NO. 15-862

IN THE
Supreme Court of the United States

STORMANS, INC., DOING BUSINESS AS RALPH'S THRIFTWAY, RHONDA MESLER, AND MARGO THELEN,
Petitioners,

v.

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

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

With neither the facts nor the law on their side, Respondents simply pound the table.

On the facts, Respondents seek to avoid review by manufacturing factual disputes, fighting their own stipulations, and using eleventh-hour gamesmanship to contrive vehicle problems. But it is too late to dispute the record, which encompasses a twelve day trial with abundant testimony, bargained-for stipulations, and extensive findings of fact—*none* of which Respondents challenged on appeal as clearly erroneous.

More telling is what Respondents do not dispute. Respondents do not defend how the Regulations were gerrymandered to target Petitioners. Nor do they dispute the district court's finding that the Regulations, in practice, permit an "almost unlimited variety" of business and convenience referrals while banning religiously-motivated ones. Nor do Respondents mention that the American Pharmacists Association ("APha") and thirty-seven other pharmacy trade associations condemn the Regulations as unnecessary, unprecedented, and affirmatively harmful to patients.

Respondents fare no better on the law. The Ninth Circuit claimed to apply *Lukumi* while studiously avoiding *Lukumi*'s command to look to the law's "real operation." Respondents never explain why the Ninth Circuit could possibly be justified in looking to the theoretical operation of the law instead. That Panglossian approach is the

opposite of *Lukumi*'s and is reason enough for summary reversal.

Even without summary reversal, the Ninth Circuit's strained effort to avoid *Lukumi* and the record resulted in a decision that conflicts with other circuits in three different respects. Respondents fail to address those splits in any meaningful way—or the decrease in healthcare access that will result if its decision remains undisturbed. U.S. Conference of Catholic Bishops ("USCCB") Br. 14-20; APhA Br. 21-25.

Respondents would erase our country's long-standing protection for religious conscience in this area not because of any harm—indeed, they have stipulated that Petitioners' conduct is harmless—but because religiously-motivated referrals are politically controversial, while secular referrals are not. The Free Exercise Clause protects religious observers against this kind of "unequal treatment." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542 (1993). The Ninth Circuit's decision to the contrary warrants this Court's review.

I. The Ninth Circuit's decision refused to follow *Lukumi*.

Summary reversal is warranted because the Ninth Circuit upheld Regulations just as problematic as the ordinances unanimously struck

down in *Lukumi*.[1] Respondents' main response, like the Ninth Circuit's holding (and the city's defense in *Lukumi*), is to insist that the case be resolved based on what "the text" of the Regulations might mean in theory, rather than "the effect of [the Regulations] in [their] real operation." 508 U.S. at 535. But that contradicts *Lukumi*.

Lukumi requires courts to evaluate a law "[a]part from the text" to determine its "real operation." *Id. Lukumi* itself struck down a facially neutral ban on the "unnecessary" killing of animals, not because of the text—which was "broad on its face" with no exemptions—but because the government deemed religious killing unnecessary while ignoring "most other killings" in practice. *Id.* at 537. The Ninth Circuit, by contrast, refused to consider the "practices [that] had occurred" under the Regulations. App.32a.

Respondents try to manufacture a factual dispute about actual practice under the Regulations by claiming that the district court's findings were based on "speculation." State 23.[2] But more than a

[1] *Cf. Lopez v. Smith*, 135 S. Ct. 1 (2014) (summary reversal of unanimous Ninth Circuit decision after no en banc vote); *Marshall v. Rodgers*, 133 S. Ct. 1446 (2013) (same); *Stanton v. Sims*, 134 S. Ct. 3 (2013) (same); *Swarthout v. Cooke*, 562 U.S. 216 (2011) (same); *Felkner v. Jackson*, 562 U.S. 594 (2011) (same).

[2] Respondents attack the impartiality of the district judge, claiming that the court "[a]dopted Petitioners' proposed findings almost verbatim." Intervenor 12. But the district court added new findings, deleted or modified others, and rejected

dozen pharmacy experts—including eight senior Commission officials (Supplemental Appendix ("SA") 1-3)—testified that since the Regulations were enacted, referrals motivated by considerations of business and convenience have remained widespread, well-known, and unpunished. App.81a, 162-68a. The Commission *stipulated* that these referrals "continue[] to occur for many reasons." App.335a; SA19-20. And the Ninth Circuit admitted the district court's findings on this point were "not clearly erroneous." App.32a; *see also* APhA Br. 10-15.

