael W. McConnell
559 Nathan Abbott Way
Stanford, CA 94305

Counsel for Petitioners

QUESTION PRESENTED

Congress and all fifty states have long protected the right of health care professionals to decline to participate in the taking of human life. Petitioners are a family-owned pharmacy and two pharmacists who cannot sell abortifacient drugs without violating their religious beliefs. Instead, they refer customers to one of dozens of nearby pharmacies that sell those drugs. No customer in Washington has ever been denied timely access to any drug due to religiously motivated referral.

Nevertheless, in 2007, Washington became the only state to make Petitioners' religious conduct illegal. It did so over the objections of its own Pharmacy Commission, against the recommendation of the American Pharmacists Association and the Washington Pharmacy Association, and despite its own stipulation that Petitioners' conduct "do[es] not pose a threat to timely access to lawfully prescribed medications." After a twelve-day trial, the district court held that the new regulations violate the Free Exercise Clause because they intentionally target religious conduct, have been enforced only against religious conduct, and exempt identical conduct when done for "an almost unlimited variety of secular reasons." The Ninth Circuit reversed.

The question presented is:

Whether a law prohibiting religiously motivated conduct violates the Free Exercise Clause when it exempts the same conduct when done for a host of secular reasons, has been enforced only against religious conduct, and has a history showing an intent to target religion.

PARTIES TO THE PROCEEDING

Petitioners are Stormans, Inc. (doing business as Ralph's Thriftway), Rhonda Mesler, and Margo Thelen.

Respondents are John Wiesman, Secretary of the Washington State Department of Health; Dan Rubin, Elizabeth Jensen, Emma Zavala-Suarez, Sepi Soleimanpour, Christopher Barry, Nancy Hecox, Tim Lynch, Steven Anderson, Albert Linggi, Maureen Simmons Sparks, Maura C. Little, and Kristina Logsdon, Members of the Washington Pharmacy Quality Assurance Commission; Mark Brenman, Executive Director of the Washington Human Rights Commission; Martin Mueller, Assistant Secretary of the Washington State Department of Health, Health Services Quality Assurance; Judith Billings; Rhiannon Andreini; Jeffrey Schouten; Molly Harmon; Catherine Rosman; and Tami Garrard.

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.

TABLE OF CONTENTS

APPENDIX:

* The Washington Board of Pharmacy changed its name to the Washington Pharmacy Quality Assurance Commission during the course of litigation.

TABLE OF AUTHORITIES

***Cases*:**

***Constitutional Provisions*:**

Statutory Provisions:

***Legislative Materials*:**

***Other Authorities*:**

PETITION FOR A WRIT OF CERTIORARI

This Court's unanimous decision in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), was clear: Governments may not pass laws that target religious conduct for negative treatment while exempting the same conduct when done for nonreligious reasons. But the Ninth Circuit upheld just such a rule here.

For decades, American pharmacies have made decisions about which drugs to sell based on a wide variety of reasons related to business, economics, convenience, and conscience. When a pharmacy chooses not to sell a drug, it is commonplace to refer a customer to a nearby pharmacy. Such referrals—including referrals for reasons of conscience—are expressly approved by the American Pharmacists Association and have long been legal in all fifty states.

But in 2007, in response to intense lobbying by national and state pro-abortion groups, Washington became the only state to make conscience-based referrals illegal. App121-22a.[1] Washington banned

---

[1] One other state—Illinois—adopted the same prohibition in 2010, expanding on an executive order issued by Governor Rod Blagojevich in 2005. But its regulation was struck down in state trial court as a violation of the Free Exercise Clause, *Morr-Fitz, Inc. v. Blagojevich*, 2011 WL 1338081, No. 2005-CH-000495 (Ill. Cir. Ct. Apr. 5, 2011), and on appeal as a violation of Illinois law, *Morr-Fitz, Inc. v. Quinn*, 976 N.E.2d 1160 (Ill. App. Ct. Sept. 20, 2012).

conscience-based referrals even though no customer has ever been denied timely access to any drug due to such a referral. And it did so even though it has *stipulated* that conscience-based referral is "a time-honored pharmacy practice" that "do[es] not pose a threat to timely access to lawfully prescribed medications." App.335a.

The state's new regulations were primarily drafted by two pro-abortion advocacy groups at the request of Governor Christine Gregoire, who personally boycotted Petitioners because of their conscientious objection to abortifacient drugs. After the State's Pharmacy Commission resisted adopting the Governor's rule, she replaced two members with new ones recommended by the pro-abortion groups. The new Commission Chairman stated that "I for one am never going to vote to allow religion as a valid reason for a facilitated referral" and advocated prosecuting conscience-based referrals "to the full extent of the law." App.145a, 186-87a, 407a.

After nearly five years of litigation and a twelve-day trial, the district court found that the new Regulations target conscientious objections to abortifacient drugs, while exempting referrals for "an almost unlimited variety of secular reasons." App.81a. It found that the Regulations have never been enforced against anything but religious conduct. And it found that "reams of emails, memoranda, and letters between the Governor's representatives, Pharmacy [Commission] members, and advocacy groups" demonstrated that the Regulations were "aimed at [abortifacient drugs] and conscientious objectors from their inception."

App.57a. The district court enjoined the Regulations as a violation of *Lukumi*.

The Ninth Circuit reversed, ignoring the district court's extensive factual findings and adopting an exceptionally narrow interpretation of the Free Exercise Clause. It held that any law can satisfy the Free Exercise Clause, no matter how clearly it targets religious conduct in practice, as long as it might also be applied to nonreligious conduct in theory. The result is so contrary to *Lukumi* that summary reversal is warranted.

Alternatively, the Ninth Circuit's departure from *Lukumi* also creates stark conflicts with other circuits warranting plenary review. The panel's opinion conflicts with the Third, Sixth, Tenth, and Eleventh Circuits and the Iowa Supreme Court on the significance of secular exemptions; it conflicts with the Third Circuit on the relevance of selective enforcement; and it conflicts with the Seventh and Eighth Circuits on the use of a law's history to demonstrate discriminatory intent.

The Ninth Circuit's decision likewise upsets a longstanding consensus on an issue of immense national importance: conscience protections in health care. For over forty years, Congress and all fifty states have protected the right of pharmacists, doctors, nurses, and other health professionals to step aside when asked to participate in what they consider to be an abortion. The decision below authorizes a dangerous intrusion on this right, which can only exacerbate intense cultural conflict over these issues.

