No. 15-862

In The Supreme Court of the United States

STORMANS, INC., DOING BUSINESS AS RALPH'S THRIFTWAY, ET AL.,

Petitioners,

v.

JOHN WIESMAN, SECRETARY OF THE WASHINGTON STATE DEPARTMENT OF HEALTH, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF EVANGELICALS, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, ANGLICAN CHURCH IN NORTH AMERICA, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, LUTHERAN CHURCH – MISSOURI SYNOD, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, EVANGELICAL PRESBYTERIAN CHURCH, NORTHWEST MINISTRY NETWORK OF THE ASSEMBLIES OF GOD, QUEENS FEDERATION OF CHURCHES, AMERICAN BIBLE SOCIETY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a diverse coalition of religious organizations with tens of millions of members in the United States. Like the Founders of our Nation, we support a vigorous right to the free exercise of religion under the First Amendment. Unless reversed, the Ninth Circuit's cramped interpretation of the Free Exercise Clause will have serious implications for religious liberty that stretch beyond this case. Plenary review is merited to ensure that the First Amendment continues to protect the freedom to *exercise* religion, as the Founders intended. Short individual statements by each *amicus* are contained in the Appendix.

SUMMARY OF ARGUMENT

"Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992). Nowhere is this insight more trenchant than in the jurisprudence of religious liberty. It is mired in doubt because, a quarter century after this Court decided *Employment Division v. Smith*, 494

[1] Counsel for all parties have received timely notice of the intent to file this brief. All parties have consented to the filing of all *amicus curiae* briefs in a letter on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity besides *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

U.S. 872 (1990), followed by *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), federal circuits and other lower courts cannot agree what makes a law neutral and generally applicable.

The Ninth Circuit's decision implicates direct conflicts among multiple circuits. As we explain in detail, the Third and Tenth Circuits hold that proof of anti-religious animus is unnecessary to show that a law is not neutral, while the First and Ninth Circuits treat animus as an element of a free exercise claim. Likewise, the Third Circuit holds that a law is not generally applicable if a single exception allows conduct for secular reasons but forbids it for religious reasons, while the First and D.C. Circuits maintain that a law is generally applicable unless it singles out religious conduct for unfavorable treatment or creates a religious gerrymander like the ordinances voided in *Lukumi*.

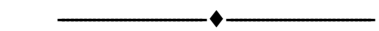
Widening multiple intercircuit splits on important questions of constitutional law is reason enough to grant review. But review is needed, as well, to reaffirm the fundamental purposes of the Free Exercise Clause. Left to interpret and apply *Smith* and *Lukumi* without substantial guidance, lower courts have grown confused about what the Free Exercise Clause protects, and why. And in that confusion, people of faith and religious organizations are being deprived of the refuge guaranteed by the First Amendment.

Petitioners will suffer profound hardships from the decision below. Petitioner Ralph's Thriftway, a family-owned grocery store and pharmacy in business since 1944, will be forced to close its doors and Petitioners Rhonda Mesler and Margo Thelen will have to abandon their chosen profession or leave the State. Those results follow from the Ninth Circuit's decision sustaining Washington State regulations that ban only pharmacy referrals for religious reasons while permitting referrals for an "almost unlimited variety of secular reasons." *Stormans, Inc. v. Selecky*, 844 F. Supp. 2d 1172, 1188 (W.D. Wash. 2012). Although the State conceded that no one was harmed by the tolerant and accommodating practice of facilitated referrals, which directed patients to nearby pharmacies, Petitioners will be pressured to choose between their conscience and their livelihood.

The Ninth Circuit's confusion over the proper application of *Smith* and *Lukumi* inflicts undeniable injuries on Petitioners, but the decision below especially warrants review because of its serious implications beyond this case. It effectively invites other courts to sustain laws and regulations that target religious believers and religious communities for unusual penalties, so long as the law has the appearance of formal neutrality. Remarkably, the Ninth Circuit's decision also endorses religious proscriptions by which governments use their regulatory and licensing authority to expel religious Americans with disfavored beliefs from particular occupations. Review is urgently needed to prevent the decision below

from becoming the model for other courts to deny the First Amendment right to exercise religion.

It is time for this Court to bring clarity to the jurisprudence of religious liberty. As the Petitioners have convincingly shown, this case provides an ideal vehicle for doing so.



