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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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress and all fifty states have long protected the right of health care professionals to decline to participate in the taking of human life. Petitioners are a family-owned pharmacy and two pharmacists who cannot sell abortifacient drugs without violating their religious beliefs. Instead, they refer customers to one of dozens of nearby pharmacies that sell those drugs. No customer in Washington has ever been denied timely access to any drug due to religiously motivated referral.

Nevertheless, in 2007, Washington became the only state to make Petitioners' religious conduct illegal. It did so over the objections of its own Pharmacy Commission, against the recommendation of the American Pharmacists Association and the Washington Pharmacy Association, and despite its own stipulation that Petitioners' conduct "do[es] not pose a threat to timely access to lawfully prescribed medications." After a twelve-day trial, the district court held that the new regulations violate the Free Exercise Clause because they intentionally target religious conduct, have been enforced only against religious conduct, and exempt identical conduct when done for "an almost unlimited variety of secular reasons." The Ninth Circuit reversed.

The question presented is:

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.

PARTIES TO THE PROCEEDING

Petitioners are Stormans, Inc. (doing business as Ralph's Thriftway), Rhonda Mesler, and Margo Thelen.

Respondents are John Wiesman, Secretary of the Washington State Department of Health; Dan Rubin, Elizabeth Jensen, Emma Zavala-Suarez, Sepi Soleimanpour, Christopher Barry, Nancy Hecox, Tim Lynch, Steven Anderson, Albert Linggi, Maureen Simmons Sparks, Maura C. Little, and Kristina Logsdon, Members of the Washington Pharmacy Quality Assurance Commission; Mark Brenman, Executive Director of the Washington Human Rights Commission; Martin Mueller, Assistant Secretary of the Washington State Department of Health, Health Services Quality Assurance; Judith Billings; Rhiannon Andreini; Jeffrey Schouten; Molly Harmon; Catherine Rosman; and Tami Garrard.

CORPORATE DISCLOSURE STATEMENT

Stormans, Inc., is a privately held corporation with no parent corporation. No publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

This Court's unanimous decision in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), was clear: Governments may not pass laws that target religious conduct for negative treatment while exempting the same conduct when done for nonreligious reasons. But the Ninth Circuit upheld just such a rule here.

For decades, American pharmacies have made decisions about which drugs to sell based on a wide variety of reasons related to business, economics, convenience, and conscience. When a pharmacy chooses not to sell a drug, it is commonplace to refer a customer to a nearby pharmacy. Such referrals—including referrals for reasons of conscience—are expressly approved by the American Pharmacists Association and have long been legal in all fifty states.

But in 2007, in response to intense lobbying by national and state pro-abortion groups, Washington became the only state to make conscience-based referrals illegal. App121-22a.[1] Washington banned

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[1] One other state—Illinois—adopted the same prohibition in 2010, expanding on an executive order issued by Governor Rod Blagojevich in 2005. But its regulation was struck down in state trial court as a violation of the Free Exercise Clause, *Morr-Fitz, Inc. v. Blagojevich*, 2011 WL 1338081, No. 2005-CH-000495 (Ill. Cir. Ct. Apr. 5, 2011), and on appeal as a violation of Illinois law, *Morr-Fitz, Inc. v. Quinn*, 976 N.E.2d 1160 (Ill. App. Ct. Sept. 20, 2012).

conscience-based referrals even though no customer has ever been denied timely access to any drug due to such a referral. And it did so even though it has *stipulated* that conscience-based referral is "a time-honored pharmacy practice" that "do[es] not pose a threat to timely access to lawfully prescribed medications." App.335a.

The state's new regulations were primarily drafted by two pro-abortion advocacy groups at the request of Governor Christine Gregoire, who personally boycotted Petitioners because of their conscientious objection to abortifacient drugs. After the State's Pharmacy Commission resisted adopting the Governor's rule, she replaced two members with new ones recommended by the pro-abortion groups. The new Commission Chairman stated that "I for one am never going to vote to allow religion as a valid reason for a facilitated referral" and advocated prosecuting conscience-based referrals "to the full extent of the law." App.145a, 186-87a, 407a.

After nearly five years of litigation and a twelve-day trial, the district court found that the new Regulations target conscientious objections to abortifacient drugs, while exempting referrals for "an almost unlimited variety of secular reasons." App.81a. It found that the Regulations have never been enforced against anything but religious conduct. And it found that "reams of emails, memoranda, and letters between the Governor's representatives, Pharmacy [Commission] members, and advocacy groups" demonstrated that the Regulations were "aimed at [abortifacient drugs] and conscientious objectors from their inception."

App.57a. The district court enjoined the Regulations as a violation of *Lukumi*.

The Ninth Circuit reversed, ignoring the district court's extensive factual findings and adopting an exceptionally narrow interpretation of the Free Exercise Clause. It held that any law can satisfy the Free Exercise Clause, no matter how clearly it targets religious conduct in practice, as long as it might also be applied to nonreligious conduct in theory. The result is so contrary to *Lukumi* that summary reversal is warranted.

Alternatively, the Ninth Circuit's departure from *Lukumi* also creates stark conflicts with other circuits warranting plenary review. The panel's opinion conflicts with the Third, Sixth, Tenth, and Eleventh Circuits and the Iowa Supreme Court on the significance of secular exemptions; it conflicts with the Third Circuit on the relevance of selective enforcement; and it conflicts with the Seventh and Eighth Circuits on the use of a law's history to demonstrate discriminatory intent.

The Ninth Circuit's decision likewise upsets a longstanding consensus on an issue of immense national importance: conscience protections in health care. For over forty years, Congress and all fifty states have protected the right of pharmacists, doctors, nurses, and other health professionals to step aside when asked to participate in what they consider to be an abortion. The decision below authorizes a dangerous intrusion on this right, which can only exacerbate intense cultural conflict over these issues.

Whether summary reversal or plenary review is more appropriate, the decision below cannot stand. This Court should intervene to realign the Ninth Circuit with the rest of the country, vindicate Petitioners' right to refrain from taking human life, and reaffirm that the Free Exercise Clause "protects religious observers against unequal treatment." *Lukumi*, 508 U.S. at 542 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987)).

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 794 F.3d 1064 (9th Cir. 2015) and reproduced at App.1a. The district court's opinion granting a permanent injunction is reported at 844 F. Supp. 2d 1172 (W.D. Wash. 2012) and reproduced at App.49a. The district court's findings of fact and conclusions of law are reported at 854 F. Supp. 2d 925 (W.D. Wash. 2012) and reproduced at App.112a.

JURISDICTION

The court of appeals entered its judgment on July 23, 2015. It denied a timely petition for rehearing en banc on September 10, 2015. App.261a. Justice Kennedy extended the time in which to file a petition for a writ of certiorari to January 4, 2016. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

The relevant portions of the Washington Administrative Code, §§ 246-869-010 and 246-869-150(1) (collectively, the "Regulations"), are reprinted in the Appendix. App.344-47a.

STATEMENT

A. Petitioners and the Practice of Pharmacy

Petitioner Stormans, Inc. is a small family business owned by the three children of Ken Stormans. For over seventy years, the Stormans family has owned and operated Ralph's Thriftway, a grocery store that includes a small retail pharmacy. Petitioners Rhonda Mesler and Margo Thelen are individual pharmacists who have worked at other retail pharmacies for a combined seventy years.

Like most pharmacies, Petitioners stock only a fraction of the roughly 6,000 drugs available on the market. App.116a. A retail pharmacy like Ralph's typically stocks about 15% of available drugs. Br. of American Pharmacists Association 6, Nov. 20, 2012, ECF No.68 ("APhA.Br."). Decisions about which drugs to stock are based on a variety of factors, such

as demand for a drug, cost of a drug, whether a drug is sold only in bulk, shelf space, shelf life, manufacturer or supplier restrictions, insurance requirements and reimbursement rates, administrative costs, monitoring or training costs, and competitors' practices. App.117-18a. Some pharmacies also choose to target a niche market, stocking drugs for geriatric, pediatric, oncological, diabetes, HIV, infusion, compounding, naturopathic, or fertility patients only. App.162a.

When a customer requests a drug that a pharmacy does not stock, standard practice is to refer the customer to another pharmacy. Pharmacies do this many times daily. App.118-19a, 165-68a. Even when a drug is in stock, pharmacies routinely refer customers elsewhere for a variety of reasons—such as when a prescription requires extra time (like simple compounding or unit dosing), or when a customer offers a form of payment that the pharmacy does not accept. App.166-68a. The State has stipulated that referral is standard practice and is often the most effective way to serve a customer. App.141-43a.

Petitioners are Christians who believe that life is sacred from the moment of conception. App.115a. Because of their religious beliefs, Petitioners cannot stock or dispense the morning-after or week-after pills (collectively, "Plan B"), which the FDA has recognized can prevent implantation of an embryo. *Id*. For Petitioners, dispensing these drugs would make them guilty of destroying human life. *Id*.

On the rare occasions when a customer requests Plan B, Petitioners provide the customer with a list of nearby pharmacies that stock Plan B and, upon the patient's request, call to confirm it is in stock. This is called a "facilitated referral." *Id.* Within five miles of Ralph's, over thirty pharmacies carry Plan B. Plan B is also available from nearby doctors' offices, government health centers, emergency rooms, Planned Parenthood, a toll-free hotline, and the Internet. App.146-47a. As of 2013, the morning-after pill is also available on grocery and drug-store shelves without a prescription.[2]

Petitioners' customers have never been denied timely access to any drug. App.147a. The State stipulated below that facilitated referral is "a time-honored pharmacy practice" that "continues to occur for many reasons" and "do[es] not pose a threat to timely access to lawfully prescribed medications," "including Plan B." App.142a. The State also stipulated that facilitated referrals "help assure timely access to lawfully prescribed medications . . . includ[ing] Plan B" and "are often in the best interest of patients." *Id*. Plaintiffs' conscience-based

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[2] *See* Lisa M. Krieger, *'Morning after' pill goes on sale Thursday in pharmacies and grocery stores, available to anyone*, San Jose Mercury News, (July 31, 2013), http://www.mercurynews.com/science/ci_23770130/morning-after-pill-goes-sale-Thursday pharmacies-and. Based on this development, the Ninth Circuit asked for supplemental briefing on whether this case was moot. But all parties agreed that the case is not moot because the week-after pill and some versions of the morning-after pill are still available only by prescription, and Petitioners are required to dispense them.

referrals were legal for decades in Washington. They are approved by the American Pharmacists Association. And they are legal in every other state. App.119-23a, APhA.Br.28-31.

B. The Regulatory Process

Washington is the only state that currently makes conscience-based referrals illegal. App.121-22a. In 2005, Planned Parenthood Public Policy Network of Washington and Legal Voice (collectively, "Planned Parenthood") contacted Governor Christine Gregoire's office and asked for her help in banning conscience-based referrals for Plan B. Governor Gregoire met personally with Planned Parenthood officials, sent a letter to the Washington Pharmacy Quality Assurance Commission ("Commission"), and appointed a former Planned Parenthood board member to the Commission. Shortly thereafter, the Commission initiated a formal rulemaking process. App.123-27a.

The Commission held two public hearings. Prior to these hearings, the Governor urged Planned Parenthood to gather stories of customers who had been refused access to Plan B. App.152a. Planned Parenthood published advertisements soliciting refusal stories, sent test-shoppers to pharmacies throughout the state, and attempted to document any refusals that occurred. App.156-57a. However, during the rulemaking hearings, neither Planned Parenthood nor the Commission were able to identify any problem of access to Plan B or any other drug. App.89a, 152a, 244a. The Commission also conducted a statewide survey of access to Plan B,

finding that 77% of Washington pharmacies stock Plan B. Of the 23% that do not, only 2% cited religious reasons, while 21% cited business or convenience reasons. The Washington State Pharmacy Association conducted two similar surveys, finding no problem of access to any drug and no instance of any patient being denied timely access due to a pharmacist's objection. App.147-49a.

After the rulemaking hearings, the Commission considered two draft rules—one that would prohibit conscience-based referrals as the Governor requested, and one that would protect them. Upon reviewing the Governor's rule, the Executive Director of the Commission asked, "Would a statement that does not allow a pharmacist/ pharmacy the right to refuse for moral or religious judgment be clearer?" App.58a, 131a, 406a. As he understood the rule, the goal was to allow referrals "for most legitimate examples raised; clinical, fraud, business, skill, etc." App.131a. But "the difficulty is trying to draft language to allow facilitating a referral for only these non-moral or non-religious reasons." *Id*. He clarified that "non-religious reasons" included referrals because of expense, shelf-life, low demand, or a pharmacy's chosen business niche. *Id*.

To increase the pressure to adopt her rule, the Governor asked Planned Parenthood to work with the State Human Rights Commission. Together, they drafted a letter threatening Pharmacy Commission members with personal liability under state antidiscrimination laws if they voted for a regulation that permitted conscience-based referrals. App.126-

27a, 374-99a. Nevertheless, the Pharmacy Commission voted unanimously to protect conscience-based referrals.

Governor Gregoire then publicly threatened to remove Commission members. App.129a. She asked Planned Parenthood to prepare a new regulation and, after reviewing the draft, asked her advisors to confirm that it was "clean enough for the advocates [i.e., Planned Parenthood] re: conscious/moral issues." App.129-30a. As the Executive Director of the Commission explained in an email: "the moral issue IS the basis of the concern. . . . [T]he public, legislators and governor are telling us loud and clear that they expect the rule to protect the public from unwarranted intervention based on the moral beliefs of a pharmacist." App.130a, 401a.

The Governor also created a new taskforce to finalize the text of the rule. The taskforce consisted of members of Planned Parenthood, the Governor's policy advisor, and three pharmacists. App.131a. Although all three pharmacists supported conscience-based referrals, the Governor and Planned Parenthood took conscience-based referrals off the table. App.132a. The taskforce then agreed that the rule should preserve referral for a variety of business, economic, and convenience reasons, but not for reasons of conscience. App.134a, 351-54a.

To guarantee final approval of the rule, Governor Gregoire personally called the Commission Chairman before a key vote and told him to "do [your] job." App.136a. She also involved Planned Parenthood in the process of interviewing candidates

for the Commission. When the Commission Chairman seemed resistant, and Planned Parenthood opposed his reappointment, the Governor refused to reappoint him. Instead, she appointed two new Commission members recommended by Planned Parenthood. App.137-38a. The new Commission Chairman stated that "I for one am never going to vote to allow religion as a valid reason for a facilitated referral." App.145a. He also stated that he would recommend prosecuting conscientious objectors "to the full extent of the law," App.186-87a, and that he viewed those who refer for reasons of conscience as "immoral" and engaging in "sex discrimination," App. 367a. He testified that the Regulations affected conscientious objectors and no others. App.140a, 144a.

On April 12, 2007, the Commission voted to approve the Governor's rule. App.138a. In the notice sent to pharmacies describing the new rule, the Commission referred only to Plan B and singled out only one prohibited reason for referral: conscientious objection. App.139a, 360a. The Commission's spokesperson testified that "the object of the rule was ending refusals for conscientious objection." App. 359a, 362a.

C. The New Regulations

The new "Delivery Rule" creates "a duty to deliver lawfully prescribed drugs or devices . . . in a timely manner," App.158a, subject to seven exemptions. The first five exemptions cover situations where (a) the prescription is erroneous, (b) there are guidelines affecting the availability of the

drug, (c) the pharmacy lacks specialized equipment or expertise needed to dispense the drug, (d) the prescription is potentially fraudulent, or (e) the drug is out of stock. A sixth exemption excuses pharmacies when a customer is unable to pay the pharmacy's "usual and customary" charge. A seventh exemption was added as a catch-all, covering any circumstances that are "substantially similar" to the first six exemptions. The district court found "abundant evidence" that the enumerated exemptions permit pharmacies to refer for a "wide variety" of common business, economic, and convenience reasons. App.175a, 135-36a, 171a, 200a-211a, 222a. And the "substantially similar" language was designed to give the Commission "wiggle room" to grant additional exemptions. App.134-36a, 212-213a, 221a, 354a.

One of the exemptions in the Delivery Rule—the out-of-stock exemption—also incorporates by reference an older "Stocking Rule," which provides that a pharmacy "must maintain at all times a representative assortment of drugs in order to meet the pharmaceutical needs of its patients." App.161a. The Stocking Rule has long given pharmacies broad discretion to decline to stock drugs for business or convenience reasons, and the out-of-stock exemption incorporates this discretion into the new Delivery Rule. App.162a. Thus, under the Delivery Rule, if a pharmacy chooses not to stock a drug for business or convenience reasons—*i.e.*, "good faith compliance

with [the Stocking Rule]"—there is no duty to deliver the drug. App.160-61a, 221-22a.[3]

D. The Regulations' Operation in Practice

In practice, the new Regulations have not changed pharmacies' traditional discretion to decline to stock or deliver drugs for reasons related to business, economics, or convenience. As the district court found, pharmacies have continued to decline to stock drugs for all of the "widespread, widely known" reasons mentioned above—such as when a drug might be unprofitable, fall outside supplier contracts, require additional equipment or training or paperwork, attract an undesirable clientele, or fall outside a chosen business niche. App.162-65a, 231a. And even when drugs are in stock, pharmacies have

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[3] The Ninth Circuit wrongly stated that Petitioners "do not challenge the Stocking Rule." App.16a, 18a n.2, 35a. But Petitioners repeatedly challenged the Stocking Rule at summary judgment, pretrial, trial, and appeal. *See*, *e.g.*, Pls.' Consolidated Resp. to State Defs.; Defs.-Intervenors' Mots. for Summ. J., 22, Apr. 26, 2010, ECF No.401. (Stocking Rule is "[a]t the center of this case"); Pls.' Trial Br., Nov. 10, 2011, ECF No.510 (pretrial); 92-100a, 162-165a (trial); Br. of Appellees, 19-21, 42-43, 73-76, 86-100, 135, Nov. 14, 2012, ECF No.62. The district court expressly ruled on it, mentioning the Stocking Rule in its ruling no less than thirty-seven times. Petitioners' Ninth Circuit brief cited it almost fifty times. Hence, the Stocking Rule was both pressed and passed upon below. The Stocking Rule is also expressly incorporated by one of the exemptions under the Delivery Rule. Thus, a challenge to the Delivery Rule necessarily requires the court to consider the Commission's interpretation and application of the Stocking Rule. App.161a.

continued to decline to deliver them for a variety of reasons—such as when they are asked to perform simple compounding, provide unit dosing, or accept an undesirable form of payment. App.166-68a. In all of these situations and more, pharmacies have continued to refer customers to other pharmacies, and none of these referrals has ever been deemed to violate the Stocking or Delivery Rules.

By contrast, the Regulations have made Petitioners' conscience-based referrals illegal. When abortion-rights activists discovered Ralph's position on Plan B, they sent coordinated patrols of test-shoppers to request Plan B and then file complaints against Ralph's. Test-shoppers also filed complaints against a nearby Walgreens, Sav-On, and Albertsons. When the other pharmacies informed the Commission that Plan B was temporarily out of stock, they were deemed to be in compliance, and the investigations were closed. Conversely, when Ralph's informed the Commission that dispensing Plan B would violate the owner's religious beliefs, they were deemed to be in "outright defiance" of the Regulations and the investigation was kept open. App.184-86a. The Chairman of the Commission testified that if Petitioners continue their practice of not stocking Plan B, they will be subject to the revocation of their pharmacy license. App.186-87a.[4]

[4] Ralph's pharmacy remains open because the district court enjoined the Regulations and the Ninth Circuit has temporarily stayed its mandate pending this Court's review.

Abortion-rights groups also organized a boycott and picketing of Ralph's. Picketers stood on both sides of the store entrance, yelling at customers and urging them to boycott the store. The Governor's office joined in the boycott, canceling an account with Ralph's that had been in place for sixteen years. App.185a.

