Case Nos. 12-35221 and 12-35223

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STORMANS INC., doing business as Ralph's Thriftway; et al.,

Plaintiffs – Appellees,

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

Defendants – Appellants,

and

JUDITH BILLINGS; et al.,

Defendants – Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA
No. 3:07-CV-5374-RBL
The Honorable Ronald B. Leighton
United States District Court Judge

Brief of *Amici Curiae* Washington State Catholic Conference, National Association of Evangelicals, Union of Orthodox Jewish Congregations of America, The Ethics & Religious Liberty Commission of the Southern Baptist Convention, International Mission Board of the Southern Baptist Convention, General Conference of Seventh-day Adventists, Lutheran Church—Missouri Synod, The General Council of the Assemblies of God, Northwest Ministry Network of the Assemblies of God, Anglican Church of North America, Evangelical Presbyterian Church, The National Hispanic Christian Leadership Conference, Christian and Missionary Alliance, American Bible Society, Queens Federation of Churches in Support of Plaintiffs-Appellees

Alexander Dushku
Justin W Starr
KIRTON | McCONKIE
60 East South Temple, Suite 1800
Salt Lake City, Utah 84111-1004
Attorneys for Amicus Curiae Religious Organizations Supporting Plaintiffs-Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned states that none of the *amici* is a corporation that issues stock or has a parent corporation that issues stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

FED R. APP. P. 29(c)(5) STATEMENT

Pursuant to Rule 29(c)(5), the undersigned states that Counsel for the parties have not authored any part of this brief and no party or counsel for any party contributed money to fund any part of the preparation or submission of this brief.

IDENTITY AND INTEREST OF AMICI

Amici Curiae are a diverse coalition of religious organizations with tens of millions of members from around the nation. We are Catholics, Orthodox Christians, Anglicans, Lutherans, Evangelicals, Baptists, Seventh-day Adventists, Presbyterians, Pentecostals, and Jews, and our ministries include believers from many other faith traditions. Like the Founders of our nation, we support a vigorous right to the free exercise of religion under the First Amendment—one that provides meaningful protections against laws and government edicts that seek to compel religious organizations and people of faith to act in violation of their deeply-held religious convictions. Consequently, we are concerned about the excessively narrow view of the Free Exercise Clause advocated by the Defendants in this case, and we urge this Court to reject it. Given its influence, the interpretation this Court gives to that vital constitutional provision will have serious implications for the religious liberty of these *amici* and their members—indeed, of all Americans—that reach far beyond the facts of this case.

A list of the religious organizations joining this brief, together with detailed statements of their individual interests, may be found in the attached Addendum. The parties have given their consent to the filing of amicus briefs pursuant to Rule 29(a).

INTRODUCTION

Religious liberty is our "first freedom." It is "the first liberty assured by the First Amendment …." *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1560 (9th Cir. 1997). No right was deemed more important during the Founding. The Religion Clauses of the First Amendment are the articles of peace that allow a diverse people of fundamentally different religions to live together in harmony. America's courts have long interpreted the First Amendment to protect religious freedom in a manner consistent with ordered liberty. Religious interests cannot always prevail, of course, but America's courts have taken great care to safeguard the preferred place of this indispensable right while appropriately accommodating legitimate governmental interests.

But according to officials of the State of Washington and Intervenors (collectively, "Defendants"), it's all quite simple: unless a law targets religion, or burdens only religion, the First Amendment is not offended. Since government actors are usually sophisticated enough to avoid the appearance of targeting religion, in Defendants' view all that is necessary to escape meaningful First Amendment scrutiny is for officials to craft laws that have a patina of religious neutrality and general applicability. Respect for the inalienable right of religious freedom is reduced to an exercise in clever drafting. *Cf. Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841 (1987) ("We view the Fifth Amendment's Property

Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination.").

This brief will show that the Defendant's arguments are based on a serious misreading of the Supreme Court's decisions in *Employment Div. v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Those decisions did not transform the Free Exercise Clause into a limited anti-discrimination principle redundant of the Equal Protection Clause. Quite the contrary, they reaffirmed the preferred place of religious freedom and the First Amendment's primacy in protecting religious liberty. To be sure, the tools courts use to ensure that protection may change with the factual context and the law at issue, but the goal remains the same. Hence, while it is true—as *Smith* and *Lukumi* hold—that religiously neutral laws of general applicability are reviewed more deferentially, the reason for that deference is a political check that provides strong hedges against both invidious *and* gratuitous abridgments of religious freedom. But, as shown below, that check *only* works where a law is truly neutral and generally applicable. *Smith* and *Lukumi*—both on their own terms and in light of prior free exercise decisions that remain good law—demonstrate that true religious neutrality and general applicability are often difficult to achieve, especially where regulators flexibly accommodate diverse secular interests.

These decisions demonstrate that the gerrymandered Pharmacy Regulations—both on their face and in their long history of application—cannot qualify as religiously neutral and generally applicable. As established by the carefully-written decision below, their intent, purpose, and structure rigidly compel religious objectors to dispense Plan B—even when other pharmacies stand ready to provide it without any burden to the client—while flexibly exempting and accommodating numerous other secular interests. For this Court to hold that the Pharmacy Regulations are nevertheless neutral and generally applicable would render those terms almost meaningless and seriously undermine vital First Amendment protections for our first freedom.

ARGUMENT

I. Religious Freedom Is Preferred And Protected By The Free Exercise Clause Of The First Amendment.

It is worth pausing to consider the place of religious liberty in our constitutional pantheon. "[T]he long and intensive struggle for religious freedom in America [is] particularly relevant in the search for the First Amendment's meaning." *McGowan v. State of Maryland*, 366 U.S. 420, 437 (1961). The fight for religious freedom is a major part of what formed America. "[R]eligious freedom was the crux of the struggle for freedom in general." *Everson v. Bd. of Educ.*, 330 U.S. 1, 34 (1947) (Rutledge J., dissenting). This freedom finds "irrefutable confirmation" in "the [First] Amendment's sweeping content." *Id.*

Religious liberty is not a second-class right that can be cast aside when government finds it annoying or inconvenient. Rather, the free exercise of religion is among "the indispensable … democratic freedoms secured by the First Amendment," which "gives these liberties a sanctity and a sanction not permitting dubious intrusions." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

A. Religious freedom is an inalienable right protected from government, not granted by government.

A foundational truth of the American Founding is that basic rights are not granted by government. Instead, as summarized in the Declaration of Independence, it is "to *secure* these [inalienable] Rights [that] Governments are instituted …." The Founders understood that "the free exercise [of religion]" is not a right granted by the First Amendment any more than are "the freedom of speech," "the right of the people to peaceably assemble," or other rights secured by the First Amendment. *See, e.g.*, James Madison, Memorial and Remonstrance Against Religious Assessments § 1 (1785) (religious freedom is a right reserved by the people when they enter into civil society). Thus, to protect religious freedom, the First Amendment prohibits Congress—and by extension of the Fourteenth Amendment, the states—from passing a "law … prohibiting the free exercise [of religion]." U.S. Const. amend. I.