Whether summary reversal or plenary review is more appropriate, the decision below cannot stand. This Court should intervene to realign the Ninth Circuit with the rest of the country, vindicate Petitioners' right to refrain from taking human life, and reaffirm that the Free Exercise Clause "protects religious observers against unequal treatment." *Lukumi*, 508 U.S. at 542 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987)).

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 794 F.3d 1064 (9th Cir. 2015) and reproduced at App.1a. The district court's opinion granting a permanent injunction is reported at 844 F. Supp. 2d 1172 (W.D. Wash. 2012) and reproduced at App.49a. The district court's findings of fact and conclusions of law are reported at 854 F. Supp. 2d 925 (W.D. Wash. 2012) and reproduced at App.112a.

JURISDICTION

The court of appeals entered its judgment on July 23, 2015. It denied a timely petition for rehearing en banc on September 10, 2015. App.261a. Justice Kennedy extended the time in which to file a petition for a writ of certiorari to January 4, 2016. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

The relevant portions of the Washington Administrative Code, §§ 246-869-010 and 246-869-150(1) (collectively, the "Regulations"), are reprinted in the Appendix. App.344-47a.

STATEMENT

A. Petitioners and the Practice of Pharmacy

Petitioner Stormans, Inc. is a small family business owned by the three children of Ken Stormans. For over seventy years, the Stormans family has owned and operated Ralph's Thriftway, a grocery store that includes a small retail pharmacy. Petitioners Rhonda Mesler and Margo Thelen are individual pharmacists who have worked at other retail pharmacies for a combined seventy years.

Like most pharmacies, Petitioners stock only a fraction of the roughly 6,000 drugs available on the market. App.116a. A retail pharmacy like Ralph's typically stocks about 15% of available drugs. Br. of American Pharmacists Association 6, Nov. 20, 2012, ECF No.68 ("APhA.Br."). Decisions about which drugs to stock are based on a variety of factors, such

as demand for a drug, cost of a drug, whether a drug is sold only in bulk, shelf space, shelf life, manufacturer or supplier restrictions, insurance requirements and reimbursement rates, administrative costs, monitoring or training costs, and competitors' practices. App.117-18a. Some pharmacies also choose to target a niche market, stocking drugs for geriatric, pediatric, oncological, diabetes, HIV, infusion, compounding, naturopathic, or fertility patients only. App.162a.

When a customer requests a drug that a pharmacy does not stock, standard practice is to refer the customer to another pharmacy. Pharmacies do this many times daily. App.118-19a, 165-68a. Even when a drug is in stock, pharmacies routinely refer customers elsewhere for a variety of reasons—such as when a prescription requires extra time (like simple compounding or unit dosing), or when a customer offers a form of payment that the pharmacy does not accept. App.166-68a. The State has stipulated that referral is standard practice and is often the most effective way to serve a customer. App.141-43a.

Petitioners are Christians who believe that life is sacred from the moment of conception. App.115a. Because of their religious beliefs, Petitioners cannot stock or dispense the morning-after or week-after pills (collectively, "Plan B"), which the FDA has recognized can prevent implantation of an embryo. *Id*. For Petitioners, dispensing these drugs would make them guilty of destroying human life. *Id*.

On the rare occasions when a customer requests Plan B, Petitioners provide the customer with a list of nearby pharmacies that stock Plan B and, upon the patient's request, call to confirm it is in stock. This is called a "facilitated referral." *Id.* Within five miles of Ralph's, over thirty pharmacies carry Plan B. Plan B is also available from nearby doctors' offices, government health centers, emergency rooms, Planned Parenthood, a toll-free hotline, and the Internet. App.146-47a. As of 2013, the morning-after pill is also available on grocery and drug-store shelves without a prescription.[2]

Petitioners' customers have never been denied timely access to any drug. App.147a. The State stipulated below that facilitated referral is "a time-honored pharmacy practice" that "continues to occur for many reasons" and "do[es] not pose a threat to timely access to lawfully prescribed medications," "including Plan B." App.142a. The State also stipulated that facilitated referrals "help assure timely access to lawfully prescribed medications . . . includ[ing] Plan B" and "are often in the best interest of patients." *Id*. Plaintiffs' conscience-based

---

[2] *See* Lisa M. Krieger, *'Morning after' pill goes on sale Thursday in pharmacies and grocery stores, available to anyone*, San Jose Mercury News, (July 31, 2013), http://www.mercurynews.com/science/ci_23770130/morning-after-pill-goes-sale-Thursday pharmacies-and. Based on this development, the Ninth Circuit asked for supplemental briefing on whether this case was moot. But all parties agreed that the case is not moot because the week-after pill and some versions of the morning-after pill are still available only by prescription, and Petitioners are required to dispense them.

referrals were legal for decades in Washington. They are approved by the American Pharmacists Association. And they are legal in every other state. App.119-23a, APhA.Br.28-31.

B. The Regulatory Process

Washington is the only state that currently makes conscience-based referrals illegal. App.121-22a. In 2005, Planned Parenthood Public Policy Network of Washington and Legal Voice (collectively, "Planned Parenthood") contacted Governor Christine Gregoire's office and asked for her help in banning conscience-based referrals for Plan B. Governor Gregoire met personally with Planned Parenthood officials, sent a letter to the Washington Pharmacy Quality Assurance Commission ("Commission"), and appointed a former Planned Parenthood board member to the Commission. Shortly thereafter, the Commission initiated a formal rulemaking process. App.123-27a.

The Commission held two public hearings. Prior to these hearings, the Governor urged Planned Parenthood to gather stories of customers who had been refused access to Plan B. App.152a. Planned Parenthood published advertisements soliciting refusal stories, sent test-shoppers to pharmacies throughout the state, and attempted to document any refusals that occurred. App.156-57a. However, during the rulemaking hearings, neither Planned Parenthood nor the Commission were able to identify any problem of access to Plan B or any other drug. App.89a, 152a, 244a. The Commission also conducted a statewide survey of access to Plan B,

finding that 77% of Washington pharmacies stock Plan B. Of the 23% that do not, only 2% cited religious reasons, while 21% cited business or convenience reasons. The Washington State Pharmacy Association conducted two similar surveys, finding no problem of access to any drug and no instance of any patient being denied timely access due to a pharmacist's objection. App.147-49a.

After the rulemaking hearings, the Commission considered two draft rules—one that would prohibit conscience-based referrals as the Governor requested, and one that would protect them. Upon reviewing the Governor's rule, the Executive Director of the Commission asked, "Would a statement that does not allow a pharmacist/ pharmacy the right to refuse for moral or religious judgment be clearer?" App.58a, 131a, 406a. As he understood the rule, the goal was to allow referrals "for most legitimate examples raised; clinical, fraud, business, skill, etc." App.131a. But "the difficulty is trying to draft language to allow facilitating a referral for only these non-moral or non-religious reasons." *Id*. He clarified that "non-religious reasons" included referrals because of expense, shelf-life, low demand, or a pharmacy's chosen business niche. *Id*.