Test-shoppers also targeted Petitioners Thelen and Mesler. Before adoption of the Delivery Rule, their employers allowed them to refer the rare Plan B customers to nearby pharmacies. But after the adoption of the Regulations, their employers informed them that they could no longer be accommodated. Thelen was constructively discharged, and Mesler was informed that she would have to transfer to a pharmacy in another state unless the Regulations were enjoined. As the district court found, this is the unavoidable result of the Regulations, because they force pharmacies to choose between either keeping a non-objecting pharmacist on duty at all times at a cost of tens of thousands of dollars annually, or terminating the objecting pharmacist. App.188a, 237a.

E. Trial Proceedings

On July 25, 2007, Petitioners filed suit challenging the Regulations under the Free Exercise, Equal Protection, and Due Process Clauses. The district court granted a preliminary injunction, *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245 (W.D. Wash. 2007), which the Ninth Circuit reversed, *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009) ("*Stormans I*"), App.263-332a. On

remand, Respondents agreed not to enforce the Regulations against Petitioners pending trial. Stipulation and Order, Mar. 6, 2009 (ECF No.355).

The district court then held a twelve-day bench trial, involving twenty-two witnesses and almost 800 exhibits. Much of the trial focused on the effect of the Regulations in practice. Reviewing four years of experience under the Delivery Rule, and over forty years of experience under the Stocking Rule, the court found that "the effect of the law in its real operation" was to "exempt pharmacies and pharmacists from stocking and delivering lawfully prescribed drugs for an almost unlimited variety of secular reasons, but fail to provide exemptions for reasons of conscience." App.80-81a. It found that pharmacies have continued to refer customers for "countless" business, economic, and convenience reasons, and that the State has been aware of and permitted these practices regardless of the potential effect on patient health. App.86a, 170a, 231a. Instead, "the only result of the Regulations has been to prohibit conscientious objections to Plan B." App.245a.

The district court also found that the Regulations had been selectively enforced, and that no conduct except conscience-based referrals has ever been deemed to violate either rule. The State claimed that this was because it enforces its regulations only in response to citizen complaints, and no citizens have ever complained about nonreligious referrals. But the district court found this testimony "to be implausible and not credible." App.176a. The Commission uses a "wide variety of

mechanisms" to promote compliance, including initiating its own complaints, inspecting pharmacies regularly, and test shopping pharmacies. *Id.* The court also found that relying on citizen complaints only made the selective enforcement problem worse, because the Commission was well aware that "Planned Parenthood and other pro-choice groups have conducted an active campaign to seek out pharmacies and pharmacists with religious objections to Plan B and to file complaints." App.228a. This resulted in a "severely disproportionate number of investigations directed at religious objections to Plan B." *Id.*

The court also made detailed findings on the Regulations' history and purpose. The court found that "the evidence at trial revealed no problem of access to Plan B or any other drug before, during, or after the rulemaking process." App.146a. Instead, the evidence "demonstrat[ed] that the predominant purpose of the [Regulations] was to stamp out the right to refuse" for reasons of conscience. App.57a. The Commission confirmed its purpose in public pronouncements and voluminous internal correspondence—all of which revealed that "the goal of the [Commission], the Governor, and the advocacy groups" was to "bar pharmacists and pharmacies from conscientiously objecting," while "allowing pharmacies and pharmacists to refuse to dispense for practically any other reason." App.58-59a, 172a.

Based on its findings, the district court held that the Regulations were neither "neutral" nor "generally applicable" under the Free Exercise Clause. App.248a. It also held that the Regulations

failed strict scrutiny because there was no problem of access to Plan B, and because the State had stipulated that conscience-based referral is "a time-honored pharmacy practice" that "do[es] not pose a threat to timely access" to Plan B. App.248-49a

F. The Ninth Circuit's Decision

A panel of the Ninth Circuit reversed, concluding that "the rules are neutral and generally applicable" and "rationally further the State's interest in patient safety." App.10a. The panel acknowledged that, in practice, pharmacies routinely refer patients elsewhere for a variety of business, economic, and convenience reasons. But it held that "the enumerated exemptions [in the Delivery Rule] are 'necessary reasons for failing to fill a prescription' in that they allow pharmacies to operate in the normal course of business," and were therefore legitimate. App.30a.

Regarding selective enforcement, although the panel acknowledged that the Commission had never taken action against nonreligious referrals, it held that the Commission had no "specific intent to disadvantage religious objectors." App.40a. The fact that "Ralph's has been implicated in a disproportionate percentage of investigations" was simply a function of the fact that "the Commission responds only to the complaints that it receives." App.39a.

Finally, addressing the historical background of the Regulations, the panel held that "[t]he collective will of the [Commission] cannot be known, except as

expressed in the text'" and official documents explicating the final rules. App.27a (quoting *Stormans I* at App.312a). And, "[e]ven if the Commission had drafted and adopted the rules solely in response to incidents of refusal to deliver Plan B, that fact would not *necessarily* mean that the rules were drafted with the intent of discriminating against religiously motivated conduct." App.28a n.6.

The Ninth Circuit denied rehearing en banc. App.261-62a.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's decision should be summarily reversed in light of *Lukumi*.

The Ninth Circuit's decision is so patently inconsistent with *Lukumi* that summary reversal is warranted. *See Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (summarily reversing Montana Supreme Court's refusal to follow *Citizens United v. FEC*, 558 U.S. 310 (2010)).

In *Lukumi*, this Court struck down three ordinances banning animal sacrifice, unanimously concluding that the ordinances fell "well below the minimum standard necessary to protect First Amendment rights." 508 U.S. at 543. The ordinances were not "neutral" or "generally applicable" because they burdened "Santeria adherents but almost no others"; they "proscribe[d] more religious conduct than [wa]s necessary to achieve their stated ends"; and they exempted "[m]any types of animal deaths or kills" that undermined the government's interests

"in a similar or greater degree than Santeria sacrifice does." *Id*. at 536-38, 543.

Here, after an extensive trial, the district court found that the Regulations operate in precisely the same manner: They burden "religious objections" but no others; they prohibit conscience-based referrals even when the State has stipulated that they "pose[] no threat to timely access to Plan B"; and they are "riddled with secular exemptions that undermine their stated goal" "in a similar or greater degree" than conscience-based referrals would. App.233a, 235a, 106a, 200a.

The Ninth Circuit did not find any of these key factual findings to be clearly erroneous. Instead, it purported to distinguish *Lukumi* on four grounds, none of which are even remotely plausible. First, it said that the Regulations are neutral because they apply "to *all* objections to delivery that do not fall within an exemption." App.23a. But that is a truism: All laws apply to conduct that isn't exempt. In *Lukumi*, for example, the ordinances applied to *all* animal killing that wasn't exempt. The problem was the breadth of the exemptions, which protected "almost all killing of animals except for religious sacrifice." 508 U.S. at 536. The same problem is present here: The Regulations in practice protect all forms of referral except conscience-based referral. Indeed, it is undisputed that *no* secular referral has *ever* been found to violate the Regulations.

Second, the Ninth Circuit reasoned that the Regulations are neutral because they *might* apply to secular referrals in the future—such as refusals to

deliver "diabetic syringes, insulin, HIV-related medications, and Valium." App.23-24a. But *Lukumi* requires the court to consider "the effect of a law in its real operation"—not speculate about the future. 508 U.S. at 535. Here, it is undisputed that the Regulations have never applied to any secular conduct, and, in any event, the district court expressly found that these hypothetical future referrals are exempt. App.151-57a, 234a.

Third, the Ninth Circuit suggested that the Regulations are neutral because they "specifically *protect* religiously motivated conduct" by "allowing pharmacies to 'accommodate' individual pharmacists" who have religious objections. App.22a. But that simply disregards the district court's factual findings, which expressly stated that the Regulations do *not*, in practice, work that way; rather, "the Delivery Rule renders the pharmacist's right to conscientious objection illusory." App.55a, 180-83a. The vast majority of pharmacies have only one pharmacist on duty, which makes it impossible to accommodate individual pharmacists. That is what happened to the two individual pharmacist Petitioners, and there is no record of any individual pharmacist ever being accommodated under the Regulations. App.188a. Indeed, the Commission's own witnesses admitted that the Regulations do not accommodate objectors. App.180-83a.

Finally, the Ninth Circuit held that the fact that there are "other means that might achieve the [government's] purpose" without burdening religious exercise does not demonstrate targeting. App.26a. But *Lukumi* says just the opposite: When laws

"proscribe more religious conduct than is necessary to achieve their stated ends," that is "significant evidence" of "improper targeting." 508 U.S. at 538. Here, the State has *stipulated* that conscience-based referrals "do not pose a threat to timely access to lawfully prescribed medications"—yet it still seeks to punish them. App.249a. That is significant evidence of targeting, and the panel simply disregarded it—along with the binding stipulation—in violation of *Lukumi*. App.25-27a.; *see also Christian Legal Soc. v. Martinez*, 561 U.S. 661, 677 (2010) ("[Factual stipulations are] binding and conclusive.").

In short, the Regulations here are just as blatantly targeted at religious conduct as the ordinances unanimously struck down in *Lukumi*. The Ninth Circuit's transparent attempt to avoid applying *Lukumi*, as well as its flagrant disregard of the district court's extensive factual findings, warrant summary reversal.

II. The Ninth Circuit's decision dramatically curtails the Free Exercise Clause in conflict with six other circuits.

Alternatively, the Court should grant plenary review to address the stark conflicts created by the Ninth Circuit's decision on three critical issues of free exercise doctrine: the significance of secular exemptions, the relevance of selective enforcement, and the use of a law's history to demonstrate discriminatory intent. A conflict on any one of these issues would merit this Court's attention. A conflict on all three demands it.

A. The Ninth Circuit's decision conflicts with the Third, Sixth, Tenth, and Eleventh Circuits and the Iowa Supreme Court on the use of exemptions to prove that a law is not generally applicable.

1. Following *Lukumi*, the Third, Sixth, Tenth, and Eleventh Circuits and the Iowa Supreme Court have held that a law is not generally applicable when it exempts nonreligious conduct that undermines the government's interests "in a similar or greater degree than [religious conduct] does." 508 U.S. at 543-44.

In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), the Third Circuit considered a free-exercise challenge to a police department's grooming policy. The policy exempted beards grown for medical reasons, but not for religious reasons. Writing for the Third Circuit, then-Judge Alito held that the policy was not generally applicable, because the exemption for medical reasons involved "a value judgment that secular (*i.e.*, medical) motivations for wearing a beard are important enough to overcome [the government's] general interest in uniformity but that religious motivations are not." *Id.* at 366. And "when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny." *Id.*; *see also Blackhawk v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004) (Alito, J.) (wildlife permitting fee was not generally

applicable where it exempted zoos and circuses, but not Native Americans).

Similarly, in *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), the Sixth Circuit considered a free-exercise challenge to a policy that limited the ability of counseling students to refer clients to other counselors. The policy "permit[ted] referrals for secular—indeed mundane—reasons," such as when a client could not pay, or wanted end-of-life counseling. *Id.* at 739. But it did not permit referrals for religious reasons. The Sixth Circuit held that this "exemption-ridden policy" was "the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny." *Id.* at 740.

In *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234-35 (11th Cir. 2004), the Eleventh Circuit considered a zoning ordinance that limited the types of permissible uses in a business district in order to create "retail synergy." The zoning code included an exemption for nonprofit clubs and lodges, but not for houses of worship. The Eleventh Circuit held that exempting clubs and lodges, but not houses of worship, "violates the principles of neutrality and general applicability because private clubs and lodges endanger [the town's] interest in retail synergy as much or more than churches and synagogues." *Id.* at 1235.

Finally, in *Mitchell County v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012), the Iowa Supreme Court considered an ordinance that protected the surface of county roads by banning vehicles with tires that had

steel protrusions. The ordinance had an exemption for school buses, tire chains, and certain pneumatic tires with ice grips or tire studs during certain months of the year. *Id.* at 5. But it did not grant an exemption to local Mennonites, who were required by their faith to use only steel wheels. *Id.* at 15-16. The Iowa Supreme Court held that the ordinance was not generally applicable, because the ordinance applied to the Mennonites but not to "various *other* sources of road damage." *Id.*

2. Under the rule adopted in these courts, this case would be straightforward. As the district court found, the Regulations "exempt pharmacies and pharmacists from stocking and delivering lawfully prescribed drugs for an almost unlimited variety of secular reasons." App.81a. For example, a pharmacy can decline to stock Clozapine (a schizophrenia drug for patients who are suicidal) because it finds it inconvenient to monitor the patient's blood work. App.164a. A pharmacy can decline to stock Lovenox (a blood thinner for patients at risk of heart attack) because it may have to order more of the drug than the patient has requested. App.172-73a. And a pharmacy can decline to stock Plan B because it has chosen a geriatric or pediatric niche. App.162a, 361a.

Even when a drug is ordinarily in stock, a pharmacy can decline to deliver it if the prescription calls for simple compounding or unit dosing, simply because the prescription would require a little more time. App.167a. A pharmacy can decline to deliver Plan B if the patient offers to pay with Medicaid. *Id.* And a pharmacy can decline to deliver Plan B if it simply ran out due to careless inventory

management. App.166a. In all of these scenarios—and many more—pharmacies routinely refer patients elsewhere. The district court provided a chart summarizing twenty-seven different types of secular referrals that are commonplace. App.200-08a. And the Ninth Circuit held that the district court's findings on this point were "not clearly erroneous." App.32a.

The district court also found, after reviewing "voluminous testimony and documentary evidence," that these secular referrals "endanger the government's interests [in ensuring timely access to medication] in a similar or greater degree than Plaintiffs religiously motivated referrals." App.200a. For example, if a pharmacy declines to stock Plan B because it chooses to focus on a pediatric niche, or if it runs out of Plan B due to careless inventory management, or if it declines to sell Plan B to a woman who offers to pay with Medicaid, it can refer the patient elsewhere, even if there are no nearby pharmacies that stock it. App.211-12a, 214a. (Indeed, if the pharmacy declines to accept Medicaid, it need not even make a referral. *Id.*) But if the same pharmacy declines to stock Plan B for religious reasons, and offers a facilitated referral to one of thirty nearby pharmacies that stock it, that is illegal. *Id.* The Commission's own witnesses acknowledged that the former refusals for business and convenience reasons are "a much more serious access issue" than the referral for reasons of conscience. App.357a, 211-12a. As the district court found, "this is a straightforward concession that the Regulations permit nonreligious referrals 'that endanger[] [the government's] interests in a similar

or greater degree' [than] Plaintiffs religiously motivated referrals." App.212a (quoting *Lukumi*, 508 U.S. at 543).

These admissions make this a far easier case than *Fraternal Order, Ward, Midrash,* or *Mitchell County*. In those cases, the laws exempted only a narrow slice of secular conduct—medical beards in *Fraternal Order*, end-of-life counseling and inability to pay in *Ward*, private clubs in *Midrash*, and school buses, tire chains, and snow tires in *Mitchell County*. All other secular conduct that might undermine the government's interests was prohibited. But here, the Regulations exempt an "almost unlimited variety" of secular conduct (App.81a, 86a)—in fact, they have never been applied against any secular conduct at all. The government's own witnesses admitted that this secular conduct poses "a much more serious access issue" than Petitioners' religious conduct would. App.211-12a, 357a. And the Commission has *stipulated* that Petitioners' conscience-based referrals "do not pose a threat to timely access to lawfully prescribed medications," "including Plan B." App.249a.

3. Although the district court relied heavily on these cases from other jurisdictions, and the parties briefed them extensively, the Ninth Circuit did not even mention them, much less attempt to distinguish them.

The Ninth Circuit offered two reasons for ignoring secular exemptions; neither can be squared with the decisions of other circuits or with *Lukumi*. First, the panel held that the exemptions for secular

referrals protect "'necessary reasons for failing to fill a prescription' in that they allow pharmacies to operate in the normal course of business." App.30a (quoting *Stormans I* at 314a). In other words, referrals for business reasons are "necessary," but referrals for religious reasons are not. This is precisely the sort of "value judgment in favor of secular motivations" that other circuits and this Court have condemned. *Fraternal Order of Police*, 170 F.3d at 366. Indeed, governments in other cases routinely argue that secular exemptions are "necessary" and religious exemptions are not. In *Fraternal Order*, for example, the government claimed that the exemption for medical beards was necessary to comply with the Americans with Disabilities Act, but a religious exemption was not. *Id.* at 365-66. In *Mitchell County*, the government claimed that the exemption for school buses was necessary "for safety reasons," but a religious exemption was not. 810 N.W.2d at 16. And in *Lukumi*, the government claimed that exemptions for hunting and pest control were "self-evident[ly]" "justified," but a religious exemption was not. 508 U.S. at 544. In each case, this value judgment triggered strict scrutiny.

Second, the Ninth Circuit held that even though secular referrals are commonplace, and even though no secular referral has ever been punished, the Commission might still prohibit those practices in the future "if complaints were filed about th[em]." App.32a. But *Lukumi* requires courts to consider "the effect of a law in its *real operation*"—not how it might operate in theory. 508 U.S. at 535 (emphasis added). Accordingly, the Court in *Lukumi* considered

the entire range of animal killing that actually occurred—not just what was "approved by express provision" in the ordinances, but also what was "not prohibited" in practice. *Id.* at 543. Similarly, in *Ward*, the Sixth Circuit rejected the government's claim that secular referrals were forbidden in theory, because "there [we]re at least two settings where" referral had been allowed in practice. 667 F.3d at 736; *see also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298-99 (10th Cir. 2004) (considering whether a theoretically neutral rule permitted exemptions in practice).

4. The Ninth Circuit's decision also conflicts with the Third, Sixth, and Tenth Circuits on the closely related doctrine of "individualized exemptions." As this Court has explained, when a law gives the government discretion to grant case-by-case exemptions based on "the reasons for the relevant conduct," strict scrutiny is required. *Lukumi*, 508 U.S. at 537 (quoting *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 884 (1990)); *see also Sherbert v. Verner*, 374 U.S. 398 (1963). In *Blackhawk*, writing for the Third Circuit, then-Judge Alito struck down a law that permitted exemptions from a wildlife permitting fee when an exemption would be "consistent with sound game or wildlife management." 381 F.3d. at 210. In *Ward*, the Sixth Circuit struck down a rule that permitted "ad hoc" exemptions from a no-referral policy. 667 F.3d at 739-40. And in *Axson-Flynn*, the Tenth Circuit ruled against a university policy that allowed "ad hoc" exemptions from the university's curricular requirements. 356 F.3d at 1298-99. In each of these cases, the problem was that the law was "sufficiently

open-ended" that it allowed the government to grant exemptions based on an "individualized governmental assessment of the reasons for the relevant conduct." *Blackhawk*, 381 F.3d at 209 (quoting *Smith*, 494 U.S. at 884) (citing *Lukumi,* 508 U.S. at 537; *Fraternal Order,* 170 F.3d at 364-65).

The Regulations in this case are even more problematic, because they include three open-ended provisions stacked on top of each other. First, the Stocking Rule requires pharmacies to maintain a "representative assortment" of drugs. As the district court found, this provision is "extraordinarily vague and open-ended." App.221a. The Commission has never offered any guidance on the meaning of "representative assortment"; it has never deemed any pharmacy except Ralph's to be in violation of it; and its own witnesses admitted that the provision "must be interpreted on a case-by-case basis depending on the reasons for the relevant conduct." *Id*. Thus, the Commission has "broad discretion" to determine, for example, that a niche pharmacy's decision not to stock Plan B is permissible, but a religiously motivated pharmacy's decision is not. App.88a, 221-22a.

