Honorable Ronald B. Leighton
Trial Date: November 28, 2011

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

STORMANS, INCORPORATED, et al.,

Plaintiffs,

vs.

MARY SELECKY, Secretary of the Washington State Department of Health, et al.,

Defendants,

and

JUDITH BILLINGS, et al.,

Intervenors.

Civil Action No. C07-5374 RBL

PLAINTIFFS' TRIAL BRIEF

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INTRODUCTION

Every day, hundreds of pharmacies in Washington receive requests for drugs that are not in stock. Every day, those pharmacies offer to obtain the drugs from other sources, or to refer patients to a nearby pharmacy. Referral is often the quickest and most convenient way for patients to obtain their medications. Referrals are as old as the practice of pharmacy itself; they occur for a wide variety of reasons; and they are fully consistent with timely access to medication.

But in recent years, one particular 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 at the same time permitting a wide variety of referrals that pharmacies have long engaged in for secular reasons. The answer, under the Free Exercise and Due Process Clauses of the Constitution, is "no."

* * * * *

Plaintiffs are family pharmacy owners and two individual pharmacists, whose religious beliefs forbid them from stocking and 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 nearby pharmacies that dispense it—just as they refer customers to nearby pharmacies when any other drug is not in stock. Plaintiffs have engaged in referrals for many years, and no customer has ever reported being unable to obtain Plan B (or any other drug) in a timely fashion.

Nevertheless, in 2007, the Board of Pharmacy adopted new Regulations that restrict Plaintiffs' ability to refer patients elsewhere for reasons of conscience. Specifically, the Regulations require all pharmacies "to deliver lawfully prescribed drugs . . . in a timely manner," subject to a variety of exceptions. WAC 246-869-010. The exceptions permit pharmacies to refer patients for a wide

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variety of business, convenience, and other secular reasons, but not for reasons of conscience. Thus, in practice, Plaintiffs' religious practices are forbidden, but a wide variety of analogous secular practices are permitted.

That is a violation of the Free Exercise Clause. Under the Free Exercise Clause, a law burdening religious conduct is subject to strict scrutiny unless it is "neutral" and "generally applicable." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). Here, the Regulations are not neutral or generally applicable for five independent reasons.

First, the Regulations are not generally applicable because they create *categorical exemptions* for secular conduct, but not for analogous religious conduct. For example, pharmacies are categorically permitted to decline to stock or dispense drugs when they have business or convenience-based reasons for doing so—such as when the drug has a short shelf-life, requires additional paperwork, or falls outside the pharmacy's chosen business niche. But they are categorically prohibited from engaging in the same conduct for reasons of conscience. Thus, the Regulations represent a "value judgment in favor of secular motivations, but not religious motivations," and are therefore not generally applicable. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999)(Alito, J.).

Second, the Regulations are not generally applicable because they give the government broad discretion to grant *individualized exemptions* on a case-by-case basis. Some provisions in the Regulations are open-ended, requiring the government to interpret them on a case-by-case basis. Other provisions are widely violated in practice, but the government turns a blind eye, thus creating exemptions on an *ad hoc* basis. Either way, the government has broad discretion to create exemptions based on an "individualized . . . assessment of the reasons

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for the relevant conduct"—thus rendering the Regulations not generally applicable. *Lukumi*, 508 U.S. at 537 (quoting *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990)); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 207-12 (3d Cir. 2004).

Third, the Regulations are not generally applicable because they have been *selectively enforced* against religious conduct. The requirement to "deliver lawfully prescribed drugs . . . in a timely manner" has been on the books for over four years, WAC 246-869-010, but it has never been enforced against any conduct except conscientious objections to Plan B. More importantly, the requirement to stock "a representative assortment of drugs" has been on the books for over *twenty-five years*, WAC 246-869-150, but *no pharmacy* has *ever* been investigated or cited for violating it—except when Plaintiffs' asserted a conscientious objection to stocking Plan B. Such selective enforcement defeats any claim that the Regulations are neutral or generally applicable. *See Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011); *Tenafly Eruv Ass'n. Inc. v. Borough of Tenafly*, 309 F.3d 144, 167-72 (3d Cir. 2002).

Fourth, the Regulations are not neutral because, like the ordinances in *Lukumi*, they have been *gerrymandered* to apply almost exclusively to religious conduct. Because of the many secular exemptions, "the burden of the [Regulations], in practical terms, falls on [conscientious objectors] but almost no others." *Lukumi*, 508 U.S. at 536. Indeed, the Regulations have *never* been enforced against *any* secular conduct. On top of that, the Regulations prohibit conscience-based referrals even when there is *no evidence* that such referrals prevent timely access to Plan B, and even when the government has *stipulated* that such referrals are fully consistent with timely access to Plan B. Such "'gratuitous restrictions' on religious conduct" further demonstrate that the

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Regulations improperly target conscientious objections to Plan B. *Lukumi*, 508 U.S. at 538.

Fifth, the Regulations are not neutral because, as shown by their historical background, they were enacted with *discriminatory intent*. Abundant evidence demonstrates that the Regulations were not the product of a disinterested regulatory process focused on access to medication; rather, they were an attempt to suppress conscientious objections to Plan B. That is clear from the events preceding the Regulations' enactment; from the actions taken by the Governor and Planned Parenthood to manipulate the process; and from the internal deliberations of the Board of Pharmacy itself. Although an intent to suppress religious conduct is not *necessary* to prove a violation of the Free Exercise Clause, *Lukumi*, U.S. at 540-42, that intent makes this case all the more egregious.

Because the Regulations are not neutral or generally applicable, they are subject to strict scrutiny—that is, they must be narrowly tailored to further a compelling governmental interest. *Lukumi*, 508 U.S. at 546-47. But the Regulations cannot even come close to satisfying that test. First, the Regulations are not narrowly tailored because they are grossly overbroad; that is, they prohibit far more religious conduct than is necessary to achieve the alleged goal of timely access to medication. Not only has the government presented *no evidence* that conscience-based referrals pose a threat to timely access to Plan B, but it has stipulated the opposite: "[F]acilitated referrals *do not* pose a threat to timely access to lawfully prescribed medications . . . includ[ing] Plan B." Dkt. #441, ¶ 1.5 (emphasis added). Second, the Regulations are grossly underinclusive, permitting a wide variety of secular referrals that pose a far greater threat to access than conscience-based referrals ever could. Finally, the Regulations actually *undermine* the alleged goal of access to medication by

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driving conscientious pharmacies and pharmacists out of the profession. Accordingly, the Regulations cannot satisfy strict scrutiny.

In addition to the Free Exercise Clause, the Regulations are also preempted under the Supremacy Clause because they conflict with Title VII. Title VII requires employers to make reasonable accommodations for their employee's religious beliefs. In the pharmacy context, that has typically meant that employers accommodate the conscientious objections of individual pharmacists by allowing them to refer patients to another pharmacy. But the Regulations in many cases make this accommodation of religious beliefs illegal. Thus, they conflict with Title VII.

Finally, the Regulations violate Plaintiffs fundamental right under the Due Process Clause to refrain from taking human life. That right is not only "deeply rooted in this Nation's history and tradition," *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), it is far more deeply rooted than other rights the Supreme Court has recognized. It was first protected in the colonial era in the context of compulsory military service, and it has naturally and promptly arisen in every context where it has been threatened—including health care. For example, no state requires health care practitioners to participate in assisted suicide; no state requires health care practitioners to participate in capital punishment; and no state requires health care practitioners to participate in an abortion. Indeed, no state has ever gone as far as Washington in requiring pharmacies and pharmacists to participate in the destruction of human life. And Defendants cannot point to a single example in our nation's history where the right to refrain from taking human life has been systematically compromised. In short, the Regulations, by forcing health care practitioners to participate in the destruction of human life, are truly unprecedented and unconstitutional.

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FACTS

I. The regulation of pharmacy before the 2007 Regulations

This case centers on Regulations governing the practice of pharmacy. In order to understand those Regulations, it is necessary to understand basic facts about the business of pharmacy—in particular, how pharmacies and pharmacists make decisions about which drugs to stock, and when pharmacies refer patients to another pharmacy to obtain a drug.

A. Pharmacies have broad discretion to decide which drugs to stock

The business of pharmacy is complex. There are over 6,000 FDA-approved drugs, and no pharmacy stocks them all. As the Board of Pharmacy has acknowledged, pharmacies "simply do not have the storage capacity" to stock all of the drugs their patients' need.[1] Thus, every pharmacy has to make decisions about which drugs to stock.

Pharmacies decide which drugs to stock based on a variety of factors. For example, pharmacies must balance a drug's up-front expense, its shelf life, the frequency with which patients request the drug, insurance reimbursement amounts, monitoring and training requirements, and inventory carrying costs.[2] A pharmacy's inventory often varies based upon the size and resources of the pharmacy. Some pharmacies choose not to stock drugs because of administrative costs—for example, a drug may require additional recordkeeping, patient monitoring, or pharmacist involvement. And some pharmacies choose to focus on particular niche markets, stocking only those drugs that fall into the niche they have chosen.

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[1] Ex. 343 (Board AAG Joyce Roper 2010 email).
[2] Ex. 297, pp. 1, 4 (2009 memo from Board Chair Al Linggi); Ex. 343 (Roper 2010 email); Ex. 405 (Roper 2010 letter).

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Accordingly, the Board's regulations have long given pharmacies broad discretion to decide which drugs to stock. The primary regulation applicable to stocking decisions is WAC 246-869-150(1) (the "Stocking Rule"). It provides: "The pharmacy must maintain at all times a representative assortment of drugs in order to meet the pharmaceutical needs of its patients." *Id.* Although the Stocking Rule has been part of the Board's regulations for over twenty-five years, the Board makes no effort to police compliance, and no pharmacy has ever been investigated or cited for violating it (except Plaintiffs' pharmacy).[3] Thus, in practice, both before and after the 2007 Regulations, pharmacies have enjoyed essentially unlimited discretion to decide which drugs to stock, except in the case of declining to stock emergency contraceptives for religious reasons.

B. Pharmacies engage in referral for a wide variety of reasons.

Pharmacies also enjoy broad discretion to decide which patients to serve and when to refer patients to another pharmacy. In part, this comes from the default common law rule, which provides that, absent a statute to the contrary, "[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.

More importantly, because pharmacies stock only a fraction of all FDA-approved drugs, they routinely receive requests from customers for a drug that is out of stock. When a pharmacy receives a request for a drug that is out–of-stock, the standard practice is to do one of three things: (1) obtain the drug for the customer (for example, by ordering it, and asking the patient to return to pick it up later); (2) return the unfilled prescription to the customer; or (3) refer the customer to another pharmacy that will fill the patient's prescription.

[3] Deposition of Rule 30(b)(6) designee, Board Executive Director and former Board member Susan Boyer, 45:17-48:12, Sept. 1, 2011 ("Rule 30(b)(6) Boyer Dep."); Ex. 142 (Saxe 2006 email).

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BOP witnesses have repeatedly acknowledged that referral is a common method for dealing with an out-of-stock drug—in fact, it occurs every day.[4] Referral helps ensure that the patient receives the medication in a timely fashion, because ordering the drug or trying to borrow it from another pharmacy often takes even longer. As the government has stipulated: "[R]eferral is a time-honored pharmacy practice, it continues to occur for many reasons, and [it] is often the most effective means to meet the patient's request when a pharmacy or pharmacist is unable or unwilling to provide the requested medication or when the pharmacy is out of stock of medication." Dkt. #441, ¶ 1.5.

C. Referrals for reasons of conscience have been permitted in Washington.

Before the Board issued the new Regulations in 2007, pharmacies also commonly engaged in referral for reasons of conscience. Conscience-based referrals have long been supported by Washington law.

In 1995, for example, when the Washington legislature enacted the Basic Health Care law, it also enacted broad statutory protections for the right of conscience:

> (1) The legislature recognizes that every individual possesses a fundamental right to exercise their religious beliefs and conscience. . . .
>
> (2)(a) No individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstances to participate in the provision of or payment for a specific service if they object to so doing for reason of conscience or religion. No person may be discriminated against in employment or professional privileges because of such objection.

RCW 48.43.065(1)-(2)(a); *see also* 70.47.160(1)-(2)(a).

[4]Deposition of former Board Chair, Asaad Awan 17:12-18:4; 58:18-59:4, Jan. 26, 2009 ("Awan Dep."); Rule 30(b)(6) Linggi Dep., 130:19-131:1; Ex. 380 (former Board Chair Harris 2010 email), Ex. 359 (Department of Health 2010 letter to Senator Keiser).

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Under the Basic Health Care law, insurers were required to offer a minimum health care package. The statutory conscience protections were intended to protect religious carriers, employers, and health care providers from being compelled to pay for or offer medical services for which they have a conscientious objection.

Although portions of the Basic Health Care law were repealed, the conscience protection remains in full force. The State Insurance Commissioner, for example, takes the position that all insurers must accommodate all health care providers, including pharmacists, who decline to provide a medical service for reasons of conscience. The Insurance Commissioner has further taken the position that referral is an appropriate mechanism to ensure timely access to health care while accommodating conscientious objectors, including pharmacists who conscientiously object to dispensing Plan B.[5]

The right to engage in referral for reasons of conscience has also long been endorsed by the Washington State Pharmacy Association.[6] Similarly, both before and after promulgating the 2007 Regulations, the Board of Pharmacy endorsed the right to refer for reasons of conscience.[7] Consistent with customary pharmacy practice, the government has stipulated that facilitated referrals—including referrals for reasons of conscience—"are often in the best interest of patients, . . . do not pose a threat to timely access to lawfully prescribed medications, and . . . help assure timely access to lawfully prescribed medications[,] . . . includ[ing] Plan B." Dkt. #441, ¶ 1.6.

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[5] Insurance Commissioner's Rule 30(b)(6) designee, Elizabeth Berendt, 21:11-25:6; 27:12-25; 34:5-24; 37:11-38:2 ("Insurance Rule 30(b)(6) Berendt Dep.")
[6] Ex. 38 (WSPA January 2006 presentation); Ex. 449 (WSPA current statement).
[7] *See e.g.* Ex. 11 (Email from Board Executive Director Steven Saxe); Ex. 24 (October 2005 Board newsletter); Ex. 348 (Stipulation).

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D. Referrals for reasons of conscience are permitted in the vast majority of states.

Conscience-based referrals are also permitted by law in the vast majority of states. In 1998, the American Pharmacists Association adopted a policy expressly approving of conscience-based referrals. 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."[8] (emphasis added). That statement has long been embodied in state pharmacy laws, and conscience-based referrals have long been an ordinary, protected part of the pharmacy profession.

In early 2005, however, the issue of conscience-based referrals for Plan B began receiving increased media attention. Pro-choice groups launched national and state-level campaigns—with names like "Who Invited the Pharmacist" and "Fill My Pills Now"[9]—to press for legislation banning the practice. A handful of states adopted various measures in response.[10] In Illinois, for example, Governor Rod Blagojevich signed an emergency rule in early 2005 that required pharmacists to dispense Plan B if their pharmacies stocked any form of contraception. After Governor Blagojevich issued his rule, Planned Parenthood and Northwest Women's Law Center informed Board officials that they, too, were considering legislation to prohibit refusals based on "moral/religious views."[11]

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[8] Ex. 15, p. 2. *See also* Ex. 280 (APhA Policy Book, October 2007).

[9] *See e.g.,* Ex. 422 (Planned Parenthood Federation of America), Ex. 448 (Planned Parenthood Western Washington) Ex. 421 (ACLU).

[10] Rob Stein, *Pharmacists' Right at Front of Debate*, WASH. POST, Mar. 28, 2005, at A01, available at http://www.washingtonpost.com/wp-dyn/articles/A5490-2005Mar27.html; In 2005 alone, state legislatures considered more than 20 bills aimed at addressing the situation. Nate Anderson, *Pharmacists with No Plan B*, CHRISTIANITY TODAY, (AUGUST 2006), available at (http://www.christianitytoday.com/ct/2006/august/31.44.html).

[11] Ex. 13 (Former Board Executive Director Saxe email).

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To date, seven states (besides Washington) have adopted a law or policy limiting conscience-based referrals to some degree or another. However, no other state has clearly gone as far as Washington in requiring pharmacies to stock Plan B.

California imposes a general obligation on pharmacists to dispense lawfully prescribed drugs. Cal. Bus. & Prof. Code § 733. But unlike Washington, California expressly protects referrals in certain circumstances based on "ethical, moral, or religious grounds," *id.* § 733(b)(3), and it does not impose a duty on pharmacies to *stock* Plan B. Thus, Plaintiffs' conduct could be accommodated in California by the simple decision not to stock Plan B.

Two states—New Jersey and Wisconsin—impose a duty on *pharmacies* to dispense drugs, including Plan B, in a timely manner. N.J. Stat. Ann. § 45:14-67.1; Wis. Stat. Ann. § 450.095 ("lawfully prescribed contraceptive drugs"). But unlike Washington, neither state imposes a duty on pharmacies to *stock* Plan B. In fact, New Jersey expressly protects referral in the case of a pharmacy that "does not carry a prescription drug or device." N.J. Stat. Ann. § 45:14-67.1(c). Thus, Plaintiffs' conduct could also be accommodated in New Jersey and Wisconsin by the decision not to stock Plan B.

Three states—Maine, Massachusetts, and Nevada—impose a duty on *individual pharmacists* to fill lawful prescriptions with a few narrow exceptions. 02-392 Me. Code R. ch. 19 § 11; Nev. Admin. Code § 639.753. But again, unlike Washington, these states do not require pharmacies to *stock* Plan B.[12] Thus,

[12] Massachusetts appears to have a stocking rule, 247 Mass. Code Regs. 6.02(4), which the pharmacy board has interpreted to require Wal-Mart pharmacies to stock emergency contraception. But it is unclear how this rule applies in practice or whether the Board's interpretation applies to smaller pharmacies in different communities. Defendants may also argue that these laws go further than Washington because they impose a duty on the *pharmacist*, not just the *pharmacy*. But in these states, it is possible to accommodate both pharmacists

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Plaintiffs' conduct could also be accommodated in Maine, Massachusetts, and Nevada.

The only state with regulations comparable to Washington is Illinois, which based its regulations on Washington's, and copied the text and structure of the Regulations largely verbatim. *See* 68 Ill. Adm. Code § 1330.500(e). But the Illinois regulations were recently struck down by an Illinois 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. 7th Jud. Cir. 04/05/11). (The decision is attached for the Court's convenience.)

In short, no state currently goes as far as Washington in requiring pharmacies to stock and dispense Plan B. The vast majority of states (42) leave pharmacies complete discretion to decide whether to stock Plan B and when to refer patients elsewhere. Although six states have imposed delivery obligations on pharmacies or pharmacists to some degree or another, none goes as far as Washington. And the only state that has clearly gone as far as Washington—Illinois—had its regulations struck down as unconstitutional.