B. The Free Exercise Clause gives special protection to the exercise of religion.

Defendants present religion as something like a private hobby—not to be discriminated against yet not entitled to better treatment than any other hobby. But that is not the American tradition. "[B]y its terms," the Free Exercise Clause "gives special protection to the exercise of religion." *Thomas v. Review Board*, 450 U.S. 707, 713 (1981). "All [First Amendment freedoms] have preferred position in our basic scheme." *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944). *See also Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S.Ct. 694, 706 (2012) ("First Amendment … gives special solicitude to the rights of religious organizations"). This "preferred position" calls for real judicial vigilance against State encroachments into religious liberty. *See West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . . and to establish them as legal principles to be applied by the courts.").

The constitutional preference for religious liberty over less fundamental interests is the touchstone and starting point of the Supreme Court's free exercise jurisprudence.

II. The Free Exercise Clause Establishes A Baseline Of Religious Liberty.

Professor Douglas Laycock notes that government lawyers frequently urge an erroneously narrow interpretation of the Free Exercise Clause, what he labels a "Religious Bigotry Interpretation." Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 Cath. Law. 25, 26-27 (2000-01). "They argue that under *Smith* and *Lukumi*, religious claimants must prove that government officials acted out of an anti-religious motive," or that even if religious claimants don't have to prove bad motive they "still ha[ve] to prove that religion is uniquely singled out for a burden that applies to no one else[.]" *Id*. at 27-28. That is exactly the error Defendants advocate here.

Such an interpretation ignores the many cases where the Supreme Court has held that the Free Exercise Clause requires preferential treatment for religion and a sphere of freedom into which government either cannot intrude—even through neutral and generally applicable laws—or may do so only for the most compelling reasons.

Of course, the First Amendment precludes all "governmental regulation of religious beliefs as such." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). The government may not compel affirmation of religious belief, *Torcaso v. Watkins,* 367 U.S. 488, (1961), punish the expression of religious doctrines it believes to be false, *United States v. Ballard*, 322 U.S. 78, 86-88, (1944), or impose special

disabilities on the basis of religious views or status, *McDaniel v. Paty*, 435 U.S. 618 (1978).

The absolute freedom of religious belief includes the right to be free from government judgments about the validity or value of those beliefs, especially judgments that "devalue" religious belief—a principle, as shown below, of great importance here. *Sherbert*, 374 U.S. 398.

But beyond freedom of belief, the Free Exercise Clause creates a broad zone of autonomy for churches. The First Amendment "radiates … a spirit of freedom for religious organizations … in short, power to decide for themselves, free from state interference matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952). Thus, "[l]egislation that regulates church administration, the operation of the churches, [or] the appointment of clergy … prohibits the free exercise of religion." *Id*. at 107-08. Even neutral and generally applicable civil rights laws must give way to religious freedom when they interfere with ecclesiastical matters. *Hosanna-Tabor*, 132 S.Ct. at 706 (barring application of ADA to minister). Matters of church membership are likewise outside the jurisdiction of civil courts. *Watson v. Jones*, 80 U.S. 679, 730 (1871) ("We cannot decide who ought to be members of the church ….").

The Free Exercise Clause also protects the right to participate in church sacraments, such as confession of sin in the Catholic Church, without government interference. *Mockaitis*, 104 F.3d at 1530 (excluding tape of jailhouse confession because taping the confession "invades their free exercise of religion and … makes it impossible for [the priest] to minister the sacrament"). Thus, "suits cannot be maintained which would require a disclosure of the confidences of the confessional …." *Totten v. United States*, 92 U.S. 105, 107 (1875).

The Free Exercise Clause protects the right to proselytize free from even benign government licensing schemes. *Cantwell v. Connecticut,* 310 U.S. 296 (1940) (invalidating licensing system for religious and charitable solicitations that gave administrator discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943); *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002) (government cannot require religious canvassers to obtain a permit).

It protects the right of parents to direct the religious upbringing of their children, *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), and to direct their education in accordance with religious tenets, *Wisconsin v. Yoder,* 406 U.S. 205, (1972).

It protects religious objectors from State requirements to engage in civic ceremonies or display religiously-offensive government messages. *See Barnette,*

319 U.S. 624 (invalidating compulsory flag salute statute challenged by religious objectors); *Wooley v. Maynard,* 430 U.S. 705 (1977) (invalidating compelled display of license plate slogan that offended individual religious beliefs).

It protects the freedom of religious association, *Roberts v. United States Jaycees,* 468 U.S. 609, 622, (1984) ("An individual's freedom . . . to worship . . . could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed."), including the essential freedom to gather for worship, *Hosanna-Tabor*, 132 S.Ct. at 711-12 ("The First Amendment protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals ….") (Alito, J., concurring, joined by Kagan, J.).

The Free Exercise Clause also bars or imposes limits on tort claims against churches. For instance, courts have "uniformly" rejected claims of clergy malpractice, *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198, 204 (Utah 2001), because such claims abridge the free exercise of religion by requiring clergy to minister according to a secular standard of care, *F.G. MacDonnell*, 696 A.2d 697, 703 (N.J. 1997) (citing cases). The Free Exercise Clause protects ecclesiastical counseling from governmental intrusion via tort law even though secular counseling is extensively regulated and routinely the subject

of lawsuits. *Bladen v. First Presbyterian Church*, 857 P.2d 789, 797 (Okla. 1993) ("Once a court enters the realm of trying to define the nature of advice a minister should give a parishioner[,] serious First Amendment issues are implicated."). Courts often invoke free exercise principles to bar or limit fiduciary duty, negligent hiring, and negligent supervision claims against clergy and churches. *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994) (per curiam); *Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo. 1997); *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 791–92 (Wis. 1995). And claims for defamation and intentional infliction of emotional distress that arise in certain ecclesiastical contexts are typically barred or strictly limited by the First Amendment. *Hadnot v. Shaw*, 826 P.2d 978, 987 (Okla. 1992) ("The First Amendment will protect and shield the religious body from liability for activities carried on pursuant to the exercise of church discipline.") (footnote omitted); *Paul v. Watchtower Bible & Tract Soc. of New York*, 819 F.2d 875, 883 (9th Cir. 1987) ("Offense to someone's sensibilities resulting from religious conduct is simply not actionable in tort.").