ARGUMENT

I. Free Exercise Doctrine Is Languishing in Division and Uncertainty Without This Court's Guidance.

The First Amendment declares that laws may not "prohibit[ ] the free exercise" of religion. U.S. CONST. amend. I. *Smith* and *Lukumi* implement that guarantee through a judicial standard that distinguishes between laws that are neutral and generally applicable and those that are not. *See Lukumi*, 508 U.S. at 531-32 (citing *Smith*) ("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."). On that standard hangs the fate of every free exercise claim.

Lower court disagreements over the *Smith-Lukumi* standard not only meet the technical requirements of Rule 10, they invoke opposing conceptions of the Free Exercise Clause itself. Some courts view it as a narrow right to be free from religious persecution: unless government action rises to that

level of severity, it is upheld even when it interferes with religious practice. Other courts view free exercise as a fundamental liberty – the liberty to exercise one's religion without special burdens or disabilities because of one's religious beliefs and practices. Constitutional text, history, and this Court's precedents confirm that the liberty-based understanding of free exercise is correct.

The free exercise of religion is a liberty preserved by the First Amendment – not a right granted by it. *See, e.g.*, James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* JAMES MADISON: WRITINGS 30 (1785) (Jack N. Rakove ed., 1999) (religious freedom is an unalienable right reserved by the people when they enter civil society). And this liberty includes the *exercise* of religion, the "performance (or abstention from) physical acts." *Smith*, 494 U.S. at 877. Viewed from this liberty-based perspective, free exercise is among "the indispensable . . . democratic freedoms secured by the First Amendment." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Smith and *Lukumi* acknowledged limits on this liberty-based understanding of free exercise but did not reject it. They held that laws incidentally restricting conduct need not satisfy strict scrutiny only if they are neutral and generally applicable. *See Lukumi*, 508 U.S. at 531-32. This case presents the Court with a chance to reaffirm this liberty-based understanding of the Free Exercise Clause. We believe that *Smith* and *Lukumi* contain the framework for doing so.

A. Properly interpreted, *Smith* and *Lukumi* provide substantial protection for free exercise.

Properly understood and applied, *Smith* and *Lukumi* support the liberty-based understanding of free exercise and provide a powerful, though undeveloped, framework for giving free exercise meaningful protection. Because a law is subject to strict scrutiny only if it is not neutral and generally applicable, determining when a law meets those criteria sets the boundaries of constitutional protection. *Smith* and *Lukumi* teach that a law is not neutral and generally applicable if "the reasons for the relevant conduct" determine whether the law has been violated, *Smith*, 494 U.S. at 884; or if the law makes or allows a judgment that "devalues" religious conduct, *Lukumi*, 508 U.S. at 538. Strict scrutiny applies when conduct is illegal for religious reasons but allowed for secular reasons, because that distinction rests on an implicit judgment that religious reasons for the conduct are less important than approved secular reasons. *See Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999).

But *Smith* and *Lukumi* stand at the polar extremes of free exercise jurisprudence. *Smith* involved an "across-the-board criminal prohibition," 494 U.S. at 879, while *Lukumi* struck down a targeted restriction or "religious gerrymander" that exempted essentially all but the religious killing of animals. 508 U.S. at 536. As extreme situations, *Smith* and *Lukumi* do not speak to the vast middle ground

where most free exercise claims arise – and they did not purport to cover the whole field. *Smith* says that a law that targets religious conduct would "doubtless[ly] be unconstitutional"; it did not say that *only* such laws are unconstitutional. *Smith*, 494 U.S. at 877. And *Lukumi* says that "if the object of a law is to infringe upon or restrict practices because of their religious motivation," or if the law "imposes burdens only on conduct motivated by religious belief," it falls "well below" the "minimum" requirements of the First Amendment. 508 U.S. at 543. Freedom from overt religious persecution is the *least* of what the Free Exercise Clause guarantees. *See id.* at 532.

Together, these principles from *Smith* and *Lukumi* offer a framework for vigorously protecting the free exercise of religion. But this framework requires a careful reading of the cases, one that is widely contested. Fundamental disagreement over whether *Smith* and *Lukumi* should be read to protect free exercise or sharply curtail it goes a long way toward explaining the circuit splits ably described by Petitioners. Pet. 22-38. That disagreement is evident in how courts determine whether a law is neutral and generally applicable.