II. Access to medications before the 2007 Regulations

Washington's pre-2007 policy, which permitted conscience-based referrals for Plan B, was fully consistent with timely access to Plan B.

A. Plan B is widely available.

Washington has long been a leader in promoting access to Plan B. It was the first state in the nation to permit pharmacists to prescribe the drug, and it has some of the highest Plan B sales in the nation.

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and pharmacies by not stocking Plan B; in Washington, both pharmacists and pharmacies face unavoidable conflicts of conscience.

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In 2006, Plan B became available to anyone over age sixteen without a prescription. Since then, Plan B's sales have more than doubled.[13] Plan B is widely available at pharmacies, doctors' offices, government health centers, emergency rooms, Planned Parenthood, and a toll-free hotline. It is also available for overnight delivery via the Internet.

B. There is no problem of access to Plan B or any other time-sensitive medication.

Throughout the 2007 rulemaking process, and despite the canvassing efforts of pro-choice groups,[14] Board officials have been unable to provide any evidence of any patients who were unable to obtain timely access to Plan B or any other time-sensitive medication because of an objection.[15] Nor have Board witnesses identified a community or area in the state with an access problem to time-sensitive drugs. During the rulemaking process, the Board conducted a survey focused on access to Plan B. That survey showed that 77% of all Washington pharmacies stock Plan B. Of the remaining 23%, only 2% cited religious objections, while 21% claimed low demand, an easy alternative source, or a decision not to stock because the facility was a hospital or niche pharmacy.[16]

C. Plaintiffs have not impeded access to Plan B or *Ella*.

Plaintiffs' practices are also fully consistent with timely access to Plan B and *ella*. When they receive a request for either drug, Plaintiffs refer patients to one of dozens of nearby pharmacies that stock the drug. There is *no evidence* that

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[13] *See e.g.,* Ex. 41 (Memo from Don Downing); Ex 138, 211 (WSPA Pharmacist Access Facts).
[14] *See e.g.,* Ex. 448 ("Has your pharmacist said, 'No?" campaign).
[15] *See e.g*., Deposition of Rule 30(b)(6) designee, former Board Executive Director Lisa Salmi, 79:20-80:8 Sept. 25, 2008 ("Rule 30(b)(6) Dep."), Insurance Rule 30(b)(6) Berendt Dep., 28:8-11; 30:7-17.
[16] Ex. 432 (October 2006 BOP Survey).

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any of Plaintiffs' patients has *ever* been unable to obtain timely access to Plan B or *ella*.

III. The development of the 2007 Regulations

A. Planned Parenthood seeks a rule prohibiting conscientious objections to Plan B.

In early 2005, Illinois Governor Rod Blagojevich signed an emergency rule requiring pharmacists to dispense Plan B despite any conscientious objections to doing so. Shortly thereafter, Planned Parenthood and Northwest Women's Law Center (collectively referred to as "Planned Parenthood") met with Christina Hulet, Governor Gregoire's senior health policy advisor, to seek support for a similar rule.[17] The Governor's staff and Planned Parenthood then contacted Steven Saxe, the Executive Director of the Board of Pharmacy, to raise the issue of conscientious objections to Plan B.

B. The Board supports the right of conscience.

Saxe and the Board expressed support for the right of conscience. In an April 4, 2005 email, Saxe forwarded information about Governor Blagojevich's order to the Board, and advised the Board that referrals were permitted.[18] Similarly, after Planned Parenthood sent a letter to the Board raising the issue of conscientious objections to Plan B,[19] Saxe prepared a memorandum for the Board addressing the subject.[20] At an August 2005 Board meeting, which both Hulet and Planned Parenthood attended, the Board confirmed it would continue its practice of permitting referrals for reasons of conscience.[21]

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[17] Ex. 19 (Hulet notes).
[18] Ex. 6 (Saxe email)
[19] Ex. 17, p. 4 (Letter from Planned Parenthood/Northwest Women's Law Center).
[20] Ex. 16, 18 (Saxe memo with forward to Hulet).
[21] Ex. 20 (Board minutes).

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C. The Governor appoints a Planned Parenthood member to the Board.

In January 2006, Planned Parenthood met again with Hulet and the Governor herself. Planned Parenthood complained about support for conscience rights, and the Governor agreed to appoint Rosemary Duffy—a former board member of a Planned Parenthood affiliate—to the Board. The Governor also sent the Board a letter expressing her position on conscientious objection,[22] and they agreed that Planned Parenthood would collect refusal stories.[23]

D. The Board initiates the rulemaking process.

At the January 2006 Board meeting, the State Pharmacy Association recommended that the Board affirm the discretion of pharmacists to refer patients elsewhere for reasons of business or conscience. It also opposed lecturing patients, destroying prescriptions, and refusing to return prescriptions.[24] The Board voted to begin the rulemaking process to clarify that the Board had the authority to discipline pharmacists for such conduct.[25]

E. The Governor considers how to circumvent the Board, and the Human Rights Commission intervenes.

In March 2006, Hulet concluded that the Board was unlikely to vote "in favor of the Governor's position."[26] Thus, the Governor's Office began discussing whether it could issue an emergency rule or order prohibiting conscience-based referrals . The Board's attorney, Joyce Roper, advised Hulet that emergency rules could be issued only if the rule was necessary to protect the public welfare or

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[22] Ex. 34 (Governor's letter and staff email to Planned Parenthood); Ex. 36 (Hulet email re Duffy).
[23] Ex. 32 (Planned Parenthood letter to Governor).
[24] The Board was not aware of any incidents involving lecturing or destroying or refusing to return prescriptions in Washington.
[25] Ex 37, pp. 5-7 (Board minutes).
[26] Ex. 49 (Hulet email).

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safety. Both Roper and Hulet agreed that there was insufficient evidence to meet that standard with respect to conscientious objections to Plan B.[27]

Hulet then urged Planned Parenthood to contact the Human Rights Commission. On April 17, 2006, HRC sent a letter to the Board, reviewed in advance by Planned Parenthood, asserting that conscientious objections to Plan B were a form of unlawful discrimination: "It is the position of the WSHRC that allowing pharmacists to discriminate, based on their personal religious beliefs, against women and others trying to fill lawful prescriptions would be discriminatory, unlawful, and against good public policy and the public interest."[28] The letter also threatened Board members with personal liability under antidiscrimination laws if they voted to protect conscientious objections to Plan B.

F. The Board votes against the Governor's rule and in favor of a pro-conscience rule.

In April 2006, the Board held public hearings. The testimony and evidence at the hearings focused almost exclusively on conscientious objections to Plan B.

After the April hearings, Board staff prepared a draft rule that aligned with the Governor's wishes.[29] The draft permitted referrals for a variety of secular reasons, but prohibited referrals for reasons of conscience. In an email to the Governor's staff, the Governor's General Counsel explained: "Bottom line: the [draft] rule does what we want it to do."[30] Shortly before the Board voted on the draft rule, the Governor sent another letter to the Board reiterating her position

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[27] Ex. 51 (Hulet email); Ex. 55, p. 2 (Hulet notes, "#2-Emergency Rule"); Ex. 53 (Governor's briefing memo).
[28] Ex. 70 (Human Rights Commission letter).
[29] Ex. 78 (Board minutes); Ex. 80 (Saxe email with rule).
[30] Ex. 82 (Mitchell email).

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that prescriptions must be filled without regard for the "personal, religious, or moral objection of individual pharmacists."[31]

At the June 2006 Board meeting, the Board rejected the Governor's favored rule. Instead, the Board voted unanimously in favor of a draft that protected conscientious objection by permitting pharmacists to provide timely alternatives, including referral, and also prohibited pharmacists from obstructing a patient's access to medication.[32]

G. The Governor threatens the Board and advocates a rule prohibiting conscience-based referrals.

On the same day of the vote, Governor Gregoire sent a third letter "strongly oppos[ing] the draft pharmacist refusal rules recommended by the Washington State Board of Pharmacy. . . ."[33] The Governor later publicly explained that she could remove the Board members if need be, but she did not "want this to be done like we're in a dictatorship."[34]

Six days later, Planned Parenthood had prepared a new, draft regulation for the Governor.[35] After reviewing the proposed rule, the Governor asked Hulet whether it was "clean enough for the advocates [*i.e.*, Planned Parenthood, NWWLC and NARAL] re: conscious/moral issues."[36] The Governor made clear that she wanted only "legitimate" exemptions in the rule—by which she meant business exemptions.

After reviewing the Governor's draft, Executive Director Steve Saxe made clear that he understood what the Governor meant by "legitimate" exemptions.

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[31] Ex. 101 (Hulet email with Governor letter).
[32] Ex. 102 (Board minutes).
[33] Ex. 104 (Hulet email with Governor letter).
[34] Ex. 96 (transcript); Ex. 117 (article).
[35] Ex. 123 (Planned Parenthood email).
[36] Ex. 139 (Governor briefing memo).

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He suggested: "Would a statement that does not allow a pharmacist/pharmacy the right to refuse for moral or religious judgment be clearer? This would leave intact the ability to decline to dispense (provide alternatives) for most *legitimate* examples raised; clinical, fraud, business, skill, etc."[37] However, Saxe candidly admitted the drafting challenges presented by trying to target religious conduct: "[T]he difficulty is trying to draft language to allow facilitating a referral for *only these non-moral or non-religious reasons*."[38]

To get the new rule approved, the Governor told Hulet to meet jointly with Planned Parenthood, NWWLC, the State Pharmacy Association, Downing, and Dockter. The only pharmacists present—Dockter, Downing, and the Executive Director of the State Pharmacy Association, Rod Shafer—continued to advocate for conscience-based referrals. But Planned Parenthood and the Governor flatly rejected any protections for conscience. Ultimately, Planned Parenthood agreed to permit a variety of business exemptions in exchange for the Pharmacy Association capitulating on its request for conscience protection.

H. The Board approves the Governor's rule.

The Governor's rule was set for a preliminary vote on August 31, 2006. Just days before the vote, the Governor personally called Board Chair Awan. She told Awan that he was "to do [his] job" and to "do the right thing" and that she was going to "roll up her sleeves and put on her boxing gloves."[39]

The Board then approved the Governor's rule by a preliminary vote. Before final approval, the Board was required to prepare a small business economic impact statement. To do so, the Board conducted a survey of pharmacies, which

[37] Ex. 155/158 (Saxe and Department of Health emails) (emphasis added).
[38] Ex. 157 (Saxe email) (emphasis added).
[39] Awan Dep., 72:6-73:3.

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focused entirely on the impact of requiring pharmacies to stock emergency contraceptives and permitting them to accommodate conscientious objectors.[40]

To guarantee final approval of the regulation, the Governor took the unprecedented step of involving her "advocates"—Planned Parenthood, NWWLC and NARAL—in the process of interviewing candidates for the Board. Board Chair Awan, who applied for a second term, testified that his interview focused almost exclusively on the pharmacy refusal issue.[41] His reappointment was opposed by the "advocates," and the Governor declined to reappoint him. The Governor then selected two new candidates recommended by Planned Parenthood, and in April 2007, the Board approved the final Regulations.[42]

IV. The text of the 2007 Regulation

The relevant portion of the Regulations is codified at WAC 246-869-010,[43] which provides, in pertinent part, as follows:

> (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:

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[40] Ex. 432 (Board survey).

[41] Awan Dep., 11:5-13:7, 14:20-24.

[42] Ex. 258 (Board minutes).

[43] Another portion of the Regulations is codified at WAC 246-863-095(4). This portion defines "unprofessional conduct" to include destroying or refusing to return a lawful prescription, violating a patient's privacy, discriminating against a patient, or intimidating or harassing a patient. WAC 246-863-095(4); *see also* WAC 246-869-010(4) (same). Because all of these actions were already prohibited by law, the new Regulations merely clarified that pharmacists could be subjected to professional discipline for engaging in them. This rule is largely uncontroversial and does not apply to Plaintiffs. At the preliminary injunction stage, however, Defendants argued that this rule might also be invoked to prohibit conscience-based referrals. *See* Dkt #43. Defendants no longer appear to take that position. But if they did, WAC 246-863-095 would suffer from the same constitutional infirmities as WAC 246-863-010.

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(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.

WAC 246-869-010(1)-(3).

A. The Delivery Rule

In general, these Regulations impose on pharmacies "a *duty to deliver* lawfully prescribed drugs . . . in a timely manner." WAC 246-869-010(1) (emphasis added) (the "Delivery Rule"). This "Delivery Rule" is then subject to at least seven

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exceptions. Five exceptions are enumerated in WAC 246-869-010(1)(a)-(e). A sixth exception says that pharmacies need not dispense a drug "without payment of their usual and customary or contracted charge." WAC 246-869-010(1)(a)-(e). The seventh exception is a broad, catch-all provision applying to any circumstances that are "substantially similar" to the first five exceptions. WAC 246-869-010(1). These exceptions will be discussed in greater detail below.

One of the most important exceptions is WAC 246-869-010(1)(e). It provides that a pharmacy need not deliver a drug when it is "[u]navailab[le] . . . despite good faith compliance with WAC 246-869-150 [*i.e.*, the Stocking Rule]." *Id.* In other words, pharmacies need not deliver a drug when (a) the drug is "unavailable" (*i.e.*, out of stock), and (b) the pharmacy is in "good faith compliance with [the Stocking Rule]." Thus, the Delivery Rule must be read together with the Stocking Rule.

B. The Stocking Rule

The Stocking Rule has been on the books for over twenty-five years. It provides, in pertinent part: "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). The terms "representative assortment," "pharmaceutical needs," and "patients" have never been defined. The Board has never attempted to enforce the Stocking Rule against any pharmacy for failing to stock a drug (except Ralph's). Thus, in practice, the Stocking Rule gives pharmacies essentially unlimited discretion to decide which drugs to stock. And when a drug is not in stock, pharmacies fall within an exception to the Delivery Rule.

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V. The operation of the 2007 Regulations

The Regulations have now been in force (except with respect to Plaintiffs) for over four years. Under the Regulations, pharmacies still retain broad discretion to decide which drugs to stock, and they still retain broad discretion over when to refer patients to another pharmacy. The only conduct that has been subjected to the Regulations is conscientious objection to Plan B.

A. Pharmacies retain broad discretion to decline to stock drugs for a wide variety of secular reasons.

Since the enactment of the Regulations, pharmacies have continued to exercise broad discretion over which drugs to stock, and they have declined to stock drugs for a wide variety of reasons. One common reason is that the pharmacy believes a drug may be unprofitable. For example:

- Pharmacies decline to stock drugs that have a short shelf-life, because, if the pharmacy is unable to sell a sufficient quantity of the drug in time, the drug may be unprofitable.
- Pharmacies decline to stock drugs when the pharmacy would have to order a larger quantity than the patient requires.
- Pharmacies decline to stock drugs that are expensive or have low demand.

Pharmacies also decline to stock drugs because they believe that it may be inconvenient to do so. For example:

- Pharmacies decline to stock drugs that would require pharmacists to perform simple compounding, such as mixing two creams. It is not that pharmacists are inadequately trained; it is simply that compounding takes more time, and some pharmacies do not want the inconvenience.
- Pharmacies decline to stock drugs (such as Accutane and Clozaril) that would require a pharmacist to monitor a patient's health or register with the drug's manufacturer. Again, it is not that pharmacists lack the training to do so; it is simply that some pharmacies do not want to spend the extra time that may be required.

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- Pharmacies decline to stock certain drugs because dispensing that drug involves additional paperwork and record-keeping requirements.

Pharmacies also routinely decline to stock drugs that fall outside their chosen business niche. For example, some pharmacies specialize in HIV drugs, pediatric drugs, fertility drugs, diabetes drugs, mental health drugs, or long-term care drugs. So, for example, pediatric pharmacies typically do not stock drugs for the elderly; HIV pharmacies typically do not stock cancer drugs; and mental-health pharmacies typically do not stock fertility drugs.

All of these business and convenience-based decisions are expressly permitted under the Regulations or permitted by the Board in practice. All are known to the Board, and none has ever been prohibited by the Regulations in practice.

B. Pharmacies retain broad discretion to engage in facilitated referral for a wide variety of secular reasons.

Pharmacies also retain broad discretion under the Regulations over when to refer patients to another pharmacy. Perhaps the most common reason for referral is that a drug is out of stock. Such referrals have been common practice for many years—both before and after the Regulations—and the Board has never interpreted the Regulations to prohibit them. Rather, the Board has stipulated that referral "is often the most effective means to meet the patient's request . . . when the pharmacy is out of stock of medication." Dkt. #441 ¶ 1.5.

Even when a pharmacy has a drug in stock, it retains discretion to refer patients elsewhere for a variety of secular reasons, including hassles related to reimbursement and forms of payment. These business and convenience-based referrals are known to the Board, and none has ever been prohibited by the Regulations in practice.

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C. The Board has made no effort to enforce the 2007 Regulations against secular referrals or decisions not to stock.

The Board has also made no effort to *enforce* the Regulations against refusals to stock or deliver a drug for secular reasons. Although the Delivery Rule has been in place over four years, and although the Board has been made aware of widespread secular refusals to deliver drugs, it has never initiated an investigation or attempted to enforce compliance with the Regulations.

Similarly, although the Stocking Rule has been in place for over twenty-five years, the Board has never investigated or cited any pharmacy for violating it (except Ralph's). Although the Board inspects pharmacies at least every two years, it makes no effort to determine whether pharmacies have a "representative assortment" of drugs for their patients. Even when the Board has received complaints, it has not attempted to investigate or enforce compliance with the Stocking Rule. From 1997-2008, for example, the Board received over 100 complaints that a pharmacy had declined to dispense a prescription. But there is no evidence that the Board made any effort to investigate these complaints under the Stocking Rule.

D. Pharmacies are prohibited from declining to stock or deliver Plan B or Ella for reasons of conscience.

Thus far, the only conduct that the Board has investigated or treated as a violation of the Regulations is Plaintiffs' conscientious objections to Plan B. According to the Board, a pharmacy violates the Stocking Rule if, after a patient requests Plan B, the pharmacy declines to stock it for reasons of conscience. Thus, Ralph's is prohibited from continuing its practice of declining to stock Plan B and referring patients to nearby pharmacies to obtain the drug.

The Regulations also prohibit many pharmacies from accommodating their *employee's* conscientious objections to Plan B or *Ella*. Pharmacies have

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traditionally accommodated conscientious objectors by allowing referral. But under the new Regulations, all pharmacies must deliver lawfully prescribed drugs. Thus, if a pharmacy has only one pharmacist on duty—as do most Washington pharmacies—that pharmacist must dispense the drug regardless of her conscientious objections to doing so.

Defendants have suggested that pharmacies can accommodate their employees by hiring second pharmacist for each shift or by hiring a second pharmacist to be on-call. These were the only accommodations considered by the Board during the rulemaking process.[44] But the cost of hiring an additional pharmacist or an on-call pharmacist is prohibitively expensive for most pharmacies. Thus, the Regulations would force many pharmacies to terminate conscientious objectors.

