No. 15-862

In the

Supreme Court of the United States

STORMANS, INC. dba RALPH'S THRIFTWAY, *et al.*

Petitioners,

v.

JOHN WIESMAN, SECRETARY, WASHINGTON STATE DEPARTMENT OF HEALTH, et al.

Respondents.

On Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Free Exercise Clause require strict scrutiny review of a state regulation that appears facially neutral, but that the state targeted at requiring people of faith to violate their religious convictions?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Constitutional Provisions

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, the Center for Constitutional Jurisprudence[1] was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. Those principles include the principle that civil government has no power to compel citizens to violate the dictates of their religious faith. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance addressing religious liberty, including *Burwell v. Hobby Lobby*, 134 S.Ct. 678 (2014) and *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014), among others.

SUMMARY OF ARGUMENT

This Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993), counseled close scrutiny of state laws where there was even a slight suspicion that the regulation stemmed from "animosity of religion." The state may not "de-

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[1] Pursuant to this Court's Rule 37.2(a), all parties were given notice amicus's intent to file at least 10 days prior to the filing of this brief and all parties have joined in a blanket consent that was filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

vise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Id.* The court below declined to give the regulations at issue this close scrutiny notwithstanding the evidence that the purpose of the law was to compel individuals to violate their religious principles. Instead, the Ninth Circuit ruled that a state may escape the restrictions of the Free Exercise Clause through an exercise of clever draftsmanship. So long as the law appears neutral, it matters not that the state formulated the regulation for the purpose of denying religious liberty.

The lower federal courts are confused about what the Free Exercise Clause protects. In this case, a state agency seeks to take advantage of that confusion in order to persecute religious belief. The Court should accept review of this case to begin the process of resolving this confusion and to interpret the individual liberty of Free Exercise of Religion more in line with its original understanding.

REASONS FOR GRANTING REVIEW

I. The Lower Federal Courts Are Confused in How to Apply the Free Exercise Clause.

It should come as no surprise that the lower federal courts are confused about the standard to apply in Free Exercise cases. This Court's own Free Exercise jurisprudence has experienced radical shifts in what the Court views as protected by the First Amendment. In *Reynolds v. United States*, 98 U.S. 145, 163-64 (1878), the Court adopted what it believed was the Jeffersonian position that the Free Exercise Clause protected only "mere opinion," but allowed the

legislature free "to reach actions which were in violation of social duties or subversive of good order."[2] A century later, this Court ruled that "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). As will be demonstrated below, the *Yoder* holding is much closer to the original understanding of the Free Exercise Clause. That understanding did not last, however.

Less than two decades after the decision in *Yoder*, this Court retreated from *Yoder*'s protection of an individual liberty, to a position closer to its opinion in *Reynolds*. The Court ruled that a law of "general applicability" that prohibits what religion requires or that compels that which religion forbids, will survive a Free Exercise challenge if the law has a mere rational basis. *Employment Division v. Smith*, 494 U.S. 872, 882 (1990). The *Smith* decision distinguished the decision in *Yoder* as one involving parental rights in addition to the Free Exercise claim. Yet in the same term that *Smith* was decided, this Court cited *Yoder* for the proposition that "'[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.'" *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 384 (1990).

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[2] The Court in *Reynolds* relied exclusively on Jefferson's letter to the Danbury Baptists, and thus overlooked his argument that compelled contribution (what would have been a social duty if enacted by Virginia) was sinful and tyrannical. *Keller v. State Bar of California*, 496 U.S. 1, 10 (1990).

A few years after *Smith* was decided, this Court confronted a local ordinance that, like the regulation at issue in this case, was crafted to look like a rule of general application but which was drafted with the intent to outlaw a religious activity. *City of Hialeah*, 508 U.S., at 534. This Court rejected the notion that its inquiry must begin and end with the text of the law. *Id*. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id*.

Indeed, this Court upheld Free Exercise Claims against laws of general applicability in recent years in *Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150 (2002) and most recently in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S.Ct. 694, 707 (2012).