B. Circuit courts disagree how to determine when a law is neutral.

Lower courts vary widely over when a law is neutral enough to escape strict scrutiny. Whether a

free exercise claimant must demonstrate that the government acted with a desire to suppress a particular religious group or viewpoint is a leading point of contention. A liberty-based understanding of free exercise treats animus as relevant but not as a necessary element because the right to exercise religion does not depend on the subjective motives of legislators. But when one views free exercise as a protection only against religious persecution, animus takes on increased importance. This disagreement can be seen in the circuit split over how to determine if a law is neutral.

In *Fraternal Order of Police*, then-Judge Alito, writing for the Third Circuit, concluded that a police department policy prohibiting beards was not neutral because it contained an exemption for medical necessity but not for religious necessity. Implicitly, the city had "made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." 170 F.3d at 366.[2]

Another Third Circuit decision focused on unequal treatment, not animus, when holding that an

[2] The Fourth Circuit reached a contrary decision in sustaining a similar beard policy for inmates in a state prison. *See Hines v. S.C. Dept. of Corrs.*, 148 F.3d 353, 358 (4th Cir. 1998) (upholding policy banning facial hair "unless the inmate has a medical condition that would be aggravated by shaving" as "a neutral and generally applicable regulation" under *Smith*).

ordinance prohibiting advertisements on telephone poles had been selectively enforced. "[T]he Free Exercise Clause's mandate of neutrality toward religion prohibits government from deciding that secular motivations are more important than religious motivations." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002) (internal quotation marks omitted). Even if a law is facially neutral, it must also be operationally neutral. Government officials violate the criterion of neutrality "if they exempt some secularly motivated conduct but not comparable religiously motivated conduct." *Id*.

Following the Third Circuit's approach, the Tenth Circuit rejected bad motive as a condition of applying the Free Exercise Clause in striking down a law that provided scholarships to all eligible students attending public and private schools, except schools the state deemed to be "pervasively sectarian." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1250 (10th Cir. 2008) (McConnell, J.). As the Court concluded, "the constitutional requirement is of government *neutrality* through the application of 'generally applicable law[s],' not just government avoidance of bigotry." *Id*. at 1260 (quoting *Smith*, 494 U.S. at 881).

In contrast, the absence of animus was decisive for the First Circuit in upholding a Maine statute excluding religious schools from eligibility to receive public funds for tuition. Facial discrimination against religion was not enough, the court said, because *Lukumi* turned on "overwhelming evidence that

animus against the Santeria religion had motivated the ordinance's passage," and "[t]here is not a shred of evidence that any comparable animus fueled the enactment of the challenged Maine statute." *Eulitt ex rel. Eulitt v. Me. Dept. of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004).

Lack of animus likewise prompted the Ninth Circuit to deny a free exercise claim even though the statute discriminated on its face against religion. Oregon law entitled disabled children to receive special services in private schools, but only in a "religiously-neutral setting." *KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1048 (9th Cir. 1999). Despite the obvious discrimination against religion, the court of appeals denied a free exercise claim brought by a blind boy with cerebral palsy because "as applied here [the statute] does not have 'the object or purpose . . . [of] suppression of religion or religious conduct.'" *Id.* at 1050 (alterations in original) (quoting *Lukumi*, 508 U.S. at 533). Judge Kleinfeld dissented. He pointed out that the law was plainly "*not* neutral," and he faulted the majority for "attempt[ing] to limit *Lukumi* to situations where there is evidence that substantial animus to repress religion motivated the law in question," calling that "a misreading" of *Lukumi*. *Id.* at 1053, 1055 (Kleinfeld J., dissenting).

Other circuits have also focused on the presence or absence of animus. *See, e.g.*, *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991) ("There is no evidence that the City has an anti-religious purpose in enforcing the [zoning]

ordinance."); *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 561 (4th Cir. 2013) (a free exercise claimant must show that the law targets conduct for uniquely adverse treatment "because of [its] religious motivation").

These intercircuit conflicts over the relevance of animus to the free exercise of religion highlight that "[n]eutrality, like other words in religion-clause jurisprudence, is a word whose very definition is endlessly contested." Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 665 n.36 (2003). As a criterion of constitutional protection, neutrality should not be indeterminate. Some laws easily fail the test of neutrality, just as others easily pass it. Part of the lower courts' confusion may be attributed to the small number of factual circumstances where this Court has elaborated the meaning of neutrality in the free exercise context.