Intervenor-Defendants have also proposed that pharmacies could accommodate conscientious objectors by using telepharmacy, an automated dispensing machine, or a pharmacy technician. But the Board has not endorsed any of these alternatives.

Telepharmacy and automated dispensing require special approval from the Board and, for most pharmacies, are prohibitively expensive. Telepharmacy requires a substantial investment in software, computer equipment, and video equipment to ensure the security of medical information and to ensure that the pharmacist supervises all aspects of the transaction. The pharmacy must also provide the patient with a private area to consult with the pharmacist by video-link.[45] An automated dispensing machine is even more expensive than telepharmacy.

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[44] Ex. 432 (Board survey); Ex. 435 (Small Business Economic Impact Statement).
[45] Board's Rule 30(b)(6) designee Tim Fuller, 51:12-52:4, Sept. 20, 2011.

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Pharmacy technicians are prohibited from filling a prescription unless and until a licensed pharmacist has visually verified it. RCW 18.64.250(2); RCW 18.64A.030(1). This is true for a behind-the-counter sales of Plan B as well. Thus, the pharmacy would still have to schedule a second pharmacist to supervise the dispensing pharmacy technician and to be available for consultation with the patient. In short, the Regulations make it prohibitively expensive for many employers to accommodate conscientious objectors.

VI. The effect of the 2007 Regulations on the Plaintiffs

The Regulations have had a severe effect on the Plaintiffs. Although Plaintiffs' religious beliefs prevent them from delivering Plan B, the Regulations would force them to do so, on pain of losing their livelihoods.

A. Plaintiffs' religious beliefs prohibit them from delivering Plan B.

Plaintiffs are Christians who believe that life begins at the moment of conception, when the female ovum and male sperm unite. This belief is deeply rooted in Christian scripture and tradition. The Old Testament psalmist, for example, celebrates the life of the unborn, stating: "You knit me together in my mother's womb, I praise you because I am fearfully and wonderfully made." Psalm 139. Plaintiffs believe that all of human life is uniquely and inherently precious because it is created by God in His image. Genesis 2. Thus, for each plaintiff, participating in the destruction of an unborn human life is an immensely grave evil.

Plaintiffs also believe that dispensing Plan B or *ella* constitutes direct participation in the destruction of human life. Plaintiffs have each reviewed the labeling of Plan B and *ella*, FDA directives regarding Plan B and *ella*, and literature regarding the medical and pharmaceutical debate over the mechanisms of action of Plan B and *ella*. For example, the manufacturers for

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both Plan B and *ella* state that the drugs can prevent implantation, thus resulting in the destruction of a fertilized egg.[46] Similarly, Washington's Emergency Contraception Informed Consent form discloses this mechanism of action when pharmacists prescribe Plan B.[47] Thus, Plaintiffs cannot, in good conscience, deliver Plan B or *ella*. Even if there were doubt about whether Plan B or *ella* could destroy human life, Plaintiffs could not dispense those drugs due to the significant risk that they would be directly participating in the destruction of human life.

B. The Regulations force Plaintiffs to violate their conscience on pain of losing their livelihood.

The Regulations force Plaintiffs to choose between abiding by their consciences or losing their livelihood. Stormans, Incorporated, is a fourth-generation, family owned business that operates Ralph's Thriftway, a grocery store and pharmacy in Olympia. In accordance with the religious beliefs of the Stormans family, Ralph's does not stock Plan B. In the past, when Ralph's received requests for Plan B, it informed customers of the nearby pharmacies where they could purchase the drug and offered to call those pharmacies on the customer's behalf. There are over thirty pharmacies within five miles of Ralph's that stock and dispense Plan B.

After the rulemaking process began, pro-choice activists started targeting Washington pharmacies to determine which ones did not stock Plan B. On July 31, 2006, at least nine women filed complaints alleging that Ralph's did not stock Plan B. They also filed complaints against Walgreen's, Sav-On, and Albertson's. All four pharmacies referred patients to nearby providers.[48]

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[46] Ex. 424, 502 (Plan B information); Ex. 451, 501 (*ella* Patient Information).
[47] Ex. 423 (Informed Consent form).

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In response, the Board initiated investigations. 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 investigations immediately ceased. Ralph's, however, informed the Board that it had a conscientious objection to dispensing Plan B. In response, the investigation has remained open to this day. In addition, the Department of Health filed another complaint and began another investigation against Ralph's after this lawsuit was filed. This Court has enjoined the investigation.

When Ralph's position became public, pro-choice groups organized a boycott and staged regular and ongoing protests against both of the Stormans' grocery stores. The Governor's office joined in the boycott, informing Ralph's that after 16 years of doing business, the Governor's Mansion would no longer purchase groceries there. Ralph's relies heavily on the income and customer traffic generated by the pharmacy. Losing the pharmacy would jeopardize the financial viability of the store.

Plaintiffs Mesler and Thelen have also been significantly harmed by the Regulations. Mesler has practiced in Washington State for over 20 years and currently serves as a pharmacy manager. Thelen has worked as a licensed pharmacist for nearly 40 years. Both pharmacists enjoy their life-long vocations and the opportunity to serve their communities. They both informed their employers when they were hired that they could not dispense Plan B for reasons of conscience. Both are also the only pharmacists on duty during their shifts.

With their employers' permission, Mesler and Thelen referred the few patients seeking Plan B to one of many nearby pharmacies that stock and dispense Plan B. After the Regulations were passed, both employers told Mesler and Thelen that they would not be able to accommodate them by hiring a second

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or on-call pharmacist to work at the same time. Thus, Mesler will likely lose her job if the Regulations stand. Thelen was already constructively discharged as a direct result of the Regulations. For the time being, her new employer has been willing to accommodate her conscientious objection.

VII. The stipulation and the 2010 rulemaking process

This case was initially set for trial on July 28, 2010. Approximately a month before trial, and shortly after their motion for summary judgment had been denied, State Defendants informed Plaintiffs that the Board of Pharmacy wanted to initiate a new rulemaking process and adopt a rule that permitted conscience-based referrals.

According to the Board's Rule 30(b)(6) designee, Chairman Al Linggi, the Board wanted to develop a new rule because it was concerned that the Regulations did not allow enough leeway for referrals. Specifically, the Board wanted to ensure that pharmacies could decline to stock drugs due to their cost, their limited shelf life, their low demand, or their need to be ordered in bulk. And it wanted to ensure that pharmacies had flexibility to refer patients elsewhere for a variety of reasons.[49]

On June 29, 2010, the Board unanimously voted to initiate rulemaking. The Board intended to amend the Regulations to allow "all pharmacies and pharmacists" to engage in facilitated referral for "any reason," including when the pharmacy was "unwilling to stock . . . or timely deliver or dispense lawfully prescribed medications . . . for conscientious reasons."[50] Six Board members attended the June 29 meeting, and a majority of the Board Members voiced

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[49] Rule 30(b)(6) designee Board Chair Al Linggi, Deposition, 113:14-114:12; 115:2-16; 116:12-118:10; 118:20-110:1; 119:21-120:19; 124:10-124, Aug. 29, 2011; *see also* Ex. 297, p. 1 (Linggi memo).

[50] Dkt. #441 ¶ 1.4 (Stipulation); *see also* Ex. 315 (BOP minutes).

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support for referral before the vote. None of the Board members spoke against referral.[51]

State-Defendants then asked Plaintiffs to join their motion to stay the July 28, 2010 trial. In order to secure Plaintiffs' consent—and this Court's approval—Defendants entered a number of binding factual Stipulations regarding the rulemaking process and facilitated referral:

1. The Board voted to commence the rule-making process to amend the Rules to permit facilitated referral for "all pharmacies and pharmacists" when a pharmacy or pharmacist is unable or unwilling to stock or deliver a drug on site for "any reason," including "for conscientious reasons." (¶1.4)[52]

2. Facilitated referral "is a time-honored practice." (¶1.5)

3. Facilitated referral "continues to occur for many reasons." (¶1.5)

4. 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." (¶1.5)

5. 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." (¶1.5)

6. "[P]harmacies and pharmacists should retain the ability to engage in facilitated referrals." (¶1.5)

7. Facilitated referrals "are often in the best interest of patients." (¶1.5)

8. Facilitated referrals "do not pose a threat to timely access to lawfully prescribed medications . . . includ[ing] Plan B." (¶1.5)

[51] Ex. 315 (Board minutes).

[52] Numerical references are to the numbered sections of the Stipulation, Dkt. #441.

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9. Facilitated referrals "help assure timely access to lawfully prescribed medications . . . includ[ing] Plan B." (¶1.5)

(Dkt. #441)

Key State officials reviewed the Stipulation prior to entry on July 12, 2010, including the Secretary of the Department of Health (Mary Selecky), the Assistant Secretary (Karen Jensen), and the Executive Director of the Board of Pharmacy (Susan Teil Boyer). Board witnesses testified that the representations in the Stipulations were accurate and they did not request to revoke them at any time.

The new rulemaking process provoked an immediate outcry from Planned Parenthood and the Governor. Planned Parenthood urged its constituents to contact the Governor, and Governor Gregoire's Legal Counsel "admonished" the State Defendants and their attorneys by letter.[53] The Governor quickly issued a statement opposing facilitated referral[54] and instructed Secretary of Health Mary Selecky to ensure that the Governor's staff testified at the Board's hearing. Despite the Department of Health's initial support for facilitated referral, Secretary Mary Selecky then sent the Board a letter informing them that she "agree[d] with what [they] have heard from Governor Gregoire's office…" and that they should not amend the Regulations.[55]

Shortly thereafter, the Board asked its staff to research the meaning of the Stocking Rule and to confirm that pharmacies need not stock expensive drugs for chronic or complex conditions, that the Regulations "recognize[] that a drug can be out of stock even when a good faith effort at compliance is made"[56] and that "a

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[53] Ex. 320 (Narda Pierce letter).
[54] Ex. 329 (Governor's statement).
[55] Ex. 389 (Selecky letter).
[56] Ex. 403 (AGO letter).

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representative assortment does not mean every drug needed by a pharmacist's patients."[57]

Ultimately, the Board voted 5-1-1 to end the rulemaking process with no changes to the Regulations. As the Board's Rule 30(b)(6) designee explained, there was no need to amend the rules because there was no evidence of a lack of timely access to drugs in 25 years, even though pharmacies routinely receive requests for drugs that are out of stock and refer patients elsewhere.[58]

LEGAL ISSUES

There are three main legal issues in this case: (1) whether the Regulations violate the Free Exercise Clause; (2) whether the Regulations violate the Supremacy Clause; and (3) whether the Regulations violate Due Process Clause. Before addressing these three issues, we briefly address Defendants' assertion that the Ninth Circuit's preliminary-injunction opinion is the "law of the case."

I. Defendants' "law of the case" argument is meritless.

Defendants' primary argument on remand has been that the Ninth Circuit definitively resolved most of the factual and legal issues in this case, and that the "sole question" for trial is "whether the rules pass constitutional muster under the rational basis standard." State Resp. at 2. In other words, they argue that the Ninth Circuit's preliminary-injunction opinion is the "law of the case."

This argument fails for three reasons: (a) The Ninth Circuit has repeatedly held the preliminary injunction rulings are not law of the case; (b) The factual record and legal arguments are dramatically different than they were at the preliminary injunction stage; and (c) Both this Court and the Ninth Circuit made

[57] Ex. 403 (AGO letter).
[58] Rule 30(b)(6) Linggi Dep. 113:14-114:12; 115:2-16; 116:12-118:10; 118:20-110:1; 119:21-120:19; 124:10-124; 130:19-131:1; 137:19-138:19.

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clear that the preliminary injunction ruling was not a final adjudication of the merits.

A. Preliminary injunction rulings generally do not constitute law of the case.

Defendants' law-of-the-case argument is flatly contrary to Ninth Circuit precedent. Time and again, the Ninth Circuit has held that "*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) (emphasis added; internal quotation omitted). The reasons for this rule are simple. First, 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 Cnty., Oregon*, 372 F.3d 1128, 1136 (9th Cir. 2004) (emphasis added). Second, the court makes this prediction "on less than a full record." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007). Thus, given the preliminary posture and partial record, a *preliminary* injunction ruling is just that: *preliminary*. It is a *prediction* based on a *partial record*.

When the record changes, the lower court is free to make "*any* findings and conclusions to the contrary based upon evidence which may be received at the trial on the merits." *Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472, 476 (9th Cir. 1969) (emphasis added). This is basic, black-letter law, supported by overwhelming authority, and Defendants do not even attempt to explain why it should not apply here.[59]

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

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B. The factual record and legal arguments now are dramatically different than they were at the preliminary injunction stage.

The reasons for the rule are in full force here. First, the question of whether the Regulations are neutral and generally applicable is highly fact intensive. As this Court noted, the answer turns not just on the text of the regulations, but on "what prompted the regulations, . . . [h]ow the laws operate in reality[,] [w]hether the exemptions are indeed narrow or not[,] [and] [w]hether or not the accommodations are fanciful or real." Hr'g Tr. 56-57 June 15, 2010; *see also Lukumi*, 508 U.S. at 535 (considering "the effect of [the] law in its real operation"). Importantly, the factual record is dramatically different now than it was at the preliminary injunction stage.

At the preliminary injunction stage, this Court and the Ninth Circuit had limited evidence to consider. The record consisted of the text of the Regulations, the Board's survey on access to Plan B, a handful of public letters and meeting

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- 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2962 (2d ed. 1995) ("The decision of both *the trial and appellate court* on whether to grant or deny a temporary injunction *does not preclude the parties in any way from litigating the merits of the case*.") (emphasis added);
- 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper § 4478.5 (2d ed. 2002) ("Preliminary or tentative rulings *do not establish law of the case*. The most frequent illustrations are provided by preliminary injunction orders. Rulings . . . as to the likely outcome on the merits made for preliminary injunction purposes do not ordinarily establish the law of the case, whether the ruling is made by a trial court *or by an appellate court*.") (emphasis added);
- *City of Anaheim v. Duncan*, 658 F.2d 1326, 1328 (9th Cir. 1981) ("We have not departed from the general rule that a decision on a preliminary injunction does not constitute the law of the case and the parties are free to litigate the merits.")
- *Ross-Whitney Corp. v. Smith Kline & French Laboratories*, 207 F.2d 190, 194 (9th Cir. 1953) ("The ruling on the motion for a preliminary injunction leaves open the final determination of the merits of the case.").

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minutes, and some newspaper articles. Plaintiffs offered only eleven exhibits. Dkt. 11 (July 26, 2007) (exhibit list). There was *no evidence* on the internal deliberations among the Board, the Governor, and Planned Parenthood. There was *no evidence* on how the Regulations applied in practice. There was *no evidence* of the discretion the Board has to interpret and enforce the Regulations. There was *no evidence* on how the Regulations have been selectively enforced. *There had been no discovery at all.*

Four years later, the parties have completed more than 30 depositions and produced over 45,000 pages of documents. There is now voluminous evidence on the historical background of the regulations; voluminous evidence on the scope and application of the exemptions; voluminous evidence on the Board's discretion to interpret and enforce the Regulations; and voluminous evidence on how they are selectively enforced in practice. Beyond that, the State-Defendants have now stipulated that facilitated referral continues to occur for a wide variety of reasons, and that facilitated referral for reasons of conscience is fully consistent with timely access to Plan B. All of this evidence is vital to the question of whether the regulations are constitutional. None of it was before the Ninth Circuit. Accordingly, the Ninth Circuit's ruling does not foreclose "findings and conclusions to the contrary based upon evidence which may be received at the trial on the merits." *Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472, 476 (9th Cir. 1969).

Aside from the new factual record, there are also several completely new legal arguments, which neither this Court nor the Ninth Circuit have ever considered. At the preliminary injunction stage, Plaintiffs based their free exercise arguments primarily on the Supreme Court's decision in *Lukumi*, arguing that the Regulations were *targeted* at conscientious objections to Plan B and were

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based on anti-religious *animus*. Now that Plaintiffs have had the benefit of further discovery, they no longer rely exclusively on a targeting claim under *Lukumi*. Rather, they make additional claims based on how the exemptions to the Regulations are applied in practice; how the Board has broad discretion to grant individualized exemptions from the Regulations; and how the Regulations have been selectively enforced in practice. None of these legal claims (or the Board's 2010 statements and stipulation) were before the Ninth Circuit; thus, the Ninth Circuit's opinion obviously cannot foreclose them.

C. This Court and the Ninth Circuit both made clear that the preliminary injunction opinion is not law of the case.

Finally, both this Court and the Ninth Circuit's opinion confirm that the preliminary injunction opinion is not law of the case. First, this Court has already rejected Defendants' "law of the case" argument. Dkt. 418. Defendants made the same argument at the summary judgment hearing, and although this Court declined to rule on that argument, Hr'g Tr. 56 June 15, 2010, this Court emphasized that trial would *not* be limited to the "sole question" of rational basis review. Rather, the Court said that "[t]he record will be as full as the parties rationally believe it ought to be." *Id.* Moreover, the Court identified several key issues for trial, all of which relate to whether the regulations are neutral and generally applicable, and thus whether strict scrutiny should apply:

> The issue here is what was done, what prompted the regulations, what the regulations say . . . How the laws operate in reality. Whether the exemptions are indeed narrow or not. Whether or not the accommodations are fanciful or real that are available. That's what we're going to decide. *Id.* at 54-55. Thus, Defendants are simply wrong that the only issue for trial is whether the rules have a rational basis.

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Equally important, the Ninth Circuit's own opinion contemplated a full trial of all issues on the merits. No fewer than seven times, the Court highlighted the unique procedural posture of the case and the "sparse" record.[60] In its key passage on neutrality, the Court noted that its ruling was based solely on the evidentiary record before it, which was "thin given the procedural posture of this case." *Id.* at 1131. The Court also said it expected this Court to receive "more recent and comprehensive data" on access to Plan B. *Id.* at 1115 n.2 (emphasis added). And it said it expected this Court to conduct "a trial on the merits" to determine whether "compell[ing] [Plaintiffs] to stock and distribute Plan B . . . violates [Plaintiffs'] constitutional rights." *Id.* at 1138.

In short, given the significantly different procedural posture, factual record, and legal arguments, the 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).

II. The Regulations violate the Free Exercise Clause.

The Regulations violate the Free Exercise Clause because they burden Plaintiffs religious beliefs, they are not neutral or generally applicable, and they cannot satisfy strict scrutiny. We first offer a brief overview of the governing legal principles (Part A); we then explain why the Regulations are not neutral or

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[60] *See*:

- *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1123 (9th Cir. 2009) ("Given the procedural posture of the case, . . . the record with respect to Mesler and Thelen is sparse.");
- *id.* at 1126 ("Here, the record is admittedly sparse . . .");
- *id.* (noting "the preliminary nature of the record");
- *id.* at 1131 ("The evidentiary 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 ("Based on the sparse record before it, the district court erred in finding that access to Plan B was not a problem.");
- *id.* at 1141 ("While we have the discretion to affirm the district court on any ground supported by the . . . record, in light of the undeveloped record, we decline to do so.") (internal citations and quotations marks omitted).