Recent decisions of the lower federal courts mirror this confusion. The Seventh Circuit, citing *Yoder*, noted that "[o]ne obvious and intuitive aspect of religious liberty is the right of conscientious objection to laws and regulations that conflict with conduct prescribed or proscribed by an adherent's faith." *Korte v. Sebelius*, 755 F.3d 654, 677 (7th Cir. 2013). In the Tenth Circuit, by contrast, "a law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a [Free Exercise Clause] constitutional challenge." *Grace United Methodist Church v. City Of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006).

The Ninth Circuit in this case looked only at the text of regulations and whether the rules "operate neutrally." *Stomans, Inc. v. Weisman*, 794 F.3d 1064, 1079 (2015).. The District Court, however, found that

there was a large "body of evidence adduced at trial shows that the purpose of the Regulations was to target conscientious objections." *Stormans, Inc. v. Selecky*, 854 F. Supp. 2d 925, 986 (W.D. Wash. 2012). The Ninth Circuit, however, refused to consider this purpose of the regulation.

Lost in all this confusion is the original understanding of the Free Exercise Clause. The Court should accept review of this case in order to return to an original understanding of this important constitutional liberty.

II. The Founders Understood Free Exercise of Religion as Prohibiting Government Compulsion to Violate Religious Strictures.

Important clues to the scope of the religious liberty that the Founders sought to protect in the First Amendment can be found in the 1787 Constitution as well as actual practices of state governments at the time of the founding.

A. The Oath and Religious Test Clauses support an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious strictures.

The 1787 Constitution contained an express recognition of religion, a protection for free exercise of religion for those situations where the Founders foresaw a potential conflict between federal practice and individual rights, and a provision designed to protect against establishments. All of this was contemplated by the Oath Clause and the Religious Test Clause.

The Oath Clause of Article VI provides:

> The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath *or affirmation*, to support this Constitution

U.S. Const., Art. VI (emphasis supplied). Similarly, Article II requires the President "[b]efore he enter on the Execution of his Office, he shall take the following Oath *or Affirmation*:--'I do solemnly swear (*or affirm*) ...."

The exception for "affirmations" was an important addition to preserve religious liberty. Oaths were not sworn under penalty of secular punishment. The concept of an oath at the time of the 1787 Constitution was explicitly religious. To take an oath, one had to believe in a Supreme Being and some form of afterlife where the Supreme Being would pass judgment and mete out rewards and punishment for conduct during this life. James Iredell, Debate in North Carolina Ratifying Convention, *supra*; Letter from James Madison to Edmund Pendleton, 8 The Documentary History of the Ratification of the Constitution, (John P. Kaminski, *et al.* eds. (Univ. of Virginia Press (2009)) at 125 ("Is not a religious test as far as it is necessary, or would operate, involved in the oath itself?"). Only those individuals that adhered to this religious belief system were allowed to swear an oath. The oath requirement was explicitly religious in nature and the exception provided for affirmations was to accommodate those who believed their religion prohibited them from "swearing an oath," but who still believed in an after-life that includes judgment.

The exception to the Oath Clause was for adherents of those religious sects that read the Gospel of Matthew and the Epistle of St. James as prohibiting Christians from swearing any oaths.[3] In the absence of an exception, then, Quakers and Mennonites would have been barred from state and federal office. Their choice would have been to forego public office or accept the compulsion to take an action prohibited by their religion. The Constitution, however, resolved this concern by providing that public office holders could swear an oath *or* give an affirmation. This religious liberty exception to the oath requirement excited little commentary in the ratification debates. The founding generation was already comfortable with this type of exception and many states had similar provisions in their state constitutions. These provisions did not create a specific, limited accommodation, but instead protected freedom of conscience in the instances the founding generation expected government compulsion to come into conflict with religious belief.