Confusion over how to determine when a law is neutral explains why some courts have elevated proof of anti-religious animus to a necessary precondition for free exercise claims. *Lukumi* cannot take the blame. "Whatever else it may be, *Lukumi* is not a motive case. The lead opinion explicitly relies on the city's motive to exclude a particular religious group – and that part of the opinion has only two votes." Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 28 (2000); *accord Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*,

100 F.3d 1287, 1292 n.3 (7th Cir. 1996). A fair reading of *Lukumi* treats animus as relevant to neutrality but not as a necessary condition of a viable free exercise claim. *See Shrum v. City of Coweta*, 449 F.3d 1132, 1144-45 (10th Cir. 2006) ("Proof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus.") (footnotes and citations omitted).

Circuit court conflicts over whether a law satisfies the criterion of neutrality without evidence of religious animus is an important reason to grant certiorari.

C. Circuit courts disagree how to determine when a law is generally applicable.

Whether a law satisfies the criterion of general applicability has prompted another category of direct conflicts among the circuits.

The Third Circuit has held that a law is not generally applicable if even a single exception "undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." *Blackhawk v. Pa.*, 381 F.3d 202, 209 (3d Cir. 2004); *accord Mitchell Cnty. v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012) (exemptions undermined general applicability of the law).

Other courts take the opposing view, suggesting that a law is generally applicable unless it singles out religiously motivated conduct for disparate treatment. *See Parker v. Hurley*, 514 F.3d 87, 96 (1st Cir. 2008) (concluding that a curriculum policy was neutral and generally applicable because the school was not "singling out plaintiffs' particular religious beliefs"). Similarly, some courts suggest that a law is generally applicable unless it accomplishes a "religious gerrymander" similar to *Lukumi*. *Am. Family Ass'n, Inc. v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004).

With such disparate approaches among the circuits, determining when a law qualifies as "neutral" and "generally applicable" is hopelessly uncertain.

D. Circuit Court judges and First Amendment scholars agree that free exercise doctrine will continue to be confused and uncertain without this Court's guidance.

No wonder Judge O'Scannlain has noted the "growing confusion among the lower courts over the demands of the First Amendment." *KDM ex rel. WJM v. Reedsport Sch. Dist.*, 210 F.3d 1098, 1099 (9th Cir. 2000) (O'Scannlain, J., dissenting from the denial of rehearing en banc). *Smith* and *Lukumi* offer clear guidance at the polar extremes, but "[t]here is an infinity of hard cases that lies between an 'across-the-board criminal prohibition' and a law that 'specifically

directs' a restriction only at religiously motivated behavior." Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 859 (2001). Most free exercise claims fall in the middle where *Smith* and *Lukumi* do not unambiguously resolve when a law is neutral and generally applicable, thus requiring strict scrutiny.

First Amendment scholars have likewise disagreed when a law challenged under the Free Exercise Clause is subject to strict scrutiny. Professor McConnell has argued that *Smith* and *Lukumi* still leave open substantial room for religious liberty because "few statutes are generally applicable across the board, without exceptions and without consideration of individual cases." Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000). Professor Laycock has identified several categories of laws that, based on *Smith* and *Lukumi*, are not neutral and generally applicable. *See* Laycock, 40 CATH. LAW. at 29-36. But Professor Tushnet calls this liberty-based understanding of free exercise wishful thinking and argues that "today the [Free Exercise] Clause protects only against statutes that target religious practice for regulation." Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 72 & n.3 (2001).

These foundational disagreements arise from "the great ambiguity . . . . that no one knows what is a neutral and general applicable law" – a critical point of uncertainty that has thrown free exercise doctrine into "a state of great confusion." Douglas Laycock, *Religious Freedom and International Human Rights in the United States Today*, 12 EMORY INT'L L. REV. 951, 967 (1998); *see* Eric C. Yordy, *Fixing Free Exercise: A Compelling Need to Relieve the Current Burdens*, 36 HASTINGS CONST. L.Q. 191, 200 (2009) ("[T]he *Smith* developments have created nothing but confusion. . . . The Supreme Court must address this confusion. . . .").