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generally applicable (Part B), cannot satisfy strict scrutiny (Part C), and cannot satisfy rational basis review (Part D).

A. Overview of governing legal principles

The Free Exercise Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . ." U.S. Const. amend. I (emphasis added). Under Supreme Court precedent, a law burdening religious exercise generally does *not* violate the Free Exercise Clause if it is "neutral and generally applicable." *Employment Division* v. *Smith*, 494 U.S. 872, 880 (1990). But if the law is "not neutral or not of general application," it is subject to strict scrutiny; that is, it is unconstitutional unless it is narrowly tailored to advance a compelling governmental interest. *Lukumi*, 508 U.S. at 546. Thus, the key question in this case is whether the Regulations are "neutral and generally applicable."

Two key Supreme Court cases elaborate on that phrase—*Smith* and *Lukumi*. *Smith* involved a blanket criminal ban on possession of peyote. Two Native Americans lost their jobs and were denied unemployment compensation because they ingested peyote at a religious ceremony. *Id.* at 874. The question before the Supreme Court was "whether that [criminal] prohibition [on possession of peyote] is permissible under the Free Exercise Clause." 494 U.S. at 876.

In a 6–3 decision, the Supreme Court upheld the law. According to the Court, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" *Id.* at 879. Because the law was "an across-the-board criminal prohibition on a particular form of conduct," strict scrutiny was inapplicable, and the Court upheld the law. *Id.* at 884.

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Lukumi involved four municipal ordinances that restricted the killing of animals. A Santeria priest challenged the ordinances under the Free Exercise Clause, and the key question was whether the ordinances were "neutral and of general applicability." *Id.* at 531. The city argued that they were neutral because they prohibited a wide variety of animal killing and were written "in secular terms, without referring to religious practices." *Id.* at 534.

In a 9–0 decision, the Supreme Court struck down the ordinances. The decision in *Lukumi* provides the Supreme Court's most thorough statement on the meaning of "neural and generally applicable." As the Court explained, when determining whether a law is neutral and generally applicable, "[f]acial neutrality is not determinative." *Id.* at 534. Rather, the Free Exercise Clause forbids even "covert" hostility to religion and "subtle departures from neutrality." *Id.* (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)). Thus, the courts "must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id.*

To apply this standard, the Court closely examined (1) "the effect of [the] law in its real operation"; (2) "the interpretation given to the [law] by [the government]"; and (3) whether the law "proscribe[s] more religious conduct than is necessary to achieve [its] stated ends." *Id.* at 535-38. Because the ordinances applied to "Santeria adherents but almost no others," had been interpreted in a manner that "devalue[d] religious reasons for killing," and prohibited Santeria sacrifice "even when it does not threaten the city's interest in the public health," the Supreme Court struck them down. *Id.* The Court also emphasized that it was not a close case: "[W]e need not define [the constitutional standard] with precision, . . . for these ordinances fall well below the minimum standard necessary to protect First Amendment rights." *Id.* at 543.

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The parties in this case sharply dispute the proper understanding of *Smith* and *Lukumi*. Defendants treat *Lukumi* as the constitutional minimum. In their view, free-exercise plaintiffs cannot prevail unless they prove that their case is just as bad as *Lukumi*. According to Defendants, *Lukumi* involved overt hostility and targeting of religion; therefore, all free-exercise plaintiffs must prove overt hostility and targeting of religion.

But that interpretation of *Lukumi* is wrong. *Lukumi* itself said it was not a close case; rather, the ordinances "f[e]ll well below the minimum [constitutional] standard necessary to protect First Amendment rights." 508 U.S. at 543. On top of that, *Lukumi* was unanimous.

Rather, as this Court has explained, *Lukumi* represents an "extreme[]" example of a law that is not even close to being neutral or generally applicable. 524 F.Supp.2d at 1264. Thus, lower courts have repeatedly struck down laws under the Free Exercise Clause even when the laws were "a very far cry from *Lukumi*." Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 Cath. Law. 25, 35 (2000) (analyzing cases). As *Lukumi* put it, there are "many ways" to prove that a law is not neutral or generally applicable. 508 U.S. at 533.

Here, Plaintiffs offer five *independent* grounds for concluding that the Regulations are not neutral or generally applicable; each is firmly rooted in *Lukumi* and in the lower courts' interpretations of it:

(1) *Categorical Exemptions:* The Regulations provide categorical exemptions for secular refusals to stock or dispense a drug, but not for conscientious objections.

(2) *Individualized Exemptions:* The Regulations give the government discretion to make individualized exemptions depending on the reasons why a pharmacy does not stock or dispense a drug.

(3) *Selective Enforcement:* The Regulations have been selectively enforced against conscientious objections to Plan B.

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(4) *Religious Gerrymandering:* The Regulations have been gerrymandered to apply almost exclusively to conscientious objections to Plan B.

(5) *Discriminatory Intent:* The history behind the Regulations shows an intent to target conscientious objections to Plan B.

If the Plaintiffs prove any one of these five theories, the Regulations are subject to strict scrutiny. As explained below, all five will be proven here.

B. The Regulations are not neutral or generally applicable.

1. The Regulations are not generally applicable because they include categorical exemptions for secular conduct, but not analogous religious conduct.

One way to prove that a law is not generally applicable is to show that it "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.). In *Fraternal Order of Police*, for example, a police department adopted a regulation prohibiting officers from growing beards. The regulation granted an exemption for beards grown for medical reasons, but refused an exemption for beards grown for religious reasons. Because this represented a "value judgment in favor of secular motivations, but not religious motivations," the law was not neutral and generally applicable. *Id.* at 366.

It is important to note that the facts of *Fraternal Order of Police* are a far cry from *Lukumi*. There was no evidence that beard prohibition was *targeted* at religious conduct. And there was certainly no evidence that the beard prohibition applied *only* to religious conduct. Rather, it applied to a wide variety of secular reasons for wearing a beard (personal preference, fashion, *etc.*). But based on one exception for a narrow slice of secular conduct—medical beards—the court found that the law was not neutral and generally applicable.

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There are two reasons why it is constitutionally problematic to grant secular exemptions while denying similar religious exemptions. First, as *Fraternal Order of Police* pointed out, selective exemptions represent a "value judgment in favor of secular motivations, but not religious motivations"—a value judgment that the government is not permitted to make. 170 F.3d at 366. Second, part of the logic of *Smith* and *Lukumi* is that religious individuals can be protected through "the political process." *Smith*, 494 U.S. at 890. Thus, if a burdensome law applies to everyone, then both secular and religious constituencies will have reason to oppose it, and it will not remain the law unless it is truly serving an important governmental interest. But if secular objections can be exempted while conscientious objections are ignored, "this vicarious political protection 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." *Lukumi*, 508 U.S. at 545. "This precise evil," *Lukumi* said, "is what the requirement of general applicability is designed to prevent." *Id.*

Thus, the key question for a Categorical Exemption claim is whether the exemptions permit "nonreligious conduct that endangers [the government's] interests in a similar or greater degree than [the prohibited religious conduct]." *Lukumi*, 508 U.S. at 543; *accord Fraternal Order of Police*, 170 F.3d at 366. So, for example, if the government exempts animal killing for secular reasons, but not religious reasons, the law is not generally applicable. *Lukumi*, 508 U.S. at 543. And if the government exempts beards for medical reasons, but not for religious reasons, the law is not generally applicable. *Fraternal Order of Police*, 170 F.3d at 366.

Here, the Regulations exempt a wide variety of secular reasons for declining to stock or deliver a drug, but do not exempt religious reasons. The secular

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conduct exempted under the Regulations undermines timely access to drugs just as much as, and in many cases more than, conscience-based referrals for Plan B. Thus, the Regulations are not generally applicable.

The Regulations contain a wide variety of exemptions—some written in the text of the Regulations, some unwritten. Most obvious are the five written exemptions from the Delivery Rule:

(1) *Erroneous prescription:* The prescription contains "an obvious or known error, inadequacies in the instructions, known contraindications," etc.;

(2) *National emergency:* "National or state emergencies or guidelines" limit availability of the drug;

(3) *Specialized equipment or expertise:* The pharmacy lacks "specialized equipment or expertise needed to safely produce, store, or dispense drugs or devices";

(4) *Fraudulent prescription:* The prescription is "potentially fraudulent";

(5) *Out of stock:* The drug is out of stock despite "good faith compliance" with the Stocking Rule.

WAC 246-869-010(1)(a)-(e). In addition to these five exemptions, there is also a "catch-all" exemption and a payment exemption:

(6) *Catch-all:* Any circumstances that are "substantially similar" to the first five exemptions; and

(7) *Customary payment:* The customer does not pay the "usual and customary or contracted charge."

WAC 246-869-010(1)-(2).

Three of the seven exemptions are facially unobjectionable. The "erroneous prescription" exemption protects patients' health; the "national emergency" exemption covers situations beyond the control of the pharmacy; and the

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"fraudulent prescription" exemption prevents fraud. None permits a pharmacy to interfere with timely, safe access to lawful medication.

The other four exemptions, by contrast, exempt a vast swath of secular conduct that undermines the government's alleged interest in ensuring timely access to lawful medication. First is the "specialized equipment or expertise" exemption. WAC 246-869-010(1)(c). The Board interprets the exemption far beyond its terms, applying it to business decisions that have nothing to do with "expertise" or safety. The patient desiring immediate access is out of luck.

Second is the "customary payment" exemption. WAC 246-869-010(2). It, too, has been interpreted broadly to protect business decisions for refusing to deliver a drug. Walgreens, for example, which is the largest pharmacy chain in the state, no longer accepts payments from certain insurance plans. Thus, thousands of patients who rely on those insurance plans are completely barred from accessing *any* drug from a Walgreens pharmacy. That is perfectly permissible under the Regulations, and it undermines timely access to drugs far more than Plaintiffs' conscientious objections to Plan B ever could.

Third is the "catch-all" exemption, which applies in any circumstances that are "substantially similar" to the enumerated list. WAC 246-869-010(1). The Board has never been able to offer a consistent explanation of how it interprets this catch-all exemption. It appears to allow the Board to exempt any secular business and convenience-based decisions that it does not want to regulate.

The final exemption to the Delivery Rule—the "out of stock" exemption—is perhaps the broadest of all. WAC 246-869-010(1)(e). It broadly allows pharmacies to refuse to deliver a drug whenever the drug is out of stock—as long as the pharmacy is in "good faith compliance" with the Stocking Rule. (The Stocking Rule requires pharmacies to "maintain at all times a representative assortment

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of drugs." WAC 246-869-150(1).) Thus, the scope of this exemption depends on what "good faith compliance" with the Stocking Rule entails.

As explained above, in over twenty-five years, the Stocking Rule has ***never*** been enforced against ***any*** pharmacy for refusing to stock a drug. In other words, pharmacies have complete discretion to decline to stock whatever drugs they choose. If a patient requests a drug that is out of stock, the pharmacy need not deliver it, because it falls within an exemption to the Delivery Rule: The drug is "unavailab[le] . . . despite good faith compliance with [the Stocking Rule]." WAC 246-869-010(1)(e).

This is exactly what happens across Washington on a daily basis. Pharmacies in Washington decline to stock drugs for all manner of secular reasons—all of which are permissible under the Regulations. Some pharmacies decline to stock drugs for business reasons:

- The drug has a short shelf-life.
- The pharmacy would have to order a larger quantity of the drug than it believes it can sell.
- The pharmacy would have to purchase specialized equipment to dispense the drug.
- The pharmacist would have to obtain specialized training to dispense the drug.
- The drug is expensive or has low demand.
- The drug requires too much shelf space or storage capacity.

Some pharmacies decline to stock drugs for convenience reasons:

- The drug would require a pharmacist to perform simple compounding.
- The drug would require a pharmacist to monitor a patient's health and register with the drug's manufacturer.

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- The drug would require the pharmacy to comply with paperwork and record-keeping requirements.

Some pharmacies decline to stock drugs that fall outside their chosen business niche:

- HIV pharmacies;
- Pediatric pharmacies;
- Fertility pharmacies;
- Diabetes pharmacies;
- Mental health pharmacies; and
- Long-term care pharmacies.

In short, pharmacies can decline to stock a drug for all manner of *secular* reasons—business reasons, convenience reasons, and otherwise—and all of those reasons are exempted under the Regulations. That is not an accident. Both the Governor's office and the Board made clear, throughout both rulemaking processes, that any regulation had to preserve the wide variety of secular reasons for declining to stock and dispense drugs.

All of these secular exemptions undermine the government's stated interest in timely access to lawful drugs. Most do so to a far greater degree than Plaintiffs' conscience-based referrals ever could. For example, Plaintiffs' conscientious objections are limited to a tiny fraction of all available drugs—Plan B and *ella*. And the number of conscientiously objecting pharmacists is also small. Thus, an exemption for reasons of conscience would have a vanishingly small effect on timely access to medication, if any effect at all. Indeed, the State has stipulated that conscience-based referrals are fully consistent with timely access to drugs, and Defendants have offered no evidence that anyone has ever been denied timely access to a drug because of a conscience-based referral.

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By contrast, the secular exemptions are far broader. They are potentially applicable to *any* drug, including Plan B and *ella*, and can be invoked by *any* pharmacy for almost *any* reason. Indeed, the exemptions *are* invoked on a *daily* basis by thousands of pharmacies across the state. Every day, hundreds if not thousands of patients across the state request a drug, are told the drug is not in stock, and are referred to another pharmacy—usually because of the pharmacy's business or convenience-based reasons. From the perspective of a patient seeking timely access to drugs, there is no difference between being referred to another pharmacy for business or convenience reasons and being referred for reasons of conscience.

Defendants may offer two arguments in response. First, they may try to claim that prohibiting certain secular refusals could harm some pharmacies financially, thus forcing them to close and reducing access to medication. That is speculative. But even assuming that is true, it is even more true of prohibiting conscience-based referrals. If the owners of Ralph's are forced to dispense drugs in violation of their conscience, it is undisputed that Ralph's will be forced to close its pharmacy. And if conscientiously objecting pharmacists like Thelen and Mesler cannot be accommodated, many will have to leave the profession—further reducing access to medication. In short, denying an exemption for reasons of conscience actually *undermines* the state's alleged interest in timely access to drugs.

Second, Defendants may argue that most of these secular refusals are actually *prohibited* by the Regulations. That response fails for many reasons. First, it is implausible. Discretion to stock drugs and refer patients elsewhere has been a fundamental aspect of pharmacy practice for decades, and the Board has offered no indication that the Regulations upend decades of settled practice. To the

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contrary, the Board admitted in the Stipulation that referral is common and continues to this day. Second, it is not credible. Board witnesses testified in their depositions that the Regulations do not prohibit these vast swaths of secular conduct. Contrary testimony at trial should not be credited. Finally, if the Regulations *do* prohibit these vast swaths of secular conduct, they have *never* been enforced against them; that simply proves that the government is selectively enforcing the Regulations against Plaintiffs.

In light of the vast range of secular conduct exempted from the Regulations, this case is far stronger than *Fraternal Order of Police*. There, the Third Circuit held that the beard prohibition was not neutral and generally applicable because there was *one* secular exemption for a *narrow slice* of secular conduct—beards worn for medical reasons. Here, there are *numerous* secular exemptions for a *vast swath* of secular conduct—everything from business reasons for not stocking a drug, to convenience reasons for not wanting to deal with a particular insurer, to practical reasons for wanting to serve a particular niche market. These numerous secular exemptions routinely result in patients being unable to obtain a drug on demand from the pharmacy of their choice. Thus, they "endanger[] [the government's] interests" in a far greater degree than a narrow exemption for conscience would. *Lukumi*, 508 U.S. at 543. Because the State has made a "value judgment in favor of secular motivations, but not religious motivations," the Regulations are not neutral and generally applicable. *Fraternal Order of Police*, 170 F.3d at 366.

Several other cases support the same result. *See Blackhawk v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004) (Alito, J.) (fee requirement for keeping wildlife was not generally applicable where it included categorical exemptions for zoos and circuses, but not for Native American religious adherents); *Canyon Ferry*

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Road Baptist Church of East Helena, Inc. v. Unsworth, 556 F.3d 1021, 1035 (9th Cir. 2009) (Noonan, J., concurring) (campaign finance requirements were not generally applicable where they included categorical exemptions for newspapers and media, but not for churches); *Rader v. Johnston*, 924 F.Supp. 1540, 1551-53 (D. Neb. 1996) (rule requiring freshmen to live on campus was not generally applicable where it included categorical exemptions for students with certain secular objections, but not religious objections); *Morr-Fitz, Inc. v. Blagojevich*, 2011 WL 1338081, No. 2005-CH-000495 (Ill. Cir. Ct. 7th Jud. Cir. 04/05/11) (striking down pharmacy rule modeled on Washington's Regulations).

Finally, in addition to the broad categorical exemptions for business and convenience reasons, the Washington Death with Dignity Act, RCW 70.425 ("DWDA"), creates another categorical exemption to the Regulations. The DWDA provides that "[o]nly willing health care providers [defined to include pharmacists] shall participate in the provision to a qualified patient of medication to end his or her life in a humane and dignified manner." RCWA 70.245.190(1)(d). Thus, notwithstanding the Regulations, any pharmacy or pharmacist may refuse to dispense lethal drugs on any ground, secular or religious. And there appears to be no referral obligation. This exemption undermines the government's stated interest in assuring timely access to lethal drugs at least as much as conscientious objections to Plan B. Thus, it provides an additional ground for finding the Regulations not neutral and generally applicable.[61]

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[61] The Regulations may also violate the Free Exercise Clause by producing "differential treatment of two religions." *Lukumi*, 508 U.S. at 536. As the Supreme Court has repeatedly said, the "clearest command" of the religion clauses is that "one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). But here, in light of the DWDA, one type of religious objection is permitted (conscientious objections to assisted suicide) but another type is forbidden (conscientious objections to Plan

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2. The Regulations are not generally applicable because they give the government discretion to make individualized 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" from a general rule. *Lukumi*, at 537; *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.). A law allowing "individualized exemptions" requires strict scrutiny because it "creates the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct." *Id.* at 209 (citing *Smith*).