Ignoring this evidence, Respondents claim the Regulations are *supposed* to make these common secular referrals illegal—or at least *might* make them illegal "if [the Commission is] ever presented with a complaint about such conduct." State 26. But the district court found that the Commission "has interpreted the rules to ensure that the burden falls squarely and almost exclusively on religious objectors," App.86a, while finding contrary testimony "implausible and not credible." App.171-76a. The Ninth Circuit disputed this finding as "clearly err[oneous]" (App.28a)—despite the fact that Commission members approved secular referrals at meetings and in correspondence. *E.g.,* App.135-36a; SA6-16; 351-58a. But this factual issue is legally immaterial. The question under *Lukumi* is not whether the Regulations are *supposed* to permit secular referrals, but whether they *actually* do so in

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two of the Petitioners' three legal theories. It also issued a separate 48-page opinion with independent factual findings. App.49a.

their "real operation." 508 U.S. at 535. That point is undisputed. App.32a.

Finally, Respondents claim that the Regulations do not violate *Lukumi* because they supposedly "*protect* religiously motivated conduct" by pharmacists—an assertion repeated over 20 times. State 1. But the district court found—and the Ninth Circuit did not dispute—that the Regulations do not, *in practice*, accommodate pharmacists. App.54-55a, 180-83a; APha Br. 23-24. Pharmacists—like Petitioners Thelen and Mesler—have been constructively discharged and threatened with termination because the Regulations make accommodations too expensive. App.187-88a. Commission witnesses confirmed "that [the] new rule would likely end in the termination of conscientious objectors." SA5; App.180-83a. But again, the Ninth Circuit relied on the possibility of an accommodation in theory rather than its unavailability in practice—in direct conflict with *Lukumi*.[3]

II. The Ninth Circuit's decision conflicts with decisions of other circuits.

Respondents claim that the Ninth Circuit "applied exactly the same test" as other circuits. State 25. But that is simply wrong.

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[3] Intervenor-Respondents claim (at 6) the Regulations mirror provisions in five other states. But in each state, pharmacies can be accommodated by not stocking objectionable drugs—as the district court found, App.121-23a, the Ninth Circuit did not dispute, and pharmacy associations confirm. APhA Br. 13-14.

1. On the question of exemptions, no other Circuit has adopted the Ninth Circuit's coulda-shoulda-woulda rule. Unlike the Ninth Circuit, other circuits do not defer to what the government says its regulations *might* do in theory but examine what the regulations *actually* do in practice. In *Ward v. Polite*, the university said it had "a policy of disallowing *any* referrals," but the Sixth Circuit examined the referrals allowed in practice. 667 F.3d 727, 739 (6th Cir. 2012). In *Axson-Flynn v. Johnson*, the university said all students must "perform the[ir] acting exercises as written," but the Tenth Circuit examined exceptions made in practice. 356 F.3d 1277, 1291 (10th Cir. 2004). And in *Tenafly Eruv Association, Inc. v. Borough of Tenafly*, the government said its ordinance "d[id] not allow [government] officials to make exceptions," but the Third Circuit looked "beyond the text of the ordinance" to what the government "tacitly" permitted "in practice." 309 F.3d 144, 151, 167 (3d Cir. 2002). The Ninth Circuit's decision conflicts with these cases.

Other circuits also forbid the government from making a "value judgment in favor of secular motivations" by treating secular conduct as more important than religious practice. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.); Pet. 28. But the Ninth Circuit did just that, concluding that secular reasons—including mere convenience—are "necessary reasons for failing to fill a prescription," while religious reasons are not. App.30a (quoting *Stormans I* at App.315a). It did so even though Commission witnesses admitted—and the district court found—that secular referrals cause

a "much more serious access issue" than religiously-motivated ones. App.356-57a, 211-12a, 215a.