To increase the pressure to adopt her rule, the Governor asked Planned Parenthood to work with the State Human Rights Commission. Together, they drafted a letter threatening Pharmacy Commission members with personal liability under state antidiscrimination laws if they voted for a regulation that permitted conscience-based referrals. App.126-

27a, 374-99a. Nevertheless, the Pharmacy Commission voted unanimously to protect conscience-based referrals.

Governor Gregoire then publicly threatened to remove Commission members. App.129a. She asked Planned Parenthood to prepare a new regulation and, after reviewing the draft, asked her advisors to confirm that it was "clean enough for the advocates [i.e., Planned Parenthood] re: conscious/moral issues." App.129-30a. As the Executive Director of the Commission explained in an email: "the moral issue IS the basis of the concern. . . . [T]he public, legislators and governor are telling us loud and clear that they expect the rule to protect the public from unwarranted intervention based on the moral beliefs of a pharmacist." App.130a, 401a.

The Governor also created a new taskforce to finalize the text of the rule. The taskforce consisted of members of Planned Parenthood, the Governor's policy advisor, and three pharmacists. App.131a. Although all three pharmacists supported conscience-based referrals, the Governor and Planned Parenthood took conscience-based referrals off the table. App.132a. The taskforce then agreed that the rule should preserve referral for a variety of business, economic, and convenience reasons, but not for reasons of conscience. App.134a, 351-54a.

To guarantee final approval of the rule, Governor Gregoire personally called the Commission Chairman before a key vote and told him to "do [your] job." App.136a. She also involved Planned Parenthood in the process of interviewing candidates

for the Commission. When the Commission Chairman seemed resistant, and Planned Parenthood opposed his reappointment, the Governor refused to reappoint him. Instead, she appointed two new Commission members recommended by Planned Parenthood. App.137-38a. The new Commission Chairman stated that "I for one am never going to vote to allow religion as a valid reason for a facilitated referral." App.145a. He also stated that he would recommend prosecuting conscientious objectors "to the full extent of the law," App.186-87a, and that he viewed those who refer for reasons of conscience as "immoral" and engaging in "sex discrimination," App. 367a. He testified that the Regulations affected conscientious objectors and no others. App.140a, 144a.

On April 12, 2007, the Commission voted to approve the Governor's rule. App.138a. In the notice sent to pharmacies describing the new rule, the Commission referred only to Plan B and singled out only one prohibited reason for referral: conscientious objection. App.139a, 360a. The Commission's spokesperson testified that "the object of the rule was ending refusals for conscientious objection." App. 359a, 362a.

C. The New Regulations

The new "Delivery Rule" creates "a duty to deliver lawfully prescribed drugs or devices . . . in a timely manner," App.158a, subject to seven exemptions. The first five exemptions cover situations where (a) the prescription is erroneous, (b) there are guidelines affecting the availability of the

drug, (c) the pharmacy lacks specialized equipment or expertise needed to dispense the drug, (d) the prescription is potentially fraudulent, or (e) the drug is out of stock. A sixth exemption excuses pharmacies when a customer is unable to pay the pharmacy's "usual and customary" charge. A seventh exemption was added as a catch-all, covering any circumstances that are "substantially similar" to the first six exemptions. The district court found "abundant evidence" that the enumerated exemptions permit pharmacies to refer for a "wide variety" of common business, economic, and convenience reasons. App.175a, 135-36a, 171a, 200a-211a, 222a. And the "substantially similar" language was designed to give the Commission "wiggle room" to grant additional exemptions. App.134-36a, 212-213a, 221a, 354a.

One of the exemptions in the Delivery Rule—the out-of-stock exemption—also incorporates by reference an older "Stocking Rule," which provides that a pharmacy "must maintain at all times a representative assortment of drugs in order to meet the pharmaceutical needs of its patients." App.161a. The Stocking Rule has long given pharmacies broad discretion to decline to stock drugs for business or convenience reasons, and the out-of-stock exemption incorporates this discretion into the new Delivery Rule. App.162a. Thus, under the Delivery Rule, if a pharmacy chooses not to stock a drug for business or convenience reasons—*i.e.*, "good faith compliance

with [the Stocking Rule]"—there is no duty to deliver the drug. App.160-61a, 221-22a.[3]

D. The Regulations' Operation in Practice

In practice, the new Regulations have not changed pharmacies' traditional discretion to decline to stock or deliver drugs for reasons related to business, economics, or convenience. As the district court found, pharmacies have continued to decline to stock drugs for all of the "widespread, widely known" reasons mentioned above—such as when a drug might be unprofitable, fall outside supplier contracts, require additional equipment or training or paperwork, attract an undesirable clientele, or fall outside a chosen business niche. App.162-65a, 231a. And even when drugs are in stock, pharmacies have

---

[3] The Ninth Circuit wrongly stated that Petitioners "do not challenge the Stocking Rule." App.16a, 18a n.2, 35a. But Petitioners repeatedly challenged the Stocking Rule at summary judgment, pretrial, trial, and appeal. *See*, *e.g.*, Pls.' Consolidated Resp. to State Defs.; Defs.-Intervenors' Mots. for Summ. J., 22, Apr. 26, 2010, ECF No.401. (Stocking Rule is "[a]t the center of this case"); Pls.' Trial Br., Nov. 10, 2011, ECF No.510 (pretrial); 92-100a, 162-165a (trial); Br. of Appellees, 19-21, 42-43, 73-76, 86-100, 135, Nov. 14, 2012, ECF No.62. The district court expressly ruled on it, mentioning the Stocking Rule in its ruling no less than thirty-seven times. Petitioners' Ninth Circuit brief cited it almost fifty times. Hence, the Stocking Rule was both pressed and passed upon below. The Stocking Rule is also expressly incorporated by one of the exemptions under the Delivery Rule. Thus, a challenge to the Delivery Rule necessarily requires the court to consider the Commission's interpretation and application of the Stocking Rule. App.161a.

continued to decline to deliver them for a variety of reasons—such as when they are asked to perform simple compounding, provide unit dosing, or accept an undesirable form of payment. App.166-68a. In all of these situations and more, pharmacies have continued to refer customers to other pharmacies, and none of these referrals has ever been deemed to violate the Stocking or Delivery Rules.