Three examples illustrate the "individualized exemptions" rule. In *Blackhawk*, the government required any person wishing to keep wildlife in captivity to pay a permitting fee; but it allowed the government to waive the fee if a waiver would be "consistent with sound game or wildlife management activities or the intent of [the Game and Wildlife Code]." *Id.* at 205. The Third Circuit held that this provision was "sufficiently open-ended" to give the government discretion in granting exemptions, thus "bring[ing] the regulation within the individualized exemption rule" and requiring strict scrutiny. *Id.* at 210. Thus, it held that the denial of a waiver to a Native American who wanted to keep a bear for religious reasons violated the Free Exercise Clause. *Id.* at 213-14.

Similarly, in *Lukumi*, one of the ordinances punished any person who "*unnecessarily* . . . kills any animal." 508 U.S. at 537 (emphasis added). This provision, the Court said, "requires an evaluation of the particular justification for the killing" to determine whether it was "necessary" or not. *Id.* Because the government must look at "the reasons for the relevant conduct" and create

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B). This situation is much the same as *Lukumi*, where kosher slaughter was permitted but Santeria sacrifice was forbidden. The Supreme Court suggested that this might be "an independent constitutional violation." 508 U.S. at 536.

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"individualized exemptions" on a case-by-case basis, the ordinance was subject to strict scrutiny. *Id.*

Third, in *Sherbert v. Verner*, 374 U.S. 398, 401 (1963), the government denied unemployment compensation to any person who quit or refused work "without good cause." The Supreme Court struck down the denial of unemployment compensation under this provision to a plaintiff who refused to work on the Sabbath. *Id.* at 408-09. As the Supreme Court explained in *Smith*, the "good cause" language triggered strict scrutiny because it "lent itself to individualized governmental assessment of the reasons for the relevant conduct," and it "created a mechanism for individualized exemptions." 494 U.S. at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

In short, when a law includes open-ended language that permits the government to make "individualized exemptions" on a case-by-case basis, the law is subject to strict scrutiny. In *Sherbert*, the open-ended language was "without good cause," 374 U.S. at 401; in *Lukumi*, it was "*unnecessarily* . . . kills," 508 U.S. at 537 (emphasis added); and in *Blackhawk*, it was "consistent with sound game or wildlife management activities," 381 F.3d at 205.

The rationale for the individualized exemptions rule is simple. When the government applies an "across-the-board" prohibition, there is little risk that it is discriminating against religious conduct. *Smith*, 494 U.S. at 884. But when an open-ended law gives the government discretion to grant exemptions on a case-by-case basis, it creates a serious risk that it will be "applied in practice in a way that discriminates against religiously motivated conduct." *Blackhawk*, 381 F.3d at 209 (citing *Smith*). Such a risk justifies strict scrutiny. *Id.*; *see also* Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith,

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Sherbert, *Hogwarts, and Religious Liberty*, 83 Neb. L. Rev. 1178 (2005) (collecting and analyzing cases involving individualized exemptions).

Here, the Regulations include several open-ended provisions that allow the Board to grant individualized exemptions on a discretionary, case-by-case basis. In addition, the Board has created a number of exemptions to the Stocking Rule on an *ad hoc* basis, without any apparent basis in the text of the Regulations.

First, the Delivery Rule says that drugs must be delivered in a manner "consistent with reasonable expectations for filling a prescription." 246-869-010(1). "Reasonable expectations" is undefined, giving the Board complete discretion to determine when a referral is "reasonable" and when it is not.

Second, after enumerating five specific exemptions, the Delivery Rule says that an exemption will be granted in any circumstances that are "substantially similar." WAC 246-869-010(1). When a pharmacy claims this open-ended exception, the Board must examine the underlying reasons for the pharmacy's conduct on a case-by-case basis to determine whether it qualifies for an exemption. This is a quintessential "individualized . . . assessment of the reasons for the relevant conduct." *Lukumi*, 508 U.S. at 537 (quoting *Smith*).

Third, the Delivery Rule creates an exemption for "good faith" compliance with the Stocking Rule. It is not clear what "good faith" means. Board officials have expressed varying interpretations of what qualifies as "good faith" compliance. Board Rule 30(b)(6) designee, Susan Boyer, testified that the "good faith" determination is determined on a case-by-case basis.[62]

Fourth, the Stocking Rule is extraordinarily vague and open-ended. It provides that a pharmacy must maintain "a representative assortment" of drugs to meet "the pharmaceutical needs of its patients." WAC 246-869-150(1). Neither

[62] Rule 30(b)(6) Boyer Dep., 46:25-48:12.

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"representative assortment" nor "patients" is defined. In practice, the Board has *never* enforced this provision against *any* pharmacy except Ralph's. In fact, in 2006, the Board promptly dropped the investigations of the Olympia-area pharmacies which claimed that they were temporarily out of Plan B, but continues to investigate Ralph's. At trial, in order to avoid the sweeping implications of this provision, the government may try to offer a new interpretation of the Stocking Rule. But that merely shows how much discretion the Board has to interpret it.

Finally, apart from these open-ended provisions in the text of the Regulations, the Board appears to grant a number of individualized exemptions on an *ad hoc* basis—that is, without any foundation in the text of the Regulations. For example, many of the secular reasons for declining to stock or deliver a drug, described above, do not fit neatly into any exemption in the Regulations.

In short, the several open-ended textual provisions, combined with authority to make *ad hoc* exceptions, gives the Board essentially complete discretion to create exemptions from the Regulations, or decline to enforce them, on a case-by-case basis. That is the opposite of a neutral and generally applicable law.

Thus, this case is far more problematic then *Blackhawk*. There, the government had discretion to waive the wildlife permitting fee if a waiver would be "consistent with sound game or wildlife management activities or the intent of [the Game and Wildlife Code]." *Id.* at 205. The Third Circuit held that this provision was "sufficiently open-ended" to require strict scrutiny. *Id.* at 210. Here, there are at least four provisions that are equally open-ended, and the Board has even created additional exemptions on an ad hoc basis.

This case is also worse than *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004). There, the plaintiff was a Mormon theater student who wished to be

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exempt from the requirement to recite portions of a script that were offensive to her religious beliefs. *Id.* 1281-83. The state university refused, claiming that it had a neutral rule requiring all theater students to adhere to all curricular requirements, including performing scripts as written. The Tenth Circuit, however, disagreed. It pointed out that the university had granted an exemption to a Jewish student who wanted to miss an assignment for Yom Kippur, *id.* at 1298, and it had sometimes granted the plaintiff herself an exemption from reciting every portion of a script, *id.* This "pattern of ad hoc discretionary decisions," said the Court, amounted to a "system of individualized exemptions" requiring strict scrutiny. *Id.* at 1299. The same is true here. The Board exercises broad discretion under the Regulations to permit a wide variety of secular referrals on an *ad hoc*, case-by-case basis. Such a system of individualized exemptions requires strict scrutiny.

Finally, this case is like the system of individualized exemptions in *Sherbert* and *Lukumi*. In those cases, the government had authority to deny unemployment compensation for "good cause," *Sherbert*, 374 U.S. at 401, and had authority to punish animal killing that was "unnecessar[y]," *Lukumi*, 508 U.S. at 537. Here, the Board has authority to regulate religious conduct based on whether it is "reasonable," 246-869-010(1), whether it is "substantially similar" to other conduct, WAC 246-869-010(1), whether it was undertaken in "good faith," 246-869-010(1)(e), and whether it complies with an open-ended Stocking Rule that has never been enforced against any other pharmacy. The Board's discretion under the Regulations is far broader and more troubling than any discretion at issue in *Sherbert* or *Lukumi*.

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3. The Regulations are not generally applicable because they are selectively enforced.

Aside from categorical exemptions and individualized exemptions, 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.) (citing *Tenafly*, 309 F.3d at 167-72). In *Tenafly*, for example, a local ordinance broadly banned the placement of any "sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place . . . ." 309 F.3d at 151. In practice, the local government permitted the placement on utility poles of a variety of signs and symbols, such as house number signs, lost animal signs, and the like; but it refused to permit Orthodox Jews to do the same with religiously significant items called *lechis* (thin black strips of plastic demarcating the area within which Orthodox Jews may carry objects on the Sabbath). *Id.* at 151-52. 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]" effectively "'single[d] out' the plaintiffs' religiously motivated conduct for discriminatory treatment." *Id.* at 168.

Similarly, in *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011), a state university required all registered student groups to abide by a nondiscrimination policy. Under this policy, the university denied recognition to a Christian fraternity and sorority because they required all members to be Christians. *Id.* at 795-96. Although the Ninth Circuit concluded that the nondiscrimination policy was neutral and generally applicable on its face, it held that it would be unconstitutional if it had been applied selectively—for example, by "grant[ing] certain groups exemptions from the policy" but denying an exemption to religious groups. *Id.* at 804-05.

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The rationale behind a selective enforcement claim is similar to that behind an individualized exemption claim. When the government enforces a law against religious conduct, but not similar secular conduct, it "devalues" religious reasons by "judging them to be of lesser import than nonreligious reasons." *Tenafly*, 309 F.3d at 168.

Here, there is abundant evidence that the Regulations have been selectively enforced. Specifically, in the *four years* since the 2007 Regulations went into effect, *no pharmacy* has been investigated or cited for violating it—except Ralph's. And in the *two decades* that the Stocking Rule has been on the books, no pharmacy has been investigated or cited for violating it—except Ralph's. This is a far more egregious case of selective enforcement than either *Tenafly*, 309 F.3d at 168, or *Alpha Delta Chi-Delta*, 648 F.3d at 804-05.

In response, the State may try to argue that the reason it has never investigated or cited any other pharmacy for violating the Regulations is because it only enforces the Regulations in response to private complaints. According to this argument, the Board's enforcement is not "selective" when it merely declines to enforce the Regulations unless it receives a private complaint.

But relying on citizen complaints to enforce the Regulations only makes the constitutional problems worse. Because enforcement of the Regulations is entirely complaint-driven, the State ignores a broad class of secular conduct that is widely known to be in violation of the Regulations, while at the same time conferring a "hecklers' veto" on any interest group motivated enough to seek out and complain about conscientious objections to Plan B. Not surprisingly, Planned Parenthood and other pro-choice groups have done just that, sending volunteer "pill patrols" to pharmacies throughout Washington and seeking out pharmacies

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with conscientious objections to Plan B.[63] The result is that the Regulations are enforced against conscientious objections to Plan B, and no other conduct.

That is just what the Supreme Court condemned in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), which the Ninth Circuit has expressly relied on in the Free Exercise context, *Alpha Delta Chi-Delta*, 648 F.3d at 804. There, a home for the mentally retarded sought a special use permit under a zoning ordinance. But the city denied the permit in response to the "negative attitudes" and "fear" of neighbors. *Id.* at 448. The Supreme Court struck down the enforcement of the ordinance as unconstitutional: "Private biases may be outside the reach of the law," the Court said, "but the law cannot, directly or indirectly, give them effect." *Id.* (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

That is just what the Regulations have done here. By relying on complaint-driven enforcement, the Regulations have ensured that secular referrals are protected, while unpopular conscience-based referrals are prohibited. That is a quintessential case of selective enforcement.

Finally, the record shows that State-Defendants have not consistently enforced the Stocking Rule even when it has received citizen complaints. From 1997-2008, for example, the Board received at least nine complaints alleging that a pharmacist had declined to dispense a prescription other than Plan B. But the Board did not investigate any of them. By contrast, when Ralph's declined to stock Plan B for reasons of conscience, the Board immediately investigated. This, too, is a quintessential example of selective enforcement.

[63] In fact, all three of Plaintiffs pharmacies received regular visits and telephone calls from the "pill patrols."

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4. The Regulations are not neutral under *Lukumi* because their practical effect is a religious gerrymander.

A fourth, independent way to prove a free exercise violation is to follow the plaintiffs in *Lukumi*—namely, to show that a law is not neutral because "the effect of [the] law in its real operation" is to accomplish a "religious gerrymander." 508 U.S. at 535. As noted above, *Lukumi* is an extreme case; it was a unanimous decision, and the Court said that the ordinances fell "well below" the minimum constitutional standard. 508 U.S. at 543. Thus, a free exercise violation need not be as extreme as *Lukumi* for a plaintiff to prevail. But *Lukumi* offers important guidance on how to prove a religious gerrymandering claim.

There, to determine whether the law accomplished a religious gerrymander, the Court examined three primary factors: (a) whether "the burden of the [law], in practical terms, falls on [religious objectors] but almost no others" (*id.* at 536); (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). In this case, all three factors demonstrate that the Regulations are gerrymandered to prohibit conscientious objections to Plan B.

a. The burden falls almost exclusively on conscientious objectors.

Here, as in *Lukumi*, the burden of the Regulations falls almost exclusively on religious conduct. Although the Regulations require pharmacies "to deliver lawfully prescribed drugs," they create sweeping exceptions for *almost every known objection to doing so*—except conscientious objections. WAC 246-869-010. As explained above, pharmacies can refuse to stock or deliver a drug for a wide variety of business or convenience-based reasons. Essentially the only time a pharmacy cannot decline to deliver a drug is when it has conscientious objections

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to doing so. The result is that "the burden of the [Regulations], in practical terms, falls on [conscientious objectors] but almost no others." *Lukumi*, 508 U.S. at 536.

Defendants will likely argue that the Regulations are neutral because they also prohibit pharmacies from referring patients because of "personal" (non-conscientious) objections to a drug. But these so-called "personal" objections are essentially non-existent. Although Washington law has permitted refusals for decades, the Board's Rule 30(b)(6) designee, Susan Boyer, testified that the Board was not aware of *any* personal objections asserted in the 2010 process or while she was a Board member in 2006-07.[64] Thus, there is no evidence of any "personal" objections.

Nor did the rulemaking process produce such evidence. Even after the Governor urged Planned Parenthood to gather refusal stories, and Planned Parenthood conducted a widespread canvassing effort, the groups came up with only three examples of non-Plan B refusals, which they recited during the rulemaking process again and again: (1) a request for antibiotics related to an abortion procedure; (2) a request for prenatal vitamins prescribed by an abortion clinic; and (3) a request for syringes. (All three were put forward by a single abortion clinic.)

With further discovery, all three proved illusory. The first request—for antibiotics—was not met with a "personal" objection at all; it was met with a conscientious objection to participating in an abortion. The Board investigated the incident and found that the pharmacy acted properly by filling the prescription in a timely fashion.[65] The second request—for prenatal vitamins—was not met with a "personal" objection, either. Rather, the Board investigated

[64] Rule 30(b)(6) Boyer Dep, 71:2-18. *See also* Rule 30(b)(6) Salmi Dep., 88:13-89:6; 2-18.

[65] Ex. 98 (May 2006 Department of Health Investigative Memorandum).

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the incident and found that the pharmacy asked several questions to determine whether it would be reimbursed for filling the prescription[66]—something it is expressly permitted to do under the Regulations. The third request—for syringes—has never been corroborated, and no party has uncovered evidence that the event actually occurred. Planned Parenthood's version of the story involves a diabetic with tattoos and gelled hair who was refused needles in a Tri-Cities Walgreen's.[67] But even if the story were true, it does not involve a "personal" objection, either. Rather, it involves yet another valid reason for not filling a prescription under the current Regulations: when the pharmacist suspects that a prescription may be fraudulent.

In short, despite a well-orchestrated effort to unearth "personal" objections and present them to the Board, Defendants have not identified a single, real-world example of a so-called "personal" objection. None of the three examples identified by Planned Parenthood involved a "personal" objection; and all three are expressly permitted under the Regulations.

The 2010 rulemaking process was no more illuminating. Planned Parenthood offered several new stories, but none involved "personal" objections. Three of the stories involved drug-induced abortions, and Washington law provides that no health care worker can be required to participate in an abortion. The remaining stories involved pharmacies that temporarily ran out of Plan B, would not dispense Plan B without a prescription, did not accept the patient's insurance coverage, or did not dispense Plan B for unidentified reasons.[68] None involved a "personal" objection, and most (if not all) are permitted by the Regulations.

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[66] Ex. 217 (September 2006 Department of Health letter)
[67] Ex. 43 (March 2006 Planned Parenthood letter).
[68] Ex. B-116 (2010 Planned Parenthood letter); Ex. B-166 (Connolly email); B-224.

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Even if defendants could identify a handful of "personal" objections that were subject to the Regulations, that would not defeat Plaintiffs' claim under *Lukumi*. *Lukumi* found the ordinances non-neutral because "*almost* the only conduct subject to [the ordinances] is the religious exercise of Santeria." 508 U.S. at 535 (emphasis added). The burden does not have to fall *exclusively* on religious conduct; it is enough that "the burden of the ordinance, in practical terms, falls on [religious] adherents but *almost* no others." *Id.* at 536 (emphasis added).

That is largely undisputed here. In contrast with hypothetical "personal" objections, there is overwhelming evidence that the Regulations hit real-world conscientious objectors, and hit them hard. Nearly all of the testimony before the Board dealt with conscientious objections to Plan B. The Board's Rule 30(b)(6) designee, Salmi, admitted that whenever a commenter mentioned Plan B during the hearings, the commenter invariably described a religious objection or said Plan B was "a form of abortion."[69] There is no serious dispute that the Regulations burden conscientious objectors. Plaintiffs are prime examples.

In short, "the burden of the [Regulations], in practical terms, falls on [conscientious objectors] but almost no others." 508 U.S. at 536. Defendants cannot sanitize the Regulations by positing hypothetical secular conduct that might also be prohibited under the Regulations—any more than the government in *Lukumi* could sanitize its ordinances by positing hypothetical secular animal killings that might have been prohibited under its ordinances. Thus, the ordinances are not neutral.

[69] Rule 30(b)(6) designee, Salmi Dep., 88:13-89:2.

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b. The Government interprets the Regulations in a way that favors secular conduct.

Similar evidence shows that, as in *Lukumi*, "the interpretation given to the [Regulations] by [the government]" favors secular conduct over religious conduct. 508 U.S. at 537. As noted above, the Board has nearly limitless discretion to interpret the Regulations on a case-by-case basis. Under the Stocking and Delivery Rules, for example, as long as a pharmacy makes a "good faith" effort to maintain a "representative assortment" of drugs, it doesn't have to deliver any drug that is out of stock. WAC 246-869-010(1)(e); WAC 246-869-150(1).

On its face, these provisions exempt a sweeping amount of conduct from the Regulations. Pharmacies across Washington have declined to stock Plan B for a variety of reasons—whether low demand, lack of profitability, or because the pharmacy occupies a unique business niche, among many others. And the Board has never held that these refusals to stock Plan B violate the Stocking Rule. Plaintiffs merely seek to engage in the same conduct for reasons of conscience.

But the Board has *interpreted* the Regulations to prohibit conscientious refusals to stock Plan B. In effect, the Board says refusals to stock Plan B for business or economic reasons comply with the Regulations, while refusals for reasons of conscience do not. Indeed, in the twenty-five years since the Stocking Rule has been on the books, the Board has *never* investigated or cited *any* pharmacy for violating it—except when Ralph's asserted a conscientious objection. Thus, as in *Lukumi*, the Board has interpreted the Regulations in a way that favors secular conduct over conscientious objections.