2. On the question of individualized exemptions, Respondents concede that the Third, Sixth, and Tenth Circuits apply strict scrutiny when (1) "the law allows government to exercise discretion in favor of secular conduct" and (2) "the government does so in practice." State 28. That is just what happened here. As the district court found, the catch-all exemptions in the Regulations contain no objective criteria; rather, the Stocking Rule, along with the exceptions for "good faith" and "substantially similar circumstances," give the Commission broad discretion to permit common secular referrals. App.88a, 90a, 220-22a. And in practice, this is precisely how the Regulations have been enforced. App.184a, 222a.

3. Respondents seek to explain the pattern of selective enforcement on the ground that the Commission only pursues citizen complaints. State 32-33. But it is undisputed that the Commission uses many tools to enforce its regulations, including inspections, test shopping, and initiating its own complaints. App.102-03a, 176-80a. It did just that against Petitioners, claiming that they violated the Regulations, yet promptly dismissing complaints against pharmacies that failed to stock Plan B for secular reasons. App. 227a, 178a. The Ninth Circuit held that this differential treatment was permissible because other pharmacies failed to stock Plan B "temporarily," while Petitioners declined to do so "at all times." App.39a n.11. But the Third Circuit rejected the same argument in *Tenafly*, holding that

the government could not distinguish between secular and religious conduct on the ground that religious conduct was "permanent." 309 F.3d at 172.

Regardless, the Commission cannot delegate enforcement power to private interest groups when it knows that those groups are targeting vulnerable religious objectors with a "severely disproportionate number of investigations." App.228a; *cf. City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985). The Commission also "consciously chose[]" to do nothing about Catholic hospitals—larger and more powerful entities serving millions of patients—even though it knew that those hospitals were not dispensing Plan B. App.97-99a; USCCB Br. 12-13, 19-20. The result is that identical religious objectors are treated differently—and identical secular conduct is ignored—based on activists' effort to target the most vulnerable.

Rather than addressing this legal conflict, Respondents claim there is no selective enforcement because Petitioners have not yet been punished. State 31-32. But that is because the district court's injunction and stay have prohibited it. Respondents kept complaints pending against Petitioners for a decade—never dismissing one on the merits, and stating that Petitioners were in "outright defiance" of the Regulations. App.186-87a, 168-69a. They admit that "the Delivery Rule does not allow a pharmacy to refuse to deliver a drug or device to a patient because its owner objects to delivery on religious . . . grounds." State 10. And they do not even suggest that Petitioners can escape punishment in the future.

Instead, Respondents claim that they recently "dismissed the three remaining complaints" against Petitioners, citing "letters on file with counsel." State 13 n.2. Respondents never sent those letters to Petitioners until after filing their Brief in Opposition. Although they emailed counsel in September 2015 claiming the complaints had been dismissed, they never sent the formal notice that is legally required when dismissing a complaint. RCW § 18.130.057(4). Respondents say they were awaiting the Ninth Circuit's decision "because of the district court's injunction." State 32. But due to the stay of the Ninth Circuit's mandate, the district court's injunction remains in place. Thus, the only plausible explanation for this irregularity is an eleventh-hour "manipulative litigation strategy," *Lawrence v. Chater*, 516 U.S. 163, 168 (1996), designed to evade judicial review.

4. Finally, on the history of the Regulations, Respondents say that "Petitioners' real disagreement is with the Ninth Circuit's analysis of the facts." State 35. But the Ninth Circuit made two *legal* rulings that conflict with other circuits. First, this Court and other circuits say that a "trial court's decision on the ultimate question of discriminatory intent represents a finding of fact" entitled to "great deference on appeal." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (internal quotations omitted). The district court found "reams" of evidence proving that "the predominant purpose of the rule was to stamp

out the right to refuse." App.57a. But the Ninth Circuit rejected that finding without any deference.[4]

Second, the Ninth Circuit held that "[t]he collective will of the [Commission] cannot be known, except as it is expressed in the text and associated notes and comments of the final rules." App.27a (quoting *Stormans I* at App.312a). That follows Justice Scalia's concurrence in *Lukumi*, 508 U.S. at 558, in conflict with the opinion of Justice Kennedy, *id.* at 540-42, which has been adopted by the Seventh and Eighth Circuits. Pet.35-38.