On top of that, pharmacies are exempt from delivering a drug any time they are out of stock despite "good faith" compliance with the vague "representative assortment" requirement. As the district court found, "[n]o [Commission] witness was able to give a definition of 'good faith.'" App.221a. The Commission's witnesses "consistently testified"—using the precise language of *Lukumi*, no less—that "good faith" compliance "must be assessed

on a case-by-case basis depending on the reasons for the relevant conduct." *Id.*; cf. *Lukumi*, 508 U.S. at 537 (prohibiting an "individualized governmental assessment of the reasons for the relevant conduct" (quoting *Smith,* 494 U.S. at 884)). Thus, the Commission can decide that a pharmacy that failed to order enough Plan B (as Walgreens, Sav-On, and Albertsons did) is in "good faith" compliance with the Stocking Rule, but a religiously motivated pharmacy like Ralph's is not.

Finally, the Delivery Rule includes an exemption not only for "good faith" compliance with the Stocking Rule, but also for any conduct that is "substantially similar" to other exempted conduct. Several Commission witnesses testified that this language was added precisely to give the Commission "wiggle room" to grant additional exemptions. App.134-36a, 212-213a, 221a, 354a. And as the district court found, the only way to apply this provision is to "examine the underlying reasons for the pharmacy's conduct on a case-by-case basis" to determine whether it is "substantially similar" to other exempted conduct. App.220a. Thus, the Commission has "unfettered discretion" to decide that a pharmacy's decision not to stock Plan B for business reasons is "substantially similar" to other exempted conduct, but a religious decision is not. App.88a.

Given these three open-ended provisions, the district court rightly held that the Regulations are "significantly more problematic" than the Regulations struck down in *Blackhawk* and *Axson-Flynn*. App.222a. But the Ninth Circuit ignored

these cases. It simply averred that the Regulations do not create a system of individualized exemptions because "the provisions are tied to particularized, objective criteria." App.34a. As the district court found, not only are there no "objective criteria" constraining the Commission's discretion, but "the stocking rule appears to be nothing but individualized exemptions, and the delivery rule mandates individualized exemptions on its face." App.223a, 87-88a.

The Ninth Circuit's ruling also misses the point: The legal question in the other circuits is not simply whether the law includes objective criteria, but whether those criteria allow the government to make "case-by-case inquiries" into "the reasons for the relevant conduct." *Axson-Flynn*, 356 F.3d at 1297; *Blackhawk*, 381 F.3d. at 207. That the State makes such case-by-case inquiries is undisputed here. Thus, the Ninth Circuit's decision squarely conflicts with the rulings of the Third, Sixth, and Tenth Circuits.

B. The Ninth Circuit's decision conflicts with the Third Circuit on the relevance of evidence of selective enforcement against religious conduct.

The Ninth Circuit's decision also conflicts with the Third Circuit on the question of whether even a facially neutral and generally applicable rule is subject to strict scrutiny due to selective enforcement. In *Tenafly Eruv Association, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002), the court considered a city ordinance that banned the placement of any materials on public utility poles. It

was undisputed that this ordinance was neutral and generally applicable on its face. But in practice, the city had not enforced the ordinance absent a complaint. The city had done nothing to prohibit common directional signs, lost animal signs, or holiday decorations. But reacting to "vehement objections" from local residents, the city prohibited *lechis* placed by Orthodox Jews. The Third Circuit held that the government's "invocation of the often-dormant Ordinance" against religious items triggered strict scrutiny. *Id.* at 168.

Likewise, in this case, it is undisputed that the Commission has done nothing to enforce the Regulations against widespread referrals for secular reasons. No secular referral has ever been found in violation of the Regulations, even though the district court found that such referrals are well-known. App.225a, 231a. But when abortion-rights activists filed complaints against Ralph's, the Commission stated that they were in "outright defiance" of the Regulations. Indeed, even when abortion-rights activists filed complaints against pharmacies that failed to stock Plan B for *secular* reasons, the Commission deemed those pharmacies to be in compliance with the Regulations and rejected the complaints. App.184a. Based on this evidence, the district court held that Petitioners had "establish[ed] selective enforcement under *Tenafly*." App.231a.

Without ever mentioning *Tenafly*, the Ninth Circuit held that there was no selective enforcement because "[t]he Commission enforces the [Regulations] through a complaint-driven process," and the Commission has not received any complaints

about "similarly situated, secularly motivated [conduct]." App.37-38a. This holding not only ignores the district court's factual findings that this testimony was "implausible and not credible," App.176a, it also squarely conflicts with *Tenafly*, where the city also enforced its ordinance in response to "vehement objections," and there was no evidence that the city had received any complaints about similarly situated, secularly motivated conduct. 309 F.3d at 151-53. Indeed, this case is far stronger than *Tenafly*, because there is direct evidence of discriminatory intent: The Commission's Chairman vowed that he was "never going to vote to allow religion as a valid reason for facilitated referral," and said that conscientious objectors are engaged in "immoral" "sex discrimination" and should be prosecuted "to the full extent of the law," among other hostile statements. App.145a, 186-87a, App. 367a.

In any event, as the district court found, the Commission's reliance on citizen complaints "only made the selective enforcement problem worse." App.228a. It found that before adopting the Regulations, the Commission was well aware that "pro-choice groups have conducted an active campaign to [file complaints against] pharmacies and pharmacists with religious objections to Plan B," but that "[i]n the vast majority of cases, a referral for business reasons is never going to generate a complaint." App.179a. Thus, the natural result of relying on citizen complaints was "a severely disproportionate number of investigations directed at religious objections to Plan B." App.228a. From 2006-2008, Ralph's was 700 times more likely to be

investigated than any other pharmacy. App.179-80a n.174.

C. The Ninth Circuit's decision conflicts with the Seventh and Eighth Circuits on the use of a law's historical background to show a lack of neutrality.

The Ninth Circuit's decision also conflicts with the Seventh and Eighth Circuits on the question of whether courts can assess the neutrality of a law by examining its "historical background." *Lukumi*, 508 U.S. at 540. Of course, evidence of hostility in the historical background of a law is not *necessary* to establish a violation of the First Amendment. In *Lukumi* itself, nine Justices found a free exercise violation, while only Justices Kennedy and Stevens proceeded to analyze the law's historical background. *Id.* But "[p]roof of hostility or discriminatory motivation may be *sufficient* to prove that a challenged governmental action is not neutral." *Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (emphasis added). And considering such evidence is consistent with this Court's approach under the Establishment and Equal Protection Clauses. *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 594-95 (1987); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 489 (1997).

Following Justice Kennedy's analysis in *Lukumi*, the Seventh and Eighth Circuits have expressly held that courts must consider a law's historical background in deciding whether it is neutral. *See St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 633 (7th Cir. 2007) ("[W]e must look at

. . . the 'historical background of the decision under challenge'") (quoting *Lukumi*, 508 U.S. at 540); *CHILD, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (8th Cir. 2000) (lack of neutrality "can be evidenced by objective factors such as the law's legislative history") (citing *Lukumi,* 508 U.S. at 535, 540). Two more circuits—the First and Sixth—have also considered evidence of historical background without expressly treating Justice Kennedy's analysis of historical background as controlling. *See Wirzburger v. Galvin*, 412 F.3d 271, 281-82 (1st Cir. 2005) (considering "evidence of animus against Catholics in Massachusetts in 1855 when the [law] was passed"); *Prater v. City of Burnside*, 289 F.3d 417, 429-30 (6th Cir. 2002) (relying on historical allegations and legislative history).

By contrast, the Ninth Circuit simply pretended that the extensive record of the Regulations' historical background did not exist. It also rejected the district court's factual finding of discriminatory intent, even though it was supposed to accord that finding "great deference on appeal." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (quoting *Hernandez v. New York*, 500 U.S. 352, 364 (1991)). As the district court found, the record includes "abundant" and "voluminous" evidence of discriminatory intent—including "reams of emails, memoranda, and letters between the Governor's representatives, Pharmacy [Commission] members, and advocacy groups" demonstrating that the Regulations were "aimed at Plan B and conscientious objectors from their inception." App.57a, 140a, 242a. The Governor asked her advisors to ensure that the Regulations were "clean

enough for the advocates re: conscious/moral issues." App.58a, 130a, 244a. To make sure they passed, she replaced Commission members with those recommended by Planned Parenthood. App.137-38a. The Executive Director admitted that the Commission was trying to "draft language to allow facilitating a referral for only . . . non-moral or non-religious reasons." App.59a, 131a. The Commission's own publications described "the issue" addressed by the Regulations as "emergency contraception" and "reasons of conscience." App. 139a, 369-72a. The Commission's Chairman vowed "never" to vote "to allow religion as a valid reason for a facilitated referral." App.145a, 407a. And the Commission's own witnesses admitted that "the object of the rule was ending refusals for conscientious objection." App.359a, 140a. As the district court explained: "Literally all of the evidence," except *post hoc* testimony by State witnesses, "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.

That is not religiously neutral under the Seventh and Eighth Circuits' approach. It is as if, in *Lukumi*, the mayor asked his advisors to make sure the ordinance was "clean enough" on "Santeria sacrifice issues"; the city attorney admitted that he was trying to "draft language to allow animal killing for only non-religious reasons"; the council chairman vowed "never to vote to allow Santeria sacrifice as a valid reason for animal killing"; and city officials admitted that "the object of the rule was ending Santeria sacrifice." The Ninth Circuit's holding that "[n]othing in the record" shows discriminatory intent

is absurd (App.28a) and plainly conflicts with rulings by other circuits.

III. This case is a clean vehicle to resolve critical questions of free exercise law and to preserve the national consensus on an issue of exceptional importance.

This case is an ideal vehicle to address these critical questions of free exercise law. The record is fully developed after a twelve-day bench trial. The parties have stipulated that facilitated referrals "do not pose a threat to timely access to lawfully prescribed medications," "includ[ing] Plan B." App.142a. And there is no evidence that any of Petitioners' customers has ever been denied timely access to any drug. App.147. This fatally undermines the State's ability to "identify an actual problem in need of solving." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (quotation omitted).

If the Ninth Circuit's decision stands, it will be the first time that health care professionals have been forced to participate in what they consider to be an abortion. This would dramatically shift the balance struck in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850-51 (1992), contradict forty years of statutory conscience protections in the area of abortion and family planning, and rob Petitioners of their dignity by denying them the ability "to establish [their] religious (or nonreligious) self-definition in the political, civil, and economic life of our larger community." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring).

The Ninth Circuit's decision also threatens all religious minorities. If these Regulations are neutral and generally applicable—when they are riddled with exemptions for secular conduct, when they have never been applied to anything but religious conduct, when the government has stipulated that the religious conduct is harmless, and when there is overwhelming evidence of discriminatory intent—then any law can be upheld as neutral and generally applicable. That cannot be the meaning of the Free Exercise Clause. The 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.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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JANUARY 4, 2016

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STORMANS, INC., doing business as Ralph's Thriftway; RHONDA MESLER; and MARGO THELEN, *Plaintiffs-Appellees,* v. JOHN WIESMAN, Secretary of the Washington State Department of Health; DAN RUBIN; ELIZABETH JENSEN; EMMA ZAVALA-SUAREZ; SEPI SOLEIMANPOUR, Members of the Washington Pharmacy Quality Assurance Commission; MARK BRENMAN, Executive Director of the Washington Human Rights Commission; MARTIN MUELLER, Assistant Secretary of the Washington State	No. 12-35221 D.C. No. 3:07-cv-05374-RBL

Department of Health, Health Services Quality Assurance; CHRISTOPHER BARRY; NANCY HECOX; TIM LYNCH; STEVEN ANDERSON; ALBERT LINGGI; MAUREEN SIMMONS SPARKS; MAURA C. LITTLE; KRISTINA LOGSDON, Members of the Washington Pharmacy Quality Assurance Commission, *Defendants-Appellants,*

and

JUDITH BILLINGS; RHIANNON ANDREINI; JEFFREY SCHOUTEN; MOLLY HARMON; CATHERINE ROSMAN; TAMI GARRARD,

Defendant-Intervenors.

STORMANS, INC., doing business as Ralph's Thriftway; RHONDA MESLER; MARGO THELEN,

Plaintiffs-Appellees,

NO. 12-35223

D.C. No. 3:07-cv-05374-RBL

OPINION

v.

JOHN WIESMAN, Secretary of the Washington State Department of Health; DAN RUBIN; ELIZABETH JENSEN; EMMA ZAVALA-SUAREZ; SEPI SOLEIMANPOUR, Members of the Washington Pharmacy Quality Assurance Commission; MARK BRENMAN, Executive Director of the Washington Human Rights Commission; MARTIN MUELLER, Assistant Secretary of the Washington State Department of Health, Health Services Quality Assurance; CHRISTOPHER BARRY; NANCY HECOX; TIM LYNCH; STEVEN ANDERSON; ALBERT LINGGI; MAUREEN SIMMONS SPARKS; MAURA C. LITTLE; KRISTINA LOGSDON, members of the

Washington Pharmacy Quality Assurance Commission,
Defendants,

and

JUDITH BILLINGS; RHIANNON ANDRIENI; JEFFREY SCHOUTEN; MOLLY HARMON; CATHERINE ROSMAN; TAMI GARRARD,
Defendant-Intervenors-Appellants.

Appeals from the United States District Court
for the Western District of Washington

Ronald B. Leighton, District Judge, Presiding

Argued and Submitted
November 20, 2014—Portland, Oregon

Filed July 23, 2015

Before: Susan P. Graber, Richard R. Clifton, and Mary H. Murguia, Circuit Judges.

Opinion by Judge Graber

SUMMARY*

Civil Rights

The panel reversed the district court's judgment, entered following a bench trial, in an action brought by the owner of a pharmacy and two pharmacists who have religious objections to delivering emergency contraceptives, and who challenged Washington state rules requiring the timely delivery of all prescription medications by licensed pharmacies.

The rules permit pharmacies to deny delivery for certain business reasons, such as fraudulent prescriptions or a customer's inability to pay. The rules also permit a religiously objecting individual pharmacist to deny delivery, so long as another pharmacist working for the pharmacy provides timely delivery.

Addressing plaintiffs' free exercise claim, the panel held that the rules, promulgated by the Washington Pharmacy Quality Assurance Commission, were facially neutral. The panel also held that the rules operated neutrally because they prescribed and proscribed the same conduct for all, regardless of motivation. The panel further held that the rules were generally applicable and that

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

according to the evidence produced at trial, the rules (1) were not substantially underinclusive in their prohibition of religious objections but allowance of certain secular exemptions; (2) did not create a regime of unfettered discretion through the individualized exemptions that would permit discriminatory treatment of religion or religiously motivated conduct; and (3) were not selectively enforced.

Because the rules were neutral and generally applicable, rational basis review applied. The panel held that the rules were rationally related to Washington's legitimate interest in ensuring that its citizens have safe and timely access to their lawful and lawfully prescribed medications. The panel rejected plaintiffs' equal protection claim on the same basis as the free exercise claim.

Addressing plaintiffs' due process claim, the panel declined to recognize a new fundamental right. The panel held that it was unconvinced that the right to own, operate, or work at a licensed professional business free from regulations requiring the business to engage in activities that one sincerely believes lead to the taking of human life was so rooted in conscience and the Nation's tradition as to be ranked as fundamental.

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OPINION

GRABER, Circuit Judge:

In order to promote patient safety in the state of Washington, the Washington Pharmacy Quality Assurance Commission ("Commission") promulgated rules requiring the timely delivery of all prescription medications by licensed pharmacies. The rules permit pharmacies to deny delivery for certain business reasons, such as fraudulent prescriptions or a customer's inability to pay. The rules also permit a religiously objecting individual pharmacist to deny delivery, so long as another pharmacist working for the pharmacy provides timely delivery. But, unless an enumerated exemption applies, the rules require a pharmacy to deliver all prescription medications, even if the owner of the pharmacy has a religious objection.

Plaintiffs are the owner of a pharmacy and two individual pharmacists who have religious objections to delivering emergency contraceptives such as Plan B and *ella*. They challenge the rules on free exercise and other constitutional grounds. After a bench trial, the district court held that the rules violate the Free Exercise and Equal Protection Clauses, and the court permanently enjoined enforcement of the rules.

Because we conclude that the rules are neutral and generally applicable and that the rules rationally further the State's interest in patient safety, we reverse.

BACKGROUND

A. History of the Rules

The Commission regulates the practice of pharmacy in the state of Washington. Wash. Rev. Code § 18.64.001. A comprehensive regulatory scheme tasks the Commission to, among other duties, "[r]egulate the practice of pharmacy and enforce all laws placed under its jurisdiction"; "[e]stablish the qualifications for licensure of pharmacists or pharmacy interns"; conduct and manage disciplinary proceedings; assist in the enforcement of the pharmacy laws and regulations; and "[p]romulgate rules for the dispensing, distribution, wholesaling, and manufacturing of drugs and devices and the practice of pharmacy for the protection and promotion of the public health, safety, and welfare." *Id.* § 18.64.005(1), (3)–(7).

To "practice pharmacy or to institute or operate any pharmacy," a person must obtain a license. *Id.* § 18.64.020. A "pharmacist" is defined as "a person duly licensed by the commission to engage in the practice of pharmacy," *id.* § 18.64.011(20), and a "pharmacy" is defined as "every place properly licensed by the commission where the practice of pharmacy is conducted," *id.* § 18.64.011(21). The "practice of pharmacy" includes "[i]nterpreting prescription orders; the compounding, dispensing, labeling, administering, and distributing of drugs and devices; . . . [and] the proper and safe storing and distributing of drugs and devices and maintenance of proper records thereof." *Id.* § 18.64.011(23). Under what is known as the "Stocking

Rule," promulgated in 1967, a pharmacy "must maintain at all times a representative assortment of drugs" approved by the Food and Drug Administration ("FDA") "in order to meet the pharmaceutical needs of its patients." Wash. Admin. Code § 246-869-150(1). Violation of an administrative rule "shall constitute grounds for refusal, suspension, or revocation of licenses or any other authority to practice issued by the commission." Wash. Rev. Code § 18.64.005(7).

In 2007, the Commission unanimously and formally adopted two new administrative rules. The first rule, known as the "Pharmacist Responsibility Rule," amends a section titled "Pharmacist's professional responsibilities," and it applies to the conduct of individual pharmacists. Wash. Admin. Code § 246-863-095. Under that rule, "[i]t is considered unprofessional conduct" for a pharmacist to: "(a) Destroy unfilled lawful prescription[s]; (b) Refuse to return unfilled lawful prescriptions; (c) Violate a patient's privacy; (d) Discriminate against patients or their agent in a manner prohibited by state or federal laws; and (e) Intimidate or harass a patient." *Id.* § 246-863-095(4). Importantly, the parties agree that the foregoing rule does *not* require an individual pharmacist to dispense medication if the pharmacist has a religious, moral, philosophical, or personal objection to delivery. *Stormans, Inc. v. Selecky* ("*Stormans I*"), 586 F.3d 1109, 1116 (9th Cir. 2009). A pharmacy may "accommodate" an objecting pharmacist in any way the pharmacy deems suitable, including having another pharmacist available in person or by telephone. *Id.*

The second rule, known as the "Delivery Rule," is titled "Pharmacies' responsibilities" and applies to pharmacies. Wash. Admin. Code § 246-869-010. That rule requires pharmacies to "deliver lawfully prescribed drugs or devices to patients and to distribute drugs and devices approved by the [FDA] for restricted distribution by pharmacies, or provide a therapeutically equivalent drug or device in a timely manner consistent with reasonable expectations for filling the prescription." *Id.* § 246-869-010(1). The Delivery Rule also prohibits pharmacies from destroying or refusing to return an unfilled lawful prescription; violating a patient's privacy; or unlawfully discriminating against, intimidating, or harassing a patient. *Id.* § 246-869-010(4). By contrast to the Pharmacist Responsibility Rule, the Delivery Rule contains no exemption for pharmacies whose owners object to delivery on religious, moral, philosophical, or personal grounds. An objecting pharmacy must deliver the drug or device and may not refer a patient to another pharmacy.