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c. The Regulations proscribe more religious conduct than necessary.

As in *Lukumi*, the Regulations also "proscribe more religious conduct than is necessary to achieve their stated ends." 508 U.S. at 538. This "overbreadth" is obvious in light of several facts.

First, it is obvious in light of the facts of this particular case. There are over thirty pharmacies within five miles of Ralph's that stock and dispense Plan B, and Ralph's willingly provides patients with a facilitated referral to any of them. The State has not even attempted to show that Ralph's practice has interfered with timely access to Plan B. In fact, it has stipulated the opposite: "[R]eferrals help assure timely access to lawfully prescribed medications . . . includ[ing] Plan B." ¶ 1.5.

Second, the Regulations are overbroad in light of history. Referrals have been permitted in Washington for decades without any evidence that they impede timely access to medication. With respect to Plan B in particular, there is *no evidence* that conscience-based referrals have ever prevented a patient from gaining timely access. And there is certainly no such evidence with respect to Plaintiffs. Thus, it is undisputed that the Regulations proscribe the Plaintiffs' religious conduct where it poses no threat to the government's alleged interest.

Third, the Regulations are overbroad in light of the laws of other states. As noted above, the vast majority of states *do not* obligate pharmacies to stock and dispense Plan B; rather, they permit facilitated referral. These states have no less interest in ensuring timely access to medication than does Washington; yet they achieve their interest without forcing pharmacies and pharmacists to violate their consciences.

Fourth, the Regulations are overbroad in light of the available alternatives. The State claims that, as an alternative to referral, pharmacies can accommodate

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the conscience of their employees by using an on-call pharmacist or video link. But in many (if not most) cases, it is more timely to refer a patient to a nearby pharmacy than to wait for an on-call pharmacist to arrive or be hooked-up by video link. Banning conscience-based referrals thus *slows* access to medication.

Finally, as noted above, if the owners of Ralph's are forced to stock and deliver Plan B in violation of conscience, they will be forced to close their pharmacy. If individual pharmacists like Ms. Mesler and Ms. Thelen cannot be accommodated, they may be forced to find a different line of work. Shutting down pharmacies and driving conscientious pharmacists from the profession does not further the government's alleged interest in timely access to medication; it undermines it. Thus, as in *Lukumi*, the Regulations are fatally "overbroad."

5. The Regulations are not neutral because the events preceding their enactment show that they were directed at conscientious objections to Plan B.

A fifth, independent way to prove a free exercise violation is to prove discriminatory intent—in other words, that the law was "enacted 'because of,' not merely 'in spite of,' [its] suppression of" religious conduct. *Lukumi*, 508 U.S. at 540. Under this analysis, "[r]elevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.*

Defendants may argue that the historical background of the Regulations is irrelevant because the portion of *Lukumi* dealing with historical background was not joined by a majority of Justices. But every circuit to address the issue (including the Ninth) has considered historical background to be relevant in free exercise challenges. *See, e.g.*, *San Jose Christian College* v. *City of Morgan Hill*,

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360 F.3d 1024, 1030 n.4 (9th Cir. 2004); *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 633 (7th Cir. 2007) (court must examine "the 'historical background of the decision under challenge, the specific series of events leading to the enactment . . . and the [act's] legislative or administrative history'") (quoting *Lukumi*); *Prater v. City of Burnside*, 289 F.3d 417, 429-30 (6th Cir. 2002) (relying on historical allegations and legislative history); *CHILD, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (8th Cir. 2000) ("the law's legislative history" is relevant); *Wirzburger v. Galvin*, 412 F.3d 271, 281-82 (1st Cir. 2005) (considering, on free exercise challenge, "evidence of animus against Catholics in Massachusetts in 1855 when the [law] was passed," "the wide margin by which the [law] passed," and the convention's "significant Catholic representation").

So has the Supreme Court. In *Lukumi*, the Court considered history not only in the minority portion of the opinion, but also in the portion joined by a majority. Specifically, although the majority noted that Ordinance 87-72 was neutral both on its face and in its operation, it struck it down because it "*was passed the same day* as [another targeted ordinance] and *was enacted . . . in direct response to the opening of the Church*." 508 U.S. at 539-40 (emphasis added). Similarly, in another recent free exercise case, the Supreme Court examined both "*the history* [and] text" of a law to probe for "anything that suggests animus toward religion." *Locke v. Davey*, 540 U.S. 712, 723-25 (2004) (emphasis). And, of course, in Establishment Clause cases, the Supreme Court routinely determine the legislature's purpose based on "contemporaneous legislative history [and] the historical context of the statute, . . . and the specific sequence of events leading to [its] passage." *Edwards v. Aguillard*, 482 U.S. 578, 594-95 (1987); *see also Cammack* v. *Waihee*, 932 F.2d 765, 774 (9th Cir. 1991) ("In determining the legislative purpose, courts may consider the statute on its face, its legislative

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history, or . . . the historical context of the statute and the specific sequence of events leading to the passage of the statute."). It would make no sense to assess a law's historical background when determining neutrality under the Establishment Clause, but when determining neutrality under the Free Exercise Clause.[70]

In *Lukumi*, the portion of the opinion addressing discriminatory intent focused on three types of evidence. First, the Court relied on "the events preceding [the ordinances'] enactment"—in particular, the fact that "the city council made no attempt to address the supposed problem" until "just weeks after the Church announced plans to open." *Id.* at 540-41. Second, the Court relied on "statements by members of the city council" expressing opposition to Santeria. *Id.* at 541. Third, the Court relied on "hostility exhibited by residents" during the legislative process, and comments by unrelated city officials (such as a police chaplain, a city attorney, and a deputy city attorney). *Id.* at 541-42. Taken together, the events and comments showed that the purpose of the ordinances was to target Santeria sacrifice. *Id.* at 542.

Here, an even larger body of evidence, developed during four years of discovery, shows that the purpose of the Regulations was to target conscientious objections to Plan B. Although the Board members, the Governor, and the "stakeholders" were careful not to make obviously inflammatory comments like the city officials in *Lukumi*, the record of their correspondence and actions shows

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[70] Here, the Ninth Circuit Panel initially ruled the historical background of the Regulations off limits. *Stormans, Inc. v. Selecky*, 571 F.3d 960, 982 (9th Cir. 2009). But in response to criticism from a concurring judge, and a petition for rehearing by Plaintiffs, the Ninth Circuit granted panel rehearing and specifically deleted this passage from its opinion, stating instead that the historical background issue "is unsettled." *Stormans*, 586 F.3d at 1131. At a minimum, this leaves this Court free to consider historical background; and in light of the great weight of precedent supporting consideration of historical background, this Court should do so.

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unmistakably that the primary purpose of the Regulations was to prohibit conscientious objections to Plan B.

First, as detailed in the Facts section above, the focus of the regulatory process, from beginning to end, was on conscientious objections to Plan B:

- Before the regulatory process began, prominent events focused the Board's attention specifically on *conscientious* objections to *Plan B*—not any other objections or any other drug.
- Public comments during the rulemaking process focused overwhelmingly on conscientious objections to Plan B.
- The Governor and her advocates, in internal discussions and when pressuring the Board, focused overwhelmingly on conscientious objections to Plan B.
- Internal Department of Health and Board staff discussions over the draft rules focused on conscientious objections to Plan B.
- After the Regulations were finalized, the Board's October 2006 survey on access dealt almost exclusively with conscientious objections to Plan B.
- And, of course, the Regulations have been enforced only against conscientious objections to Plan B.

Second, abundant evidence demonstrates that, unlike most of the Board's regulations, these Regulations were *not* the product of a neutral, bureaucratic process based on scientific and technical expertise. Rather, they were a highly political affair, driven largely by the Governor and Planned Parenthood—both outspoken advocates of abortion rights and outspoken opponents of conscientious objections to Plan B:

- In accordance with both the National and State Pharmacy Association, the Board originally voted in favor of accommodating conscientious objections.
- Within hours of the Board's pro-conscience vote, the Governor and Planned Parenthood set in motion a plan to reverse the Board's decision. The Governor publicly threatened to replace members of the Board, and the Governor did, in fact, refuse to reappoint Board Chair Awan.
- The Governor's own handwritten notes indicate her primary concern was ensuring the Regulations were "clean enough for the advocates [*i.e.*, Planned Parenthood] re: conscious/moral issues." Ex. 44.

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- The Governor ultimately advocated a draft regulation that prohibited conscience-based referrals.
- To ensure her victory, the Governor personally called the Board Chair to pressure him to do pass her Regulations.[71]
- When the Chair resisted, the Governor replaced him with appointees recommended by Planned Parenthood.
- The Board never researched access to Plan B (or any other drug) before passing the Regulations. The Board never identified a single incident in which a patient was unable to gain timely access to Plan B. And its post hoc survey of access to Plan B showed that there was no problem of access.

Finally, the 2010 rulemaking process further confirmed that the primary goal of the process was to ensure that pharmacies retained broad discretion to refer patients elsewhere for business reasons, but not for reasons of conscience.

In sum, the record consists of overwhelming evidence that the regulatory process was initiated in response to conscientious objections to Plan B; that the process focused almost exclusively on conscientious objections to Plan B; that the process was driven by powerful political opposition to conscientious objections to Plan B; that the Board never identified any problem of access to Plan B; and that the only result of the Regulations has been to prohibit conscientious objections to Plan B. In short, the Regulations were adopted "because of" conscientious objections to Plan B, not merely "in spite of" them. *Lukumi*, 508 U.S. at 540.

Defendants may attempt to argue that only Planned Parenthood was focused on conscientious objections to Plan B, but that the Governor and Board itself considered access to all drugs more broadly. That is both irrelevant and inaccurate.

It is irrelevant because the portion of *Lukumi* addressing intent did not limit itself to comments by city council members. Rather, the opinion broadly considered "the events preceding [the law's] enactment" (508 U.S. at 540); the

[71] Awan Dep., 71:21-74:18.

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comments of "residents" and the "public crowd" that attended the city council meeting (*id.* at 541); and comments of a police "chaplain," a "city attorney," and a "deputy city attorney," none of whom served on the city council (*id.* at 541-42). Thus, the relevant evidence consists not just of Board members' testimony, but of the events that prompted the Regulations, and the comments and actions of those who supported it. Those overwhelmingly demonstrate that the focus of the Regulations was on conscientious objections to Plan B.

More importantly, the Board *did* focus on conscientious objections to Plan B. Before the regulatory process even began, the Board specifically took a position on conscientious objections to Plan B; it considered public comments that overwhelmingly focused on conscientious objections to Plan B; it had internal discussions focused on conscientious objections to Plan B; it conducted a survey focused entirely on conscientious objections to Plan B; and it has enforced the Regulations only against conscientious objections to Plan B. Defendants' attempt to portray the rulemaking as a dispassionate process addressing access to all drugs is not credible.

6. Defendants' counterarguments are meritless.

Defendants will likely offer two additional counter-arguments in support of the neutrality of the Regulations. Both are meritless.

a. "Moral" objections

First, Defendants may argue that the Regulations do not target *religious* objections to dispensing Plan B, because they also prohibit *moral* objections to dispensing Plan B. This argument fails for multiple reasons.

First, like the "personal" objections discussed above, secular "moral" objections to Plan B are purely hypothetical. Defendants have not come forward

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with a single, real-world example of a pharmacist who objects to dispensing Plan B (or any other drug) on secular "moral" grounds.

Second, even if there were secular "moral" objections, those objections would not defeat a targeting claim under *Lukumi*. To prove targeting, Plaintiffs don't have to show that the burden falls *exclusively* on religious conduct; they need only show that the burden "on [religious] adherents but *almost* no others." 508 U.S. at 536 (emphasis added). Here, it is undisputed that numerous religious adherents are burdened by the Regulations. Defendants have had complete regulatory authority over the pharmacy industry for decades, and yet they have not come forward with a *single*, real-world example of secular moral objections prohibited by the Regulations. That is more than enough to show that the burden falls on religious adherents but "almost no others." *Id.*

Third, it is not at all clear that "moral" objections are meaningfully distinguishable from "religious" objections for First Amendment purposes. The Supreme Court wrestled with this question in *United States v. Seeger*, 380 U.S. 163, 165 (1965). There, a federal statute protected those who conscientiously objected to war based on their "religious" beliefs. "Religious" belief was defined in the statute as "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation," but not including a "merely personal moral code." *Id.* at 165. Several servicemen challenged the statute as a violation of the Free Exercise Clause and Establishment Clause, because they objected to war on "ethical" grounds. *Id.* at 166. The question was whether their beliefs qualified for protection as "religious" under the statute.

The Supreme Court held that they did. According to the Court, a belief qualifies as "religious" under the statute so long as it is "sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the

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orthodox belief in God." *Id.* at 166. Justice Douglas concurred, noting that discriminating against such beliefs, like discriminating against the non-theistic beliefs of a Buddhist, "would violate the Free Exercise Clause." *Id.* at 188. Thus, in light of *Seeger*, it is not at all clear that "moral" objections are distinguishable from "religious" objections under the Free Exercise Clause—at least not without wading into deep philosophical and theological waters.[72]

Finally, the existence of "moral" objections, no matter how numerous, is simply irrelevant to most of Plaintiffs' free exercise arguments—especially those based on categorical exemptions, individualized exemptions, and selective enforcement. In *Fraternal Order of Police*, for example, the prohibition on beards applied to numerous secular reasons for wearing a beard—whether fashion, personal preference, or convenience. Yet the law still was not generally applicable, because it provided an exemption for medical reasons. 170 F.3d at 365.

Similarly, in *Blackhawk*, the wildlife permitting fee applied to numerous secular reasons for keeping wild animals—whether curiosity, hobby, or love of wild animals. Yet the law still was not generally applicable, because it gave the government discretion to grant individualized exemptions on a case-by-case basis. 381 F.3d at 209.

And in *Tenafly*, the ordinance banning signs on telephone poles applied to numerous secular reasons for posting signs—whether garage sales, political

[72] The Supreme Court extended the definition of "religion" even further in *Welsh v. United States*, 398 U.S. 333 (1970). There, it concluded that even "purely ethical or moral" beliefs, completely divorced from religion, qualified as "religious" for purposes of the conscientious objector statute. *Id.* at 343-44. Justice Harlan concurred on the ground that excluding such beliefs would violate the First Amendment. *Id.* at 356-57.

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campaigns, or a lost cat. Yet the law still was not generally applicable, because it was selectively enforced. 309 F.3d at 168.

In all of these cases, the existence of secular conduct that was subject to the law did not defeat a free exercise claim. The same is true here. Even assuming there are purely secular "moral" objections, the neutrality and general applicability of the Regulations are undermined by numerous categorical exemptions, individualized exemptions, and selective enforcement. Thus, hypothetical "moral" objections are beside the point.

b. Disparate impact

Alternatively, Defendants may argue that "[t]he neutrality of the [Regulations] is not destroyed by the possibility that pharmacists with religious objections to Plan B will *disproportionately require accommodation* under the rules." *Stormans*, 586 F.3d at 1131 (citing *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995)) (emphasis added). But Plaintiffs agree with this proposition. Plaintiffs are not basing their free exercise claim merely on the fact that the Regulations *disproportionately impact* conscientious objectors (although they surely do). Rather, Plaintiffs offer five different ways of showing that the Regulations are not neutral or generally applicable. *See supra*. None of these arguments suggests that a law can be invalidated "simply because it may affect a greater proportion of one [religion] than of another." *Washington v. Davis*, 426 U.S. 229, 242 (1976) (rejecting disparate impact theory under Equal Protection Clause).

In fact, *Lukumi* expressly distinguishes between disparate impact claims and claims based on a religious gerrymander. "To be sure," the Court said, "*adverse impact* will not always lead to a finding of *impermissible targeting*" (suggesting, however, that sometimes it would). *Lukumi*, 508 U.S. at 535 (emphasis added).

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But the Free Exercise Clause is *always* violated where the "design of these laws accomplishes instead a 'religious gerrymander[.]'" *Lukumi*, 508 U.S. at 535 (quoting *Walz v. Tax Comm'n*, 397 U.S. at 696). To determine whether a law accomplishes such a "religious gerrymander," a court "'must survey meticulously the circumstances of *governmental categories*'" *Id.* at 534 (quoting *Walz*, 397 U.S. at 696) (emphasis added).

That is just what Plaintiffs urge here. Each of their arguments goes to "governmental categories" and the "design of these [Regulations]." *Id.* at 534-35. Categorical exemptions and individualized exemptions are a question of the "design of these [Regulations]," asking whether the government has made value judgments—or has discretion to make value judgments—favoring secular conduct. *Id.* Selective enforcement goes to the "circumstances" of the law. *Id.* And obviously, examining evidence of a religious gerrymander or anti-religious animus is precisely the inquiry set out in *Lukumi*. *Id.* at 534.

American Life League v. Reno, 47 F.3d 642, 654 (4th Cir. 1995), which the Ninth Circuit cited on appeal, supports this distinction, too. There, the court distinguished the disparate impact point made by the Ninth Circuit from a claim that the law accomplishes a "religious gerrymander" or "single[s] out religious practices for discriminatory treatment." *Id.* Similarly, in *Booth v. Maryland*, the Fourth Circuit applied *American Life League* to state the general rule of neutrality under *Smith*, while citing *Lukumi* for the point that courts must make a meticulous examination of governmental categories to seek out religious gerrymanders. 327 F.3d 377, 380 (4th Cir. 2003). In short, *American Life League* and *Booth* further support the distinction between a disparate impact claim on the one hand, and the Free Exercise claims advanced by Plaintiffs here.

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7. The Regulations are subject to strict scrutiny because they infringe free exercise in conjunction with the fundamental right not to be forced to take human life.

Finally, the Regulations are 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. 872. In particular, the Regulations here not only infringe Plaintiffs' rights under the Free Exercise Clause, but also violate Plaintiffs' fundamental right under the Due Process Clause not to be forced to take human life. *See* Part IV, *infra*. In a case involving such "hybrid rights," *Smith* held that even a neutral and generally applicable law may be subject to strict scrutiny.[73]

C. The Regulations fail strict scrutiny.

Because the Regulations are not neutral or generally applicable, they are subject to strict scrutiny. This requires Defendants to show 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 courts to "look[] beyond broadly formulated interests justifying [the law]" and instead "scrutinize[] the asserted harm of granting *specific* exemptions to *particular* religious claimants." *Gonzales*

[73] The hybrid rights doctrine is currently the subject of a circuit split. *See Combs v. Homer-Center School Dist.*, 540 F.3d 231, 244 (3d Cir. 2008) ("Smith's hybrid-rights theory has divided our sister circuits."). Some circuits have criticized the hybrid rights theory as dictum; others require an "independently viable" companion right; still others require merely a "colorable claim" that the companion right has been violated." *Id.* at 244-46 (collecting cases; internal quotations and citations omitted). An early Ninth Circuit case adopted the "colorable claim" standard, *San Jose Christian Coll. v. Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004), but a more recent case has shown hostility to the theory, *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 440 n. 45 (9th Cir. 2008). We mention the argument here merely to preserve it for appeal. 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 IV, infra.