In those circuits, the egregious history of the Regulations—including the many hostile statements from Commission officials and the Governor—would be dispositive. As the district court found, "[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." App.91a, 37a. This evidence was summed up when the Commission official charged with explaining the Regulations to the public confirmed: "[T]he object of the rule was ending refusals for conscientious objection." App.359a. Under the law of other circuits, that is a straightforward violation of *Lukumi*.

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[4] Intervenor-Respondents (at 27) say that the facts in free exercise cases require "independent" review under *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). They mischaracterize the *Bose* standard and the Ninth Circuit never invoked it.

III. This case is a clean vehicle to resolve extraordinarily important issues.

Unable to address these conflicts, Respondents strain to manufacture a vehicle problem. First, they say Petitioners "never properly challenged" the Stocking Rule. State 37. But the Delivery Rule expressly incorporates the Stocking Rule, and both rules were pressed and passed upon in the district court and Ninth Circuit. Pet.13 n.5. That preserves the issue for review. *Verizon Commc'ns Inc. v. Fed. Commc'ns Comm'n*, 535 U.S. 467, 530 (2002).

Next, Respondents claim that the over-the-counter availability of one form of Plan B may moot this litigation, even though *ella* and other forms of Plan B are still available only through pharmacies. State 37. But that is *the opposite* of what Respondents argued below. As their brief explained: "the challenged rules continue to apply to these time-sensitive medicines, . . . maintaining a live controversy here." Defs.-Appellants' Supp. Br. 1-2, (Dkt.#152). Respondents were right the first time. Although over-the-counter availability of Plan B renders the ban on conscience-based referrals even more gratuitous, Respondents' about-face on mootness is a transparent attempt to avoid review.

Finally, Respondents claim this Court should deny review because of a dormant, "possible rulemaking" notice. State 37-38. While this notice has been pending for sixteen months, others have been pending for up to seventeen years. *See e.g.,* Wash. St. Reg. 98-13-105; Wash. Dep't of Health, Rule-Making Activity, http://www.doh.wa.gov/

AboutUs/RuleMaking/RuleMakingActivity. Vague claims that the law might someday change cannot prevent this Court's review. The Commission has aggressively defended the Regulations against Petitioners for nearly a decade and has never, since refusing to amend them in 2010, suggested any intent to change them.

Faux vehicle issues aside, this case is an ideal vehicle for the Court to address post-*Lukumi* free exercise law, which is rife with circuit splits and indifference to constitutional violations. The parties agree that pharmacies continue to refer patients for all kinds of secular reasons and that the Regulations ban conscience-based referrals. The Commission has *stipulated* that conscience-based referrals are "a time-honored pharmacy practice" that "do not pose a threat to timely access to lawfully prescribed medications"—a fact the Commission simply ignores. App.335a. Intervenor-Respondents likewise present no evidence that Petitioners' customers were ever denied timely access to any drug, presumably because over thirty pharmacies are located nearby. App.147a. It is thus undisputed that Petitioners' referrals are fully consistent with timely access to medication.[5]

[5] Intervenor-Respondents (at 10-11) recycle a handful of refusal stories they offered the Commission in 2006 and 2010. But each story was examined and the district court found—without contradiction—that they involved conduct expressly permitted under the Regulations or were inaccurately reported; none suggested any problem of access to medication. App.152-57a;

By contrast, the Ninth Circuit's decision poses a major threat to the provision of health care throughout the circuit. USCCB Br. 14-24; APhA Br. 5, 23-24. Catholic hospitals currently provide half of all Washington hospital beds and serve millions of patients. And Respondents do not dispute that, absent this Court's review, they will soon be forced to choose between continuing their mission or violating the directives of their faith. USCCB Br. 19-24. Respondents' allies have also promised to push similar laws in other states. *Id.* at 22-23.

Ultimately, the Ninth Circuit twisted itself into legal knots to avoid applying anything more than rational basis review. It analyzed the Regulations without regard to their real operation, allowed value judgments in favor of secular conduct, and dismissed the relevance of selective enforcement and legislative history, all of which deepen circuit splits and depart from both the spirit and the letter of *Lukumi*. It is no accident that in the quarter century since *Employment Division v. Smith*, 494 U.S. 872 (1990), with only one exception that was later reversed, the nation's largest circuit has never held a law subject to strict scrutiny under the Free Exercise Clause. *See Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002) *rev'd*, 540 U.S. 712 (2004). Absent this Court's review, the Free Exercise Clause will remain a dead letter in the Ninth Circuit.