Under the Delivery Rule's enumerated exemptions, a pharmacy need not deliver a drug or device

> [in] the following or substantially similar circumstances:
>
> (a) Prescriptions containing an obvious or known error, inadequacies in the instructions, known contraindications, or incompatible prescriptions, or prescriptions

> requiring action in accordance with WAC 246-875-040[;]
>
> (b) National or state emergencies or guidelines affecting availability, usage or supplies of drugs or devices;
>
> (c) Lack of specialized equipment or expertise needed to safely produce, store, or dispense drugs or devices, such as certain drug compounding or storage for nuclear medicine;
>
> (d) Potentially fraudulent prescriptions; or
>
> (e) Unavailability of drug or device despite good faith compliance with [the Stocking Rule].

Id. § 246-869-010(1). The Delivery Rule also provides that pharmacies are not required to deliver a drug or device "without payment of their usual and customary or contracted charge." *Id.* § 246-869-010(2).

The Delivery Rule and the amended Pharmacist Responsibility Rule took effect on July 26, 2007.

B. Procedural History

Plaintiffs filed this action on July 25, 2007, the day before the rules were to take effect. Plaintiffs include Stormans, Inc., a family business that operates Ralph's Thriftway ("Ralph's"), a grocery store and pharmacy located in Olympia, Washington. Stormans, Inc., declines to stock

Ralph's with the emergency contraceptive drugs Plan B or *ella* because the pharmacy's owners have religious objections to their use.[1] Since 2006, twenty-four complaints have been filed with the Commission against Ralph's in connection with this policy. Twenty-one of the complaints have been dismissed for procedural reasons, but three remain pending.

The other two Plaintiffs are Rhonda Mesler and Margo Thelen, Washington-based pharmacists who are unwilling to dispense Plan B or *ella* for religious reasons. Before 2007, Mesler and Thelen referred customers who were seeking Plan B to another pharmacy. After the regulations took effect, Thelen was transferred to a different pharmacy because her employer could not accommodate her religious objection. Mesler alleges that she will be forced to move out-of-state if the regulations are upheld.

Defendants include the Commission's members and the Secretary of the Washington State Department of Health. The district court also permitted several Washington residents to intervene

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[1] Plan B is an emergency contraceptive containing levonorgestrel, a synthetic hormone similar to progesterone. *Tummino v. Hamburg*, 936 F. Supp. 2d 162, 164–65 (E.D.N.Y. 2013). At the time of the bench trial, Plan B was available for "behind-the-counter," non-prescription distribution for women at least 17 years old and via prescription for women under 17. *Id.* *ella* is an emergency contraceptive containing the chemical compound ulipristal acetate. Approved by the FDA in 2010, *ella* is currently available only with a prescription. *Id.* Plaintiffs amended their complaint to include *ella* within their requests for relief. Plaintiffs believe that dispensing these drugs "constitutes direct participation in the destruction of human life."

to defend the rules. Intervenors Rhiannon Andreini and Molly Harmon had negative experiences after being denied or delayed access to Plan B. Intervenor Dr. Jeffrey Schouten is HIV-positive, and Intervenor Judith Billings has AIDS; both fear being denied timely access to their prescription medications.

Plaintiffs seek declaratory and injunctive relief under the Free Exercise Clause, the Due Process Clause, the Equal Protection Clause, and the Supremacy Clause. Plaintiffs limit their claims to the Pharmacist Responsibility Rule and the Delivery Rule; they do not challenge the Stocking Rule. *Stormans I*, 586 F.3d at 1118.

In 2007, the district court issued a preliminary injunction prohibiting enforcement of the rules. The district court held that Plaintiffs were likely to succeed on the merits of their free exercise claim because the rules were neither neutral nor generally applicable, and the rules could not survive strict scrutiny. The court preliminarily enjoined Defendants from enforcing the rules against any pharmacy or pharmacist who declined to dispense Plan B.

In 2009, we vacated the preliminary injunction and remanded for further proceedings. *Stormans I*, 586 F.3d 1109. We held that, on the record presented, the rules were both neutral and generally applicable. *Id.* at 1127–37. We declined to conduct rational basis review in the first instance and instead remanded for the district court to apply that standard in assessing whether Plaintiffs were likely to succeed on the merits. *Id.* at 1137–38, 1142. We

further held that the district court had erred in its analysis of the remaining preliminary injunction factors and that it had abused its discretion in enjoining enforcement of the rules as to all pharmacies and pharmacists, rather than limiting the relief to the named Plaintiffs. *Id.* at 1138–40. Also in 2009, the district court stayed enforcement of the two rules in dispute.

In 2010, the Commission commenced a new rule-making process to consider whether to amend the rules to allow for facilitated referrals in the face of a conscientious objection to a prescription medication. Because such an amendment would have mooted Plaintiffs' claims, the parties agreed to delay trial until the rule-making process was complete. Over Intervenors' objections, Defendants stipulated 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." The stipulation also provided that the district court's 2009 stay order would remain in effect. In late 2010, after receiving public comments and conducting additional hearings, the Commission voted not to amend the rules.

After a twelve-day bench trial, the district court ruled in Plaintiffs' favor, issuing an opinion accompanied by extensive findings of fact and conclusions of law. *Stormans, Inc. v. Selecky*, 854 F. Supp. 2d 925 (W.D. Wash. 2012). The court again held that the rules were neither neutral nor

generally applicable and that they did not survive strict scrutiny. *Id.* at 967–90. Accordingly, the district court held that Plaintiffs were entitled to relief on their free exercise claim. *Id.* at 992. Because Plaintiffs' equal protection claim was coextensive with their free exercise claim, the court ruled, in an unpublished supplemental order, that Plaintiffs also had established an equal protection violation. Although the court implied that Plaintiffs had a meritorious due process claim, premised on the right "to refrain from taking human life," the court ultimately rejected that claim. *Id.* at 990–91. Finally, the district court rejected Plaintiffs' contention that the rules are preempted by federal law under the Supremacy Clause. *Id.* at 991.

The court entered a final judgment (1) declaring the Delivery Rule, the Pharmacist Responsibility Rule, and the Stocking Rule[2] unconstitutional under the Free Exercise Clause; (2) declaring those rules unconstitutional under the Equal Protection Clause; (3) enjoining Defendants from enforcing those rules against Plaintiffs; and (4) retaining jurisdiction to enforce the judgment. Defendants and Intervenors timely appeal.

STANDARD OF REVIEW

We review de novo a district court's conclusions of law following a bench trial. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1067 (9th Cir. 2008) (en banc). We review for clear error the court's findings

[2] The district court held the Stocking Rule unconstitutional even though Plaintiffs did not challenge it.

of fact.[3] *Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837, 843 (9th Cir. 2004).

DISCUSSION

A. Free Exercise Claim

The First Amendment's Free Exercise Clause, which applies to the states via the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. The right to exercise one's religion freely, however, "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) (internal quotation marks omitted); *see also United*

[3] The parties dispute this standard of review. Defendants and Intervenors contend that we should review de novo the district court's findings because they pertain to "mixed questions of law and fact that implicate constitutional rights." *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009) (en banc). Moreover, Defendants and Intervenors note that we review a district court's findings of fact "'with special scrutiny'" when a district court "'engage[s] in the regrettable practice of adopting the findings drafted by the prevailing party wholesale.'" *Silver v. Exec. Car Leasing Long-Term Disability Plan*, 466 F.3d 727, 733 (9th Cir. 2006) (alteration in original) (quoting *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1385 (9th Cir. 1984)). Plaintiffs, on the other hand, argue that the district court's factual findings are reviewed for clear error. Because we would reach the same conclusion under either a "clear error" or "de novo" standard, we apply the standard of review that Plaintiffs seek, and we need not resolve the parties' dispute.

States v. Lee, 455 U.S. 252, 261 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.").

Under the rule announced in *Smith* and affirmed in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* ("*Lukumi*"), 508 U.S. 520, 531 (1993), a neutral law of general application need not be supported by a compelling government interest even when "the law has the incidental effect of burdening a particular religious practice."[4] Such laws need only survive rational basis review. *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999). For laws that are not neutral or not generally applicable, strict scrutiny applies. *See Lukumi*, 508 U.S. at 531–32 ("A law failing to satisfy these requirements must be justified by a compelling governmental interest and

[4] Last year, the Supreme Court addressed the statutory protections afforded by the Religious Freedom Restoration Act of 1993 ("RFRA"). *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). RFRA, which applies only to federal laws, provides protections to religious practices above and beyond those afforded by the Constitution; specifically, the statute prevents the federal government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb- 1(a). The Court expressly limited its holding to that statutory context. *Hobby Lobby*, 134 S. Ct. at 2785. Here, Plaintiffs have not asserted claims under RFRA; nor could they, because they challenge only state laws and regulations, to which RFRA does not apply.

must be narrowly tailored to advance that interest.").

The tests for "[n]eutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531. Nevertheless, we must consider each criterion separately so as to evaluate the text of the challenged law as well as the "effect . . . in its real operation." *Id.* at 535. Accordingly, we assess whether the rules are neutral and generally applicable.[5]

1. Neutrality

"[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . ." *Id.* at 533. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from

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[5] Defendants argue that *Stormans I*, 586 F.3d 1109, which vacated the district court's grant of a preliminary injunction, constitutes the law of the case. We disagree. The "general rule" is that our decisions "at the preliminary injunction phase do not constitute the law of the case." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007) (internal quotation marks omitted). Although there is an exception to the general rule for "conclusions on pure issues of law," *id.*, the exception does not apply here because we are analyzing a mixed question of law and fact, *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804–05 (9th Cir. 2011). But *Stormans I* is "law of the circuit" and, therefore, is relevant. *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc) (internal quotation marks omitted), *aff'd*, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013).

the language or context." *Id.* Because the rules at issue here make no reference to any religious practice, conduct, belief, or motivation, they are facially neutral.

The more challenging question is whether the rules are operationally neutral. In *Lukumi*, practitioners of the Santeria religion, which prescribes ritual animal sacrifice as a principal form of devotion, challenged city ordinances restricting the slaughter of animals. *Id.* at 524–25. One of the challenged ordinances flatly prohibited the sacrifice of animals, but the definition of "sacrifice" excluded "almost all killings of animals except for religious sacrifice" and provided an additional exemption for kosher slaughter. *Id.* At 535–36. The net result of this definition, the Court ruled, was that "few if any killings of animals are prohibited other than Santeria sacrifice." *Id.* at 536. Thus, because of the way the ordinance operated in practice, it (and two others) actually prohibited *only* Santeria sacrifice. *Id.* In this way, the challenged ordinances accomplished a "religious gerrymander," an impermissible attempt to target religious practices through careful legislative drafting. *Id.* at 535–37 (internal quotation marks omitted).

Unlike the ordinances at issue in *Lukumi*, the rules here operate neutrally. As an initial matter, we note that, as they pertain to *pharmacists*, the rules specifically *protect* religiously motivated conduct. The Commission created a right of refusal for pharmacists by allowing pharmacies to "accommodate" individual pharmacists who have religious, moral, philosophical, or personal objections

to the delivery of particular prescription drugs. The rules do not require pharmacists to dispense a prescription medication to which they object.

As they pertain to *pharmacies*, the rules' delivery requirement applies to *all* objections to delivery that do not fall within an exemption, regardless of the motivation behind those objections. *See Stormans I*, 586 F.3d at 1131 ("[A]side from the exemptions, any refusal to dispense a medication violates the rules, and this is so regardless of whether the refusal is motivated by religion, morals, conscience, ethics, discriminatory prejudices, or personal distaste for a patient."). By prohibiting all refusals that are not specifically exempted, the rules establish a practical means to ensure the safe and timely delivery of all lawful and lawfully prescribed medications to the patients who need them. *See id.* ("[T]he object of the rules was to ensure safe and timely patient access to lawful and lawfully prescribed medications."); *see also* Wash. Rev. Code § 18.64.005 (assigning to the Commission the responsibility of regulating the practice of pharmacy so as to protect and promote the public health, safety, and welfare).

The delivery requirement also applies to all prescription products—not just Plan B, *ella*, or other emergency contraceptives. In both trial testimony and official documents accompanying the final regulations, Commission members expressed their expectation that the Delivery Rule's effect would extend beyond Plan B, for example, by guaranteeing access to medications for HIV patients. Evidence before the Commission and at trial demonstrated

that pharmacists and pharmacies had refused to fill prescriptions for several kinds of medications other than emergency contraceptives. Specific examples included refusals, for a variety of reasons, to deliver diabetic syringes, insulin, HIV-related medications, and Valium.

The possibility that pharmacies whose owners object to the distribution of emergency contraception for religious reasons may be burdened disproportionately does not undermine the rules' neutrality. The Free Exercise Clause is not violated even if a particular group, motivated by religion, may be more likely to engage in the proscribed conduct. *See Reynolds v. United States*, 98 U.S. 145, 166–67 (1878) (upholding a ban on polygamy despite the fact that polygamy was practiced primarily by members of the Mormon Church); *cf. United States v. O'Brien*, 391 U.S. 367, 378–86 (1968) (rejecting a First Amendment challenge to a statutory prohibition of the destruction of draft cards even though most violators likely would be opponents of war). In *American Life League, Inc. v. Reno*, 47 F.3d 642, 646, 656 (4th Cir. 1995), the Fourth Circuit upheld the Federal Freedom of Access to Clinic Entrances Act of 1984 ("Access Act"), which prohibited conduct intended to injure, intimidate, or interfere with persons seeking to obtain or provide reproductive health services. Even after acknowledging that Congress passed the law in response to religiously motivated protests at reproductive health clinics, the court found no free exercise violation. *Id.* at 654 ("[T]he Access Act punishes conduct for the harm it causes, not because the conduct is religiously motivated."). Although the

Access Act may have the effect of disproportionately punishing religiously motivated violators, it makes no difference whether a violator acts because of religious convictions or for other reasons, for "[t]he same conduct is outlawed for all." *Id.*

Here, similarly, the rules prescribe and proscribe the same conduct for all, regardless of motivation. The rules require, subject to specific exemptions, that all pharmacies deliver all lawfully prescribed drugs. And the rules allow the Commission to sanction conduct (refusal to deliver a lawfully prescribed drug) because of the harm that it causes—patients' being denied safe and timely access to their lawfully prescribed medications—not because the conduct is religiously motivated. *Id.* Neutrality is not destroyed by the supposition that pharmacies whose owners have religious objections to emergency contraception will be burdened disproportionately, or by the speculation that pharmacists with religious objections to Plan B disproportionately will require accommodation from their pharmacy-employers. *Stormans I*, 586 F.3d at 1131.

Plaintiffs counter that the Commission's decision not to allow facilitated referrals demonstrates discriminatory intent, which undercuts the rules' neutrality. According to Plaintiffs, facilitated referrals are a reasonable accommodation for objecting pharmacies because facilitated referrals do not jeopardize the timely delivery of prescription medication. Plaintiffs assert that the Commission's decision could have no purpose other than to

discriminate against religiously motivated refusals to deliver. We disagree.

When a drug is unavailable at a particular pharmacy, facilitated referrals help the customer receive the prescribed drug by traveling to another pharmacy where it is available. But the immediate delivery of a drug is always a faster method of delivery than requiring a customer to travel elsewhere. Speed is particularly important considering the time-sensitive nature of emergency contraception and of many other medications. The time taken to travel to another pharmacy, especially in rural areas where pharmacies are sparse, may reduce the efficacy of those drugs. Additionally, testimony at trial demonstrated how facilitated referrals could lead to feelings of shame in the patient that could dissuade her from obtaining emergency contraception altogether. In our view, the Commission's decision not to allow facilitated referrals falls within its stated goal of ensuring timely and safe delivery of prescription medications and, accordingly, does not demonstrate discriminatory intent.

As a matter of logic, we reject Plaintiffs' argument that *Defendants' 2010* mid-litigation stipulation regarding facilitated referrals is evidence of discriminatory intent by *the Commission* when it adopted the rules in *2007*. Moreover, the existence of other means that might achieve the Commission's purpose does not necessarily destroy the rules' neutrality.

Nor does the legislative and administrative history behind the rules undermine their neutrality. Whether a court may examine legislative history in this context remains an open question. *Id.* at 1131–32. Even if we should analyze that history, it does not reveal improper intent. As we explained in *Stormans I*, the administrative history "hardly reveals a single design to burden religious practice; rather, it is a patchwork quilt of concerns, ideas, and motivations." *Id.* at 1133. "The 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." *Id.*

To the extent that the record reveals anything about the Commission's motivation in adopting the rules, it shows that the Commission approached the problem from the point of view of ensuring patients' timely access to prescription medications. The Commission did not act solely in response to religious objections to dispensing emergency contraception. It was also concerned with the safe and timely delivery of many other drugs, which may or may not engender religious objections. *See id.* at 1114 (noting that public testimony "addressed the availability of a variety of prescription medicines and devices, such as syringes, prenatal vitamins, oral contraceptives, and AIDS medications"). For example, the Commission had heard testimony that patients "were not getting access to" prescription medications and devices used to treat diabetes and HIV. Similarly, the district court noted that "since 1997 there have been at least nine complaints to the [Commission] regarding a pharmacy's refusal (or failure) to dispense drugs other than Plan B."

Accordingly, the Commission was "motivated by concerns about the potential deleterious effect on public health that would result from allowing pharmacists to refuse to dispense lawfully prescribed medications based on personal, moral objections (of which religious objections are a subset)."[6] *Id.* at 1133. Nothing in the record developed since *Stormans I* alters that conclusion. Therefore, the district court clearly erred in finding discriminatory intent.

For the foregoing reasons, we hold that the rules operate neutrally.

2. General Applicability

We next must consider whether the rules are generally applicable. *Lukumi*, 508 U.S. at 542; *Smith*, 494 U.S. at 879–81. A law is not generally applicable if it, "in a selective manner[,] impose[s] burdens only on conduct motivated by religious

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[6] Even if the Commission had drafted and adopted the rules solely in response to incidents of refusal to deliver Plan B, that fact would not *necessarily* mean that the rules were drafted with the intent of discriminating against religiously motivated conduct. *See Stormans I*, 586 F.3d at 1131; *Am. Life League*, 47 F.3d at 654; *see also Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 999 (7th Cir. 2006) (finding no free exercise violation even if a zoning ordinance targeted a proposed plan for a new church, because the commission was concerned about the nonreligious effect of the church on the community); *Knights of Columbus, Council No. 94 v. Town of Lexington*, 272 F.3d 25, 35 (1st Cir. 2001) (finding no free exercise violation although a regulation limiting displays on the town green was adopted in response to a flood of requests from religious groups seeking to erect displays).

belief." *Lukumi*, 508 U.S. at 543. Plaintiffs argue that the rules are not generally applicable because (a) they are substantially underinclusive in their prohibition of religious objections but allowance of certain secular exemptions; (b) they contain vague, open-ended wording that affords individualized discretion that could rest on discriminatory animus; and (c) the Commission has selectively enforced the rules against, and only against, Plaintiffs.

a. Substantial Underinclusion

A law is not generally applicable if its prohibitions substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect. *Id.* at 542–46. In other words, if a law pursues the government's interest "only against conduct motivated by religious belief" but fails to include in its prohibitions substantial, comparable secular conduct that would similarly threaten the government's interest, then the law is not generally applicable.[7] *Id.* at 545.