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v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (emphasis added).

Defendants cannot even begin to satisfy this test. Although Defendants claim that the Regulations are narrowly tailored to further a compelling interest in timely access to medication, that argument fails for a variety of reasons.

1. The Regulations are grossly over-inclusive, because conscience-based referrals do not undermine timely access to Plan B.

First, the Regulations are not narrowly tailored because they are grossly "overbroad," prohibiting far more religious conduct than necessary to achieve the government's stated end. *Lukumi*, 508 U.S. at 546. Here, the stated end is timely access to medication; but by the government's own stipulation, Plaintiffs' conscientious objections to Plan B do not undermine that interest.

The government has stipulated that "referral is a time-honored pharmacy practice, it continues to occur for many reasons, and is often the most effective means to meet the patient's request." Dkt. #441, ¶ 1.5. With respect to Plaintiffs' conduct, the government further stipulated that "facilitated referrals *do not pose a threat to timely access to lawfully prescribed medications*[,] . . . *includ[ing] Plan B*." *Id.* ¶ 1.6 (emphasis added). In other words, Defendants *agree* that Plaintiffs' conduct does not threaten timely access to Plan B. Thus, as applied to Plaintiffs' conduct, the Regulations are "overbroad"—not narrowly tailored. *Lukumi*, 508 U.S. at 546.

Even aside from the stipulations, there is abundant evidence that Plaintiffs' conduct does not pose a threat to timely access to medication. First, Defendants have not identified any problem of access to Plan B. Indeed, all evidence is to the contrary. Plan B is available without a prescription to anyone over age sixteen, and it is widely available at pharmacies, doctors' offices, government health

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centers, emergency rooms, Planned Parenthood, and a toll-free hotline. It is also available for overnight delivery via the Internet. According to the Board's own survey, there is no problem of access to Plan B. And throughout the rulemaking process, Defendants were unable to identify even a single example of anyone who had ever been denied timely access to Plan B. Thus, there is no evidence of any access problem.

Even assuming there might be an access problem somewhere in the State, there is no access problem near Plaintiffs. Plaintiffs can and do refer patients to dozens of nearby pharmacies that willingly stock and dispense Plan B. Plaintiffs regularly refer patients to those nearby locations for any number of drugs, and the government concedes that facilitated referral does not undermine access to medication.

In short, there is *no evidence* that Plaintiffs' actions pose a threat to timely access to Plan B. And there is *no evidence* that applying the Regulations to Plaintiffs serves any governmental interest at all. The government could easily accomplish its stated interest in ensuring timely access to Plan B simply by requiring conscientious objectors to refer patients to nearby pharmacies. The fact that it has not done so demonstrates that the Regulations are not narrowly tailored. *See O Centro*, 546 U.S. at 431 (Government must show with "particularity" that its interest "would be adversely affected by granting an exemption.") (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972)).

2. The Regulations are grossly under-inclusive, because they permit a wide variety of secular conduct that undermines timely access to medication.

The Regulations also fail strict scrutiny because they are "underinclusive in substantial respects"—*i.e.*, "[t]he proffered objectives are not pursued with respect to analogous non-religious conduct." *Lukumi*, 508 U.S. at 546. Although

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the government claims (contrary to its stipulations) that it has an interest in promoting immediate, on-site delivery of time-sensitive medication, it permits pharmacies to undermine that alleged interest for a wide variety of business, convenience, and personal reasons. For example, pharmacies can refuse to stock Plan B if it does not fall within their business niche; they can refuse to stock time-sensitive insulin medication because they want extra shelf space; and they can refuse to accept payment for Plan B if they do not want the hassle of dealing with the patient's insurance plan.

Beyond that, the obligation to stock a drug does not commence unless a regular patient demands it (if ever), meaning that travelers or those who visit a pharmacy for the first time can be denied medication. And the state allows doctors to refuse to write prescriptions for Plan B, thus preventing patients who are under the age of seventeen from accessing the drug. All of these actions, and many more, prevent immediate, on-site delivery of time-sensitive medication. Thus, "[t]he proffered objectives are not pursued with respect to analogous non-religious conduct," and the Regulations are not narrowly tailored. *Lukumi*, 508 U.S. at 546.

The broad exemptions for secular conduct also prevent the government from demonstrating that the Regulations further a compelling interest. As the Court explained in *Lukumi*: "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." 508 U.S. at 547 (alteration omitted). Just as permitting a wide variety of secular killing undermined the alleged governmental interest in *Lukumi*, permitting a wide variety of secular refusals to stock or deliver drugs undermines the alleged interest here. Moreover, the government has failed to adduce any evidence, either before or after passing the Regulations, of a problem

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of access to Plan B or any other drug. Thus, the government has failed to demonstrate that the Regulations further a compelling governmental interest.

3. Forcing conscientious objectors out of the pharmacy profession does not promote timely access to medication.

Finally, the Regulations are not narrowly tailored because, as applied to Plaintiffs, they actually *undermine* the government's alleged interest. As noted above, if the owners of Ralph's are forced to stock and deliver Plan B in violation of conscience, they will be forced to shut down. And if pharmacies are forbidden from accommodating pharmacists like Ms. Thelen and Ms. Mesler, such pharmacists will be driven from the profession. Shutting down pharmacies and reducing the number of practicing pharmacists will not increase access for anyone. Thus, applying the Regulations here ultimately reduces, rather than increases, access to drugs.

D. Even assuming the Regulations were neutral and generally applicable, they lack a rational basis in light of the government's stipulations.

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, Inc. v. Selecky*, 586 F.3d 1109, 1137 (9th Cir. 2009). 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. Furthermore, some objectives—such as a bare desire to harm a politically unpopular group—are not legitimate state interests." *In re Levenson*, 587 F.3d 925, 931 (9th Cir. 2009) (Reinhardt, J.) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985)).

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Here, the government's own stipulations prevent it from satisfying rational basis review. Defendants argue that prohibiting conscience-based referrals is rationally related to the government's interest in promoting timely access to medication. But the government has stipulated the opposite: "Facilitated referrals do not pose a threat to timely access to lawfully prescribed medications." Dkt. #441, ¶1.5. Thus, applying the Regulations to prevent Plaintiffs from engaging in facilitated referrals is not related to any governmental purpose. Indeed, since Plaintiffs' conduct is fully consistent with timely access to Plan B, it appears that the only purpose served by applying the Regulations to Plaintiffs is "to harm a politically unpopular group." *Cleburne*, 473 U.S. at 446-47. Thus, 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. Department of Air Force*, 527 F.3d 806 (9th Cir. 2008) (applying heightened review).

III. The Regulations conflict with Title VII and therefore fail under the Supremacy Clause

The Regulations also conflict with Title VII and therefore fail under the Supremacy Clause. Under the Supremacy Clause of Article VI of the U.S. Constitution, federal law preempts state law in three scenarios: (1) an express statement of preemption, (2) occupation of the field, or (3) conflict between state and federal law. *Malabed v. No. Slope Borough*, 335 F.3d 864, 869 (9th Cir. 2003); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). Here, the Regulations are preempted under the first and third scenarios because they prohibit employers from accommodating the religious beliefs of their employees—which is precisely what Title VII requires.

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A. Congress expressed its intent that Title VII have preemptive effect.

The first basis for preemption is Congress's express statement of preemption. Title VII expressly provides that it preempts "any provision of State law" that is "inconsistent with any of the purposes of this Act, or any provision thereof." 42 U.S.C. § 2000h-4. Similarly, 42 U.S.C. § 2000e-7 provides an exemption from any state law that "require[s] or permit[s] the doing of any act which would be an unlawful employment practice" under Title VII. In light of these provisions, the Ninth Circuit has said that state laws that require or permit a violation of Title VII are preempted. *Malabed*, 335 F.3d at 870, 871; *see also Sosa v. Hiraoka*, 920 F.2d 1451 (9th Cir. 1990); *Rosenfeld v. So. Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971).

Here, the Regulations are preempted because they permit, and in many cases require, a violation of Title VII. Specifically, Title VII requires employers to make reasonable accommodations for their employee's religious beliefs. 42 U.S.C. § 200e(j); *American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 776 (9th Cir. 1986). Prior to the Regulations, pharmacies routinely complied with Title VII by allowing pharmacists with conscientious objections to refer patients to a nearby pharmacy for timely access to Plan B. That is just what Plaintiff Thelen's and Plaintiff Mesler's employers did before passage of the Regulations. And that is just the sort of reasonable accommodation that Title VII requires. Yet the Regulations make this form of accommodation illegal and effectively force pharmacies to fire, or refuse to accommodate, certain pharmacists because of their religious beliefs. This directly conflicts with Title VII.

As discussed earlier, the Board has also expressed its intention to discipline a pharmacist or pharmacy if any pharmacist declines to fill a prescription because of his or her religious beliefs. The Board has suggested that it will defer to the

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HRC to interpret and enforce the prohibition on discrimination in WAC 246-869-010(4)(d). The HRC has explained that a pharmacy is prohibited from accommodating a conscientious objector *even if the pharmacy has another pharmacist on site to fill prescriptions to which the colleague objected*.[74] The Regulations thus mandate an employment practice illegal under federal law—refusing to accommodate an employee's religious beliefs—by making it illegal under state law to accommodate that employee's beliefs. Accordingly, the Regulations frequently require or permit a pharmacy to violate Title VII.

As discussed under Plaintiffs' free exercise claim, Defendants' suggestions of other accommodations are illusory. In short, the Regulations forbid employers from making any reasonable accommodations for conscientious objectors, as they are required to do under Title VII. Specifically, the Regulations in many cases require a pharmacy to refuse to employ conscientious objectors, and in other cases impose liability merely for employing conscientious objectors. This is flatly inconsistent with Title VII. At a minimum, there are serious factual disputes over what accommodations, if any, are available under the Regulations.

B. The Regulations conflict with Title VII.

The second basis for preemption is the conflict between the Regulations and Title VII. Conflicts occur when the state law makes "compliance with both federal and state regulations a physical impossibility" and when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

[74] At the preliminary injunction stage, the HRC argued that Brenman's letter was his personal opinion and not the official position of the HRC. In discovery, the HRC produced copies of emails and letters expressing the opposite. In addition, Plaintiffs learned that the HRC Chair (Friedt) and its Assistant Attorney General were intimately involved in preparing the letter. When the Board sent a *second* letter to the Board, emails indicate that other HRC Commissioners also approved of the letter and had been kept informed and approved of the HRC's actions.

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Congress." *Cal. Fed. Savings & Loan Assoc. v. Guerra*, 479 U.S. 272, 281 (1987) (citations omitted)). Congress passed Title VII "to prohibit all practices in whatever form which create inequality in employment due to discrimination on the basis of race, religion, sex, or national origin, and ordained that its policy of outlawing such discrimination should have the 'highest priority." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (citations omitted). As discussed above, the Regulations prevent a pharmacy from offering reasonable accommodations to conscientious objectors, making compliance with Title VII and the Regulations in many cases impossible. This conflict overcomes any presumption asserted by Defendants that the Regulations are valid.[75]

C. Defendants' arguments based on legislative immunity and exhaustion of remedies fail.

At the summary judgment stage, Defendants argued that the Title VII claim failed based on legislative immunity and exhaustion of remedies. Plaintiffs fully addressed these arguments in their response to Defendants' motion for summary judgment, which is incorporated here by reference.

IV. The Regulations violate the Fourteenth Amendment.

The Regulations also violate Plaintiffs' fundamental right to refrain from taking human life. That right is "deeply rooted in this Nation's history and tradition" and is "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Indeed, it is far more deeply established than other rights that the Supreme Court has recognized under the Due Process

[75] The Board argues that the Regulations do not conflict with Title VII because of "the presumption that state or local regulation of matters related to health or safety is not invalidated under the Supremacy Clause." *Hillsborough Cty., Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 715 (1985). (State Mot. at 20.) However, "a conflict between a particular local provision and the federal scheme" overcomes the presumption. *Id.*, 471 U.S. at 716. Further, the presumption applies to only valid regulations. *Id.*, 471 U.S. at 715-16.

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Clause. *See generally* Mark Rienzi, *The Constitutional Right to Refuse:* Roe, Casey, *and the Fourteenth Amendment Rights of Healthcare Providers*, *forthcoming* 87 Notre Dame L. Rev __ (2011) (*available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1749788).

A. There is a fundamental right to refrain from taking human life.

The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests."[76] *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). To receive protection under the Due Process Clause, a right must be, "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 was] sacrificed.'" *Id.* (quoting *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) and *Palko v. Connecticut*, 302 U.S. 319 (1937)). It must also be subject to a "careful description" of the asserted fundamental liberty interest at stake. *Id.* at 721 (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

When analyzing a due process claim, the "crucial guideposts for responsible decisionmaking" are the nation's "history, legal traditions, and practices." *Id.* (internal quotations and citations omitted). The question is whether the right is "so rooted in the traditions and conscience of our people as to be ranked as

[76]The liberty interests the Supreme Court has held to be protected by the Due Process Clause include the rights to marry, *Loving v. Virginia,* 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut,* 381 U.S. 479 (1965); to use contraception, *ibid.; Eisenstadt v. Baird,* 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California,* 342 U.S. 165 (1952), to abortion, *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992); and to intimate consensual sexual conduct, *Lawrence v. Texas*, 539 U.S. 558 (2003). The Court also strongly suggested that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan,* 497 U.S., at 278-279.

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fundamental." *Snyder v. Commonwealth*, 291 U.S. 97, 105 (1934). If so, the right may not be infringed "*at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. at 721. (quoting *Flores*, 507 U.S. at 302).

Here, the fundamental liberty interest at stake is the right to refrain from taking human life. As explained below, this right is deeply rooted in our nation's "history, legal traditions, and practices." *Id.* It was first protected in the context of compulsory military service in the Colonies, and it has naturally and promptly received protection in a variety of contexts—including health care—in response to new legal, social, and scientific developments.

1. The right of conscientious objection to military service

Moral consensus prior to the time of the Founding was that military self-defense was mandatory. Several colonies levied heavy fines or criminal penalties on anyone who refused to serve in the militia. But with the arrival of the Quakers in the 1600s, the colonies had to address conscientious objection to military service. Peter Brock ed., *Liberty and Conscience* 10 (Oxford University Press 2002).

The Quakers' conscientious stand gradually changed public opinion. Before the Revolutionary War, exemptions from military service were established in Massachusetts (1661), Rhode Island (1673), and Pennsylvania (1757). Lillian Schlissel ed., *Conscience in America* 28 (E. P. Dutton & Co., Inc. 1968); Louis Fischer, *Congressional Protection of Religious Liberty* 11 (Nova 2003). In 1775, the Continental Congress formally expressed support for conscientious objectors. Fischer, 11-12. And after the Declaration of Independence, numerous states—including Pennsylvania (1776), Vermont (1777), New Hampshire (1784), and

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Maine (1819)—wrote protections for conscientious objectors into their new constitutions. Louis Fischer, *supra*, at 12.

Similar protections were enacted in states that entered the Union after the Revolutionary War period—Illinois (1818), Alabama (1819), Iowa (1846), Kentucky (1850), Indiana (1851), Kansas (1855), and Texas (1859), among others. Lillian Schlissel, *supra*, at 57. The tradition of conscientious objection gained significant legal ground during the Civil War, when President Lincoln directed his War Department to make accommodations for those with objections to bearing arms. J. G. Randall & Richard Nelson Current, *Lincoln the President,* 172-75 University of Illinois Press (1999).

In World War I, Congress enacted the first comprehensive conscientious objection bill. Congress followed that enactment with a second in World War II. And during the Vietnam War, the Supreme Court stretched the conscientious objector exemption to include not only religiously-based objections, but all "sincere and meaningful" beliefs that "occup[y] a place . . . parallel to that filled by the orthodox belief in God." *United States v. Seeger*, 380 U.S. 163, 166 (1965). Many states have also written conscientious objection into their laws regulating state militias. *Macintosh v. United States*, 42 F.2d 845, 848, n. 1, n. 2. (2nd Cir. 1930), *rev'd*, 283 U.S. 605 (1931).

Although the Supreme Court did not recognize a constitutionally protected right to refrain from military service in the 1930s, its reasoning was grounded in the "well-nigh limitless extent of the war powers." *United States v. Macintosh*, 283 U.S. 605 (1931). In other words, the Court did not reject the idea that conscientious objection is a fundamental right; rather, it recognized that Congress, in time of war, may have a compelling interest in overriding it. (The

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case was also decided long before the modern era of substantive due process analysis.)

In fact, the Supreme Court has repeatedly recognized the fundamental nature of the right of conscientious objection. In *Welsh v. United States*, Justice Harlan observed that the policy of exempting conscientious objectors "is one of longstanding tradition in this country" dating back to colonial times, and has "roots . . . deeply embedded in history." 398 U.S. 333, 365-66 (1970) (Harlan, J., concurring). In *Seeger*, the Court offered even stronger language in support of conscientious objection:

> [B]oth morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. *So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation.*

United States v. Seeger, 380 U.S. 163, 170 (1965) (emphasis added) (quoting Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919).

In short, the history of conscientious objection to military service demonstrates that the right to refrain from taking human life is deeply rooted in our traditions and has been steadily broadened.

2. The right of conscientious objection to abortion

The right to refrain from taking human life is just as deeply rooted in the medical context. In the wake of *Roe v. Wade* in 1973, protections for conscientious objections to abortion sprung up overnight. *See generally* Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in *Same Sex Marriage And Religious Liberty* 77-93 (Douglas Laycock et al. eds. 2008) (summarizing the right of conscientious objection in the medical

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field). Within weeks, Congress passed the Church Amendment, which prohibits the government from requiring individuals or institutions to assist in an abortion in violation of conscience. Health Programs Extension Act § 401, Pub. L. No. 93-45, 87 Stat. 91, 95 (June 18, 1973), codified at 42 U.S.C. § 300a-7(b)-(c)(1). Other federal laws passed in the 1970s prohibit even *private employers* from discriminating against employees who object to participating in an abortion on grounds of conscience. 42 U.S.C. § 300a-7(c)(1). These laws remain in force and have been joined by many others.[77]

States, too, have uniformly protected health care practitioners' right to refrain from taking human life. A full 47 out of 50 states expressly protect health care practitioners' right of conscience to some degree, many providing full exemptions to any health care practitioner who conscientiously refuses to participate in an abortion. Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in *Same Sex Marriage And Religious Liberty* 90-91 (Douglas Laycock et al. eds. 2008) (summarizing the right of conscientious objection in the medical field). No state has *ever* passed a law compelling a health care practitioner to participate in an abortion in violation of conscience.