SA17-18. Commission witnesses admitted they were unable to identify any access problem. App.149-52a, 409a.

CONCLUSION

The Court should summarily reverse the Ninth Circuit decision or, alternatively, grant plenary review. Absent immediate review, the Court should hold the petition in light of *Trinity Lutheran Church of Columbia v. Pauley*, No. 15-577, which also arises under the Free Exercise Clause.

Respectfully submitted.

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APPENDIX

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Identification of Witnesses
Addendum B to Brief of Appellees
(Filed on November 14, 2012, Dkt. # 62)

Witness	Description
Rhiannon Andreini	Defendant-Intervenor
Asaad Awan	Former Board of Pharmacy member; former Chair of the Board of Pharmacy; licensed pharmacist
Kathy Baros-Friedt	Chair of Washington Human Rights Commission
Elizabeth Berendt	Fed. R. Civ. Pro. 30(b)(6) designee for Washington Insurance Commissioner
Judith Billings	Defendant-Intervenor
Susan Teil Boyer	Former Board of Pharmacy member; former Executive Director of Board of Pharmacy (2009 to 2012); licensed pharmacist
Alto Charo	Defendant-Intervenors' Expert Witness
James Doll	Pharmacist Investigator for the Department of Health (21 years); licensed pharmacist

Witness	Description
Timothy Fuller	Board of Pharmacy Pharmacist Consultant (19 years); licensed pharmacist
Dana Blackman Gigler	Assistant Attorney General for Washington State Attorney General's Office; test-shopped Plaintiffs' pharmacy on behalf of Planned Parenthood
Molly Harmon	Defendant-Intervenor
Gary Harris	Board of Pharmacy member from 2005 to present; former Chair of the Board of Pharmacy; licensed pharmacist
Lisa (Salmi) Hodgson	Assistant to Board of Pharmacy; Interim Executive Director of Board of Pharmacy from July 2006 to August 2007
Christina Hulet	Former Governor's Executive Health Policy Advisor
Al Linggi	Former Chair of the Board of Pharmacy; former Board of Pharmacy member; licensed pharmacist (50 years)
Katherine McLean	OB/GYN; Defendant-Intervenors' witness

Witness	Description
Rhonda Mesler	Plaintiff; Pharmacy manager; licensed pharmacist (21 years)
Steven Saxe	Supervisor in Department of Health Director of Health Professions and Facilities; Executive Director of Board of Pharmacy from 2004 to 2006 and 2008 to 2009; licensed pharmacist
Rod Shafer	Chief Executive Officer of the Washington State Pharmacy Association (1994 to 2008); licensed pharmacist and pharmacy owner (32 years)
Jeffrey Shouten	Defendant-Intervenor
Kevin Stormans	Plaintiff; pharmacy owner (over 25 years)
Margo Thelen	Plaintiff; licensed pharmacist (39 years)

EXCERPTS FROM PLAINTIFFS-APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD (SER), Filed July 31, 2013 (ECF No. 141)

SER331-33
Excerpts from Trial Testimony of Board Pharmacist Consultant, Board Spokesperson, and a 30(b)(6) Witness Timothy S. Fuller

Q. …Just so we are clear and the record is clear, what I want to get at and what I want to get your testimony on is what did the Board of Pharmacy staff discuss during the rule-making process as the means of accommodating or dealing with the religious objector and the three that you testified to at your deposition, and I am asking you now in court, are hiring a second pharmacist, arranging for an on-call, or termination of the religious objector. Those were the three discussed?

A. Yes.

Q. So the Board knew that termination of a conscientious objector was one of the outcomes if it adopted the regulations, correct?

A. Yes.

Q. Let's look at the other two that were discussed. You know it's very expensive to use a temp agency to provide for absent pharmacists, correct?

A. Yes, correct.

Q. And in terms of hiring a second pharmacist, that option that was discussed back in 2006-2007, the costs of that, the average cost of that you knew was $80,000, was correct?

A. Yes.

Q. So in 2007, the Board was on notice that its new rule would likely end in the termination of conscientious objectors, correct?