In sum, the Free Exercise Clause powerfully protects religious liberty by requiring preferential treatment in many areas. Defendants' cramped view of religious freedom cannot be squared with the robust religious freedoms that have long found protection under the Free Exercise Clause.

III. *Smith* and *Lukumi* Reaffirm that the Free Exercise Clause Protects Religious Liberty.

Defendants portray *Employment Div. v. Smith*, 494 U.S. 872 (1990), as if it revoked this long-standing, liberty-based understanding of the Free Exercise Clause, leaving only a narrow anti-discrimination principle. *Smith* says no such thing, and it is dangerously wrong to read it that way.

In *Smith*, the plaintiffs claimed the right to be exempt from an "across-the-board criminal prohibition" on peyote use. *Smith*, 494 U.S. at 884. The Court clarified "that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id*. at 879. In other words, there is no religious exemption from laws that bind all citizens, lest "every citizen . . . become a law unto himself." *Id*. (quotation marks omitted).

But *Smith* did not reject the historical liberty-based understanding of the Free Exercise Clause, and it certainly didn't convert the Free Exercise Clause into an anti-discrimination provision. To be sure, the Supreme Court said that laws that target religion would "doubtless[ly] be unconstitutional," *id*. at 877, but that is a far cry from saying that *only* such laws are unconstitutional.

Nor did *Smith* define "neutral and generally applicable" in the way Defendants argue. This is obvious from the fact that *Smith* did not overturn a

single case, including *Sherbert*, which invalidated on free exercise grounds a law that neither targeted religion nor burdened only religion. In *Sherbert*, the law provided that an applicant was ineligible for unemployment benefits if the Employment Security Commission found that the applicant had failed "without good cause" to accept "suitable work." 374 U.S. at 400-01. The Commission found that Sherbert's religiously-motivated refusal to work on Saturdays was not "good cause." The Supreme Court held that this decision unconstitutionally burdened Sherbert's religious exercise, even though the law did not "single[] out for disqualification only those persons who are unavailable for work on religious grounds." *Id*. at 416. *See also id*. at 420 (Harlan, J., dissenting) ("Thus in no proper sense can it be said that the State discriminated against the appellant on the basis of her religious beliefs or that she was denied benefits because she was a Seventh-day Adventist.").

"[I]n this highly sensitive constitutional area," the Court continued, "only the gravest abuses, endangering paramount interest, give occasion for permissible limitation" on religious freedom. *Id*. at 406 (brackets and quotation marks omitted). The Court found no such compelling governmental interest and held that the denial of unemployment compensation violated the Free Exercise Clause—not because Sherbert had been discriminated against, but because her religiously-

motivated refusal to accept a job had been treated less favorably than secular motivations for the same conduct.

Sherbert is still binding precedent. *Smith* explained that the law at issue in *Sherbert* was not neutral and generally applicable and thus was properly subject to strict scrutiny. *Smith*, 494 U.S. at 884.

And this makes sense. The applicant for unemployment in *Sherbert* was not seeking to become "a law unto [her]self." *Id*. at 879. She was not asking for the right to engage in conduct that the law prohibited for everyone else, such as ingesting peyote or practicing polygamy. *See Reynolds v. United States*, 98 U.S. 145, 166-67 (1878). She merely wanted to be treated as favorably as those who were granted unemployment benefits notwithstanding their secular reasons for refusing work.

Smith also reaffirmed the continuing validity of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), another important case upholding free exercise rights where the law did not target religion. In *Yoder*, Amish parents appealed a conviction for violating the state's compulsory-education law. The parents had a sincerely-held religious belief that high school attendance was contrary to their way of life. The Court noted that although "religiously grounded conduct must often be subject to the broad police power of the State," there "are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the

Sate to control, *even under regulations of general applicability*." *Id*. at 220 (emphasis added). The Court held that while education is of paramount importance, the government's interest was still not compelling enough to force Amish children to go to school past the eighth grade.

The law at issue in *Yoder* was neutral and generally applicable, and it certainly didn't target religion. The *Smith* Court reaffirmed *Yoder* anyway because it involved a deep incursion by the State into the right of Amish parents to direct the religious upbringing of their children. *Smith*, 494 U.S. at 881. The magnitude of the religious hardship in *Yoder* was undoubtedly a significant factor in the Court's holding that the law prohibited the "free exercise" of religion. *Yoder*, 406 U.S. at 218 (noting the "severe" threat the compulsory-attendance law was to the Amish way of life; "precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent"). Thus, *Smith* reaffirmed *Yoder*'s liberty-based understanding of the Free Exercise Clause.

Since *Smith*, the Supreme Court has addressed the Free Exercise Clause in *Lukumi* (1993) and *Hosanna-Tabor* (2012).[1] Both cases confirm the preferred

[1] A third case, *Locke v. Davey*, 540 U.S. 712 (2004), also addressed the Free Exercise Clause but in an entirely different context: whether it required public funding of a theology program, which raised Establishment Clause concerns as well. This case raises no such concerns.

place of religious freedom and the overarching First Amendment imperative to protect religious liberty from substantial governmental incursions.

Starting with the latter, in *Hosanna-Tabor* the EEOC brought suit against a religious school alleging that it violated the Americans with Disabilities Act when it terminated a disabled teacher. 132 S.Ct. at 700-01. The EEOC and Solicitor General argued, much like Defendants here, for an extremely narrow interpretation of the Free Exercise Clause. They argued that the ADA was neutral and generally applicable and there was "no need—and no basis" for special religious protections "grounded in the Religion Clauses themselves." *Id*. at 706. A unanimous Court rejected the argument that churches were not entitled to be treated better than secular groups as "untenable" and "remarkable" in light of the "text of the First Amendment itself, which gives special solicitude to the rights of religious organizations." *Id.* The Court held that even though the ADA is both neutral and generally applicable, "the Free Exercise Clause prevents [government] from interfering with the freedom of religious groups to select their own [ministers]." *Id*. at 703. Thus, the Court strongly reaffirmed a liberty-based interpretation of the Free Exercise Clause. The mere absence of religious targeting was irrelevant.