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[7] For example, in *Lukumi*, the city claimed that the ordinances at issue advanced two interests: protecting the public health and preventing cruelty to animals. 508 U.S. at 543. The ordinances failed to prohibit secular conduct that would nevertheless endanger these interests in the same way that religiously motivated conduct would. *Id.* Prohibiting Santeria animal sacrifices may have advanced the government's interests, but so would have prohibiting several types of secular killings. *See id.* ("Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision."); *id.* at 544 ("The health risks posed by the improper disposal of animal carcasses are the same whether

The rules require pharmacies to deliver prescription medications, but they also carve out several enumerated exemptions. *See* Wash. Admin. Code § 246-869-010(1), (2) (exempting pharmacies from the duty to deliver when the prescription cannot be filled due to lack of payment; because the prescription may be fraudulent, erroneous, or incomplete; because of declared emergencies; because the pharmacy lacks specialized equipment or expertise; or when a drug or device is unavailable despite good faith compliance with the Stocking Rule). Plaintiffs assert that those exemptions threaten the State's interest in patient safety to the same degree as would a religious exemption. In Plaintiffs' view, the rules are substantially underinclusive because of the secular exemptions. We disagree.

As we held in *Stormans I*, the enumerated exemptions are "necessary reasons for failing to fill a prescription" in that they allow pharmacies to operate in the normal course of business. 586 F.3d at 1134. Indeed, we reassert the following:

> Nobody could seriously question a refusal to fill a prescription because the customer did not pay for it, the pharmacist had a legitimate belief that it was fraudulent, or

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[prohibited] Santeria sacrifice or some [non-prohibited] nonreligious killing preceded it."). The ordinances' failure to prohibit non-religious conduct endangered the government interest "in a similar or greater degree" than the religiously motivated conduct. *Id.* at 543. It was this substantial underinclusion that led the Court to conclude that the ordinances were not generally applicable. *Id.*

> supplies were exhausted or subject to controls in times of declared emergencies. Nor can every single pharmacy be required to stock every single medication that might possibly be prescribed, or to maintain specialized equipment that might be necessary to prepare and dispense every one of the most recently developed drugs. Instead of increasing safe and legal access to medications, *the absence of these exemptions would likely drive pharmacies out of business or, even more absurdly, mandate unsafe practices*. Therefore, the exemptions actually increase access to medications by making it possible for pharmacies to comply with the rules, further patient safety, and maintain their business.

Id. at 1135 (emphasis added). In that way, the exemptions further the rules' stated goal of ensuring timely and safe patient access to medications. Evidence presented at trial does not alter the quoted conclusions that we reached in *Stormans I*.

But the district court found that there are several *unwritten* exemptions to the Delivery Rule's delivery requirement. *Stormans*, 854 F. Supp. 2d at 970–72. These are scenarios, the district court explained, in which a pharmacy's refusal to deliver medication was "permitted in practice" despite the lack of an enumerated exemption in the text of the rules. *Id.* The court asserted that, for instance, some pharmacies would "not deliver the drug over the counter because it requires extra recordkeeping (e.g., Sudafed)," "not stock the drug because it is an

expensive drug," or "not stock the drug because it would attract crime (e.g., Oxycontin)." *Id.* at 970. The court found that, in other instances, pharmacies refused to perform "simple compounding" or "unit dosing" packaging and refused to carry and dispense specific drugs that require the monitoring of patient dosages. *Id.*

The district court's findings that those practices had occurred are not clearly erroneous, but the court clearly erred by concluding that the Commission permitted those practices or exempted them from enforcement. Trial testimony shows that, if complaints were filed about those practices, the Commission would follow its normal procedure in deciding whether to investigate and to initiate an enforcement action. It has not received such complaints. The fact that no one has filed a complaint with the Commission, to trigger its action, does not make the practices permissible under the rules. The Commission has never issued an official interpretation of the rules suggesting that those practices are permitted. An individual Commission member's view about how the Commission might act if it received a complaint has no bearing on the Commission's collective interpretation of the rules. Accordingly, the evidence produced at trial did not demonstrate that the rules are substantially underinclusive.

b. Individualized Exemptions

Plaintiffs also contend that the rules are not generally applicable because they contain discretionary text that allows those who enforce the

rules to discriminate against religion. The "individualized exemptions" doctrine, which Plaintiffs thus invoke, was developed in a series of cases involving unemployment benefits programs under which persons were ineligible for benefits if they failed to accept available employment "without good cause." *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717–18 (1981) (finding unconstitutional the denial of unemployment benefits when the state determined that the claimant's religiously motivated voluntary termination of his employment in the production of armaments was "without good cause"); *Sherbert v. Verner*, 374 U.S. 398, 402–10 (1963) (finding unconstitutional a state's denial of unemployment benefits when the state determined that the claimant's religiously motivated refusal to work on Saturday was "without good cause"); *see also Hobbie v. Unemp't Appeals Comm'n*, 480 U.S. 136, 140–46 (1987) (finding unconstitutional a state's denial of benefits to a claimant whose employment was terminated because she refused to work on Saturday, as was required by her religion). The Court opined that an open-ended, purely discretionary standard like "without good cause" easily could allow discrimination against religious practices or beliefs. *Sherbert*, 374 U.S. at 406; *see also Lukumi*, 508 U.S. at 537–38 (holding that the city's determination that Santeria animal sacrifice was "unnecessary"—and thus in violation of the ordinance at issue—"devalue[d] religious reasons for killing by judging them to be of lesser import than nonreligious reasons," meaning that "religious

practice [was] being singled out for discriminatory treatment").

But the Court has limited that doctrine. In *Smith*, the Court refused to extend that reasoning to a criminal prohibition on the use of peyote that could disqualify a violator from receiving state unemployment benefits. 494 U.S. at 882–85; *see id.* at 884 (noting that the reasoning of *Sherbert*, *Thomas*, and *Hobbie* had "nothing to do with an across-the-board criminal prohibition on a particular form of conduct"). The Court explained that the individual exemption test was "developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct." *Id.* at 884.

Here, Plaintiffs point to two phrases in support of their argument that the Delivery Rule contains discretionary text: "substantially similar" (located in the Delivery Rule's introduction) and "good faith compliance" (located in the Delivery Rule's fifth exemption). We conclude, however, that the rules do not afford unfettered discretion that could lead to religious discrimination because the provisions are tied to particularized, objective criteria.

The introduction to the list in the Delivery Rule allows exemptions in circumstances that are "substantially similar" to those in the five enumerated exemptions in section 246-869-010(1) of the Washington Administrative Code. Thus, the introductory text is tethered directly to those five business-related exemption categories.

The fifth exemption is broader than the other four in that it requires "good faith compliance" with the Stocking Rule. Wash. Admin. Code § 246-869-010(1)(e). Similarly, though, that exemption ties directly to the objective standard of meeting patients' needs by providing a representative assortment of drugs, as is required by the Stocking Rule. And, again, we note that Plaintiffs do not challenge the Stocking Rule.

As mentioned previously, Plaintiffs' reliance on evidence of individual Commission members' opinions does not support the conclusion that the exemptions will be interpreted broadly to permit discriminatory treatment of religion or religiously motivated conduct. The Commission collectively has never issued commentary supporting such a broad interpretation. To the extent that the Commission has made official comments, those comments contradict Plaintiffs' assertion that the Commission would allow exemptions except for religious reasons; for instance, the Commission has stated that pharmacies may not object to delivering drugs because the drugs are too expensive.

The mere existence of an exemption that affords some minimal governmental discretion does not destroy a law's general applicability. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006) ("Consistent with the majority of our sister circuits, . . . we have already refused to interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption."). As the

Third Circuit explained in *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*:

> What makes a system of individualized exemptions suspicious is the possibility that certain violations may be condoned when they occur for secular reasons but not when they occur for religious reasons. In *Blackhawk*[*v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004)], it was not the mere existence of an exemption procedure that gave us pause but rather the fact that the Commonwealth could not coherently explain what, other than the religious *motivation* of [the prohibited] conduct, justified the unavailability of an exemption.

510 F.3d 253, 276 (3d Cir. 2007); *cf. Grace United Methodist Church*, 451 F.3d at 651 ("Indeed, in the land use context, the Sixth, Seventh, Eighth, and Eleventh Circuits have rejected a *per se* approach and instead apply a fact-specific inquiry to determine whether the regulation at issue was motivated by discriminatory animus, or whether the facts support an argument that the challenged rule is applied in a discriminatory fashion that disadvantages religious groups or organizations."). In summary, because the exemptions at issue are tied directly to limited, particularized, business-related, objective criteria, they do not create a regime of unfettered discretion that would permit

discriminatory treatment of religion or religiously motivated conduct.[8]

c. Selective Enforcement

Plaintiffs also argue that the Commission has enforced the rules selectively in two ways: by enforcing them against Ralph's pharmacy but not against Catholic-affiliated hospitals; and by enforcing them against religiously motivated violations but not against secularly motivated violations.

The Commission enforces the Delivery Rule and section (1) of the Stocking Rule through a complaint-driven process.[9] Although the Commission may have

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[8] Although the challenged rules on their face, and the official commentary, demonstrate that the discretionary text in the exemptions is tied to specific, objective criteria, we note that the Commission has the power to change its interpretation of its rules. If the Commission were to adopt an interpretation that penalizes religious conduct while permitting a broad range of similar secular conduct, our holdings today would not prevent a future as-applied challenge. *See Monahan v. N.Y. City Dep't of Corr.*, 214 F.3d 275, 290 (2d Cir. 2000) (noting that a previous lawsuit challenging the constitutionality of a government policy would not bar subsequent as-applied challenges to the same policy, should the execution or interpretation of the policy change).

[9] Although the district court found that the Commission actively enforced sections (2) through (6) of the Stocking Rule by means of, inter alia, inspections, test-shopping, newsletters, and Commission-initiated complaints, the Commission is not required to use the same mechanisms to enforce every rule. Accordingly, we disagree with the district court's conclusion that the Commission's methods of enforcing *other* rules

different enforcement mechanisms for rules not at issue in this litigation, the record shows that the Commission has adopted a passive enforcement process with respect to the rules listed above; that is, it takes action only when a consumer files a complaint of a violation.[10] Plaintiffs assert that Catholic-affiliated pharmacies also refuse to stock or deliver Plan B or *ella*. But the record contains no evidence that any complaints have been filed against Catholic-affiliated pharmacies. The Commission did not investigate alleged non-compliance among Catholic pharmacies for the simple reason that the Commission received no complaints against those pharmacies. The record does not show that the Commission has made religiously based distinctions in its complaint-driven enforcement of the rules. The record, similarly, contains no evidence that the Commission responded differently to complaints about Catholic-affiliated pharmacies than it did to complaints about Ralph's. Nor does the evidence at trial show that consumers filed complaints about similarly situated, secularly motivated refusals to

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demonstrates selective enforcement with respect to the Delivery Rule and section (1) of the Stocking Rule.

[10] Although the district court found that the Commission itself initiated a complaint under the Stocking Rule against Ralph's, the Commission's enforcement process remained consumer-driven. The Commission filed a complaint for procedural reasons; the original genesis was a consumer complaint that had been filed against a pharmacist employed at Ralph's. The Commission terminated the complaint against the pharmacist and filed the complaint against Ralph's because the individual pharmacist would have dispensed Plan B if Ralph's had carried it. Accordingly, the Commission's action was in reality initiated by a consumer's complaint.

deliver prescription drugs.[11] What the record does show is that consumers filed many complaints against Ralph's in connection with the store's policy of declining to stock and deliver Plan B and *ella*. In short, selective enforcement cannot be inferred from the fact that Ralph's has been implicated in a disproportionate percentage of investigations, because the Commission responds only to the complaints that it receives.

That there may be other means by which the Commission could enforce the rules does not weaken this conclusion. The executive branch has an array of enforcement options, and it is not our role to second-guess how the executive branch exercises its discretion to enforce administrative regulations. *Wayte v. United States*, 470 U.S. 598, 607–08 (1985). The Commission quite reasonably could have decided that a "passive enforcement" system—one that relies on reports of non-compliance—is the most efficient and cost-effective means of enforcement.[12]

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[11] Although three complaints were filed against entities other than Ralph's for failing to dispense Plan B, those entities were not similarly situated to Ralph's. The record shows that the Commission did not need to take further action because the other pharmacies reassured the Commission that they would re-stock the medication; the original failure to dispense Plan B occurred simply because the pharmacies were temporarily out of stock. By contrast, Plaintiffs refuse to stock Plan B and *ella* at all times.

[12] *Wayte* concerned a passive enforcement system used to prosecute persons who failed to register for the draft. The Court described some of the benefits of this system:

> [B]y relying on reports of nonregistration, the Government was able to identify and prosecute

See id. at 612–13. That is especially true in the present context, because those who file complaints—customers of pharmacies—are the rules' intended beneficiaries. Plaintiffs' suggestion that the Commission adopted the complaint system with the specific intent to disadvantage religious objectors to emergency contraception lacks any foundation in the record. The Commission has utilized the complaint-driven system to enforce the Stocking Rule since its enactment in 1967, decades before Plan B or *ella* came on the market.

In short, no evidence supports the district court's finding that the Commission's enforcement of the rules is other than complaint-driven. Because no complaints have been filed against Catholic-affiliated pharmacies or against other pharmacies for non-religious refusals, other pharmacies are not "similarly situated" to Ralph's.[13] Therefore, they provide no evidence of selective enforcement.

> violators without further delay. Although it still was necessary to investigate those reported to make sure that they were required to register and had not, the Government did not have to search actively for the names of these likely violators. Such a search would have been difficult and costly at that time. Indeed, it would be a costly step in any "active" prosecution system involving thousands of nonregistrants. The passive enforcement program thus promoted prosecutorial efficiency.

470 U.S. at 612. Those sentiments apply equally here.

[13] As noted previously, the three complaints filed against entities other than Ralph's are not comparable secular refusals

3. Application of Rational Basis Review

Because the rules at issue are neutral and generally applicable, we review them for a rational basis. *Guam v. Guerrero*, 290 F.3d 1210, 1215 (9th Cir. 2002); *Miller*, 176 F.3d at 1206. Under rational basis review, we must uphold the rules if they are rationally related to a legitimate governmental purpose. *Gadda v. State Bar of Cal.*, 511 F.3d 933, 938 (9th Cir. 2007). Plaintiffs "have the burden to negat[e] every conceivable basis which might support [the rules]," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (internal quotation marks omitted), a burden that they have failed to meet. The rules are rationally related to Washington's legitimate interest in ensuring that its citizens have safe and timely access to their lawful and lawfully prescribed medications.

Defendants' stipulation regarding "facilitated referrals" does not change our conclusion. Whether facilitated referrals also further patients' access to medication is irrelevant. On rational basis review, Plaintiffs still have the burden to negate the Commission's chosen method for achieving that goal. *Id.* Because Plaintiffs have failed to meet that burden, the rules survive rational basis review.

In sum, Plaintiffs' free exercise claim fails.

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because those entities experienced a temporary shortage and agreed to re-stock the medication.

B. Equal Protection Claim

The district court also held that the rules at issue violated Plaintiffs' equal protection rights under the Fourteenth Amendment. The court reasoned that Plaintiffs' equal protection claim is coextensive with their free exercise claim. On appeal, Plaintiffs do not advance any equal protection arguments independent of their arguments concerning the Free Exercise Clause. Because we reject Plaintiffs' free exercise claim, their equal protection claim, as they have framed it, also fails.

C. Due Process Claim

Plaintiffs also argue that the rules violate their due process rights under the Fourteenth Amendment. The district court rejected the argument and declined to enter a judgment that the rules violate the Due Process Clause. Defendants urge us not to reach this issue on appeal because Plaintiffs failed to cross-appeal. *See Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (holding that, under the "cross-appeal rule, . . . an appellate court may not alter a judgment to benefit a nonappealing party"); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999) ("Absent a cross-appeal, an appellee may urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court, but may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his

adversary." (internal quotation marks omitted)). We reject Defendants' suggestion.

Although "there is no bright-line test" for determining whether an argument on appeal falls within the scope of the cross-appeal rule, *Lee v. Burlington N. Santa Fe Ry. Co.*, 245 F.3d 1102, 1107 (9th Cir. 2001), we need not explore that issue in depth here. "Because the cross-appeal requirement is a rule of practice and not a jurisdictional bar, an appellate court has broad power to make such dispositions as justice requires." *Id.* (internal quotation marks omitted). Even assuming that Plaintiffs' due process argument is an attempt to enlarge their own rights or lessen Defendants' rights, in the absence of prejudice to Defendants and in the interest of fairness to Plaintiffs, we exercise our discretion to reach the issue.

Plaintiffs assert that the rules infringe a fundamental right, which they characterize as the "right to refrain from taking human life." Laws that infringe a "fundamental" right protected by the Due Process Clause are constitutional only if "the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). Laws that do not infringe a fundamental right survive substantive-due-process scrutiny so long as they are "rationally related to legitimate government interests." *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

The Supreme Court "require[s] in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." *Id.* at 721.

Accordingly, we must formulate the asserted right by carefully consulting both the scope of the challenged regulation and the nature of Plaintiffs' allegations. *See, e.g., id.* at 723–24 (consulting the text of the challenged state statute in reformulating the asserted right); *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) ("It is important, therefore, to focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake . . . .").

For example, in *Flores*, 507 U.S. at 297, a class of juvenile detainees challenged a regulation that permitted their release to a parent, close relative, or legal guardian generally but permitted their release to others only in certain circumstances. The Supreme Court rejected the plaintiffs' characterization of the right to "freedom from physical restraint" as too broad and concluded that "the right at issue is the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." *Id.* at 302; see also *Glucksberg*, 521 U.S. at 722–23 (rejecting the plaintiffs' characterization of "the liberty to shape death" and, consulting the text of the challenged state statute, reformulating the right as "a right to commit suicide which itself includes a right to assistance in doing so"); *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 277–79 (1990) (referring to the right at issue as the "constitutionally protected right to refuse lifesaving hydration and nutrition" instead

of the more generic "right to die"); *Raich v. Gonzales*, 500 F.3d 850, 864 (9th Cir. 2007) (generally accepting Raich's "careful statement" of the right as the "right to make life-shaping medical decisions that are necessary to preserve the integrity of her body, avoid intolerable physical pain, and preserve her life" but only after adding "the centerpiece—the use of marijuana—to Raich's proposed right" (brackets and internal quotation marks omitted)). "This degree of specificity is required." *Raich*, 500 F.3d at 864 n.12. "[T]he right must be carefully stated and narrowly identified before the ensuing analysis can proceed." *Id.* at 864.

Here, Plaintiffs characterize the fundamental liberty interest at stake as the "right to refrain from taking human life." That formulation is too broad in two important respects. We must be "more precise." *Glucksberg*, 521 U.S. at 723.

First, Plaintiffs have not attempted to establish that Plan B and *ella objectively* cause the taking of human life. As the district court noted, "the parties do not agree that a life is at stake. There is no doubt about the consequences of assisted suicide; here, there is doubt." In response, Plaintiffs have neither argued nor presented evidence to establish that the drugs objectively cause the taking of human life. Instead, Plaintiffs have emphasized that their "religious beliefs form the foundation" of their due process claim. They seek to prove a violation of their due process rights by establishing that: "Plaintiffs believe that human life begins at the point of union of the female ovum and male sperm, or fertilization"; they "believe Plan B may prevent implantation of a

fertilized ovum";[14] and their "religious beliefs are sincere." Accordingly, we must refine the asserted fundamental liberty interest to account for the subjectivity of Plaintiffs' allegations.

A second refinement is also necessary. The disputed rules do not apply generally to the population as a whole. *See, e.g., Glucksberg,* 521 U.S. at 707 (noting that the criminal prohibition against assisting suicide applies to all persons). Instead, like the challenged regulations in *Flores*, 507 U.S. at 297, the rules here apply only to persons in specific circumstances. In particular, the rules require the delivery of medication only by *pharmacies*, which are professional businesses subject to licensing and regulatory requirements.[15] Accordingly, as the Court did in *Flores*, 507 U.S. at 302, we must refine the asserted right to account for the particularized scope of the challenged law.