A. Yes.

Q. If you are an employer and you have to decide am I going to hire the conscientious objector or am I going to hire the nonconscientious objector with these new regulations, and my options are I have got to hire a second pharmacist at $80,000 if I hire the conscientious objector or I am going to have to arrange for an expensive temp agency if I hire that conscientious objector. Wouldn't you agree with me that most employers, when faced with that situation are going to decide to hire the conscientious objector?

…

A. Yes.

Q. And that was something that the Board discussed and knew at the time that it passed these regulations, correct?

A. Yeah, we were aware of the possibility.

SER713-17, 719-721, 725-28, 746-48, 803-04 Excerpts from Trial Testimony of Pharmacy Commission Chair Gary Harris

Q. Mr. Harris, do you remember at the Board meetings Ms. Dockter and others discussing that pharmacies face challenges with regard to 1ow reimbursement rates and burdensome audit requirements?

A. I know that was a theme for her, being a pharmacy owner.

Q. You would agree that that's a realistic, practical concern that pharmacy managers and owners have, right?

A. Yes.

Q. And that the Board did discuss that issue, correct?

A. Yes, we did.

Q. You agree that the rules permit pharmacies the discretion to decide whether they want to participate in insurance contracts, right?

A. All businesses have various insurance providers, and yes, I don't know of any business that covers every insurance.

Q. That's because pharmacies need the flexibility to determine which relationships they want to engage in with insurance companies, right?

A. Yes.

Q. You are aware that audit practices sometimes influence whether a pharmacy will want to do business with an insurance company as well, right?

A. Yes.

Q. Because sometimes there are just hassles with certain insurance companies in the way they aggressively audit, right?

A. Yes.

Q. It's not a violation of the rules for a pharmacy not to accept Medicaid, is it?

A. No.

Q. You are aware that some pharmacies refuse to fill prescriptions when Labor & Industries is responsible to pay for that prescription, right?

A. Labor & Industries is a difficult insurance to deal with.

Q. So there are some pharmacies that just choose not to deal with them, right?

A. Probably so.

Q. Does your pharmacy take L&I?

A. Yes, we do.

Q. Have you been at pharmacies that don't?

A. Well, as you just mentioned, my last 21 years was at Group Health. That's pretty much a closed system, and we didn't deal at all with the insurance issues there.

Q. But as a Board member, you do believe there are pharmacies that don't accept L&I?

A. There probably are.

Q. Does your pharmacy take Medicare Part B?

A. Yes.

Q. Are you aware that there are pharmacies that don't?

A. There could be, yeah, I think there are.

Q. For the same or similar reasons as L&I, the hassle of billing, right?

A. Yes, uh-huh, or they don't feel like they -- that they are filling medications at a loss.

Q. You would agree that all these instances we just talked about fall under an exemption in the rules, section (2) of a pharmacy setting their usual and customary charge, right?

A. Yes.

Q. Do you recall that at the Board meetings, and in the letter we just looked at, Ms. Dockter reminding the Board that some pharmacies choose not to fill insulin syringes?

A. Yes.

Q. But if a patient can't inject their time-sensitive medication -- can't inject their time-sensitive medication without a syringe, right?

A. Correct.

Q. But a pharmacy doesn't have to stock or dispense syringes, rights.

A. Some choose to dispense among prescription only.

Q. So if a patient comes in and needs a syringe and they don't have a prescription right then, some pharmacies will turn the patient away, right?

A. Or if they -- if it's one of your regular patients and you look on their profile and see if they have an insulin order on their profile.

Q. But you are aware that some pharmacies just won't fill a syringe?

A. Yes.

Q. We also talked about Ms. Dockter raising the example of clozapine and Accutane, right?

A. Uh-huh.

Q. If a pharmacy dispenses clozapine, the pharmacy must sign up to participate in a monitoring program and review copies of lab work, correct?

A. Correct.

Q. And Ms. Dockter also raised Accutane as an example and she explained that a pharmacy would need to take certain steps to activate an authorization number with the manufacturer, right?

A. Correct.

Q. You agree that it doesn't take special expertise to enroll in these programs, right?

A. For the Accutane, you have to go through a little training program.

Q. It takes like an hour. Doesn't it?

A. I believe so.

Q. So other than taking the hour training program to fill the Accutane prescription, there's no other specialized expertise that's needed for clozapine and Accutane, right?