In *Lukumi*, the Court held that "[a] law failing to satisfy these requirements [of neutrality and general applicability] must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."

Lukumi, 508 U.S. at 531-32. The challenged ordinances prohibited the ritual killing of animals while carefully exempting most secular killing of animals. The Court explained that "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral" and is therefore subject to strict scrutiny. *Id*. at 533. The evidence in *Lukumi* showed that religious animal killings had been specifically targeted and, therefore, the law was not neutral. The Court also explained that a law is not generally applicable if "in a selective manner [it] imposes burdens only on conduct motivated by religious belief," and (emphasizing religious liberty concerns) that barring government's ability to do so "is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 543. The ordinances had been "gerrymander[ed]" to apply almost "only" to religious animal killings and, thus, utterly failed the requirement of general applicability and fell "well below the minimum standard necessary to protect First Amendment rights." *Id*.

Lukumi involved the Defendants' scenario of religious targeting, but the Court never suggested that such targeting is the only thing the Free Exercise Clause prohibits. Rather, the Court held that such targeting falls "well below" the "minimum" requirements of the First Amendment. *Lukumi* struck down the challenged laws *not* because of bad intent or because they burdened only religion, but because religious conduct was not treated as favorably as secular conduct.

Lukumi and *Smith* (as well as *Hosanna-Tabor*) reaffirm the preferred place of religion and the role of the Free Exercise Clause in protecting religious liberty. When a law burdens religion, it must survive strict scrutiny unless it applies to everyone equally, and even then, as in *Hosanna-Tabor*, the law may still run afoul of the Free Exercise Clause. Sham neutrality and lack of uniformity are fatal.

IV. The Meaning of Neutrality and General Applicability Under *Smith* and *Lukumi*.

Smith's requirement of neutrality and general applicability, properly understood, fulfills the First Amendment's essential function of protecting the preferred place of religious liberty.

A. At a minimum, the neutrality requirement prohibits laws that target religion.

Smith said that laws that prohibit certain acts "only when they are engaged in for religious reasons" are not neutral. *Smith*, 494 U.S. at 877. Such a law would "doubtless[ly]" be unconstitutional. *Id*. Likewise, in *Lukumi*, the Court stated that "***[a]t a minimum***, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it was undertaken for religious reasons." *Lukumi*, 508 U.S. at 532 (emphasis added). Thus, the Free Exercise Clause protects religious freedom by, at a minimum, prohibiting laws that specifically target religion.

This *minimum* requirement is not like being tall enough to ride a roller coaster. Rather, the *least* of what the Free Exercise Clause does is prohibit discrimination. But the Free Exercise Clause protects against *more* than targeting of religion. Thus, Defendants are clearly wrong when they argue that the Pharmacy Regulations are neutral merely because they do not target religious conduct—that is necessary to pass muster but not sufficient. At any rate, the district court correctly found that the Pharmacy Regulations do indeed target religious conduct.

B. A law is not generally applicable if it imposes burdens only on conduct motivated by religious belief.

In *Lukumi*, the Court explained that a law can also fail the general applicability test if "in a selective manner [it] impose[s] burdens only on conduct motivated by religious belief …." *Lukumi*, 508 U.S. at 543. Defendants embrace this language as though it defines what is "generally applicable" rather than merely giving an example of what it is not. State's Brief at 26-27. But clearly the Court was not fully defining general applicability; it was merely stating the obvious proposition that a law that burdens *only* religion is not generally applicable—indeed, it's not even close. *See Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012) (a law riddled with exceptions is "the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny"). Two sentences later the Court states: "In this case *we need not define*

with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances *fall* ***well below*** *the* ***minimum*** *standard* necessary to protect First Amendment rights." *Lukumi*, 508 U.S. at 543 (emphasis added).

Thus, even if the Regulations do not burden "only" conduct motivated by religious belief, that would merely mean that they do not fall "well below the minimum" requirements of the Free Exercise Clause—not that they automatically pass muster. In any case, Plaintiffs have persuasively demonstrated that the Pharmacy Regulations do impose their burden on religious objectors and almost no one else, precluding any claim to general applicability.

C. Neutrality and general applicability require that religiously-motivated conduct be treated as favorably as favored secular conduct.

At the opposite end of these "minimum" requirements is the requirement in *Smith* and *Lukumi* that religious conduct be treated as favorably as favored secular conduct.

Smith says that if "the reasons for the relevant conduct" determine whether a law has been violated, the law is not neutral and generally applicable. *Smith*, 494 U.S. at 884. And when a law prohibits conduct for some reasons but not for others, the Free Exercise Clause requires that, absent a compelling interest, religiously-motivated conduct must be treated as favorably as favored secular conduct. *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214,

1234(11th Cir. 2004) ("Surfside's treatment of synagogues as categorically different … clearly implicates the Supreme Court's requirement that governments should not treat secular motivations more favorably than religious motivations").

This is what *Sherbert* stands for after *Smith*. In *Sherbert*, unemployment compensation was granted to some who refused work for secular reasons, such as the hope of finding work in their customary field, but denied to Sherbert because she refused work for religious reasons. That was unconstitutional, as the Supreme Court has explained, because "in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'" *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884). Importantly, it does not matter why some secular conduct has been favored; absent compelling reasons, religiously-motivated conduct must be treated as favorably as the favored secular conduct.[2]

[2] *Stinemetz v. Kan. Health Policy Auth.*, 252 P.3d 141, 154-56 (Kan. App. 2011) (Free Exercise rights of a Jehovah's Witness Medicaid beneficiary were violated when she was denied a request for an out-of-state bloodless liver transplant because regulations allowed for individual exemptions); *Horen v. Commonwealth*, 479 S.E.2d 553, 557 (Va. App. 1997) (Free Exercise Clause violated when a Native American medicine woman was convicted of illegally possessing owl feathers and the statute exempted possession of such feathers by "taxidermists, academics, researchers, museums, and educational institutions").

Lukumi carries the exemption analysis further. In *Smith*, the Court explained that laws that require "individualized governmental assessment of the reasons for the relevant conduct" are not generally applicable. *Smith*, 494 U.S. at 884. In *Lukumi*, the Court explained that *categorical* exemptions are even more suspect than individualized exemptions: "[C]ategories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542. Thus, like laws that allow individualized exemptions, laws with categorical exemptions are likewise subject to strict scrutiny.