By contrast, the Regulations have made Petitioners' conscience-based referrals illegal. When abortion-rights activists discovered Ralph's position on Plan B, they sent coordinated patrols of test-shoppers to request Plan B and then file complaints against Ralph's. Test-shoppers also filed complaints against a nearby Walgreens, Sav-On, and Albertsons. When the other pharmacies informed the Commission that Plan B was temporarily out of stock, they were deemed to be in compliance, and the investigations were closed. Conversely, when Ralph's informed the Commission that dispensing Plan B would violate the owner's religious beliefs, they were deemed to be in "outright defiance" of the Regulations and the investigation was kept open. App.184-86a. The Chairman of the Commission testified that if Petitioners continue their practice of not stocking Plan B, they will be subject to the revocation of their pharmacy license. App.186-87a.[4]

[4] Ralph's pharmacy remains open because the district court enjoined the Regulations and the Ninth Circuit has temporarily stayed its mandate pending this Court's review.

Abortion-rights groups also organized a boycott and picketing of Ralph's. Picketers stood on both sides of the store entrance, yelling at customers and urging them to boycott the store. The Governor's office joined in the boycott, canceling an account with Ralph's that had been in place for sixteen years. App.185a.

Test-shoppers also targeted Petitioners Thelen and Mesler. Before adoption of the Delivery Rule, their employers allowed them to refer the rare Plan B customers to nearby pharmacies. But after the adoption of the Regulations, their employers informed them that they could no longer be accommodated. Thelen was constructively discharged, and Mesler was informed that she would have to transfer to a pharmacy in another state unless the Regulations were enjoined. As the district court found, this is the unavoidable result of the Regulations, because they force pharmacies to choose between either keeping a non-objecting pharmacist on duty at all times at a cost of tens of thousands of dollars annually, or terminating the objecting pharmacist. App.188a, 237a.

E. Trial Proceedings

On July 25, 2007, Petitioners filed suit challenging the Regulations under the Free Exercise, Equal Protection, and Due Process Clauses. The district court granted a preliminary injunction, *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245 (W.D. Wash. 2007), which the Ninth Circuit reversed, *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009) ("*Stormans I*"), App.263-332a. On

remand, Respondents agreed not to enforce the Regulations against Petitioners pending trial. Stipulation and Order, Mar. 6, 2009 (ECF No.355).

The district court then held a twelve-day bench trial, involving twenty-two witnesses and almost 800 exhibits. Much of the trial focused on the effect of the Regulations in practice. Reviewing four years of experience under the Delivery Rule, and over forty years of experience under the Stocking Rule, the court found that "the effect of the law in its real operation" was to "exempt pharmacies and pharmacists from stocking and delivering lawfully prescribed drugs for an almost unlimited variety of secular reasons, but fail to provide exemptions for reasons of conscience." App.80-81a. It found that pharmacies have continued to refer customers for "countless" business, economic, and convenience reasons, and that the State has been aware of and permitted these practices regardless of the potential effect on patient health. App.86a, 170a, 231a. Instead, "the only result of the Regulations has been to prohibit conscientious objections to Plan B." App.245a.

The district court also found that the Regulations had been selectively enforced, and that no conduct except conscience-based referrals has ever been deemed to violate either rule. The State claimed that this was because it enforces its regulations only in response to citizen complaints, and no citizens have ever complained about nonreligious referrals. But the district court found this testimony "to be implausible and not credible." App.176a. The Commission uses a "wide variety of

mechanisms" to promote compliance, including initiating its own complaints, inspecting pharmacies regularly, and test shopping pharmacies. *Id.* The court also found that relying on citizen complaints only made the selective enforcement problem worse, because the Commission was well aware that "Planned Parenthood and other pro-choice groups have conducted an active campaign to seek out pharmacies and pharmacists with religious objections to Plan B and to file complaints." App.228a. This resulted in a "severely disproportionate number of investigations directed at religious objections to Plan B." *Id.*

The court also made detailed findings on the Regulations' history and purpose. The court found that "the evidence at trial revealed no problem of access to Plan B or any other drug before, during, or after the rulemaking process." App.146a. Instead, the evidence "demonstrat[ed] that the predominant purpose of the [Regulations] was to stamp out the right to refuse" for reasons of conscience. App.57a. The Commission confirmed its purpose in public pronouncements and voluminous internal correspondence—all of which revealed that "the goal of the [Commission], the Governor, and the advocacy groups" was to "bar pharmacists and pharmacies from conscientiously objecting," while "allowing pharmacies and pharmacists to refuse to dispense for practically any other reason." App.58-59a, 172a.

Based on its findings, the district court held that the Regulations were neither "neutral" nor "generally applicable" under the Free Exercise Clause. App.248a. It also held that the Regulations

failed strict scrutiny because there was no problem of access to Plan B, and because the State had stipulated that conscience-based referral is "a time-honored pharmacy practice" that "do[es] not pose a threat to timely access" to Plan B. App.248-49a

F. The Ninth Circuit's Decision

A panel of the Ninth Circuit reversed, concluding that "the rules are neutral and generally applicable" and "rationally further the State's interest in patient safety." App.10a. The panel acknowledged that, in practice, pharmacies routinely refer patients elsewhere for a variety of business, economic, and convenience reasons. But it held that "the enumerated exemptions [in the Delivery Rule] are 'necessary reasons for failing to fill a prescription' in that they allow pharmacies to operate in the normal course of business," and were therefore legitimate. App.30a.

Regarding selective enforcement, although the panel acknowledged that the Commission had never taken action against nonreligious referrals, it held that the Commission had no "specific intent to disadvantage religious objectors." App.40a. The fact that "Ralph's has been implicated in a disproportionate percentage of investigations" was simply a function of the fact that "the Commission responds only to the complaints that it receives." App.39a.

Finally, addressing the historical background of the Regulations, the panel held that "[t]he collective will of the [Commission] cannot be known, except as

expressed in the text'" and official documents explicating the final rules. App.27a (quoting *Stormans I* at App.312a). And, "[e]ven if the Commission had drafted and adopted the rules solely in response to incidents of refusal to deliver Plan B, that fact would not *necessarily* mean that the rules were drafted with the intent of discriminating against religiously motivated conduct." App.28a n.6.

The Ninth Circuit denied rehearing en banc. App.261-62a.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's decision should be summarily reversed in light of *Lukumi*.

The Ninth Circuit's decision is so patently inconsistent with *Lukumi* that summary reversal is warranted. *See Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (summarily reversing Montana Supreme Court's refusal to follow *Citizens United v. FEC*, 558 U.S. 310 (2010)).