The Supreme Court has recognized the right, too. On the same day it decided *Roe v. Wade*, the Supreme Court also decided *Doe v. Bolton*, which struck down

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[77] *See, e.g.*, 42 U.S.C. § 300a-7(c)(2) (conscientious objections in medical research); 42 U.S.C. § 300a-7(d) (conscientious objections in health service programs and research activities); 42 U.S.C. § 300a-7(e) (conscientious objections to abortion by participants in medical training programs); 42 U.S.C. § 238n (conscientious objections to abortion by health care entities or training programs); Consolidated Appropriations Act, 2008, Public Law No. 110-161, Div. G, § 508(d), 121 Stat. 1844, 2209 (Dec. 26, 2007) ("Weldon Amendment") (annual appropriations provision stripping federal, state, and local governments of certain federal funds if they discriminate against health care entities that refuse to participate in abortion).

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Georgia's criminal abortion statute. In *Doe*, the Court recognized that protecting conscientious objectors was appropriate:

> Under [Georgia law], the [denominational] hospital is free not to admit a patient for an abortion. . . . Further a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute *in order to afford appropriate protection to the individual and to the denominational hospital.*

410 U.S. 179, 197-98 (1973)(emphasis added). In the **wake** of *Roe*, plaintiffs brought numerous lawsuits attempting to compel public hospitals to provide abortions. But federal courts repeatedly held that the liberty interest recognized in *Roe* was not sufficient to overcome the right of conscientious objection approved in *Doe*.[78]

Washington is no exception. Its law provides that "[n]o person or private medical facility" (including pharmacists and pharmacies) may be required "in any circumstances to participate in the performance of an abortion." RCW 9.02.150. Similarly, in the context of the state's basic health plan (RCW 70.47.160) and health insurance (RCW 48.43.065) statutes, Washington recognizes the same fundamental right:

> The legislature recognizes that every individual possesses a *fundamental right* to exercise their religious beliefs and conscience. . . . No individual health care provider . . . may be required by law or contract in any circumstances to participate in

[78] *See, e.g., Doe v. Hale Hospital*, 500 F.2d 144, 147 (1st Cir. 1974) ("Nor does this order require that any individual … participate or assist in any way in the performance of these abortions if that person as a matter of conscience objects to so doing."); *Doe v. Poelker*, 515 F.2d 541, 546 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 519 (1977) (order to allow abortions "should not require that any present member of the staff of the public hospitals . . . participate or assist in any way in the performance of abortions if, as a matter of conscience, he objects to so doing."); *Wolfe v. Schroering*, 541 F.2d 523, 527 (6th Cir. 1976) ("We are of the view that the conscience clause may constitutionally permit . . . physicians, nurses and employees to refuse to perform or participate in performing abortions for 'ethical . . . , moral, religious or professional reasons.'").

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> the provision of or payment for a specific service if they object to so doing for reason of conscience or religion.

RCW 48.43.065(1)-(2)(a) (emphasis added). Indeed, this statute extends the right beyond abortion to *any* "service." *Id.* Thus, it has been interpreted by the Insurance Commissioner to authorize doctors to refuse to write prescriptions for Plan B and to refer patients to a nearby provider on grounds of conscience.[79]

In short, the federal government, the states, and the Supreme Court have uniformly recognized the fundamental right to refrain from taking human life in the abortion context. That right springs from the same deeply-rooted traditions as military conscientious objection, and Defendants cannot point to *any* state or federal law that has *ever* violated it.

3. The right of conscientious objection to abortifacient drugs.

The right to refrain from taking human life has also been consistently protected in the context of abortifacient drugs, such as Plan B and *ella*. As noted above (at 12), forty-two of fifty states place no restrictions on conscience-based referrals. In most of these states, there is no law expressly addressing the issue, because pharmacies have long had discretion to decide which drugs to stock, and pharmacists have long had the right, under the policy of the American Pharmacists Association, "to exercise conscientious refusal."[80] At least thirteen

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[79] The Insurance Commissioner's Rule 30(b)(6) designee, Elizabeth Brerendt, testified regarding RCW 43.48.065:

> Q. And if a carrier reported back to you our policy is that we will require a doctor which will not write a Plan B prescription notify the patient and refer the patient to a nearby provider who will provide the Plan B prescription within the Olympia area, would that be an adequate mechanism?
>
> A. That would be an adequate mechanism.

Rule 30(b)(6) Berendt Dep. 24:25-25:6. This is precisely the same right that Plaintiffs seek. Under Washington law, physicians may refer patients elsewhere for Plan B, but pharmacists may not.

[80] Ex. 281 (APha Policy Guide).

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states have adopted laws expressly or impliedly protecting this right.[81] Only eight states have adopted laws limiting conscience-based referrals; all of those laws were adopted recently, and only one of those laws clearly goes as far as Washington's. That law has been struck down as unconstitutional. *See supra* at 12. In short, despite recent efforts by pro-choice groups, state laws overwhelmingly protect the right to refrain from taking human life in the context of abortifacient drugs.

4. The right of conscientious objection to assisted suicide

The same is true in the context of assisted suicide. Presently, only two states—Oregon and Washington—have statutory schemes that authorize assisted suicide. Both expressly protect the rights of medical providers who conscientiously object to participating in the destruction of human life. ORS 127.885(4); RCW 70.245.190(1)(d). Washington, which modeled its assisted suicide statute on Oregon's, allows medical providers, including pharmacists, to refuse to participate in the taking of innocent life. RCW 70.245.190(1)(d).[82] Again, the right to refrain from taking human life was uncontroversial, because it is so deeply rooted in the nation's history and conscience.

5. The right of conscientious objection to state executions

The states and the federal government likewise recognize the right correctional personnel, including medical personnel, to refrain from taking human life in the context of state-sanctioned capital punishment. The vast majority of executions in the United States take place by means of lethal

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[81] National Women's Law Center, Pharmacy Refusals: State Laws, Regulations, and Policies (March 29, 2011), http://www.nwlc.org/resource/pharmacy-refusals-state-laws-regulations-and-policies.

[82] The Board members and staff testified in deposition that an exemption was appropriate because pharmacists should do no harm and that includes not being coerced into participating in taking human life against a pharmacist's objection.

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injection, which requires the administration of several prescription drugs under the supervision of medical personnel. Federal law provides that no federal or state correctional employee and no contractor "shall be required, as a condition of that employment or contractual obligation, . . . to participate in any prosecution or execution under this section if such participation is contrary to the moral or religious convictions of the employee." 18 U.S.C. § 3597(b). Many states have enacted similar protections.[83] We are aware of no state, in law or in practice, that requires corrections personnel or health care practitioners to participate in executions in violation of conscience. Thus, even in the context of state-sanction execution, the right to refrain from taking human life remains inviolate.

6. The right of conscientious objection in the medical community

The right to refrain from taking human life has also long been recognized in the medical community. Since at least 1973 (the year of *Roe v. Wade*), the American Medical Association has repeatedly affirmed that "[n]either physician, hospital, nor hospital personnel shall be required to perform any act violative of personally held moral principles." Ex. 56. Rather, "good medical practice requires only that the physician or other professional withdraw from the case, so long as the withdrawal is consistent with good medical practice." Ex. 56.

Similarly, the American Pharmacists' Association explicitly recognizes "the individual pharmacist's right to exercise conscientious refusal" and supports "the

[83] *See also* Cal. Penal Code § 3605 (West 2002); Fla. Stat. § 922.105 (2009); Ga. Code Ann. § 17-10-38 (2009); 75 Ill. Comp. Stat. 5/119-5 (2003); La. Rev. Stat. Ann. § 15:569 (2005); Or. 291-024-0005 (2009); Ariz. Dep't of Corr., Dep't Order 710 (2009); Dep't of Corr., State of Conn., Directive No. 6.15 (2004); Idaho Dep't of Corr. Standard Operating Procedure 135.02.01.001 (2006); 501 Ky. Admin. Regs. 16:320 (2010); Dep't of Corr., State of Wash., Policy No. DOC 490.200 (2008)

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establishment of systems to ensure patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal." Ex. 55.

The medical community's recognition of the right of conscience is simply one stream of many that flow from a single source of liberty deeply rooted in American tradition: the fundamental right to refuse to take human life—a right with unique importance to a profession of healers, whose first rule is "do no harm."

7. The right of conscientious objection in foreign and international law

Finally, the right to refrain from taking human life is not unique to the United States. Many foreign countries provide analogous, and sometimes even stronger, protections for conscience in the health care field. In the United Kingdom, for example, the first statute legalizing abortion in 1967 provided an exemption for conscientious objectors: "no person shall be under any duty, . . . to participate in any treatment authorized by this Act to which he has a conscientious objection." Abortion Act 1967 (c. 87). Similar protections are provided in the laws of many other western countries, including Australia, Austria, Belgium, Cyprus, Denmark, France, Germany, Hungary, Ireland, Italy, New Zealand, Portugal, and Spain.[84]

[84] Natashia Crea, Abortion Law in Australia, PARLIMENTARY LIBRARY, August 31, 1998, available at http://www.aph.gov.au/library/pubs/rp/1998-99/99rp01.htm; Health (Family Planning) Act, 1979 (Act No. 20/1979) (Ir.), available at http://acts2.oireachtas.ie/zza20y1979.1.html; Contraception, Sterilisation and Abortion Act 1977, 1977 S.N.Z. No.112, available at http://www.legislation.co.nz/act/public/1977/0112/latest/DLM17680.html; *See* generally The Right to Conscientious Objection and the Conclusion of EU Member States of Concordats with the Holy See, EU Network of Independent Experts on Fundamental Rights, December 17, 2005, available at http://www.fd.uc.pt/igc/pdf/eu_fund_rights/CFR-CDFopinion4-2005.pdf.

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The international community has also recognized the right of conscientious objection. The United Nations Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948, declares:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Universal Declaration of Human Rights, Art. 18. This provision has been interpreted by the UN Human Rights Committee to include a right to refrain from taking life due to a conscientious objection. UN Human Rights Committee, General Comment No. 22 (Art. 18). Although these statements are not a product of the United States' history and tradition, the Supreme Court has expressed a willingness to look to international standards as support for the fundamental rights established under the Constitution. *See Atkins v. Virginia*, 536 U.S. 304, 316 n. 21 (2002) (looking to international laws opposed to the execution of the mentally handicapped to support the conclusion that such statutes are prohibited by the Constitution).

* * * * *

In sum, if any right is "objectively, 'deeply rooted in this Nation's history and tradition," it is the right to refrain from taking human life. That right has been uniformly protected in every context where it has been threatened—military service, abortion, abortifacient drugs, assisted suicide, and capital punishment. And Defendants cannot point to a single example in our nation's history where it has been systematically compromised.

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B. The right to refrain from taking human life is far more deeply rooted than other rights recognized by the Supreme Court.

The right to refrain from taking human life is not only deeply rooted in our nation's history, it is also "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Indeed, when the right to refrain from taking human life is compared with other rights that the Supreme Court has recognized—such as the right to abortion in *Roe* and *Casey*, or the right to privacy in intimate relationships in *Lawrence*—it is clear that the right not refrain from taking human life is far more deeply established in American law and society.

In *Roe*, for example, the Supreme Court supported its holding by noting "a trend toward liberalization of abortion statutes" at the state level. 410 U.S. at 140. Specifically, "about one-third" of the states had adopted "less stringent laws" regulating abortion. *Id.* Similarly, in *Lawrence*, the Court noted that, "[o]ver the course of the last decades, States with same-sex prohibitions have moved toward abolishing them." 539 U.S. at 570 (2003).

But state-law support for the rights in *Roe* and *Lawrence* cannot even come close to state-law support for the right to refrain from taking human life. At the time of *Lawrence*, fourteen states still had anti-sodomy laws. And at the time of *Roe*, thirty-three states still banned abortion. By contrast, as explained above, support for the right to refrain from taking human life is truly universal. The federal and state governments have protected conscientious objection to military service since the colonial era. More importantly, Defendants cannot point to a single law that requires health care professionals to participate in an abortion, assisted suicide, or execution. And only one state has gone as far as Washington in the context of abortifacient drugs, and that law was struck down as

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unconstitutional. In short, the right to refrain from taking human life is far more universally recognized than the rights recognized in *Roe*, *Casey*, and *Lawrence*.

That right also passes muster under the more nebulous standard, relied on in *Casey* and *Lawrence*, of a right "to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Lawrence*, 539 U.S. at 574 (quoting *Casey*). According to these cases, beliefs about these matters are "central to personal dignity and autonomy" and cannot be "formed under compulsion of the State." *Id.*

These statements apply with even greater force to the right to refrain from taking human life. Beliefs about the value of human life, when it begins, and when it can be destroyed are obviously "central to personal dignity and autonomy" and fundamental to "the mystery of human life." *Id.* More importantly, in every account of human ethics and morality, fidelity to conscience is an essential aspect of "personal dignity and autonomy." *Id.*; *see also* Edmund Pellegrino, *The Physician's Conscience, Conscience Clauses and Religious Belief*, 30 Fordham Urban Law Journal 221 (2002). To violate one's conscience—especially in matters as fundamental as life and death—is to do violence to one's very identity as a human person.

In sum, in an unbroken line of tradition, from the colonial era to the present, our nation has recognized the right to refrain from taking human life. That right has been recognized and protected, without exception, in every context in which it has been implicated. The historical pedigree of that right far outshines several of the rights already recognized by the Supreme Court. Thus, the right is protected by the Fourteenth Amendment.

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C. The right to refrain from taking human life has been violated here.

There is no dispute that the right to refrain from taking human life has been violated here. Plaintiffs believe, as a matter of sincere religious faith, that human life begins at conception, and that participating in the destruction of a fertilized egg by dispensing Plan B or *ella* takes human life. These sincere religious beliefs are unchallenged. They are no different than the beliefs of a conscientious objector who cannot serve in the military because he might be required to kill, or a pharmacist who cannot in good conscience fill a prescription for lethal drugs that are to be used in a state-sanctioned execution.

The Regulations force Plaintiffs to choose between participating in taking human life or losing their pharmacy licenses and their livelihoods. That coercion is no different from early colonial militia laws, which punished conscientiously objecting Quakers with monetary fines and loss of livelihood. It is also no different from a law that would coerce a state medical examiner in violation of conscience to participate in an execution or lose his job.

Nor can the burden on the fundamental right to refrain from taking human life satisfy strict scrutiny. As explained above, Defendants have offered *no evidence* that Plaintiffs' practice of conscience-based referral ever has, or ever could, pose a threat to timely access to Plan B. Indeed, the government has stipulated that Plaintiffs' referrals "help[s] assure timely access to lawfully prescribed medications." ¶ 1.5. Thus, the Regulations compel Plaintiffs to participate in the destruction of human life without furthering any legitimate purpose at all. Accordingly, they violate the Due Process Clause.

V. Plaintiffs are entitled to a permanent injunction.

Because the Regulations violate the Constitution, they should be permanently enjoined so that the government cannot enforce them against Plaintiffs. This

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Court has broad discretion to fashion appropriate equitable relief. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). A permanent injunction is appropriate when the plaintiff demonstrates:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Antoninetti v. Chipotle Mexican Grill, Inc., 643 F.3d 1165, 1174 (9th Cir. 2010) (quoting eBay, 547 U.S. at 391). Here, all four factors strongly favor a permanent injunction.

Irreparable Injury. First, Plaintiffs have suffered an irreparable injury because the Regulations deprive them of their right to the free exercise of religion under the First Amendment. Both the Ninth Circuit and the Supreme Court "have repeatedly held that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). As the Ninth Circuit stated in its preliminary-injunction ruling: "If [Plaintiffs] are compelled to stock and distribute Plan B . . . , and a trial on the merits shows that such compulsion violates their constitutional rights, *[Plaintiffs] will have suffered irreparable injury*, since unlike monetary injuries, constitutional violations cannot be adequately remedied through damages." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (emphasis added; internal quotations omitted). Beyond the loss of First Amendment freedoms, Plaintiffs face severe emotional harms if they are forced to choose between following their religious beliefs, which forbid them from

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participating in the destruction of human life, and continuing to provide for their families. *See American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) ("[T]he loss of one's [business] does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of [losses].") (alterations in original; internal quotations omitted).

Inadequate Remedy at Law. For similar reasons, Plaintiffs have no adequate remedy at law—"since unlike monetary injuries, constitutional violations *cannot be adequately remedied through damages*." *Id.* (emphasis added; internal quotations omitted). Beyond emotional harms and the loss of First Amendment rights, Plaintiffs also face the loss of their job, their business, and their livelihood. Although such financial losses might ordinarily be remedied through damages, "the Eleventh Amendment sovereign immunity of the [State Defendant] bars the [Plaintiffs] from ever recovering damages in federal court." *California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 851-52 (9th Cir. 2009). Thus, an injunction is particularly appropriate because Plaintiffs have *no remedy* available at law. *Id.*

Balance of Hardships. The balance of hardships also tips overwhelmingly in Plaintiffs favor. Absent an injunction, Plaintiffs will be forced to choose between their First Amendment rights and their ability to provide for their families. Such a "stark choice" tips "sharply" in favor of granting an injunction. *Nelson v. National Aeronautics and Space Admin*, 530 F.3d 865, 881-82 (9th Cir. 2008), *rev'd on other grounds*, *National Aeronautics and Space Admin. v. Nelson*, 131 S.Ct. 746 (2011). On the other side of the scale, Defendants offer *no evidence* of hardship. There is no evidence that Plaintiffs' referrals have ever impeded timely access to Plan B. In fact, Defendants have stipulated precisely the opposite: "that

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facilitated referrals help assure timely access to lawfully prescribed medications . . . includ[ing] Plan B." Dkt. #441, ¶ 1.5.

Public Interest. For the same reasons, the public interest weighs heavily in favor of a permanent injunction. The Ninth Circuit has recognized a "significant public interest" in upholding First Amendment principles. *Klein*, 584 F.3d at 1208. Here, the Regulations infringe "not only the [First Amendment] interest of [Plaintiffs], but also the interests of other people subjected to the same restrictions." *Id.* (internal quotations omitted). On the other hand, enforcing the Regulations against Plaintiffs serves no public interest, as Plaintiffs' conduct undisputedly does not threaten any alleged interest in timely access to medication.

CONCLUSION

For the foregoing reasons, the Court should find in favor of Plaintiffs on all issues and permanently enjoin the State Defendants from enforcing the Regulations against Plaintiffs. The Court should also award Plaintiffs their attorneys' fees and costs as prevailing parties.

Respectfully submitted this 10th day of November, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2011, I electronically filed the foregoing Plaintiffs' Trial Brief with the Clerk of the Court using the CM/ECF System, which will send notification of the filing to all counsel of record.

I certify under penalty of perjury that the foregoing is true and correct.

DATED this 10th day of November, 2011.

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