This exception for "affirmations" included in the Oath Clause is significant for what it tells us about the scope of religious liberty that the Framers sought to protect with both the 1787 Constitution and the

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[3] "'But I say to you, Do not swear at all, either by heaven, for it is the throne of God, or by the earth, for it is his footstool, or by Jerusalem, for it is the city of the great King. And do not swear by your head, for you cannot make one hair white or black. Let your word be 'Yes, Yes' or 'No, No'; anything more than this comes from the evil one.'" Matthew 5:34-37, THE NEW OXFORD STUDY BIBLE, *supra*, at New Testament 15. "Above all, my beloved, do not swear, either by heaven or by earth or by any other oath, but let your 'Yes' be yes and your 'No' be no, so that you may not fall under condemnation." James 5:12, THE NEW OXFORD STUDY BIBLE, *supra*, New Testament at 392.

First Amendment. The accommodation did not simply welcome Quakers and Mennonites into state and federal government offices. It demonstrated recognition that an oath requirement would put members of these sects in a position of choosing whether to forgo government service or violate the fundamental tenets of their religion. The Framers chose to protect people of faith from government compulsion to act contrary their religious faith.

The second protection of religious liberty contained in the 1787 Constitution was the prohibition on religious tests for office holders in Article VI. This was a departure from the law in some states.

A number of state constitutions at the founding had some form of Free Exercise guaranty, but joined that guaranty with a religious test. For instance, the Maryland Constitution required office holders to subscribe "a declaration of [their] belief in the Christian religion." The Constitutions of the Several Independent States of America (Rev. William Jackson ed., 2d ed. 1783) (reproducing the congressional resolution of December 29, 1780) at 246 (Md. Const. part A, art. XXXV (1776)). Members of the Pennsylvania Legislature were required to make a more detailed pledge: "I do believe in one God, the Creator and Governor of the Universe, the rewarder of the good, and the punisher of the wicked. And I do acknowledge the scriptures of the Old and New Testament to be given by divine inspiration." *Id.* at 191 (Pa. Const. ch. 2, § 10 (1776)). Delaware's oath of office required the profession of a Trinitarian belief while providing a right of free exercise and prohibiting the "establishment of any one religious sect in this State in preference to another." *Id.* at 229 (Del. Const. art. 22 (1776)), 233 (Del. Const. art.

29 (1776)). The Framers of the federal constitution rejected this dual approach of guarantying free exercise of religion on the one hand but requiring a religious test on the other. Instead, the Framers sought to maximize religious liberty.

By prohibiting religious tests, the Framers accomplished two purposes. First, as Madison argued, this provision prohibited Congress from establishing a religion. Letter of James Madison to Edmund Randolph, 17 The Documentary History of the Ratification, *supra* at 63; *see also* Rev. Backus, Convention Debates, 6 The Documentary History of the Ratification, *supra* at 1421-22 ("[I]t is most certain, that no way of worship can be established, without any religious test"). Although the Framers argued that Congress had no explicit power to establish a religion under any of the provisions in Article I, there was a concern that in creating new offices and defining the qualifications for those offices, Congress could limit those offices to members of a particular sect. Governor Randolph, Convention Debates, 9 The Documentary History of the Ratification, *supra*, at 1100. If only members of a particular sect could serve in government, the federal government would then take on the character of the English system where public officials had to be members of the official state church in order to hold office. Michael McConnell, *Establishment and Dis-establishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2113 (2003). Such a system would, it was feared, ultimately lead to the type of coercion that led the original colonist to set out for America in search of the freedom to practice their faith. The ban on religious tests, however, prevented any one religious sect from capturing government. The combination of the ban on religious

tests and the number or religious sects in America at the time of the Constitution was thought the best security against a federal establishment. Governor Randolph, Convention Debates in 9 The Documentary History of the Ratification, *supra*, at 1100-01. The importance of avoiding a federal establishment was twofold. First it left the issue in the hands of the states, allowing the states to maintain their own establishments and allowing citizens to continue to move between states if they were dissatisfied with a state's establishment. Second, and importantly for this case, the avoidance of a federal establishment offered the best protection of religious liberty, a protection later enshrined in the First Amendment.

Experience with the established church in England convinced the Framers of the need for this provision. In order to serve in government under the English system, one had to, among other things, receive the communion in the Church of England within a short period after taking office. McConnell, *supra* at 2176. As with the oath, one had the option of either not serving in office or foreswearing one's own religious beliefs. Recognizing the diversity of religious belief in America,[4] the Framers chose to avoid compelling the citizens of the new country to violate their religious beliefs. This freedom from government compulsion to foreswear one's religious beliefs lies at the core of religious liberty protected by the First Amendment. Historical practice at the time of the founding confirms this analysis.