Confusion on this scale regarding a fundamental constitutional right is intolerable. Freedom of speech, freedom from unreasonable searches and seizures, and every other cherished constitutional right depends on reliable judicial standards that vindicate those rights in practice. The free exercise of religion needs a reliable judicial standard no less. Its jurisprudence is confused because, in the intervening quarter century since *Smith* and *Lukumi*, lower court uncertainties about what qualifies as a neutral and generally applicable law have led some courts to question whether the Free Exercise Clause protects anything besides freedom from outright religious persecution. Only review by this Court can reaffirm that the Free Exercise Clause is intended to secure the full range of religious liberty.

II. The Decision Below Exemplifies the Injuries That Religious People and Faith Communities Will Suffer Without This Court's Guidance and Supervision.

A. The Ninth Circuit's decision imposes grave consequences on Petitioners for exercising their religion.

The division and confusion that we have highlighted carry practical consequences. Religious believers like Petitioners cannot get the constitutional protection they seek because courts do not have a coherent standard for adjudicating free exercise claims. The Ninth Circuit's decision exemplifies how doctrinal confusion translates into the loss of religious liberty.

The court of appeals concluded that Washington's pharmacy regulations are neutral only by departing from how *Smith* and *Lukumi* define neutrality. Facial neutrality was satisfied, the court said, because the rules "make no reference to any religious practice, conduct, belief, or motivation." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015). What the court called "operational neutrality" was satisfied because the rules "appl[y] to *all* objections to delivery that do not fall within an exemption, regardless of the motivation behind those objections." *Id.* at 1077.

Conducting a word search for religious terms and relying on the truism that a regulation applies equally to everything not covered by an exemption hardly satisfies *Lukumi*. Ignored was its lesson that "if the

object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." 508 U.S. at 533. And the court of appeals failed to mention the district court's finding that "[e]xcept for post-lawsuit testimony by State witnesses, literally all of the evidence demonstrates that the 2007 rulemaking was undertaken primarily (if not solely) to ensure that religious objectors would be required to stock and dispense Plan B." *Stormans*, 844 F. Supp. 2d at 1193.

The Ninth Circuit's holding that the challenged regulations were generally applicable was similarly confused. Virtually unlimited secular exemptions were insufficient proof of underinclusiveness, the court said, because they are "necessary reasons for failing to fill a prescription in that they allow pharmacies to operate in the normal course of business." *Stormans*, 794 F.3d at 1080. The court of appeals simply disregarded the district court's findings that "the burden of the rules falls almost exclusively on religious objectors to Plan B, the Board of Pharmacy has interpreted the rules in favor of secular conduct over similar religiously motivated conduct, and the rules themselves proscribe more religious conduct than necessary to achieve patient access." *Stormans*, 844 F. Supp. 2d at 1193. Also brushed aside by the Ninth Circuit was a pattern of enforcing regulatory violations only against Petitioners; this was the natural consequence, the court said, of the Commission's policy of "tak[ing] action only when a consumer files a complaint of a violation," combined

with "many complaints against Ralph's in connection with the store's policy of declining to stock and deliver Plan B and *ella*." *Stormans*, 794 F.3d at 1083.

But insisting that the challenged rules are generally applicable because secular exemptions preserve "normal" business practices and the executive's preference for complaint-driven regulatory enforcement misses the point. Under *Lukumi*, laws are not generally applicable if they "fail to prohibit nonreligious conduct that endangers [professed governmental] interests in a similar or greater degree than [religious conduct] does." 508 U.S. at 533. In its confusion, the Ninth Circuit turned a blind eye to the district court's finding that the rules admit exemptions for "an almost unlimited variety of secular reasons, but fail to provide exemptions for reasons of conscience." *Stormans*, 844 F. Supp. 2d at 1188.

Deep confusion over what makes a law "neutral and generally applicable" threatens Petitioners with real hardships. They have engaged in a recognized form of religious exercise by referring Plan B or *ella* customers to other pharmacies based on their belief that "life is sacred from the moment of conception," Pet. 6. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770 (2014) ("Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition [of the exercise of religion]."). Uncertainty about the *Smith-Lukumi* standard misled the Ninth Circuit into denying Petitioners the protection of strict scrutiny. *Stormans*, 794 F.3d at 1084. Unless reversed, that

judgment will deprive Petitioners of their First Amendment rights – a substantial harm by itself. *See Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (citation omitted). Only a stay, granted at the Ninth Circuit's discretion, now stands between Petitioners and the loss of those rights. *See* Pet. 14 n.4.