Taking into account those two refinements, the proper formulation of the asserted liberty interest at stake is the right to own, operate, or work at a licensed professional business free from regulations requiring the business to engage in activities that

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[14] We doubt that courts are equipped to make a factual finding concerning whether life begins at fertilization. *Roe v. Wade*, 410 U.S. 113, 159 (1973). Whether the drugs at issue prevent implantation of a fertilized ovum, however, strikes us as a proper subject for a finding of fact. Nevertheless, Plaintiffs declined to introduce evidence on that point, so we address Plaintiffs' claims as presented—which rests on their "belief" that the drugs prevent implantation.

[15] As discussed above, the rules do not require delivery of the medications by individual *pharmacists*.

one sincerely believes lead to the taking of human life. With that "careful description" in mind, *Glucksberg*, 521 U.S. at 724, we turn to whether the asserted right is, "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed," *id.* at 720–21 (citations and internal quotation marks omitted). We must be "reluctant to expand the concept of substantive due process" and must "exercise the utmost care whenever we are asked to break new ground in this field." *Id.* at 720 (internal quotation marks omitted).

We conclude that Plaintiffs have not established the fundamental nature of the asserted right. Plaintiffs cite a law review article that offers historical evidence concerning, among other things, legal protections for those wishing not to participate in military service, capital punishment, and assisted suicide. Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121, 130–47 (2012). Those topics concern non-participation in events that *objectively* cause the taking of human life. Accordingly, they have little, if any, probative weight on the topic whether our Nation has a deep tradition of protecting the non-participation of persons who *subjectively* believe that an event leads to the taking of human life. See *id.* at 147 (noting that, with respect to military service, capital punishment, and assisted suicide, "there is essentially no room for debate that each of these contexts involves the killing of other human beings" and that the "context of abortion, of course, is different"). Even if we assume that society generally protects personal non-

participation in contexts that indisputably cause death, it does not follow that society is equally concerned with protecting non-participation in every context that an individual might believe leads to death. *Cf. Glucksberg*, 521 U.S. at 727 ("That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . ."). Moreover, very few of the legal sources presented by Plaintiffs concern a right of non-participation by *businesses*.

We recognize that there is a "trend of protecting conscientious objectors to abortions," Rienzi, 62 Emory L.J. at 148, and that most—but not all—states do not require pharmacies to deliver prescriptions, such as Plan B and *ella*, in a timely manner. On balance, however, we are unconvinced that the right to own, operate, or work at a licensed professional business free from regulations requiring the business to engage in activities that one sincerely believes leads to the taking of human life is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Accordingly, we decline to recognize a new fundamental right.

Because the rules do not infringe a fundamental right, they need only be "rationally related to legitimate government interests." *Glucksberg*, 521 U.S. at 728. As explained above, in Part A-3 of our discussion, p. 37, the rules meet that test.

REVERSED.

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STORMANS INCORPORATED, et al., Plaintiffs, v. MARY SELECKY, Secretary of the Washington State Department of Health, et al., Defendants, and JUDITH BILLINGS, et al., Intervenors.	CASE NO. C07-5374 RBL OPINION

I. SUMMARY

This case presents a novel question: can the State compel licensed pharmacies and pharmacists to dispense lawfully prescribed emergency contraceptives over their sincere religious belief that doing so terminates a human life? In 2007, under

pressure from the Governor, Planned Parenthood, and the Northwest Women's Law Center, the Washington State Board of Pharmacy enacted regulations designed to do just that.

The rule primarily[1] at issue, commonly known as the "delivery rule," requires pharmacies to timely deliver all lawfully prescribed medications, including the emergency contraceptives Plan B and *ella*.[2] Under the delivery rule, a pharmacy's refusal to deliver is grounds for discipline, up to and including revocation of its license. In operation, the delivery rule bars a pharmacy from referring patients seeking Plan B to other pharmacies, meaning they must dispense the drugs.

In violation of the regulations, but in conformity with their religious beliefs, the Plaintiffs refused to dispense Plan B to Planned Parenthood test shoppers and others. The Board launched a series of investigations, and this suit was the result. Based on the evidence presented at trial, the Board's regulations, while facially acceptable, are in practice unconstitutional.

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[1] The other new rule (the "pharmacist responsibility rule"), and the pre-existing "stocking rule," are also at issue in this case. They are discussed below.

[2] Plaintiffs amended their Complaint to add allegations regarding *ella* when it became widely available in 2010. [Dkt. # s 470 & 474]. For ease of reference, the two are referred to as "Plan B" in this Opinion.

II. BACKGROUND[3]

A. The Parties.

Plaintiffs are two individual pharmacists and a corporate pharmacy.[4] Each holds the sincere religious belief that life begins at conception, when an egg from the female is fertilized by the sperm from the male. Taken after unprotected sex, emergency contraceptives Plan B and *ella* delay ovulation,[5] and can also prevent a fertilized egg from adhering to the wall of the uterus (implanting). Plan B is most effective if taken within three days, while ella is effective for five. Because of their religious beliefs, Plaintiffs refuse to dispense Plan B.

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[3] A detailed history of the Rules' promulgation and enforcement is set forth in the Court's Findings of Fact and Conclusions of Law, filed herewith. Only those facts essential to the Court's opinion are reiterated here.

[4] Plaintiffs are Margo Thelen, Rhonda Mesler, and Stormans, Inc. Stormans owns and operates two grocery stores, one of which contains a retail pharmacy.

[5] There may be disagreement about the actual scientific operation of the drugs, or whether they are in fact abortifacients. The court did not admit evidence on either side regarding this issue, and instead accepted Plaintiffs' testimony that their faith precludes them from delivering the drugs. [*See* Dkt. # 458] This case is about the State's ability to require Plaintiffs to deliver the drugs in the face of that belief, not about whether the belief is reasonable or scientifically supportable. No party or witness disputes that Plaintiffs hold the belief.

The State Defendants are individuals sued in their official capacities, charged with the promulgation, interpretation and enforcement of Board of Pharmacy regulations, including the 2007 Rules. The Defendant–Intervenors are various individuals personally concerned about access to lawful medications in Washington. Two are HIV-positive individuals concerned that the success of Plaintiffs' claims could result in the denial of lawfully prescribed and medically necessary drugs to combat their condition, based on the asserted religious or moral judgment of the dispensing pharmacist or pharmacy. They do not claim that they have been denied access to lawfully prescribed medications in the past.

The remaining Intervenors are women of child-bearing age who have been denied access to Plan B, who have heard that pharmacists in various pharmacies will refuse to dispense Plan B and will judge, intimidate, or harass them, who have engaged in "test shopping" to determine which pharmacies will not deliver Plan B, or who simply want to participate in order to ensure that women have access to Plan B.

B. The Pharmacy Board Rules and Their Operation.

The Board's 2007 rulemaking resulted in two new rules: the delivery rule and the pharmacist responsibility rule. The Board also gave a new interpretation to its pre-existing stocking rule. The effect of the new rules and the new interpretation is to force religious objectors to dispense Plan B.

> The delivery rule imposes a "duty to deliver" on pharmacies:
>
> (1) *Pharmacies have a duty to deliver lawfully prescribed drugs* or devices to patients and to distribute drugs and devices . . . in a timely manner consistent with reasonable expectations for filling the prescription, except for the following or substantially similar circumstances:
>
> (a) Prescriptions containing an obvious or known error . . .
>
> (b) National or state emergencies or guidelines affecting availability . . .
>
> (c) Lack of specialized equipment or expertise needed to safely produce, store, or dispense drugs . . .
>
> (d) Potentially fraudulent prescriptions; or
>
> (e) Unavailability of drug or device despite good faith compliance with WAC 246–869–150.
>
> (2) Nothing in this section requires pharmacies to deliver a drug or device without payment of their usual and customary or contracted charge.

Wash. Admin. Code § 246–869–010 (entitled "Pharmacies' Responsibilities"). The delivery rule operates in tandem with the stocking rule, which requires a pharmacy to stock a "representative assortment of drugs in order to meet the pharmaceutical needs of its patients." *Id.* § 246–869–150 (entitled "Physical standards for pharmacies—

Adequate stock"). The rules, however, do not apply directly to pharmacists themselves.

Pharmacists have a statutory right to conscientious objection, and thus, may not be "required by law or contract in any circumstances to participate in the provision of or payment for a specific service if they object to so doing for reason of conscience or religion." Wash. Rev. Code § 48.43.065(2)(a) (applying to "health care providers," including pharmacists). The Board's 2007 "pharmacist responsibility rule" recognized this right. It prohibits a pharmacist from destroying or refusing to return unfilled a lawful prescription, from violating a patient's privacy, and from unlawfully discriminating against, intimidating, or harassing a patient. *See id.* § 246–863–095. A pharmacist may refuse to fill a prescription, but a pharmacy may not. Accordingly, a pharmacy employing a pharmacist with a religious objection to Plan B can discharge its obligation under the delivery rule by having another on-duty pharmacist deliver the medication. The practical effect of the delivery rule (and the board's current interpretation of the stocking rule) nevertheless directly and adversely impacts pharmacists with a religious objection to dispensing Plan B.

Pharmacies without the need or ability to have two pharmacists on duty at all times cannot employ a pharmacist with a religious objection to dispensing Plan B without risking a violation of the delivery rule, if a patient with a valid Plan B prescription seeks to have it filled at that pharmacy. Nor does the fact that the rules obligate the pharmacy (and not

the pharmacist) to timely deliver lawfully prescribed medications permit a pharmacist operating his own pharmacy to comply with the delivery rule without violating his conscience. Because a pharmacy must fill a prescription for Plan B, if it employs a pharmacist who objects, it must staff a second pharmacist simply to ensure that the pharmacy can comply. In effect, the conscientious objector costs the pharmacy twice what a single, non-conscientious objector does. For pharmacies that need only one pharmacist per shift, such a cost is unreasonable, and the pharmacy's only real option is to fire the conscientious objector. The delivery rule thus renders the pharmacist's right to conscientious objection illusory.

In the case of a pharmacy owner with religious objections to Plan B, there is no option other than to leave the business—and the Board was well aware of this result when it designed the rule.[6]

In practice, both the stocking rule and delivery rule contain exemptions not present in their text.

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[6] The Board of Pharmacy's own formal analysis of the rules' impact recognized that "pharmacy owners [may] close rather than dispense medications that conflict with their beliefs." *Final Significant Analysis for Rule Concerning Pharmacists' Professional Responsibilities, WAC 246–863–095 & Pharmacies' Responsibilities, WAC 246–869–010* at 12. [Pl.'s Ex. 434]. But the Board found that any disruption in access to medications would be temporary because, "if there is sufficient consumer demand in the area, a pharmacy ... may be purchased and run by a new operator who will comply with these rules." *Id.* In other words, the Board contemplated its rules would result in pharmacies run by religious-objectors being replaced by non-objectors.

While the stocking rule states pharmacies must carry a representative assortment of drugs requested by its patients, in practice, pharmacies refuse to carry drugs for a variety of reasons. Pharmacies regularly refuse to stock such drugs as oxycodone for fear of robbery; they refuse to dispense syringes because they dislike the clientele they associate with the product. Pharmacies may decline to stock a drug because it is expensive, because the "return on investment is less than desired, or because of the "hassle factor"—additional paperwork or patient tracking. Pharmacies may decline to stock drugs because they have contracted with manufacturers of competing drugs or because the pharmacy opts to serve a particular niche market. None of these exemptions exist in the text of the rules; but in practice, the Board allows pharmacies to shape their stock rather than allowing patients to do so. Further, the Board has no written policy or procedure about how to enforce the stocking rule. And in at least 40 years, the Board has *never* enforced the stocking rule against any pharmacy—until the delivery rule required pharmacies to deliver Plan B.

Like the stocking rule, the delivery rule operates far more loosely than its text suggests. For example, the Board has interpreted the delivery rule to allow pharmacies to refuse to deliver a drug because it does not accept a patient's particular insurance or because it does not accept Medicare or Medicaid. That leeway exists because the delivery rule exempts a pharmacy from its duty to deliver in not just the five enumerated categories, but in all "substantially similar circumstances."

C. Development of the Board of Pharmacy Regulations.

The Board's regulations have been aimed at Plan B and conscientious objectors from their inception. The events leading to promulgation began in 2005, when Planned Parenthood and the Northwest Women's Law Center contacted Christina Hulet, Senior Health Policy Advisor to the Governor, who began meeting with the groups. Ms. Hulet then referred the groups to Steven Saxe, the Pharmacy Board's Executive Director, and in doing so, informed Mr. Saxe that Northwest Women's Law Center was "looking into the issue of a pharmacist's right to refuse to fill a prescription for moral/religious views" and that the groups "[were] considering pushing for national or state legislation on the issue." Pl.'s Ex. 13. That cause—barring a pharmacist's right of conscience—played a decisive role in the Board's rulemaking. Indeed, Plaintiffs have presented reams of emails, memoranda, and letters between the Governor's representatives, Pharmacy Board members, and advocacy groups demonstrating that the predominant purpose of the rule was to stamp out the right to refuse.

Negotiations among the Board, the Governor, the Washington State Pharmacy Association, Planned Parenthood, the Northwest Women's Law Center, and other groups, led the Board to adopt a draft rule in June 2006. The draft rule allowed a pharmacist the right to refuse for conscience reasons. The Governor objected: "I strongly oppose the draft pharmacist refusal rules.... [N]o one should be denied appropriate prescription drugs based on

the personal, religious, or moral objection of individual pharmacists." Pl.'s Ex. 104 (letter from Governor Gregoire to Dr. Asaad Awan, Chair of Board of Pharmacy). Days later, the Governor threatened to replace the entire Board if the draft rule was not changed. Pl.'s Exs. 96 & 117.

On June 7, 2006, Planned Parenthood and the Northwest Women's Law Center submitted an alternative rule. Pl.'s Ex. 123. After minor alterations made by the Governor's office and the Washington State Pharmacy Association, the Governor sent handwritten comments to Ms. Hulet, asking whether "this draft [is] clean enough for the advocates re: conscious/moral issues can't allow pharmacist to refuse?" Pl.'s Ex. 139 (citing internal Governor's office memorandum).

> Mr. Saxe responded to the alternative rule with an honest, and telling, question:
>
> Would a statement that does not allow a pharmacist/pharmacy the right to refuse for moral or religious judgment be clearer? This would leave intact the ability to decline to dispense (provide alternatives) for most *legitimate* examples raised; clinical, fraud, business, skill, etc.

Pl.'s Exs. 154 & 155 (emphasis added). Mr. Saxe was asking, rightfully, why the Board did not simply draft clear language to do exactly what it was attempting to do with vague language—bar pharmacists and pharmacies from conscientiously objecting, while at the same time allowing

pharmacies and pharmacists to refuse to dispense for practically any other reason. Doing so would be easier, of course, than "*trying to draft language to allow facilitating a referral for only . . . non-moral or non-religious reasons,*" the ultimate goal of the proposed draft. Pl.'s Ex. 157 (email from Mr. Saxe to Ms. Hulet). Indeed, Mr. Saxe's division of reasons not to dispense into illegitimate (i.e., moral reasons) and legitimate (i.e., any other reason) highlights the goal of the Board, the Governor, and the advocacy groups: to eliminate conscientious objection. At trial, Mr. Saxe admitted that the rule targeted conscientious objectors:

> Q. And it was your understanding that the intent of the proposed rule was to allow professional judgment and as you've indicated business reasons that are consistent with the time honored practices of pharmacy but not moral or religious reasons, right?
>
> A. I believe so, yes.

Trial Tr. vol. 3 at 32, Nov. 30, 2011.

The Governor then convened a taskforce, consisting of representatives of the WSPA, Planned Parenthood, Northwest Women's Law Center, Board members, and a University of Washington professor. The group agreed that a pharmacy would be permitted to refer patients for a broad range of business reasons, but referral for reasons of conscience was objectionable and should not be permitted.

The Board preliminarily approved the Governor's rule in August 2006, and adopted the rule in April 2007. Following approval, the Board sent a guidance letter to pharmacies and pharmacists on how to comply. Pl.'s Ex. 436. The Board's letter explains that facilitated referral is permissible except in cases of conscientious objection to Plan B.[7]

D. Procedural History.

Plaintiffs commenced this action on July 25, 2007, and the rules became effective the following day. In September 2007, the Court heard oral argument on Plaintiffs' Motion for a Preliminary Injunction. In a written Order, the Court enjoined enforcement of the rules as to all pharmacists and pharmacies practicing "refuse and refer" pending trial:

> The defendants are enjoined from enforcing WAC 246–863–095(4)(d) and WAC 246–869–010(4)(d) (the anti-discrimination provisions) against any pharmacy which, or pharmacist who, refuses to dispense Plan B but instead immediately refers the patient either to the nearest source of Plan B or to a nearby source for Plan B.

See Order, Dkt. # 95, November 8, 2007. The Court's injunction was based on its view that Plaintiffs were

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[7] In fact, the Board's July 2007 "Notice to Pharmacists" regarding the Board's new rules was internally titled "<<pharmacy**plnB**103_001.pdf>>." *See* Pl.'s Ex. 275 (emphasis added).

likely to succeed on their free exercise claim. As they did during the rulemaking process and throughout this litigation, Plaintiffs argued that refuse and refer[8] accommodates their religious beliefs while ensuring that patients have timely access to lawfully prescribed medications, including Plan B.

The State and the Intervenors appealed and asked the Ninth Circuit to stay this Court's injunction. The Motion to Stay was denied on May 1, 2008. *See Stormans v. Selecky,* 526 F.3d 406 (9th Cir.2008). On March 6, 2009, while the appeal was pending and a trial on the merits without guidance from the Ninth Circuit was impending, the parties stipulated to a stay of the case until the Ninth Circuit's decision and, if necessary, the subsequent trial. *See* Order on Stipulation [Dkt. # 355]. The State agreed not to "take investigative or enforcement action against Plaintiffs or their employers under WAC 246–863–095(4)(d) or WAC 246–869–010(4)(d) until a trial on the merits has concluded."

The parties also agreed that, if the Ninth Circuit vacated this Court's injunction, the State would notify the Court if they received any complaints that a non-party pharmacy or pharmacist was failing to

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[8] Prior to the development and implementation of the 2007 Rules, pharmacists and pharmacies with a religious objection to dispensing Plan B engaged in a practice known throughout this litigation as "refuse and refer" or "facilitated referral." The requesting patient would be referred to a nearby pharmacy which would dispense the medication. This practice was apparently permitted under the Board of Pharmacy's prior rules.

comply with § 246–869–010(4)(d) or § 246–863–095(4)(d), and that no investigation of any such complaint would proceed absent the Court's approval. Though the State reported the receipt of two such complaints, they did not seek to investigate them from the date of the Stipulation through the date of trial.

The Ninth Circuit issued an Opinion reversing this Court's injunction on July 8, 2009. *See Stormans v. Selecky,* 571 F.3d 960 (9th Cir.2009). After rehearing by the Ninth Circuit panel, that Opinion was vacated and superseded by an Opinion dated October 28, 2009. *See Stormans v. Selecky,* 586 F.3d 1109 (9th Cir.2009). The Opinion reversed this Court's injunction.