In *Lukumi*, this Court struck down three ordinances banning animal sacrifice, unanimously concluding that the ordinances fell "well below the minimum standard necessary to protect First Amendment rights." 508 U.S. at 543. The ordinances were not "neutral" or "generally applicable" because they burdened "Santeria adherents but almost no others"; they "proscribe[d] more religious conduct than [wa]s necessary to achieve their stated ends"; and they exempted "[m]any types of animal deaths or kills" that undermined the government's interests

"in a similar or greater degree than Santeria sacrifice does." *Id*. at 536-38, 543.

Here, after an extensive trial, the district court found that the Regulations operate in precisely the same manner: They burden "religious objections" but no others; they prohibit conscience-based referrals even when the State has stipulated that they "pose[] no threat to timely access to Plan B"; and they are "riddled with secular exemptions that undermine their stated goal" "in a similar or greater degree" than conscience-based referrals would. App.233a, 235a, 106a, 200a.

The Ninth Circuit did not find any of these key factual findings to be clearly erroneous. Instead, it purported to distinguish *Lukumi* on four grounds, none of which are even remotely plausible. First, it said that the Regulations are neutral because they apply "to *all* objections to delivery that do not fall within an exemption." App.23a. But that is a truism: All laws apply to conduct that isn't exempt. In *Lukumi*, for example, the ordinances applied to *all* animal killing that wasn't exempt. The problem was the breadth of the exemptions, which protected "almost all killing of animals except for religious sacrifice." 508 U.S. at 536. The same problem is present here: The Regulations in practice protect all forms of referral except conscience-based referral. Indeed, it is undisputed that *no* secular referral has *ever* been found to violate the Regulations.

Second, the Ninth Circuit reasoned that the Regulations are neutral because they *might* apply to secular referrals in the future—such as refusals to

deliver "diabetic syringes, insulin, HIV-related medications, and Valium." App.23-24a. But *Lukumi* requires the court to consider "the effect of a law in its real operation"—not speculate about the future. 508 U.S. at 535. Here, it is undisputed that the Regulations have never applied to any secular conduct, and, in any event, the district court expressly found that these hypothetical future referrals are exempt. App.151-57a, 234a.

Third, the Ninth Circuit suggested that the Regulations are neutral because they "specifically *protect* religiously motivated conduct" by "allowing pharmacies to 'accommodate' individual pharmacists" who have religious objections. App.22a. But that simply disregards the district court's factual findings, which expressly stated that the Regulations do *not*, in practice, work that way; rather, "the Delivery Rule renders the pharmacist's right to conscientious objection illusory." App.55a, 180-83a. The vast majority of pharmacies have only one pharmacist on duty, which makes it impossible to accommodate individual pharmacists. That is what happened to the two individual pharmacist Petitioners, and there is no record of any individual pharmacist ever being accommodated under the Regulations. App.188a. Indeed, the Commission's own witnesses admitted that the Regulations do not accommodate objectors. App.180-83a.

Finally, the Ninth Circuit held that the fact that there are "other means that might achieve the [government's] purpose" without burdening religious exercise does not demonstrate targeting. App.26a. But *Lukumi* says just the opposite: When laws

"proscribe more religious conduct than is necessary to achieve their stated ends," that is "significant evidence" of "improper targeting." 508 U.S. at 538. Here, the State has *stipulated* that conscience-based referrals "do not pose a threat to timely access to lawfully prescribed medications"—yet it still seeks to punish them. App.249a. That is significant evidence of targeting, and the panel simply disregarded it—along with the binding stipulation—in violation of *Lukumi*. App.25-27a.; *see also Christian Legal Soc. v. Martinez*, 561 U.S. 661, 677 (2010) ("[Factual stipulations are] binding and conclusive.").

In short, the Regulations here are just as blatantly targeted at religious conduct as the ordinances unanimously struck down in *Lukumi*. The Ninth Circuit's transparent attempt to avoid applying *Lukumi*, as well as its flagrant disregard of the district court's extensive factual findings, warrant summary reversal.

II. The Ninth Circuit's decision dramatically curtails the Free Exercise Clause in conflict with six other circuits.

Alternatively, the Court should grant plenary review to address the stark conflicts created by the Ninth Circuit's decision on three critical issues of free exercise doctrine: the significance of secular exemptions, the relevance of selective enforcement, and the use of a law's history to demonstrate discriminatory intent. A conflict on any one of these issues would merit this Court's attention. A conflict on all three demands it.

A. The Ninth Circuit's decision conflicts with the Third, Sixth, Tenth, and Eleventh Circuits and the Iowa Supreme Court on the use of exemptions to prove that a law is not generally applicable.

1. Following *Lukumi*, the Third, Sixth, Tenth, and Eleventh Circuits and the Iowa Supreme Court have held that a law is not generally applicable when it exempts nonreligious conduct that undermines the government's interests "in a similar or greater degree than [religious conduct] does." 508 U.S. at 543-44.

In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), the Third Circuit considered a free-exercise challenge to a police department's grooming policy. The policy exempted beards grown for medical reasons, but not for religious reasons. Writing for the Third Circuit, then-Judge Alito held that the policy was not generally applicable, because the exemption for medical reasons involved "a value judgment that secular (*i.e.*, medical) motivations for wearing a beard are important enough to overcome [the government's] general interest in uniformity but that religious motivations are not." *Id.* at 366. And "when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny." *Id.*; *see also Blackhawk v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004) (Alito, J.) (wildlife permitting fee was not generally

applicable where it exempted zoos and circuses, but not Native Americans).

Similarly, in *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), the Sixth Circuit considered a free-exercise challenge to a policy that limited the ability of counseling students to refer clients to other counselors. The policy "permit[ted] referrals for secular—indeed mundane—reasons," such as when a client could not pay, or wanted end-of-life counseling. *Id.* at 739. But it did not permit referrals for religious reasons. The Sixth Circuit held that this "exemption-ridden policy" was "the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny." *Id.* at 740.

In *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234-35 (11th Cir. 2004), the Eleventh Circuit considered a zoning ordinance that limited the types of permissible uses in a business district in order to create "retail synergy." The zoning code included an exemption for nonprofit clubs and lodges, but not for houses of worship. The Eleventh Circuit held that exempting clubs and lodges, but not houses of worship, "violates the principles of neutrality and general applicability because private clubs and lodges endanger [the town's] interest in retail synergy as much or more than churches and synagogues." *Id.* at 1235.