A. No.

Q. Schedule V cough syrups and syringes were also raised by Ms. Dockter, and you would agree with me that even though they are available over the counter, they are only distributed in pharmacies, right?

A. Yes.

Q. And Ms. Dockter talked with the Board about the fact that most pharmacies don't dispense

Schedule V cough syrups because of the log requirement; do you recall that?

A. Yes.

Q. And is that consistent with your experience?

A. Yeah. I personally haven't seen a Schedule V cough syrup log for decades. They are either prescribed by the doc or they are not carried.

Q. And so a script that comes in for -- excuse me, a person that comes in and wants to order Schedule V cough syrups, pharmacies will not dispense those cough syrups without a prescription, right?

A. Probably not.

[SER719]

Q. Ms. Dockter raised the issue of Medi-Sets as an example of packaging that pharmacies do not provide. Do you recall that?

A. I believe she did.

Q. What is a Medi-Set?

A. Well, it's a way of putting medications into a more identifiable means for the patient. You can either blister pack medications or you can have a plastic Medi-Set that's labeled with the days of the week or times of the day and you put meds in there for patients that maybe have forgotten if they have taken their med or not.

Q. And is it also sometimes referred to as unit dosing?

A. You could.

Q. You could refer to it as unit dosing?

A. Yeah.

…

Q. I am asking you if you are aware that they don't do Medi-Sets. Many pharmacies refer in those situations?

A. I know when I was at Group Health we had a Medi-Set program, and where I am now we blister pack meds after we have some patients request it.

Q. But you recall Ms. Dockter talking at the meeting that there are many pharmacies that don't do Medi-Sets, right?

A. There could be.

…

Q. So the Board discussed the issue of assisted suicide during the rule-making process, didn't it?

A. We probably did.

Q. You understand that under the assisted suicide law, a pharmacy can choose not to dispense lethal drugs for conscience reasons, don't you?

A. Yes, it's an opt-in program.

Q. For volunteers, right?

A. Yes.

Q. Personally, do you believe that only volunteers should have the right to -- should have to participate in assisted suicide?

A. Yes.

[SER725]

Q. Mr. Harris, returning to some of these situations, actual situations where pharmacists will not dispense, we have talked about Clozapine, Accutane, simple compounds.

At the bottom, Ms. Dockter also discusses "restricted list" with the Board; do you see that?

A. Yes.

Q. And then Schedule V cough syrups, right?

A. Yes.

Q. And syringes, as well as the disruptive patient or the patient with the past behavior, right?

A. Yes.

Q. Ms. Dockter also raised issues with the Board: patient has no money to pay for the script, insurance issues, again, disruptive actions were raised by Ms. Dockter, and then many actual refusals, including the medication is not in stock but is already

promised to another patient, as well as Medi-Sets that she raised, and Schedule II narcotics. She says under 15: "Pharmacist does not stock Schedule II narcotics." Do you see that as well?

A. Yes.

Q. So does that refresh your recollection that the Board did discuss the fact that some pharmacies do not stock Schedule II narcotics?

A. I don't know that for a fact, but it looks like we discussed the possibility.

Q. So all those possibilities that we talked about before the break, Ms. Dockter had raised with the Board. I am showing you the August 31, 2006, Board meeting minutes. Do you see that?

A. Yes.

Q. In those minutes, it's recorded that you stated: "Gary Harris stated that he supports the Governor's proposed language. In response to the many examples given by Ms. Dockter, Hr. Harris felt that the Board would not pursue disciplinary action against the pharmacist."

That is what you said at the Board meeting, right?

A. Yes. So referring to her examples of not selling syringes, or the Accutane or the Clozapine, the examples that she presented.

Q. So we've got insurance contracts, right? We've talked about that?

A. Yeah.

Q. So all those examples that I just ran through, you agreed at the August 31st meeting that those examples would be permissible reasons for a pharmacy not to order or dispense a drug, right?

A. It was my opinion, but again --

Q. That's what I am asking for.

A. -- I am just one member of seven.

Q. Yes. Do you also recall at the meeting where the Board was discussing the exemptions that Ms. Dockter has raised, that Ms. Roper assured Ms. Dockter that the Board would evaluate each situation on a case-by-case basis? Do you remember that?