In *Bowen v. Roy*, 476 U.S. 693 (1986), the Court explained why strict scrutiny is required when a law contains exemptions. *Bowen* involved a free exercise challenge to the requirement that a Social Security number be supplied by any applicant seeking welfare benefits. Presaging *Smith*, the Court emphasized that governmental action is entitled to "substantial deference" when the government chooses to "treat all applicants alike" because the government cannot be accused of "favoring religious over nonreligious applicants." *Id*. at 707. In contrast, if a law creates categorical or individual exemptions, as in *Sherbert*, "its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent," and "[i]n those cases, therefore, it [i]s appropriate to require the State to demonstrate a compelling reason for denying the requested exemption." *Id*. at 708.

The Pharmacy Regulations fail this test. The "purpose" of the Pharmacy Regulations "was to ensure that patients who need lawfully-prescribed medicines can obtain them in a timely manner." State's Brief at 1. But the Board knew it could not guarantee access to every medicine at every pharmacy at any time. As this Court explained, "every single pharmacy [cannot] be required to stock every single medication that might possibly be prescribed …." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1135 (9th Cir. 2009).

So the Pharmacy Regulations contain several exemptions, written and unwritten. A pharmacy is exempt from the stocking rule if, for example, demand for a particular medicine is limited, or if the medicine requires specialized equipment. A pharmacy is exempt from the delivery rule if it runs out of a medicine despite "good faith" efforts to comply with the stocking rule, or if it does not accept the customer's insurance. Thus, application requires evaluation of "the reasons for the relevant conduct." *Smith*, 494 U.S. at 884. Refusal to comply with the Pharmacy Regulations for certain secular reasons receives favored treatment. Refusal to comply for religious reasons is punished. Like *Sherbert*, some motivations are deemed "good cause"—*e.g.*, lack of demand and lack of specialized equipment, which are primarily financial motivations—while religious

motivations are automatically rejected.[3] For that reason alone, the Pharmacy Regulations are subject to strict scrutiny, which they cannot survive.[4] *See Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) ("[I]t is clear from those decisions [*Smith* and *Lukumi*] that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations.").

In sum, because the Pharmacy Regulations create both individualized and categorical exemptions—and treat secular motivations more favorably than

[3] In *Lukumi*, the city argued that the secular exemptions were "different" from the prohibited animal killings. "According to the city, it is 'self-evident' that killing animals for food is 'important'; the eradication of insects and pests is 'obviously justified'; and the euthanasia of excess animals 'makes sense.'" *Lukumi*, 508 U.S. at 544. The State makes similar assertions about the exceptions to the Pharmacy Regulations. State's Brief at 46-48. The secular exemptions may be important to the statutory scheme, but the financial hardship they shield is not constitutionally protected. The free exercise of religion is.

[4] Intervenors argue that "even if the burden of the [Pharmacy Regulations] did fall almost exclusively on religiously motivated conduct, that alone would not be enough to invalidate the rules." Intervenors' Brief at 41. They use the example of criminal prohibitions on polygamy, which "fall[] almost exclusively on members of certain religions." *Id*. But polygamy is, without exception, illegal in the United States, just as ingesting peyote was illegal in Oregon without exception. By contrast, failing to stock or dispense Plan B is not illegal in Washington without exception. It depends on the reason. Absent a compelling interest, the Free Exercise Clause would certainly invalidate a law that allowed polygamy for secular reasons but disallowed it for religious reasons.

religious motivations—they are not neutral and generally applicable and thus are subject to strict scrutiny.

D. A true neutral-and-generally-applicable requirement protects religious freedom in the political process.

The secular exemptions here were the result of a political process, which rejected a similar exemption for religious conscience. It is this type of disparate treatment that the neutral-and-generally-applicable requirement aims to prevent.

In *Lukumi*, the Court noted that the ban on religiously-motivated animal killings was "a prohibition that society is prepared to impose upon [Santeria worshipers] but not upon itself." *Lukumi*, 508 U.S. at 545. And then this key sentence: "This *precise evil* is what the requirement of general applicability is designed to prevent." *Id*. at 545-46 (emphasis added).

> The framers of the Constitution knew … that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply the legislation and thus to escape the political retribution that might be visited upon them if large numbers were affected.

Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

That is precisely what happened here. The Board was unwilling to make the Pharmacy Regulations truly neutral and generally applicable. Religious objectors

made their voices heard but did not have enough political clout. The Board was willing to impose the rule on religious objectors but not on everyone else. The failure of the political process to treat religious interests equally triggers strict scrutiny.

E. The neutral-and-generally-applicable requirement protects religious freedom by imposing strict scrutiny whenever judgments are made about religious conduct.

The ordinances at issue in *Lukumi* prohibited the "unnecessar[y]" killing of animals. *Lukumi*, 508 U.S. at 537. Like *Sherbert*, this required an individualized assessment of the reasons for the conduct. *Id*.

The Free Exercise Clause protects religious freedom against these types of judgments for two reasons. First, it is beyond the competence of government to judge the value of religious beliefs. A civil official cannot say, for example, that Sabbath worship is not "good cause" for refusing to work on Saturdays. *See Smith*, 494 U.S. at 887 ("'It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds.'" (*quoting Hernandez v. Commissioner*, 490 U.S. at 699)). A law is not religiously neutral when it requires such judgments. *See Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 166 (3d Cir. 2002) (such judgments "exemplif[y] the Supreme Court's concern in *Smith* and *Lukumi*

about … 'the government's deciding that secular motivations are more important than religious motivations'") (quoting *Fraternal Order of Police*, 170 F.3d at 365).

Second, the neutrality requirement prohibits judgments that "devalue[]" religious conduct. In *Lukumi*, the Court explained: "Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser importance than nonreligious reasons." *Lukumi*, 508 U.S. at 537-38.