Finally, in *Mitchell County v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012), the Iowa Supreme Court considered an ordinance that protected the surface of county roads by banning vehicles with tires that had

steel protrusions. The ordinance had an exemption for school buses, tire chains, and certain pneumatic tires with ice grips or tire studs during certain months of the year. *Id.* at 5. But it did not grant an exemption to local Mennonites, who were required by their faith to use only steel wheels. *Id.* at 15-16. The Iowa Supreme Court held that the ordinance was not generally applicable, because the ordinance applied to the Mennonites but not to "various *other* sources of road damage." *Id.*

2. Under the rule adopted in these courts, this case would be straightforward. As the district court found, the Regulations "exempt pharmacies and pharmacists from stocking and delivering lawfully prescribed drugs for an almost unlimited variety of secular reasons." App.81a. For example, a pharmacy can decline to stock Clozapine (a schizophrenia drug for patients who are suicidal) because it finds it inconvenient to monitor the patient's blood work. App.164a. A pharmacy can decline to stock Lovenox (a blood thinner for patients at risk of heart attack) because it may have to order more of the drug than the patient has requested. App.172-73a. And a pharmacy can decline to stock Plan B because it has chosen a geriatric or pediatric niche. App.162a, 361a.

Even when a drug is ordinarily in stock, a pharmacy can decline to deliver it if the prescription calls for simple compounding or unit dosing, simply because the prescription would require a little more time. App.167a. A pharmacy can decline to deliver Plan B if the patient offers to pay with Medicaid. *Id.* And a pharmacy can decline to deliver Plan B if it simply ran out due to careless inventory

management. App.166a. In all of these scenarios—and many more—pharmacies routinely refer patients elsewhere. The district court provided a chart summarizing twenty-seven different types of secular referrals that are commonplace. App.200-08a. And the Ninth Circuit held that the district court's findings on this point were "not clearly erroneous." App.32a.

The district court also found, after reviewing "voluminous testimony and documentary evidence," that these secular referrals "endanger the government's interests [in ensuring timely access to medication] in a similar or greater degree than Plaintiffs religiously motivated referrals." App.200a. For example, if a pharmacy declines to stock Plan B because it chooses to focus on a pediatric niche, or if it runs out of Plan B due to careless inventory management, or if it declines to sell Plan B to a woman who offers to pay with Medicaid, it can refer the patient elsewhere, even if there are no nearby pharmacies that stock it. App.211-12a, 214a. (Indeed, if the pharmacy declines to accept Medicaid, it need not even make a referral. *Id.*) But if the same pharmacy declines to stock Plan B for religious reasons, and offers a facilitated referral to one of thirty nearby pharmacies that stock it, that is illegal. *Id.* The Commission's own witnesses acknowledged that the former refusals for business and convenience reasons are "a much more serious access issue" than the referral for reasons of conscience. App.357a, 211-12a. As the district court found, "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." App.212a (quoting *Lukumi*, 508 U.S. at 543).

These admissions make this a far easier case than *Fraternal Order, Ward, Midrash,* or *Mitchell County*. In those cases, the laws exempted only a narrow slice of secular conduct—medical beards in *Fraternal Order*, end-of-life counseling and inability to pay in *Ward*, private clubs in *Midrash*, and school buses, tire chains, and snow tires in *Mitchell County*. All other secular conduct that might undermine the government's interests was prohibited. But here, the Regulations exempt an "almost unlimited variety" of secular conduct (App.81a, 86a)—in fact, they have never been applied against any secular conduct at all. The government's own witnesses admitted that this secular conduct poses "a much more serious access issue" than Petitioners' religious conduct would. App.211-12a, 357a. And the Commission has *stipulated* that Petitioners' conscience-based referrals "do not pose a threat to timely access to lawfully prescribed medications," "including Plan B." App.249a.

3. Although the district court relied heavily on these cases from other jurisdictions, and the parties briefed them extensively, the Ninth Circuit did not even mention them, much less attempt to distinguish them.

The Ninth Circuit offered two reasons for ignoring secular exemptions; neither can be squared with the decisions of other circuits or with *Lukumi*. First, the panel held that the exemptions for secular

referrals protect "'necessary reasons for failing to fill a prescription' in that they allow pharmacies to operate in the normal course of business." App.30a (quoting *Stormans I* at 314a). In other words, referrals for business reasons are "necessary," but referrals for religious reasons are not. This is precisely the sort of "value judgment in favor of secular motivations" that other circuits and this Court have condemned. *Fraternal Order of Police*, 170 F.3d at 366. Indeed, governments in other cases routinely argue that secular exemptions are "necessary" and religious exemptions are not. In *Fraternal Order*, for example, the government claimed that the exemption for medical beards was necessary to comply with the Americans with Disabilities Act, but a religious exemption was not. *Id.* at 365-66. In *Mitchell County*, the government claimed that the exemption for school buses was necessary "for safety reasons," but a religious exemption was not. 810 N.W.2d at 16. And in *Lukumi*, the government claimed that exemptions for hunting and pest control were "self-evident[ly]" "justified," but a religious exemption was not. 508 U.S. at 544. In each case, this value judgment triggered strict scrutiny.

Second, the Ninth Circuit held that even though secular referrals are commonplace, and even though no secular referral has ever been punished, the Commission might still prohibit those practices in the future "if complaints were filed about th[em]." App.32a. But *Lukumi* requires courts to consider "the effect of a law in its *real operation*"—not how it might operate in theory. 508 U.S. at 535 (emphasis added). Accordingly, the Court in *Lukumi* considered

the entire range of animal killing that actually occurred—not just what was "approved by express provision" in the ordinances, but also what was "not prohibited" in practice. *Id.* at 543. Similarly, in *Ward*, the Sixth Circuit rejected the government's claim that secular referrals were forbidden in theory, because "there [we]re at least two settings where" referral had been allowed in practice. 667 F.3d at 736; *see also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298-99 (10th Cir. 2004) (considering whether a theoretically neutral rule permitted exemptions in practice).

4. The Ninth Circuit's decision also conflicts with the Third, Sixth, and Tenth Circuits on the closely related doctrine of "individualized exemptions." As this Court has explained, when a law gives the government discretion to grant case-by-case exemptions based on "the reasons for the relevant conduct," strict scrutiny is required. *Lukumi*, 508 U.S. at 537 (quoting *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 884 (1990)); *see also Sherbert v. Verner*, 374 U.S. 398 (1963). In *Blackhawk*, writing for the Third Circuit, then-Judge Alito struck down a law that permitted exemptions from a wildlife permitting fee when an exemption would be "consistent with sound game or wildlife management." 381 F.3d. at 210. In *Ward*, the Sixth Circuit struck down a rule that permitted "ad hoc" exemptions from a no-referral policy. 667 F.3d at 739-40. And in *Axson-Flynn*, the Tenth Circuit ruled against a university policy that allowed "ad hoc" exemptions from the university's curricular requirements. 356 F.3d at 1298-99. In each of these cases, the problem was that the law was "sufficiently

open-ended" that it allowed the government to grant exemptions based on an "individualized governmental assessment of the reasons for the relevant conduct." *Blackhawk*, 381 F.3d at 209 (quoting *Smith*, 494 U.S. at 884) (citing *Lukumi,* 508 U.S. at 537; *Fraternal Order,* 170 F.3d at 364-65).