Besides, the decision below will have the practical effect of coercing Petitioners into choosing between their religious beliefs and their livelihood. It is undisputed that enforcing the challenged regulations against Petitioners will cause Ralph's Thriftway to lose its pharmacy license and close its business and that Mesler and Thelen will be forced to leave the pharmacy profession or move from Washington State. *Stormans, Inc. v. Selecky*, 854 F. Supp. 2d 925, 974 (W.D. Wash. 2012). State regulators openly admitted that "some pharmacy owners would close their business rather than violate their conscience." *Id.* (footnote omitted). Although recognizing that risk, the Board sought to justify itself by invoking a largely hypothetical "adverse impact on patients" while disregarding the concrete impact on pharmacy owners and pharmacists. *Stormans*, 844 F. Supp. 2d at 1197.

Review is warranted not only to vindicate Petitioners' right to the free exercise of religion, but to ensure that the decision below does not undermine the First Amendment.

B. The Ninth Circuit decision supplies a roadmap for government to target religious people and faith communities for unusual penalties because of their religious beliefs and practices.

Certiorari was granted in *Lukumi* out of concern for the "fundamental nonpersecution principle of the First Amendment" that "government may not enact laws that suppress religious belief or practice." 508 U.S. at 523. That same principle is implicated here. By prohibiting religiously motivated referrals, Washington State has applied its power to suppress religious beliefs and practices opposed to the use of emergency contraceptives. Violations of the nonpersecution principle have been "few" because the principle is "so well understood." *Id.* But violations will proliferate if the First Amendment's central concern with religious persecution is ignored. And it is the prospect of "a legal framework for persecution" – "oppressive laws . . . enacted through hostility, sheer indifference, or ignorance of minority faiths" and sustained by courts poised to "defer to any formally neutral law restricting religion" – that the Ninth Circuit's decision threatens. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 4.

The decision below invites other courts to sustain laws and regulations that appear to be formally neutral but that actually target religious believers and religious communities for unusual penalties. *See Stormans*, 844 F. Supp. 2d at 1188 ("The most compelling evidence that the rules target religious conduct is

the fact the rules contain numerous secular exemptions."). If that reasoning goes uncorrected, complying with the Free Exercise Clause will become a mere "exercise in cleverness and imagination." *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841 (1987).

Petitioners' right to free exercise should have been a straightforward matter, seeing that the challenged rules "discriminate[ ] against some . . . religious beliefs" and "prohibit[ ] conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. Yet the court below sustained those rules as "neutral and generally applicable" by misconstruing neutrality, *Stormans*, 794 F.3d at 1076-77, and confusing "generally applicable" with a standard tolerant of underinclusiveness and selective enforcement. *Id.* at 1080. With the decision below as their guide, government officials can "in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. Worse, they can place "gratuitous restrictions on religious conduct." *Id.* at 538 (internal quotation marks omitted).

Targeting religiously motivated pharmacy referrals was purely gratuitous because the loss of religious liberty is not justified by any corresponding benefit. Facilitated referrals avoided any conflicts between patient care and religious liberty. *Stormans*, 854 F. Supp. 2d at 933. The State Respondents stipulated – over intervenors' objections – that " 'facilitated referrals are often in the best interest of patients, pharmacies, and pharmacists; that facilitated referrals do not pose a threat to timely access to lawfully

prescribed medications[;] and that facilitated referrals help assure timely access to lawfully prescribed medications.'" *Stormans*, 794 F.3d at 1074. Thirty pharmacies within five miles of Ralph's carry Plan B. Pet. 7. A 12-day trial produced "no evidence that any of [Ralph's] customers have ever been unable to obtain timely access to emergency contraceptives or any other drug." *Stormans*, 854 F. Supp. 2d at 946. Yet the State deliberately set out to make religious-based referrals – and only those referrals – illegal. *Id.* at 945. Religious liberty was thus restricted not as the regrettable cost of safeguarding public health, but as a gratuitous burden on religious believers with a traditional viewpoint toward reproduction.