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[4] Admittedly, the Framers were mostly concerned with protecting the diversity of Christian/Protestant sects. *See* Joseph Story, . *supra* at §1877 (Little, Brown 1858)

B. Historical practice at the time of the founding support an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious strictures.

Even states that had a religious test also sought to guaranty free exercise of religion. State efforts to ensure religious liberty focused on preventing government compulsion of ordinary citizens to violate their religious beliefs. Thus, Delaware, New Hampshire, New York, and Pennsylvania included exemptions from militia service for Quakers in their state constitutions. Stephen M. Kohn, Jailed for Peace, The History of American Draft Law Violators 1658-1985 (Praeger 1987). Statutes containing a similar exemption from militia service for Quakers were enacted in Georgia, Rhode Island, and Virginia. Margaret E. Hirst, The Quakers in Peace and War, (Garland 1972) at 331, 396-97. These early protections accepted that Quaker religious belief forbade the use arms and chose to honor religious liberty even at the expense of additional soldiers.

This protection of religious liberty is most clearly illustrated during the Revolutionary War. If ever there was a "compelling governmental interest," certainly it was the muster of every able-bodied man to prepare to defend towns from the oncoming British army. Yet George Washington would not compel Quakers to fight. Even when some Quakers were forced to march into Washington's camp at Valley Forge with muskets strapped to their back, Washington ordered their release. *Id*. at 396.

Washington's commitment to this religious freedom was also demonstrated in his orders issued to

towns that were in the path of the British army's march. In January of 1777, as the British army advanced on Philadelphia, Washington ordered "that every person able to bear arms (*except such as are Conscientiously scrupulous against in every case*) should give their personal service." George Washington, Letter of January 19, 1777, in Jailed for Peace, *supra* at 10 (emphasis added). The call for every man to "stand ready ... against hostile invasion" was not a simple request. The order included the injunction that "every person, who may neglect or refuse to comply with this order, within Thirty days from the date hereof, will be deemed adherents to the King of Great-Britain, and treated as common enemies of the American States." Proclamation issued January 25, 1777 in George Washington, A Collection, *supra* at 85. Again, however, the order expressly exempted those "conscientiously scrupulous against bearing arms." *Id*. Even in the face of the most extreme need for militia to resist the British army, therefore, Washington's army would not compel Quakers and Mennonites to violate the commands of their religion.

After the Revolution, states continued to protect against compulsion to violate religious beliefs. State constitutions in Maryland and South Carolina included protection in their constitutions for adherents of religious sects that forbade the swearing of oaths. South Carolina's constitution of 1778 allowed people who were called as witnesses to affirm the truth of their statements "in that way which is most agreeable to the dictates of his own conscience." Thorpe, *supra* at vol. 6, 3255-56. Similarly, Maryland's constitution of 1776 explicitly acknowledged the religious nature of an oath and provided an exception from any oath requirement for "Quakers, those called Dunkers, and

those called Menonists, holding it unlawful to take an oath on any occasion, ought to be allowed to make their solemn affirmation, in the manner that Quakers have been heretofore allowed to affirm." *Id.*, at vol. 3, 1690.

These examples demonstrate that the founding generation understood religious liberty to mean that government is not permitted, even by generally applicable laws, to compel a citizen to violate his religious beliefs. That understanding of religious liberty should inform this Court's interpretation of the Free Exercise Clause of the First Amendment. That clause guaranties "free exercise" (freedom of action) and freedom from compulsion. The original understanding of the Free Exercise Clause forbids the state of Washington from compelling pharmacists and pharmacy owners from violating their religious beliefs. This Court should grant review in this case to return to the original understanding of the Free Exercise Clause as a protection of individual liberty for citizens to live out their faith.

CONCLUSION

This Court should grant review in this case to return to the original understanding of the Free Exercise Clause as a protection of individual liberty for citizens to live out their faith.

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Respectfully submitted,

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