The Regulations in this case are even more problematic, because they include three open-ended provisions stacked on top of each other. First, the Stocking Rule requires pharmacies to maintain a "representative assortment" of drugs. As the district court found, this provision is "extraordinarily vague and open-ended." App.221a. The Commission has never offered any guidance on the meaning of "representative assortment"; it has never deemed any pharmacy except Ralph's to be in violation of it; and its own witnesses admitted that the provision "must be interpreted on a case-by-case basis depending on the reasons for the relevant conduct." *Id*. Thus, the Commission has "broad discretion" to determine, for example, that a niche pharmacy's decision not to stock Plan B is permissible, but a religiously motivated pharmacy's decision is not. App.88a, 221-22a.

On top of that, pharmacies are exempt from delivering a drug any time they are out of stock despite "good faith" compliance with the vague "representative assortment" requirement. As the district court found, "[n]o [Commission] witness was able to give a definition of 'good faith.'" App.221a. The Commission's witnesses "consistently testified"—using the precise language of *Lukumi*, no less—that "good faith" compliance "must be assessed

on a case-by-case basis depending on the reasons for the relevant conduct." *Id.*; cf. *Lukumi*, 508 U.S. at 537 (prohibiting an "individualized governmental assessment of the reasons for the relevant conduct" (quoting *Smith,* 494 U.S. at 884)). Thus, the Commission can decide that a pharmacy that failed to order enough Plan B (as Walgreens, Sav-On, and Albertsons did) is in "good faith" compliance with the Stocking Rule, but a religiously motivated pharmacy like Ralph's is not.

Finally, the Delivery Rule includes an exemption not only for "good faith" compliance with the Stocking Rule, but also for any conduct that is "substantially similar" to other exempted conduct. Several Commission witnesses testified that this language was added precisely to give the Commission "wiggle room" to grant additional exemptions. App.134-36a, 212-213a, 221a, 354a. And as the district court found, the only way to apply this provision is to "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. App.220a. Thus, the Commission has "unfettered discretion" to decide that a pharmacy's decision not to stock Plan B for business reasons is "substantially similar" to other exempted conduct, but a religious decision is not. App.88a.

Given these three open-ended provisions, the district court rightly held that the Regulations are "significantly more problematic" than the Regulations struck down in *Blackhawk* and *Axson-Flynn*. App.222a. But the Ninth Circuit ignored

these cases. It simply averred that the Regulations do not create a system of individualized exemptions because "the provisions are tied to particularized, objective criteria." App.34a. As the district court found, not only are there no "objective criteria" constraining the Commission's discretion, but "the stocking rule appears to be nothing but individualized exemptions, and the delivery rule mandates individualized exemptions on its face." App.223a, 87-88a.

The Ninth Circuit's ruling also misses the point: The legal question in the other circuits is not simply whether the law includes objective criteria, but whether those criteria allow the government to make "case-by-case inquiries" into "the reasons for the relevant conduct." *Axson-Flynn*, 356 F.3d at 1297; *Blackhawk*, 381 F.3d. at 207. That the State makes such case-by-case inquiries is undisputed here. Thus, the Ninth Circuit's decision squarely conflicts with the rulings of the Third, Sixth, and Tenth Circuits.

B. The Ninth Circuit's decision conflicts with the Third Circuit on the relevance of evidence of selective enforcement against religious conduct.

The Ninth Circuit's decision also conflicts with the Third Circuit on the question of whether even a facially neutral and generally applicable rule is subject to strict scrutiny due to selective enforcement. In *Tenafly Eruv Association, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002), the court considered a city ordinance that banned the placement of any materials on public utility poles. It

was undisputed that this ordinance was neutral and generally applicable on its face. But in practice, the city had not enforced the ordinance absent a complaint. The city had done nothing to prohibit common directional signs, lost animal signs, or holiday decorations. But reacting to "vehement objections" from local residents, the city prohibited *lechis* placed by Orthodox Jews. The Third Circuit held that the government's "invocation of the often-dormant Ordinance" against religious items triggered strict scrutiny. *Id.* at 168.

Likewise, in this case, it is undisputed that the Commission has done nothing to enforce the Regulations against widespread referrals for secular reasons. No secular referral has ever been found in violation of the Regulations, even though the district court found that such referrals are well-known. App.225a, 231a. But when abortion-rights activists filed complaints against Ralph's, the Commission stated that they were in "outright defiance" of the Regulations. Indeed, even when abortion-rights activists filed complaints against pharmacies that failed to stock Plan B for *secular* reasons, the Commission deemed those pharmacies to be in compliance with the Regulations and rejected the complaints. App.184a. Based on this evidence, the district court held that Petitioners had "establish[ed] selective enforcement under *Tenafly*." App.231a.

Without ever mentioning *Tenafly*, the Ninth Circuit held that there was no selective enforcement because "[t]he Commission enforces the [Regulations] through a complaint-driven process," and the Commission has not received any complaints

about "similarly situated, secularly motivated [conduct]." App.37-38a. This holding not only ignores the district court's factual findings that this testimony was "implausible and not credible," App.176a, it also squarely conflicts with *Tenafly*, where the city also enforced its ordinance in response to "vehement objections," and there was no evidence that the city had received any complaints about similarly situated, secularly motivated conduct. 309 F.3d at 151-53. Indeed, this case is far stronger than *Tenafly*, because there is direct evidence of discriminatory intent: The Commission's Chairman vowed that he was "never going to vote to allow religion as a valid reason for facilitated referral," and said that conscientious objectors are engaged in "immoral" "sex discrimination" and should be prosecuted "to the full extent of the law," among other hostile statements. App.145a, 186-87a, App. 367a.