A. Yes, and that's pretty much what we've said all along, is that cases are decided on a case-by-case basis.

Q. And she also advised the Board -- Ms. Roper did -- that the Board would not discipline a pharmacist if he or she acted consistent with customary pharmacy practice, and that that was the measure the pharmacist would be governed by, right?

A. I don't recall those exact words but --

Q. You don't recall "consistent with customary pharmacy practice"?

A. I don't recall the exact words from that memo.

Q. Do you recall that it was something similar to "customary pharmacy practice" or "consistent with reasonable expectations," what's in the rule?

A. Yes.

Q. Showing you Exhibit 232, which is the December 14, 2006, meeting minutes, do you recognize those?

A. Yes.

Q. Do you also recall at the meeting after Ms. Dockter gave her many examples, Ms. Duffy offering that the statement that "Except for the following or substantially similar circumstances provides for similar situations that are not explicitly stated in the rule"?

Do you recall Ms. Duffy saying that Ms. Dockter's exceptions would be permitted by the rule?

A. I see it written there. I don't recall Rosemarie stating that, but I see it there in the minutes.

Q. You don't have any reason to doubt that the minutes are accurate?

A. No.

[SER746-48]

Q. You would agree with me that those are the four examples that were repeated many times throughout this rule-making process, right?

A. You say repeated. We received a number of things from both sides that were repeated and on the same -- exact same format, exact same spacing between paragraphs.

Q. So those four refusals were repeated again and again, right?

A. I don't know again and again, but we heard them more than once.

Q. You heard all of those before the June 1 meeting, correct?

A. Yes.

Q. Before you voted on the rules, right? Yes?

A. Yes.

…

Q. I would like to talk for a few minutes about the 2010 rule-making process. During the 2010 rule-making process, you told media and legislators that referral is a regular daily practice, correct?

A. Yes.

[SER803-04]

Q. And so when the board was going through the rule making process in 2006 and 2007, I understood your testimony to be that the board was concerned about removing barriers to access to medication; is that right?

A. Uh, yes.

Q. And that the barrier that the board intended to remove in these rules was patients being unable or being delayed in getting their medications due to personal, moral, or religious objections, right?

A. Yes.

Q. And since you are not a conscientious objector, I take it that the pharmacy responsibility rule has not changed your practice or that of the QFC in which you work, right?

A. No.

Q. And you aren't aware of the pharmacy responsibility rule changing the practice of pharmacies for anyone else either, other than conscientious objectors, right?

A. Um, no. As far as I know, we're all complying with the rule.

SER 827-30, Excerpts from Deposition Transcript in Lieu of Oral Testimony at Trial of former Pharmacy Commission Member, Executive Director, and 30(b)(6) Witness Susan Teil Boyer

Q. …. Do you recall any member of the board objecting to the contents of the stipulation?

MR. GREENE: Object to the form.

A. I - - I do not recall any objection.

Q. Did the board of pharmacy, to your knowledge, ever consider revoking the stipulation after it was entered with the Court?

A. No.

…

Q. Let's take a look at paragraph 1.4 of the stipulation, Exhibit - 435. That second -- that second sentence beginning with, "Specifically" -- why don't you read that into the record.

A. "Specifically the board intends to adopt a rule allowing facilitated referrals for all pharmacies and pharmacists out of stock or unable or unwilling to stock or timely deliver or dispense lawfully prescribed medications on site to their patients for any reason, including for conscientious reasons."

Q. Is that an accurate statement, as far as you're concerned?

A. Yes.

…

Q. 1.5, let's go on. "As board members indicated in their comments at the June 29th meeting, referral is a time-honored pharmacy practice." You agree with that statement, don't you?

A. I do.

Q. And, again, you're here as the board representative. The board agrees with that statement, doesn't it?

A. I believe it does.

Q. Okay. And the board agrees with the statement that "it continues to occur for many reasons," correct?

A. Yes.

Q. "And is often the most effective means to meet the patient's request when the pharmacy or pharmacist is unable or unwilling to provide the requested medication." We'll stop there. You agree with that statement?

A. Yes.