Similarly, the Pharmacy Regulations "devalue[] religious reasons for" refusing to dispense Plan B "by judging them to be of lesser importance than nonreligious reasons." *Id*. Financial hardship is valued by the Regulations; religious hardship is devalued. Strict scrutiny is required whenever such judgments are made.[5]

F. The Free Exercise Clause protects religious freedom from "gratuitous restrictions" on religiously-motivated conduct.

In *Lukumi*, the Court explained that laws are not neutral if they "proscribe more religious conduct than is necessary to achieve their stated ends." *Id*. at 538. "It is not unreasonable to infer, at least when there are no persuasive indications to

[5] In *Smith*, the Court said that when the "reasons for the relevant conduct" must be assessed, the law is not generally applicable. *Smith*, 494 U.S. at 884. In *Lukumi*, the Court says that when the "reasons for the relevant conduct" have been assessed and religious reasons have been rejected, the law is not neutral. *Lukumi*, 508 U.S. at 537. This is an example of how neutrality and general applicability are independent but "interrelated." *Id*. at 531.

the contrary, that a law which visits '*gratuitous restrictions*' on religious conduct seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Id*. at 538 (emphasis added). In other words, a law cannot pointlessly burden religious conduct.

In *Lukumi*, the Court explained that the government's interests could have been addressed through narrower restrictions rather than a "flat prohibition" that unnecessarily criminalized religious sacrifice "even when it does not threaten the city's interest in the public health." *Id*. at 538-39. Failure to use narrower means fatally undermined the government's claim of neutrality.

The Pharmacy Regulations likewise prohibit religious conduct even when it does not threaten their purposes. Assume, for example, that there are two pharmacies on the same block. The first dispenses Plan B and the second, because of religious objections, does not. Requiring the second to dispense Plan B, notwithstanding its ready availability from another pharmacy, would be a "gratuitous restriction" that would serve no purpose. The record shows that there are *30 pharmacies* within five miles of Ralph's that stock and dispense Plan B. Plaintiffs' Brief at 40.

The Board could have protected religious freedom and accomplished its purposes by allowing referrals for reasons of religious conscience when there is another pharmacy near enough to timely dispense the prescription. To prohibit

such referrals is similar to what the city did in *Lukumi*, where a "flat prohibition" restricted religious sacrifice "even when it [did] not threaten the city's interest in the public health." *Lukumi*, 508 U.S. at 538-39.

The Pharmacy Regulations do not prohibit referrals in all circumstances. If a pharmacy does not carry a medicine because of lack of patient demand, lack of specialized equipment, or it is temporarily out of stock, then it can refer the customer to a nearby pharmacy, even though this undermines the purposes of the Pharmacy Regulations because there may not be a nearby pharmacy that carries the medicine. *All* religiously motivated referrals are prohibited, however, even if there is a nearby pharmacy that could timely deliver the medicine. Such a gratuitous restriction is not neutrality.

G. The neutral-and-generally-applicable test protects against laws passed with an anti-religious intent.

Lukumi, relying on equal protection cases, suggests that a law must be neutral on its face, in its operation, *and in its purpose—i.e.*, improper motive is one way (but certainly not the only way) to show that a law is not neutral.[6] *Id*. at 540. In *Lukumi*, the evidence showed that "the ordinances were enacted because of, not merely in spite of, their suppression of Santeria religious practice …." *Id*. (internal quotation marks omitted). Here, Plaintiffs have presented significant

[6] This part of the opinion did not receive majority support.

evidence that the Pharmacy Regulations were passed, at least in part, because of, not merely in spite of, the refusal of religious objectors to dispense Plan B.

The neutral-and-generally-applicable requirement prevents this kind of discrimination. It will be an extremely rare circumstance where a truly neutral and generally applicable law will be passed just for the sake of targeting religious conduct. A county is unlikely to go "dry," for example, just to prohibit the use of wine for communion. Likewise, the Board is unlikely to adopt truly neutral and generally applicable rules just to prohibit refusals to deliver Plan B based on religious conscience. Conversely, a lax neutrality and general applicability requirement invites religiously-based prohibitions.

H. The neutral-and-generally-applicable requirement protects against underinclusive laws.

In *Lukumi*, the city claimed that the ordinances "advance two interests: protecting the public health and preventing cruelty to animals." *Id*. at 543. But the ordinances were "underinclusive for those ends" because they "fail[ed] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree," *Id*.

The Pharmacy Regulations are extremely underinclusive with respect to their purpose of providing access to time-sensitive medicines. The explicit exceptions make them underinclusive, and the unwritten exceptions detailed in the district court's findings further undermine the Regulations. Additionally, the

Board does not regulate pharmacy hours, which undermines the purpose of the Pharmacy Regulations far more than an exemption for religious conscience. A woman in timely need of Plan B is vastly more likely to be unable to obtain it because the pharmacy she goes to is closed than because the pharmacy owner has a religious objection. The Pharmacy Regulations "fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree." *Id*. The neutral-and-generally-applicable requirement protects against this underinclusiveness. The Pharmacy Regulations are therefore subject to strict scrutiny.

CONCLUSION

The Free Exercise Clause vigorously protects the fundamental right to freedom of religion. Contrary to Defendants' arguments, that right has not been reduced to a bare nondiscrimination principle. Rather, it requires strict judicial scrutiny where a law purporting to be neutral and generally applicable in fact gratuitously restricts religion while exempting secular interests. That is precisely the case here with the Pharmacy Regulations. The district court's decision should be affirmed.

DATED this 21st day of November, 2012.

KIRTON | MCCONKIE

By: *s/* Alexander Dushku
Alexander Dushku
1800 Eagle Gate Tower
60 E. South Temple
P.O. Box 45120
Salt Lake City, Utah 84145-0120
Telephone: (801)328-3600
Facsimile: (801)321-4893
e-mail: adushku@kmclaw.com

Attorneys for *Amici Curiae* Religious Organizations Supporting Plaintiffs-Appellees

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

This brief complies with the type-volume limitation of Fed. R. App. P 32(a)(7)(B) and 29(b) because it contains 6,989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

KIRTON | MCCONKIE

By: *s/* Alexander Dushku

Alexander Dushku
Justin W Starr
1800 Eagle Gate Tower
60 E. South Temple
P.O. Box 45120
Salt Lake City, Utah 84145-0120
Telephone: (801)328-3600
Facsimile: (801)321-4893
e-mail: adushku@kmclaw.com

Attorneys for *Amici Curiae* Religious Organizations Supporting Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 21, 2012.