In any event, as the district court found, the Commission's reliance on citizen complaints "only made the selective enforcement problem worse." App.228a. It found that before adopting the Regulations, the Commission was well aware that "pro-choice groups have conducted an active campaign to [file complaints against] pharmacies and pharmacists with religious objections to Plan B," but that "[i]n the vast majority of cases, a referral for business reasons is never going to generate a complaint." App.179a. Thus, the natural result of relying on citizen complaints was "a severely disproportionate number of investigations directed at religious objections to Plan B." App.228a. From 2006-2008, Ralph's was 700 times more likely to be

investigated than any other pharmacy. App.179-80a n.174.

C. The Ninth Circuit's decision conflicts with the Seventh and Eighth Circuits on the use of a law's historical background to show a lack of neutrality.

The Ninth Circuit's decision also conflicts with the Seventh and Eighth Circuits on the question of whether courts can assess the neutrality of a law by examining its "historical background." *Lukumi*, 508 U.S. at 540. Of course, evidence of hostility in the historical background of a law is not *necessary* to establish a violation of the First Amendment. In *Lukumi* itself, nine Justices found a free exercise violation, while only Justices Kennedy and Stevens proceeded to analyze the law's historical background. *Id.* But "[p]roof of hostility or discriminatory motivation may be *sufficient* to prove that a challenged governmental action is not neutral." *Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (emphasis added). And considering such evidence is consistent with this Court's approach under the Establishment and Equal Protection Clauses. *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 594-95 (1987); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 489 (1997).

Following Justice Kennedy's analysis in *Lukumi*, the Seventh and Eighth Circuits have expressly held that courts must consider a law's historical background in deciding whether it is neutral. *See St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 633 (7th Cir. 2007) ("[W]e must look at

. . . the 'historical background of the decision under challenge'") (quoting *Lukumi*, 508 U.S. at 540); *CHILD, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (8th Cir. 2000) (lack of neutrality "can be evidenced by objective factors such as the law's legislative history") (citing *Lukumi,* 508 U.S. at 535, 540). Two more circuits—the First and Sixth—have also considered evidence of historical background without expressly treating Justice Kennedy's analysis of historical background as controlling. *See Wirzburger v. Galvin*, 412 F.3d 271, 281-82 (1st Cir. 2005) (considering "evidence of animus against Catholics in Massachusetts in 1855 when the [law] was passed"); *Prater v. City of Burnside*, 289 F.3d 417, 429-30 (6th Cir. 2002) (relying on historical allegations and legislative history).

By contrast, the Ninth Circuit simply pretended that the extensive record of the Regulations' historical background did not exist. It also rejected the district court's factual finding of discriminatory intent, even though it was supposed to accord that finding "great deference on appeal." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (quoting *Hernandez v. New York*, 500 U.S. 352, 364 (1991)). As the district court found, the record includes "abundant" and "voluminous" evidence of discriminatory intent—including "reams of emails, memoranda, and letters between the Governor's representatives, Pharmacy [Commission] members, and advocacy groups" demonstrating that the Regulations were "aimed at Plan B and conscientious objectors from their inception." App.57a, 140a, 242a. The Governor asked her advisors to ensure that the Regulations were "clean

enough for the advocates re: conscious/moral issues." App.58a, 130a, 244a. To make sure they passed, she replaced Commission members with those recommended by Planned Parenthood. App.137-38a. The Executive Director admitted that the Commission was trying to "draft language to allow facilitating a referral for only . . . non-moral or non-religious reasons." App.59a, 131a. The Commission's own publications described "the issue" addressed by the Regulations as "emergency contraception" and "reasons of conscience." App. 139a, 369-72a. The Commission's Chairman vowed "never" to vote "to allow religion as a valid reason for a facilitated referral." App.145a, 407a. And the Commission's own witnesses admitted that "the object of the rule was ending refusals for conscientious objection." App.359a, 140a. As the district court explained: "Literally all of the evidence," except *post hoc* testimony by State witnesses, "demonstrates that the 2007 rulemaking was undertaken primarily (if not solely) to ensure that religious objectors would be required to stock and dispense Plan B." App.91a.

That is not religiously neutral under the Seventh and Eighth Circuits' approach. It is as if, in *Lukumi*, the mayor asked his advisors to make sure the ordinance was "clean enough" on "Santeria sacrifice issues"; the city attorney admitted that he was trying to "draft language to allow animal killing for only non-religious reasons"; the council chairman vowed "never to vote to allow Santeria sacrifice as a valid reason for animal killing"; and city officials admitted that "the object of the rule was ending Santeria sacrifice." The Ninth Circuit's holding that "[n]othing in the record" shows discriminatory intent

is absurd (App.28a) and plainly conflicts with rulings by other circuits.

III. This case is a clean vehicle to resolve critical questions of free exercise law and to preserve the national consensus on an issue of exceptional importance.

This case is an ideal vehicle to address these critical questions of free exercise law. The record is fully developed after a twelve-day bench trial. The parties have stipulated that facilitated referrals "do not pose a threat to timely access to lawfully prescribed medications," "includ[ing] Plan B." App.142a. And there is no evidence that any of Petitioners' customers has ever been denied timely access to any drug. App.147. This fatally undermines the State's ability to "identify an actual problem in need of solving." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (quotation omitted).

If the Ninth Circuit's decision stands, it will be the first time that health care professionals have been forced to participate in what they consider to be an abortion. This would dramatically shift the balance struck in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850-51 (1992), contradict forty years of statutory conscience protections in the area of abortion and family planning, and rob Petitioners of their dignity by denying them the ability "to establish [their] religious (or nonreligious) self-definition in the political, civil, and economic life of our larger community." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring).

The Ninth Circuit's decision also threatens all religious minorities. If these Regulations are neutral and generally applicable—when they are riddled with exemptions for secular conduct, when they have never been applied to anything but religious conduct, when the government has stipulated that the religious conduct is harmless, and when there is overwhelming evidence of discriminatory intent—then any law can be upheld as neutral and generally applicable. That cannot be the meaning of the Free Exercise Clause. The Ninth Circuit's decision is truly radical, grossly out of step with the jurisprudence of this Court and other circuits, and demands this Court's review.

CONCLUSION

The petition should be granted.

Respectfully submitted.

Luke W. Goodrich
Hannah C. Smith
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave., Ste. 700
Washington, D.C. 20036
(202) 955-0095

Steven T. O'Ban
ELLIS, LI & MCKINSTRY PLLC
2025 First Ave., Pent. A
Seattle, WA 98121-3125

Kristen K. Waggoner
Counsel of Record
David A. Cortman
Rory T. Gray
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
kwaggoner@ADFlegal.org

Michael W. McConnell
559 Nathan Abbott Way
Stanford, CA 94305

Counsel for Petitioners

JANUARY 4, 2016