The implications for religious liberty are severe. Freedom from state and local laws that violate *Lukumi*'s "fundamental nonpersecution principle" depends on vibrant and reliable protection under the Free Exercise Clause. Statutory protections are often unavailable: the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, does not apply to state laws, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); only 21 states have adopted parallel safeguards, *see* Nat'l Conference of State Legislatures, *State Religious Freedom Restoration Acts* (Mar. 30, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx; and Washington is not among them. *See id.* Without this Court's review, the decision below could pave the way for a legal regime that permits official hostility toward religion – especially toward people of faith with traditional

moral views. Such hostility could lead to indefensible results across a broad range of settings, from professional licensing to college accreditation.

Official hostility toward religion contradicts the First Amendment's guarantee of religious freedom. Religious Americans, committed to living according to "precepts far beyond the authority of government to alter or define," *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1827 (2014); *accord* Madison, *Memorial and Remonstrance*, at 30, are entitled to participate fully as citizens in civic life. "Free exercise in this sense implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). Our constitutional traditions sternly refute the idea of religious ghettoization or the use of licensing, regulation, and other coercive governmental powers to target religious people and communities for burdens and penalties because of their beliefs. *See Lukumi*, 508 U.S. at 546.

C. The Ninth Circuit decision implicitly endorses a religious test that excludes religious Americans with disfavored beliefs from particular occupations.

Review should be granted, as well, to correct the toxic notion that state governments may use their licensing and regulatory authority to remove religious

believers from certain professions *en masse*. The First Amendment exists, in part, to ensure that no American will be forced to choose between his conscience and his livelihood. Christian pharmacists should be no less free to exercise their religion than the Muslim grocers or Jewish restauranteurs that recently attracted the Court's concern. *See Hobby Lobby*, 134 S. Ct. at 2781 n.37 (interpreting RFRA). Working in one's chosen profession free of arbitrary or discriminatory burdens is a constitutional right – not a product of government largesse.[3] Laws targeting and penalizing religious people for their religious practices, whether acting individually or as business owners, are repugnant to the Free Exercise Clause.

Needlessly prohibiting conscience-based referrals is an assault on religious Americans. Common sense tells us that "bans on important religious practices are equivalent to a ban on adherents." Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J.L. & REL. 139, 149-50 (2009); *accord Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on

[3] *See Truax v. Raich*, 239 U.S. 33, 41 (1915) ("[T]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (The Fourteenth Amendment guarantees the liberty "to engage in any of the common occupations of life . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men").

Jews."). Religious proscriptions of this type are a notorious affront to the free exercise of religion, understood as "the right to express [religious] beliefs and to establish one's religious (or nonreligious) self-definition in the . . . *economic* life of our larger community." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) (emphasis added).

By sustaining Washington State's determination to exclude members of certain faith communities from the pharmacy profession, the decision below lends judicial endorsement to a religious proscription – a form of religious persecution specifically rejected by our Founding Fathers. *See* U.S. CONST. art. VI ("[N]o religious test shall ever be required as a qualification to any office or public trust under the United States."). The reasons for the State's exclusion are not hard to find.

Washington State's campaign to ban only religiously motivated pharmacy referrals emerges from a vein of illiberal thought that asks why the obstetric profession should allow a Catholic physician who refuses to perform abortions or why the counseling profession should admit an Evangelical counselor with traditional beliefs about marriage. *See* Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 872-73. Dissent, so the thinking goes, is incompatible with membership in the profession. The purpose of such arguments is not to ensure the delivery of needed services but to drive certain believers out of the profession. *See id.* at 872. The dangerous corollary is that forcing believers out

of their chosen professions is no burden on religious liberty since they have no right to a profession in the first place. After all, it is said, "their religions do not require them to be . . . a marriage counselor, or an obstetrician. Never mind that excluding Catholics from professions was a time-honored means of persecution, well-known to the Founders." *Id.* at 873-74 (footnotes omitted).

Washington State's abuse of its licensing authority resembles threats to constitutional rights in other settings. Denying a pharmacy license to Ralph's Thriftway because of the owners' religious beliefs is no less an affront to our constitutional traditions than denying permission to hold a public demonstration because of the speaker's opinions or adopting a blanket policy of authorizing the police to search homes without a warrant. There is "no reason why [the Free Exercise Clause], as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). Each of these situations is marked by the abuse of coercive power to achieve ends the Constitution forbids.