In reversing the injunction, the Court of Appeals held that this Court had applied the wrong preliminary injunction standard in light of the Supreme Court's intervening decision in *Winter v. Natural Resources Defense Council,* 555 U.S. 7(2008) (invalidating the Ninth Circuit's "possibility of irreparable injury" standard as too lenient).[9] Further, the Ninth Circuit held that, based on the evidentiary record at the time, the Court should have applied a rational-basis test instead of an "ends/means" test, which it equated to heightened scrutiny. *See Stormans,* 586 F.3d at 1131 (noting

[9] Judge Wardlaw's opinion also held that the Plaintiffs had standing and that, with the exception of their claims against the Human Rights Commission, Plaintiffs' claims were ripe. On remand, this Court dismissed the Plaintiffs' claims against the Human Rights Commission. *See* Order Granting Mot. to Dismiss [Dkt. # 376].

that the evidentiary record was "thin"). In considering the merits, the Court of Appeals held that Plaintiffs were unlikely to succeed, and that the injunction was overly broad because it applied to all pharmacists and pharmacies practicing "refuse and refer." The Court of Appeals further held that even if an injunction was warranted, it should have been limited to the named Plaintiffs.

The Ninth Circuit remanded the case for evaluation of Plaintiff's Motion for a Preliminary Injunction under the correct standards. Because the parties had already stipulated to a stay of the litigation and enforcement of the rules against Plaintiffs, this Court did not reevaluate Plaintiff's Motion for a Preliminary Injunction under the guidance of the Ninth Circuit's Opinion.

In 2010, the Board of Pharmacy undertook a new rulemaking process, during which they considered whether to include in the delivery rule an exception for conscience. At the request of Plaintiffs and the State (and over the objection of the Intervenors), the Court struck the trial date and stayed this litigation pending the outcome of that rulemaking process. *See* Order on Stipulation [Dkt. # 447]. The Board did not change the rules to include a conscience exception. The stay was lifted and the case proceeded to an twelve day bench trial. The full evidentiary record has now been developed.

III. DISCUSSION

Plaintiffs assert three constitutional claims, all through the usual vehicle of 42 U.S.C. § 1983: that

the Board of Pharmacy rules violate (1) their right to substantive due process; (2) their right to free exercise of religion; and (3) their right to equal protection. *See* Second Am. Compl., at ¶¶ 58–84 [Dkt. # 474]. Plaintiffs also assert that the Board's rules violate and are preempted by Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq. Id.* ¶¶ 71–74. The Court addresses each claim in turn.

A. Plaintiffs' Fourteenth Amendment Substantive Due Process Claim.

Though it is not the claim that received the most attention in this litigation, Plaintiffs' core position is that they have a fundamental right to refrain from actively participating in the termination of a human life[10] under the Fourteenth Amendment's Substantive Due Process Clause. They argue that

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[10] Plaintiffs draw a bright line between pharmacies and pharmacists with a sincere religious objection to dispensing emergency contraceptives, and those who might claim the right to refuse to deliver lawfully prescribed medications for reasons of common bigotry.

The Intervenors, for example, are concerned that recognizing an exception to the delivery rule for "moral" objections or judgments would permit a pharmacy or pharmacist to refuse to dispense time-sensitive HIV drugs because it or she claimed to be religiously or morally opposed to the lifestyle of the patient requesting them.

If the Plaintiffs are permitted to refuse to deliver Plan B because they have fundamental right not to do so (in the absence of a rule narrowly tailored to achieve a compelling state interest), the Intervenors' concerns on this point would vanish. If it exists at all, the fundamental right at stake is the limited and narrowly defined right to refuse to actively participate in terminating a life.

the State cannot force them to violate their right of conscience, absent the application of a rule narrowly tailored to achieve a compelling state interest.

Plaintiffs' sincerely-held religious belief precludes them from dispensing Plan B, which they view as active participation in the destruction of a human life. The religious right of conscience they assert (and seek to defend) in this case is qualitatively different than the sincerely held beliefs at issue in countless opinions discussing a State's regulatory impact on religious practices in the free exercise context.[11]

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[11] An incomplete but representative list: *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993) (sacrificing animals); *Lee v. Weisman,* 505 U.S. 577 (1992) (school prayer); *Employment Div. v. Smith,* 494 U.S. 872 (1990) (ingesting illegal drugs); *U.S. v. Lee,* 455 U.S. 252 (1982) (payment of taxes); *Wisconsin v. Yoder,* 406 U.S. 205 (1972) (school attendance); *Sherbert v. Verner,* 374 U.S. 398 (1963) (refusal to work on the Sabbath); *Reynolds v. U.S.,* 98 U.S. 145 (1878) (polygamy); *Ward v. Polite,* ___ F.3d ___, 2012 WL 251939 (6th Cir. 2012) (counseling homosexuals); *Grayson v. Schuler,* ___ F.3d ___, 2012 WL 130454 (7th Cir. 2012) (hair length); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch,* 510 F.3d 253 (3rd Cir. 2007) (zoning restrictions); *Tenafly Eruv Ass'n Inc. v. Borough of Tenafly,* 309 F.3d 144 (3rd Cir. 2002) (placement of *lechis* on public property); *Fraternal Order of Police v. City of Newark,* 170 F.3d 359 (3rd Cir. 1999) (facial hair), *Adams v. Comm'r of Internal Revenue,* 170 F.3d 173 (3rd Cir. 1999) (refusing to pay taxes); *May v. Baldwin,* 109 F.3d 557 (9th Cir. 1997) (dreadlocks); *Mitchell County v. Zimmerman,* ___ N.W.2d ___, 2012 WL 33377 (Iowa 2012) (steel cleats on tractor tires).

The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. Due Process also provides heightened protection against government interference with certain fundamental rights and liberty interests. *Washington v. Glucksberg,* 521 U.S. 702, 720–21 (1997) (internal citations omitted).

The substantive due process analysis has two primary features. First, in order to warrant this heightened protection, a right or interest must be, objectively, "deeply rooted in this Nation's history and tradition." It must be "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [it was] sacrificed." *Id.* (quoting *Moore v. City of East Cleveland,* 431 U.S. 494 (1977) and *Palko v. Connecticut,* 302 U.S. 319 (1937)).

Second, the fundamental liberty interest at stake must also be subject to a "careful description." *Id.* at 721 (citing *Reno v. Flores,* 507 U.S. 292, 302 (1993)). The "crucial guideposts for responsible decision-making" in evaluating the existence of a fundamental right are the nation's "history, legal traditions, and practices." *Id.* (internal quotations and citations omitted). The question is whether the right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Commonwealth,* 291 U.S. 97, 105 (1934). If so, the right may not be infringed "*at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Glucksberg,* 521 U.S. at 721 (quoting *Flores,* 507 U.S. at 302). In short, if a right is deemed

fundamental, any law infringing that right must pass strict scrutiny.

The Supreme Court has cautioned that "because guide posts for responsible decision making in this unchartered area are scarce and open-ended," courts should be "reluctant to expand the concept of substantive due process." *Glucksberg,* 521 U.S. at 720. In *Glucksberg,* the Supreme Court held that Washington's (then) ban on assisted suicide was constitutional, because the "right to determine the time and manner of one's death" was not a fundamental one as measured against the nation's history, legal traditions, and practices. Instead, the list of fundamental rights (beyond those enumerated in the Bill of Rights) recognized by the Supreme Court was, and is, a short one.[12] It includes:

> [T]he rights to marry, *Loving v. Virginia,* 388 U.S. (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut,* 381 U.S. 479 (1965); to use contraception, *ibid.;*

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[12] The Supreme Court is demonstrably and understandably reticent to recognize new "fundamental" rights, even when it determines that long-standing laws are unconstitutional. The most recent example of this is the Court's decision in *Lawrence v. Texas,* 539 U.S. 558 (2003) (striking down Texas' sodomy statute on Fourteenth Amendment grounds but stopping short of calling the right to engage in homosexual behavior "fundamental").

> *Eisenstadt v. Baird,* 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California,* 342 U.S. 165 (1952), and to abortion, [*Planned Parenthood v.*] *Casey,* [505 U.S. 833 (1992)].

Glucksberg, 521 U.S. at 720. The Supreme Court also noted that it had "assumed, and strongly suggested" that one had a fundamental right to refuse unwanted lifesaving medical treatment. *Id.,* (citing *Cruzan v. Dir., Mo. Dep't of Health,* 497 U.S. 261, 278 (1990)).

But the *Glucksberg* Court refused to extend *Cruzan's* recognition of the fundamental right to refuse unwanted end-of-life medical care to a fundamental right to receive the assistance of another in proactively seeking suicide. The nation's historical legal tradition was precisely the opposite; almost every state had made a policy choice against assisted suicide from each state's founding. "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Id.* (quoting *Flores,* 507 U.S. at 303). The Court held the state's ban on assisted suicide was constitutional, on its face and as applied. *Id.*

Less than 15 years after *Glucksberg,* Washington made a policy decision to permit (and to regulate, rather than ban) assisted suicide. *See* Washington's "Death with Dignity" Act, Rev. Code of Wash. § 70.245. In support of their claim that the right to refrain from taking a life is fundamental, Plaintiffs emphasize that that Act specifically allows

medical providers—including pharmacists—to refuse to participate in an assisted suicide.

Plaintiffs argue that this is only the latest example of the nation's tradition recognizing the fundamental right to refuse to take a human life over a sincere religious or moral objection. They cite the long history of conscientious objectors to military service, which goes back to colonial times. The right has also been consistently protected for health care practitioners in the context of abortion, abortifacient drugs, assisted suicide, and capital punishment.

In the wake of *Glucksberg* and the Death with Dignity Act, it is clear that Washington State can *prohibit* medical providers from assisting in taking life, and it can *permit* them to participate in taking a life. But can the state *compel* medical providers to participate in taking a life? If the Death with Dignity Act had required medical providers to participate in assisted suicide, there is little doubt that the medical providers would have the right to refuse to do so. The only difference between this difficult case and that presumably easy one is that here, the parties do not agree that a life is at stake. There is no doubt about the consequences of assisted suicide; here, there is doubt.

It is unlikely that there would ever be the political will to mandate that a doctor participate in an assisted suicide, a capital punishment, or an abortion. While the right of conscience in the abortion context has been recognized as constitutionally *permissible* (see, for example, *Doe v. Bolton,* 410 U.S. 179 (1973)), the Supreme Court has

not yet had to address the corollary question of whether a doctor has a fundamental, constitutionally-protected right of conscience.

Neither the State nor the Intervenors directly dispute that there is a long national tradition and practice of recognizing the right to refrain from taking a life. Instead, they appear to honestly believe that there is a significant, qualitative difference between administering a lethal injection to a terminally ill patient or a convicted murderer, or killing an enemy combatant, on the one hand, and dispensing an over the counter emergency contraceptive hours after unprotected sex, on the other. Indeed, they describe the rules' requirement that Catholic-affiliated pharmacies stock and dispense Plan B as a "technical" violation of the Church's directives against doing so.[13] [*See* Dkt. # 523, at 5].

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[13] The State argues that it is constitutionally prohibited from recognizing a "right of conscience" exception to the delivery rule. It claims "an accommodation specific to Plaintiffs' religious beliefs and objections would implicate the prohibitions in the First Amendment's Establishment Clause," and would violate its First Amendment obligation to maintain "governmental neutrality between religion and religion, and between religion and nonreligion." *See* Dkt. # 534, at 2 & 4, *Citing McCreary v. ACLU,* 545 U.S. 844, 860 (2005) (internal citations omitted).

This position is flawed for at least two reasons. First, the Supreme Court has never held that statutes giving special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of its cases that there is "ample room for accommodation of religion under the Establishment Clause." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter–day Saints v. Amos,* 483 U.S. 327, 338 (1987) (internal

But for Plaintiffs, there is no doubt—these acts are the same. It is not this Court's "business to evaluat[e] the relative merits" of differing religious beliefs, and it is not "within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Emp. Div., Dep't of Human Res. of Ore. v. Smith,* 494 U.S. 872,

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references omitted). The *Amos* Court certainly did not so hold; to the contrary, it upheld § 702 of the Civil Rights Act of 1964 (which creates an exception for religious employers) against an Establishment Clause challenge. *Id.* at 330. *See also Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC,* ___ S.Ct. ___, 2012 WL 75047 (2012). The Supreme Court has repeatedly "recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Amos,* 483 U.S. at 334 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 144–45 (1987)).

Secondly, the State's own argument acknowledges that whether or not exceptions for conscience are constitutionally *required,* no case has ever held that they are not constitutionally *permitted. See* Dkt. # 534 at 5, n.1, arguing that governmental recognition of a right of conscience is "a matter of legislative grace." Indeed, the State affirmatively sought a stay of this litigation in July 2010, so that the Board of Pharmacy could revisit the rulemaking process to consider incorporating a conscience exception into the delivery rule. That effort resulted in no change, but a rule recognizing the right asserted by Plaintiffs here would not violate the Establishment Clause.

The evidence is undisputed that the Board twice considered and rejected a conscience exception, for reasons that had nothing to do with the State's now-claimed fear of violating the Establishment Clause. If anything, an Establishment Clause issue is raised by the Board's failure to enforce its delivery and stocking rules against Catholic-affiliated pharmacies. This failure is discussed below.

887 (1990) (quoting *U.S. v. Lee,* 455 U.S. 252, 263 n. 2 (1982); *Hernandez v. Comm'r,* 490 U.S. 680, 699 (1989)).

In the initial rulemaking process and throughout this litigation, the State and the Intervenors have dismissed Plaintiffs' religious beliefs about the implications of dispensing emergency contraceptives as unworthy of the same sorts of protections they would, presumably, freely recognize in another context. Indeed, they view the decision that confronts people of faith as minor, even quaint, burdens on religious practices like regulations on facial hair, dreadlocks, drug use, land use regulation, taxation, and the like. They argue that Plaintiffs' sincere belief about an issue at the core of their religion is not entitled to constitutional protection, but is instead granted (or not) as a matter of legislative grace.

In *Roe v. Wade,* the Supreme Court acknowledged that experts in medicine, philosophy, and theology could not agree upon when life begins. It therefore refused to adopt its own definition of the beginning of life. Thirty years later, we are perhaps no closer to definitively answering that question as a society. But, whether or not they are correct, the Plaintiffs sincerely believe they know the answer, and are compelled to act accordingly.

Because the beginning of life has not been defined for purposes of constitutional law, it is unclear whether the Supreme Court would apply abortion or contraception precedent to emergency contraceptives. When the Supreme Court addressed

the murky question of when life begins, it recognized a constitutional right for women to choose to terminate a pregnancy in some circumstances. The question in this case is whether a corollary to that fundamental freedom to choose is a similar constitutional protection of an honest, good faith belief that life begins at the moment of conception.

In this Court's view, the answer is clear. However, the Supreme Court has never taken the opportunity to add "the right to refuse to participate in the taking of a life" to the limited list of constitutionally-protected fundamental rights it has recognized. Given the Supreme Court's prudent warning on the extension of fundamental rights, and the novel circumstances this case presents, this Court will not extend the scope of existing substantive due process. The Supreme Court will have to answer that question in the affirmative before this Court can recognize the fundamental right the Plaintiffs assert.

B. Plaintiffs' First Amendment Free Exercise of Religion Claim.

1. Free Exercise Claims under *Smith* and *Lukumi*.

The heart of this case lies in the Free Exercise Clause. Plaintiffs contend that the stocking and delivery rules, as applied, violate their right to free exercise of their religion. In effect, the rules force them to choose between their religious beliefs and their livelihood.

The First Amendment provides in part that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*." U.S. Const., amend. I. (emphasis added). These clauses are the Establishment Clause and the Free Exercise Clause, respectively. They are made applicable to the States through the Fourteenth Amendment. *See Cantwell v. State of Conn.* 310 U.S. 296, 303 (1940).

Under the Free Exercise Clause, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531 (1993). In short, if a law is neutral and generally applicable, it need only be rationally related to a legitimate government interest; if not, it must meet strict scrutiny. *See Stormans Inc. v. Selecky,* 586 F.3d 1109, 1129–30 (9th Cir.2009).

Any free-exercise analysis must begin with two cases: *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990) and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993). *Smith* and *Lukumi* represent the outer markers on the free exercise spectrum, delineating the range of permissible regulations.

Smith illustrates a law that burdens religious conduct but is constitutionally permissible. There, plaintiffs sought and were denied unemployment compensation after they were fired for using peyote.

Smith, 494 U.S. at 874. Plaintiffs argued that they had taken the drug as part of a religious ceremony at their Native American Church, and thus, the state law barring peyote use was unconstitutional under the Free Exercise Clause (as it applied to them). *Id.* The Supreme Court disagreed. *Id.* at 890.

Justice Scalia explained that the Free Exercise Clause protects, "first and foremost, the right to believe and profess whatever religious doctrine one desires." *Id.* at 877 (noting that the government cannot regulate, punish, or compel a religious belief as such). Beyond belief itself, the Free Exercise Clause also protects "the performance (or abstention from performance) of various physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." *Id.* at 878. It is well established that the state cannot prohibit such acts:

> It would be true, we think (though no case of ours has involved the point), that a State would be [impermissibly] "prohibiting the free exercise of religion" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.

Id. at 877–78

While the Free Exercise Clause immunizes religious beliefs themselves, the Clause obviously cannot and does not bar regulation of all religiously-

based conduct. Indeed, the Supreme Court has "never held that an individual's religious beliefs excuse him from complying with an otherwise valid law prohibiting conduct that a State is free to regulate." *Id.* at 878–79. To do otherwise would "permit every citizen to become a law unto himself." *Id.* at 879 (quoting *Reynolds v. United States,* 98 U.S. 145, 166–167(1879)). Recognizing that Oregon's law barring peyote was neutral (it did not target religious conduct), and it was generally applicable (it applied to all citizens regardless of religious affiliation), the Supreme Court determined that the law was constitutionally applied. *Id.* at 890.

At the other end of the spectrum, *Lukumi* illustrates a government regulation that burdens religious conduct but is not constitutionally permissible. In *Lukumi,* the City of Hialeah passed a series of ordinances prohibiting the ritual sacrifice of animals after a Santeria church, which practices animal sacrifice, announced plans to open in the City. *Lukumi,* 508 U.S. at 526–28. The City's residents were "distressed" at the news, and in response, the city council passed an ordinance making it "unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida." *Id.* at 528. The ordinance defined "sacrifice" as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." *Id.* at 527. The ordinances, according to the City, were necessary to protect "the public health, safety, welfare and morals of the community." *Id.* at 528. The ordinance exempted,

however, the slaughter or processing for sale of "small numbers of hogs and/or cattle per week," as well as hunting, euthanasia, and the eradication of pests. *Id.* at 528, 537.

The Supreme Court found that the ordinances allowed the killing of animals for a wide range of secular reasons but barred the same conduct when religiously-motivated, and thus, the ordinances were unconstitutionally targeted. *Id.* at 536 ("careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished"). The Hialeah ordinances fell well short of the constitutional minimum because they were substantially underinclusive to meet the City's stated interests in protecting the public health and preventing cruelty to animals. *Id.*

Plaintiffs emphasize that the rules in *Lukumi* were "well beyond" what is permissible under the Free Exercise Clause, and argue that the rules at issue here resemble those rules more than the peyote prohibition at issue in *Smith*. The State argues that the case bears a greater resemblance to *Smith*. The evidence at trial demonstrates that the Plaintiffs are correct. The Board of Pharmacy's rules are neither neutral nor generally applicable, as is discussed below.

2. Law of the Case.

Having articulated the legal standards against which the State's 2007 rules and the Plaintiffs' claims must be evaluated, the Court must here

detour to address Defendants' argument that the Ninth Circuit has already conclusively established that the rules are neutral and generally applicable, and that they are therefore subject only to rational basis review as a matter of law.

The State and the Intervenors rely on the statement in the Ninth Circuit's Opinion that "[b]ecause the rules are neutral and generally applicable, the district court should have subjected the rules to the rational basis standard of review." *Stormans,* 586 F.3d at 1137. They argue that the sole question on remand is whether the rules can withstand that deferential level of scrutiny—an issue upon which the Defendants sought summary judgment. [*See* Dkt. # s 391 & 393]. Because the Opinion "signaled that the rules survive rational basis review but properly left the final determination to this Court," the trial was largely for show. [Dkt. # 391 at 11]. They continue to assert that because the Plaintiffs could not "negate every conceivable rational basis for the rules" their Free Exercise claim, it must be rejected.