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

KIRTON | MCCONKIE

By: *s/* Alexander Dushku
Alexander Dushku
Justin W Starr
1800 Eagle Gate Tower
60 E. South Temple
P.O. Box 45120
Salt Lake City, Utah 84145-0120
Telephone: (801)328-3600
Facsimile: (801)321-4893
e-mail: adushku@kmclaw.com

Attorneys for *Amici Curiae* Religious Organizations Supporting Plaintiffs-Appellees

ADDENDUM

Amici Curiae are the Washington State Catholic Conference, National Association of Evangelicals, Union of Orthodox Jewish Congregations of America, The Ethics & Religious Liberty Commission of the Southern Baptist Convention, International Mission Board of the Southern Baptist Convention, General Conference of Seventh-day Adventists, Lutheran Church—Missouri Synod, The General Council of the Assemblies of God, Northwest Ministry Network of the Assemblies of God, Anglican Church in North America, Evangelical Presbyterian Church, The National Hispanic Christian Leadership Conference, Christian and Missionary Alliance, American Bible Society, Queens Federation of Churches.

Individual statements of interest follow.

WASHINGTON STATE CATHOLIC CONFERENCE

The Washington State Catholic Conference of Bishops represents the Catholic Bishops of the State of Washington. The Catholic Bishops of Washington State are Archbishop J. Peter Sartain of the Archdiocese of Seattle, Bishop Blase J. Cupich of the Diocese of Spokane, Bishop Joseph J. Tyson of the Diocese of Yakima, and Bishop Eusebio Elizondo, Auxiliary Bishop of the Archdiocese of Seattle.

The Archdiocese of Seattle covers 19 counties west of the Cascade Mountains of the State of Washington, serving a total Catholic population of

974,000 people. The Diocese of Yakima covers 7 counties in Central Washington, serving a total Catholic population of 77,149 people. The Diocese of Spokane covers 13 counties in Eastern Washington serving a Catholic population of 97,655 people.

The Washington State Catholic Conference of Bishops has an interest in ensuring that the Free Exercise Clause of the United States Constitution is properly interpreted. Moreover, the Conference holds a sincere religious belief that life begins at conception and that Plan B prevents implantation and can destroy human life. Finally, members of the Catholic Church have historically played an instrumental role in providing excellent health care services throughout the United States and the world, and this role stems from Catholic tenets, which urge members to engage in these types of activities. Catholics will be prevented from following these tenets and continuing to serve in these capacities if they are forced to participate in the destruction of life.

NATIONAL ASSOCIATION OF EVANGELICALS

The National Association of Evangelicals is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 50 member denominations and associations, representing 45,000 local churches and over 30 million Christians.

UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish umbrella organization, representing nearly one thousand synagogues throughout the United States.

THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION

The Ethics & Religious Liberty Commission (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 44,000 churches and 16.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Part of the work of the ERLC is defending the ability of people of faith to live out their faith in all circumstances. That includes our commitment to protect the right of people of faith when it comes to their deeply held convictions regarding the sanctity of human life.

INTERNATIONAL MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION

The International Mission Board of the Southern Baptist Convention (IMB) is an entity of the Southern Baptist Convention (SBC), the nation's largest evangelical denomination with more than 44,000 churches and 16.2 million members. IMB believes in a robust interpretation of the First Amendment's Free

Exercise Clause and statutes that lift government-imposed burdens on religious exercise.

GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents nearly 59,000 congregations with more than 17 million members worldwide. In the United States the North American Division of the General Conference overseas the work of more than 5,200 congregations with more than one million members. The church employs over 80,000 individuals in the United States in its various ecclesiastical, educational, and healthcare institutions. The Seventh-day Adventist church has a strong interest in insuring that individuals and institutions are not compelled to extend benefits that violate their beliefs.

LUTHERAN CHURCH-MISSOURI SYNOD

The Lutheran Church—Missouri Synod ("The Synod") is a nonprofit corporation organized under the laws of the State of Missouri. It is the second-largest Lutheran denomination in North America, with approximately 6,000 member congregations which, in turn, have approximately 2,400,000 baptized members. The Synod has a keen interest in protecting religious liberty generally and in supporting a broad construction and application of the Free Exercise Clause of the First Amendment particularly.

THE GENERAL COUNCIL OF THE ASSEMBLIES OF GOD

The General Council of the Assemblies of God in the United States of America, also known as the Assemblies of God USA (AG), is a Pentecostal Christian denomination in the United States founded in 1914. There are more than 12,500 AG churches in the U.S. with over 3 million members and adherents. It was ranked the ninth largest denomination in the United States in 2011. The AG is associated with seventeen institutions of higher education: six universities, ten Bible colleges, and a seminary. The AG is the U.S. member of the World Assemblies of God Fellowship, the world's largest Pentecostal body. There are more than 65 million Assemblies of God members worldwide, making the Assemblies of God the world's largest Pentecostal denomination.

The AG has a significant interest in ensuring that the Free Exercise Clause of the United States Constitution is properly interpreted. Since its founding, the denomination has held the belief taught in Scripture that life begins at conception. Plan B and ella can prevent implantation post-fertilization. The AG believes that the subject regulations will prevent members of its denomination from following their religious beliefs by forcing them to participate in the destruction of life.

THE NORTHWEST MINISTRY NETWORK OF THE ASSEMBLIES OF GOD

The Northwest Ministry Network of the Assemblies of God provides local oversight of ministers and local Assemblies of God churches throughout the State

of Washington and North Idaho. The Network encompasses local congregations in all counties in Washington State and North Idaho State, serving a total population of approximately 65,000 constituents attending 350 local churches, and nearly 1400 credentialed ministers. We also partner with Northwest University, a fully accredited four-year university in Kirkland, Washington that trains health care professionals.

The Northwest Ministry Network has a strong interest in ensuring that the Free Exercise Clause of the United States Constitution is properly interpreted. Our denomination and Network holds a sincere religious belief that life begins at conception. Plan B and *ella* can prevent implantation post-fertilization. We remain concerned that the subject regulations will prevent members of our denomination and those who attend churches in our Network from following their sincerely held religious beliefs by forcing them to participate in the destruction of life.