With such grave implications for religious liberty, we readily agree with Petitioners that "[t]he Ninth Circuit's decision is truly radical, grossly out of step with the jurisprudence of this Court and other circuits, and demands this Court's review." Pet. 39.

CONCLUSION

For all these reasons, a writ of certiorari should be granted.

Respectfully submitted,

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Appendix – Individual Statements of Interest

The National Association of Evangelicals is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, representing 45,000 local churches, as well as numerous evangelical associations, organizations, universities, seminaries, social-service providers, and millions of individual Christians. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries. NAE is grateful for the American legal tradition of church-state relations and religious liberty, and believes that this constitutional and jurisprudential history should be honored, nurtured, taught, and maintained.

The Church of Jesus Christ of Latter-day Saints is a Christian denomination with 15 million members worldwide. Religious liberty is an essential Church doctrine: "We claim the privilege of worshipping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may." Art. of Faith 11. And we believe that "governments . . . are bound to enact laws for the protection of all citizens in the free exercise of their religious belief." D&C 134:4. This brief reflects the Church's determination to strengthen religious liberty as a fundamental constitutional right.

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. As representatives of a minority faith community, the Orthodox Union takes a keen interest in the Supreme Court's religious freedom jurisprudence and has participated in most of the cases considered by the Court in this arena in the past few decades. The Orthodox Union is firmly committed to an expansive understanding of the First Amendment's guarantees of religious liberty for they have enabled the Orthodox Jewish community, and others, to thrive in the United States.

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) and formally recognized by the GAFCon Primates – leaders of Anglican Churches representing 70 percent of active Anglicans globally. The ACNA is determined with God's help to maintain the doctrine, discipline, and worship of Christ as the Anglican Way has received them and to defend the God-given inalienable human right to free exercise of religion.

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 50,000 churches and 15.8 million members. The ERLC is charged by the SBC with addressing religious liberty, which is an indispensable, bedrock value for SBC members. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

The Lutheran Church – Missouri Synod ("The Synod"), a Missouri nonprofit corporation, has some 6,150 member congregations with 2,200,000 baptized members throughout the United States. The Synod has a fervent interest in protecting and maintaining the religious freedom and liberties afforded in the United States Constitution, and it fully supports a broad construction and application of the Free Exercise Clause of the First Amendment, which is the focus of this case.

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 18 million members worldwide. In the United States the North American Division of the General Conference oversees 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 ensuring that individuals and

institutions are not compelled to extend benefits that violate their beliefs.

The Evangelical Presbyterian Church (EPC) consists of over 575 churches with over 170,000 members. Its administrative offices are in Livonia, Michigan. The EPC's interest in *Stormans Inc. v. Wiesman* arises from its commitment to the protection of freedom of conscience as affirmed in the Bible as well as in the Westminster Confession of Faith, our doctrinal standard. Broadly, fundamental issues of liberty are at stake. Washington State's requirement that pharmacy owners stock and dispense Plan B and *ella* – contrary to one's religious beliefs – infringes the Free Exercise Clause.

The Northwest Ministry Network of the Assemblies of God (NWMN) provides oversight of 1400 ministers and 300 churches throughout the State of Washington and North Idaho, with a constituency of 70,000 parishioners. The NWMN founded fully accredited Northwest University in Kirkland, Washington (2,000 students), which offers numerous degree programs, including nursing. The NWMN has a strong interest in upholding the Free Exercise Clause of the United States Constitution. We hold a sincere religious belief that life begins at conception, and remain opposed to governmental regulations requiring our members or constituents to provide abortifacients against their personal convictions.

Queens Federation of Churches is an ecumenical organization committed to ministry within the

diverse communities of Queens. It serves over 700 Christian congregations including 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 congregations. Organized in 1931, the Federation views society from the perspective of the Gospel according to Jesus Christ, believes that all are called to live as members of the One Family of God, and seeks to care, nurture, and bring justice on behalf of God's children everywhere.

Headquartered in Philadelphia, the 199-year-old ***American Bible Society*** exists to make the Bible available to every person in a language and format each can understand and afford, so all people may experience its life-changing message. As advocates for the Bible, American Bible Society and its partners are committed to operating their institutions consistent with their reading of the Bible, and to ensuring that the religious freedoms which entitle them to do so continue to be preserved for all.