ANGLICAN CHURCH IN NORTH AMERICA

The Anglican Church in North America ("ACNA") unites some 100,000 Anglicans in nearly 1,000 congregations across the United States and Canada into a single Church. It is a Province in the Fellowship of Confessing Anglicans, initiated at the request of the Global Anglican Future Conference (GAFCon) in June 2008 and formally recognized by the GAFCon Primates - leaders of Anglican Churches representing 70 percent of active Anglicans globally - in April 2009. The

ACNA is determined by the help of God to hold and maintain the doctrine, discipline, and worship of Christ as the Anglican Way has received them. The ACNA is also determined to defend the inalienable human right to the free exercise of religion as given by God and embodied in the First Amendment to the United States Constitution. The ACNA is quickly growing, through efforts such as its "Anglican 1000" initiative, to rapidly catalyze the planting of Anglican congregations and communities of faith across North America. The ACNA strongly supports the free exercise rights of pharmacists who, on account of their sincerely held religious beliefs, cannot in good conscience dispense "Plan B" emergency contraception.

EVANGELICAL PRESBYTERIAN CHURCH

The Evangelical Presbyterian Church consists of over 400 churches in the United States and the Bahamas, with over 130,000 members. It is committed to the Presbyterian (representative) system of government and reformed theology. The Evangelical Presbyterian Church holds an annual meeting of local church representatives (called the "General Assembly") which addresses business affecting the whole denomination and its mission. It is a non-profit organization that is incorporated in the State of Michigan; its administrative offices are in Livonia, Michigan.

The Evangelical Presbyterian Church is interested in *Stormans et al v. Selecky et al*. because it is committed to protecting freedom of conscience as it is affirmed in the Bible and Westminster Confession of Faith, the doctrinal standard of the Evangelical Presbyterian Church. This tenet is included in the Constitution of the Evangelical Presbyterian Church in Book of Government 17-5: "The Church may make no laws to bind the conscience with respect to the interpretation of Scripture." On June 22, 2012 the General Assembly of the Evangelical Presbyterian Church declared its affirmation of the Free Exercise clause of the Constitution of the United States, especially as the freedom of religious expression relates to abortion. Further, in response to the implementation of the Preventative Care Mandate of the Affordable Care Act, the Evangelical Presbyterian Church took the unprecedented step of declaring it "will join as amici curiae in pending or future civil actions to ensure the protection of religious freedom and rights of conscience." It is the position of the Evangelical Presbyterian Church that the particulars in *Storman et al. v. Selecky et al.* are consistent with that of the implementation of the Preventative Care Mandate of the Affordable Care Act.

The specific interest of the Evangelical Presbyterian Church in this case is declared in the following excerpts from the 2012 Evangelical Presbyterian Church Response to the Preventative Care Mandate:

On February 15, 2012 the U.S. Department of Health and Human Services issued final regulations under the Affordable Care Act requiring nearly all new health insurance plans after August 1, 2012 to cover "all FDA-approved contraceptive methods, sterilization procedures and [related] patient education and counseling" (the "Preventive Care Mandate").

The regulations apply to employers generally. Churches and other houses of worship are exempt from the mandate. However, a private company headed by a person with strongly held religious convictions as well as religious nonprofits (or what we might know of as para-church groups) are not exempt.

Thus, many non-church, religious non-profits and devout owners of for-profit organizations will be forced to participate in the provision of these drugs, procedures and services to their employees.

It is the position of the Evangelical Presbyterian Church that these regulations constitute an unprecedented overreach by the federal government and an infringement upon religious liberty and rights of conscience guaranteed by the Free Exercise Clause of the First Amendment of the U.S. Constitution.

We acknowledge not every part of the Preventive Care Mandate offends the conscience of all believers. The Evangelical Presbyterian Church, for example, does not take a stand against artificial means of contraception. However, we do profoundly object to abortion on demand (see "Position Paper on Abortion,"

http://www.epc.org/about-the-epc/position-papers/abortion/). Others, like many of our Roman Catholic brothers and sisters, object to artificial contraception.

The Evangelical Presbyterian Church strongly and respectfully objects to this government overreach and infringement of the Free Exercise Clause.

If the Department of Health and Human Services does not rescind the regulation, the Evangelical Presbyterian Church requests the United States Congress to take appropriate action to ensure the protection of religious liberty and rights of conscience.

THE NATIONAL HISPANIC CHRISTIAN LEADERSHIP CONFERENCE

The National Hispanic Christian Leadership Conference, The Hispanic National Association of Evangelicals, is America's largest Hispanic Christian organization serving millions of constituents via our 40118 member churches and member organizations. The NHCLC exists to unify, serve and represent the Hispanic Born Again Faith community by reconciling the vertical and horizontal elements of the Christian message via the 7 directives of Life, Family, Great Commission, Stewardship, Education, Justice and Youth.

CHRISTIAN AND MISSIONARY ALLIANCE

The Christian and Missionary Alliance (C&MA) is an evangelical denomination established in 1897 with a major emphasis on world evangelization. It maintains a "big tent" stance in reference to many doctrinal matters, encouraging

believers of diverse backgrounds and theological traditions to unite in an alliance to know and exalt Jesus Christ and to complete His Great Commission. The C&MA has 2,035 member churches in the 50 states of the United States, Puerto Rico and the Bahamas with approximately 439,000 individual members and adherents and 4,765 official workers. The C&MA also has 800 missionary personnel in 58 countries around the world.

C&MA is a Colorado nonprofit corporation with a number of constituent entities. The C&MA has a great concern that the religious freedom and religious conscience of its members be protected from unreasonable laws and regulations that threaten to punish its members when exercising this freedom based on sincerely held beliefs.

AMERICAN BIBLE SOCIETY

American Bible Society ("ABS"), established in 1816 and based in New York City, works to make the Bible available to every person in a language and format each can understand and afford so that all may experience its life-changing message. ABS partners with churches, national Christian ministries, and the global fellowship of United Bible Societies to help touch millions of lives hungry for the hope of the Bible and to support individual and corporate worship.

QUEENS FEDERATION OF CHURCHES

Queens Federation of Churches is an ecumenical organization that is committed to ministry within the ethnically diversified communities of Queens. It reaches out to more than 700 Christian congregations which include the denominations of Adventist, Assemblies of God, Baptist, Christian Science, Congregational, Disciples, Episcopal, Lutheran, Methodist, Nazarene, Orthodox, Pentecostal, Presbyterian, Reformed, Roman Catholic, Salvation Army, Unitarian, United Church of Christ, and other independent Christian congregations. The Federation looks at society from the perspective of the Gospel according to Jesus Christ. Organized in 1931, the Federation sought to unify the Christian churches of Queens. The Federation believes that we are all called to live together in God's Household as a member of the One Family of God. The Federation's Ecumenical Ministry seeks to care, nurture and bring justice on behalf of God's children everywhere.