Plaintiffs argue that Orders reviewing Preliminary Injunctions have traditionally not been accorded law of the case preclusive effect in later proceedings (*see,* for example, *Golden State Transit Corp. v. City of Los Angeles,* 754 F.2d 830, 832 (9th Cir.1985)), in part because they are necessarily decided on less than a complete record. They argue that the factual record in this case was not then, but is now, complete, which changes the Court's analysis, and that the Ninth Circuit did not purport to establish the law of the case.

It is true that the Opinion more than once stated that the 2007 rules were neutral and generally applicable. But it also acknowledged repeatedly[14] that the factual record was "thin," "sparse," or otherwise incomplete, which it was. Because the Opinion also relied on *Smith* and *Lukumi,* it is clear that it recognized that a regulation's neutrality and general applicability requires more than a review of the text used, and must be based on review of a complete factual record. There are "many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct," and evidence of the effect of a law is "strong evidence of its object." *Lukumi,* 508 U.S. at 535. It would be curious indeed if, after doing so, the Ninth Circuit actually intended that its determination on an admittedly incomplete record was determinative of the issues in the case. The Defendants' argument that the core question is settled as a matter of law is rejected.

3. Neutrality.

a. Facial Neutrality.

As the Ninth Circuit opined, the rules at issue are facially neutral. On its face, the delivery rule requires all pharmacies to timely deliver all lawfully-prescribed medications (with certain enumerated exemptions). The stocking rule similarly requires all pharmacies to "maintain at all times a representative assortment of drugs in order to meet

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[14] By Plaintiffs' count, the Ninth Circuit's Opinion made seven such references.

the pharmaceutical needs of [their] patients." Wash. Admin. Code § 246–869–150(1) (emphasis added). Neither rule contains any reference to religious practice, conduct, or motivation. *See Stormans,* 586 F.3d at 1130. The rules are facially neutral, and if the Board of Pharmacy applied those rules to all pharmacies as written, there is little doubt that the rules would pass constitutional muster.

The test of neutrality is not, however, limited to a mechanical review of text. Indeed, the Free Exercise Clause "protects against government hostility which is masked as well as overt." *Lukumi,* 508 U.S. at 534. Thus, the Court "must meticulously survey" how the rule functions in practice in order to eliminate "religious gerrymanders"—laws tailored to regulate religiously-motivated, but not similar secularly-motivated, conduct. *See id.* at 534.

b. Operational Neutrality

The effect of a law in its real operation is strong evidence of its object. *Lukumi,* 508 U.S. at 535. A law "targeting religious beliefs as such is never permissible." *Id.* In other words, "[i]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral," and it is "invalid unless it can withstand strict scrutiny." *Id*. at 533 (internal citations omitted). Thus, a court must ask whether a law's impact on religious practices is merely incidental (in which case the regulation is neutral) or intentional and targeted (in which case it is not).

A law is not neutral if, in practice, it accomplishes a "religious gerrymander." *Id.* at 535. In *Lukumi,* the Supreme Court addressed three related questions in determining whether the City of Hialeh's ban on animal sacrifice impermissibly did so: (1) whether the regulation's burden falls, in practical terms, on religious objectors but almost no others; (2) whether the government's interpretation of the law favors secular conduct; and (3) whether the law proscribes more religious conduct than is necessary to achieve its stated ends. *See id.,* at 536–38. Here, the answers to these inquiries show that the Board of Pharmacy's rules similarly accomplish a religious gerrymander.

The burden of the delivery and stocking rules falls "almost exclusively" on those with religious objections to dispensing Plan B. The most compelling evidence that the rules target religious conduct is the fact the rules contain numerous secular exemptions. In sum, the rules exempt pharmacies and pharmacists from stocking and delivering lawfully prescribed drugs for an almost unlimited variety of secular reasons, but fail to provide exemptions for reasons of conscience.

In free exercise challenges, courts consistently find unconstitutional those regulations that exempt secular conduct but do not exempt similar religious conduct. In *Lukumi,* the Supreme Court held that Hialeh's ordinance banning sacrificial killing was not neutral, in part, because the ordinance exempted killing for food, hunting, euthanasia, and eradication of pests. *Lukumi,* 508 U.S. at 537. The Court noted that Hialeh enforced the rules and exemptions "on

what seems to be a *per se* basis." *Id.* The Board of Pharmacy enforces the stocking and delivery rules in the same manner.

The Third Circuit followed *Lukumi*'s reasoning in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,* 170 F.3d 359 (3d Cir. 1999). There, a police department regulation prohibited officers from wearing beards, ostensibly to ensure that the officers presented a uniform appearance. The "no beard" rule contained only two narrow exceptions: undercover officers were permitted to wear beards, and officers were permitted to wear beards for medical reasons (e.g., due to a skin condition that made shaving difficult). The plaintiffs, both Sunni Muslim officers who wore beards for religious reasons, were disciplined for violating the no-beard rule. The Third Circuit found no fault with the exemption for undercover officers; they were not presented to the public at all, and thus, the undercover exemption did not undermine the purpose of the no-beard rule. *Id.* at 366.

But the medical exemption "undoubtedly undermine[d] the Department's interest in fostering a uniform appearance." *Id.* The court concluded that "there is no apparent reason why permitting officers to wear beards for religious reasons should create any greater difficulties" than officers who wore beards for medical reasons. *Id.*

The Board's enforcement of its rules in this case presents the same constitutional problem. Permitting pharmacies to refuse and refer for religious reasons does not create any greater

difficulties in terms of patient access than permitting pharmacies to refuse and refer for secular reasons.

Three years after *Fraternal Order,* the Third Circuit reiterated these principles in *Tenafly Eruv Association, Inc. v. Borough of Tenafly,* 309 F.3d 144, 169 (3rd Cir.2002): "[G]overnment cannot discriminate between religiously motivated conduct and comparable secularly motivated conduct in a manner that devalues religious reasons for acting." In *Tenafly,* Orthodox Jews in the Borough of Tenafly asked the mayor and borough council for permission to place "*lechis*" on utility poles to extend their "*eruvs*." *Id.* at 152. The *lechis* were strips of black plastic tubing, largely indistinguishable from tubing already placed there by the utilities themselves. *Id.* The *lechis* extended the ceremonial demarcation area in which Orthodox Jews could engage in otherwise prohibited activities (such as pushing a stroller or wheelchair) on the Sabbath. *Id.*

After residents "expressed vehement objections," prompted by "their fear that an *eruv* would encourage Orthodox Jews to move to Tenafly," the borough council essentially took no action to approve the creation of an *eruv*. *Id.* at 153. In response, Jewish leaders and a local utility company constructed the *eruv* themselves. *Id.* After learning that the *eruv* had been constructed, the Borough ordered the utility company to remove the *lechis* pursuant to a longstanding ordinance that prohibited the placement of "signs, advertisements, or any other matter" on utility poles in public streets. *Id.* at 154.

The Third Circuit held that, although the ordinance was facially neutral, the Borough had not applied the ordinance in a neutral manner. *Id.* at 167. "From the drab house numbers and lost animal signs to the more obtrusive holiday displays ... the Borough has allowed private citizens to affix various materials to its utility poles." *Id.* The Borough's "discretionary application of [the ordinance] against *lechis*" thus violated the neutrality principle, making the regulation unconstitutional. *Id.* at 168.

Like the ordinances in *Lukumi, Fraternal Order,* and *Tenafly,* Plaintiffs have shown that the rules at issue here are riddled with exemptions for secular conduct, but contain no such exemptions for identical religiously-motivated conduct. As the Board of Pharmacy now interprets the stocking rule (a rule that was enforced for the first time in 40 years against Plaintiffs here), a pharmacy can decline to stock a drug for a host of secular reasons: because the drug falls outside the pharmacies' chosen business niche (i.e., it is a pediatric, diabetic, or fertility pharmacy);[15] the drug has a short shelf life; the drug is expensive; the drug requires specialized training or equipment; the drug requires compounding; the drug is difficult to store; the drug requires the pharmacy to monitor the patient or register with the manufacturer; the drug has an additional paperwork burden; or simply that the

[15] Indeed, Steve Saxe (former Executive Director of the Board of Pharmacy) agreed that the stocking rule allows pharmacies the "leeway" to stock drugs based on whatever "type of pharmacy they have chosen to open." Tr. Trans. vol. 1 at 59:1–4, Nov. 28, 2011.

pharmacy has a contract with the supplier of a competing drug. Pharmacies regularly decline to stock oxycodone, cough medicine, and Sudafed due to concerns that such drugs would make the pharmacy a target for crime. Pharmacies can refuse to deliver syringes based on "clientele concerns." Pharmacies can refuse to stock for any of these secular reasons—*even when there is patient demand.*[16] Those pharmacies then can (but are not required to) refer customers to where they can obtain the drugs they seek.

Like the stocking rule, the delivery rule is, in operation, undermined by secular exceptions. A pharmacy can, for instance, decline to accept Medicare or Medicaid or the patient's particular insurance, and on that basis, refuse to deliver a drug that is actually on the shelf.

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[16] The Court further notes that if the Board of Pharmacy applied the stocking rule as written, the rule would produce absurd results. The rule requires a pharmacy to "maintain at all times a representative assortment of drugs in order to meet the pharmaceutical needs of its patients." Wash. Admin. Code § 246–869–150(1). With respect to Plan B, the Board has interpreted the rule to mean that if "patients" request the drug, then the pharmacy must stock Plan B. If applied to all drugs, a pharmacy's stock would be subject to the arbitrary requests of patients, and no specialized pharmacies could exist. For example, a pediatric pharmacy would have to stock geriatric-specific drugs if a minimum number of elderly patients happened to request them (although the State was unable to identify what number of customer requests triggers the stocking rule). *See* Tr. Trans. vol. 1 at 59:23; 60:2, Nov. 28, 2011 (testimony of Steve Saxe) (noting that the stocking rule grants the "leeway" for pharmacies to self-define; giving as an example, pediatric pharmacies).

Though given ample opportunity to do so, the State failed to explain why a refuse and refer policy creates greater difficulties when a pharmacy declines to stock a drug for religious reasons, rather than for secular reasons. A pharmacy is permitted to refuse to stock oxycodone because it fears robbery, but the same pharmacy cannot refuse to stock Plan B because it objects on religious grounds. Why are these reasons treated differently under the rules? Both pharmacies refuse and refer, both refusals inhibit patient access, yet the secular refusal is permitted and the religious refusal is not.

In sum, while the Board allows pharmacies to refuse to stock drugs for countless secular reasons, the Board will investigate if a religious objector refuses to stock Plan B for a religious reason. The Board of Pharmacy has interpreted the rules to ensure that the burden falls squarely and almost exclusively on religious objectors—accomplishing an impermissible religious gerrymander under *Lukumi*.

Defendants respond with three arguments: (1) the exemptions in the Board's rules are categorical rather than individualized; (2) the exemptions further the stated goal of the rule, increasing patient access; and (3) the stocking and delivery rules bar all personal objections to dispensing drugs, not just religiously-motivated ones. *See* Intervenors' Post Tr. Br. at 2, 3, 5 [Dkt. # 543]. Defendants are incorrect on all points.

First, the exemptions to the stocking rule and delivery rules are largely individualized. Where an exemption "requires an evaluation of the particular

justification for the [conduct] ... [it] represents a system of individualized governmental assessment of the reasons for the relevant conduct." *Lukumi,* 508 U.S. at 537. The stocking rule itself requires the Board to make an individualized determination of who is a "patient" before it can determine whether a pharmacy has violated the rule. Moreover, the stocking rule's unwritten exemptions are entirely individualized.[17] The unwritten exemptions are *ad hoc* creations that allow pharmacies to shape their own business. In fact, there are no guidelines for when the Board might actually enforce the stocking rule outside of Plan B.[18]

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[17] For example, Mr. Saxe testified that in determining whether a pharmacy had violated the stocking rule by refusing to stock an expensive drug, the Board would consider "their *individual* financial situation." Tr. Trans. vol. 1 at 60:25, Nov. 28, 2011.

Thus, a large pharmacy might violate the stocking rule because it could better afford the expensive drug, but a small pharmacy might not violate the rule because it could not. In any event, the Board would be applying the rule on an ad hoc basis, considering the individual justification offered by the pharmacy. *See also id.* at 64:22–65:2 ("Q. You would agree that the Board has to look at the issue on a case-by-case basis, right? A. More than likely they would, yes. Q. Considering all the circumstances involved that we just talked about? A. Correct."); 66:17–19 ("Q.... [W]hether a drug is filled in a timely manner [under the delivery rule], you concluded that that would be determined on an *individualized basis,* right? A. Yes. Q. So like the stocking rule, pharmacists need leeway to be able to decide whether and when a drug needs to be filled, right? A. Yeah, it could depend again on the drug, the patient, the situation.").

[18] Tr. Trans. vol. 1 at 65:6–10 (testimony of Steve Saxe) (the Board has no written policy or procedure for determining a violation of the stocking rule).

Unlike the stocking rule, the delivery rule expressly mandates individualized exemptions. The regulation itself says that a pharmacy will be exempt from its duty to deliver in *any circumstances substantially similar* to the five enumerated exemptions. By necessity, the Board must compare a pharmacy's stated justification for refusing to dispense with the five enumerated exemptions. In short, the stocking rule appears to be nothing but individualized exemptions, and the delivery rule mandates individualized exemptions on its face.

Furthermore, even if the exemptions were entirely categorical, the Court would still find them indicative of impermissible targeting. As the Third Circuit explained in *Fraternal Order,* a court's concern should be "the prospect of the government's deciding that secular motivations are more important than religious motivations," and that concern is "only further implicated when the government does not merely create a mechanism for individualized exemptions ... but actually creates a categorical exemption [.]" *Fraternal Order,* 170 F.3d at 365. Thus, the categorical medical-exemption from the no-beard rule was "sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny." *Id.* In other words, a categorical exemption may be just as indicative of targeting as an individualized one. In this case, the Board of Pharmacy appears to have unfettered discretion to apply the stocking and delivery rules on a *per se* basis, and it has exercised that discretion only against religious objectors to Plan B.

Second, the exemptions discussed above do not further the stated goal of the rule. The evidence at trial demonstrated that both the stocking and delivery rules have numerous unwritten (but commonly recognized) exemptions. Many of those exemptions do not further patient access. Patient access is not increased when a pharmacy is exempted from the stocking rule because it made an advantageous contract with a competing drug manufacturer. Patient access is not increased when a pharmacy is exempted from the delivery rule because it chooses not to accept certain insurance, or in any of the other instances where a pharmacy is free to ignore the stocking and delivery rules for secular reasons.

Third, the argument that the delivery and stocking rules seek to bar "personal objection of all kinds" is unpersuasive. Intervenors' Br. at 3 [Dkt. # 543]. Intervenors argue that the rules would ensure that, for example, a pharmacist could not refuse to stock and dispense HIV drugs because they associated them with a lifestyle of which they disapproved. Luckily, common bigots do not lurk amongst the rank-and-file pharmacists of Washington. Perhaps due to the absence of bigots, the State was unable to present any evidence that pharmacists in Washington have ever, even once, refused to stock or dispense drugs for personal reasons other than religious. If common bigotry was the evil the Board sought to defeat, then including an exception for conscientious objectors would hardly have been an issue. Finally, Defendants cannot explain why the stocking and delivery rules are necessary to combat non-religious personal

objections (if they exist). The Board could take action against a pharmacist under the rules governing professional responsibilities, Wash. Admin. Code § 246–863–095, if a pharmacist intimidated, harassed, or discriminated against a patient. In this sense, the rules are overinclusive.

The Court concludes, therefore, that the onus of the rules falls almost exclusively on religious objectors to Plan B. And in the discussion above, the answer to the *Lukumi* Court's other concerns becomes apparent. The Board of Pharmacy has interpreted the stocking and delivery rules in a way that favors secular conduct over religiously-motivated conduct. The Board has never enforced the stocking rule against anyone but religious objectors to Plan B; rather, the Board allows widespread *ad hoc* exemptions for secular purposes.

Further, the Board's application of the rules proscribes more religious conduct than is necessary to achieve patient access. The State has compelled pharmacies (and, effectively, pharmacists) to dispense Plan B where it might have simply compelled them to refer patients to nearby pharmacies that do dispense the drug. Defendants have not shown why a continuation of the pre-rule refuse and refer policy, used daily by most pharmacies for a wide variety of other drugs, fails to ensure that patients will have the access they need. To the contrary, in the pre-trial stipulation to stay, the State admitted that "facilitated referrals do not pose a threat to timely access to lawfully prescribed medications"; rather, facilitated referrals "help assure timely access," including to Plan B

specifically. Pl.'s & State Def.'s Stip. & Agreed Or. ¶ 1.5 [Dkt. # 441].

In sum, the evidence demonstrates 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. The rules are not neutral and are therefore subject to strict scrutiny.

This conclusion is buttressed by the history of the rules' development, which demonstrates that they were intended to target religious objectors.

c. Legislative History.

From the start, the drafters sought to create rules that would permit refusal for almost any secular reason while prohibiting refusal for religious reasons. Except 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. The Governor's office worked actively with the Board and interest groups to ensure that religious or moral objections to Plan B would not allow a pharmacy to refuse and refer a patient. The Governor herself threatened to replace Board members who supported a draft rule that included a conscience exception.

Mr. Saxe acknowledged at trial that the rulemakers sought to accomplish a religious gerrymander.[19] Indeed, Mr. Saxe candidly asked how they might achieve this goal without actually *saying* that only facilitated referrals "for non-moral or non-religious reasons" were permissible. He recognized the difficulty in crafting a rule that would distinguish "legitimate" reasons for failing to dispense ("clinical, fraud, business, skill, etc.") and illegitimate "moral or religious judgment" reasons.[20]

While Defendants argued that the Board's rules intended to prohibit personal objections generally, it is telling that the Board's "Notice to Pharmacists," instructing pharmacists on the Board's new rules' operation, was internally titled "<<pharmacy**plnB**103_001.pdf>>." The title highlights the document's unstated focus.

These rules were drafted for the primary—perhaps *sole*—purpose of forcing pharmacies (and, in turn, pharmacists) to dispense Plan B over their sincerely held religious beliefs. The rules were adopted "because of" religious objections to dispensing Plan B, not "in spite" of their incidental suppression of those beliefs. *Lukumi,* 508 U.S. at 540. Accordingly, the rules are not neutral in their operation, and they are not valid unless they were narrowly tailored to achieve a compelling state

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[19] Tr. Trans. vol. 1 at 72:24–73:4, Nov. 28, 2011 ("Q. You understood the goal of the final regulations was to permit clinical, professional, and business reasons for not stocking, right? A. [Mr. Saxe] Yes. Q. But not conscience reasons, correct? A. Correct.").

[20] *See* Pl.'s Exs. 155 & 157.

interest. Whether they meet this strict scrutiny is discussed below.

4. General Applicability.

The second inquiry in the Court's *Smith/Lukumi* Free Exercise analysis is whether the regulation is generally applicable. A regulation is not generally applicable when it applies to or is enforced against only religiously-motivated conduct.

The Free Exercise Clause "protect[s] religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi* at 543–43. A facially neutral and generally applicable regulation violates the Free Exercise Clause when it has been enforced in a discriminatory manner. A law is not generally applicable if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated, and which undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated. *Blackhawk,* 381 F.3d at 209 (*citing Lukumi* and *Fraternal Order*).

A regulation is not constitutional when the government applies it in a selective, discriminatory manner, thus singling out the plaintiffs' religiously motivated conduct. When the government enforces a law against religious conduct but not similar secular conduct, it devalues religious reasons by judging

them to be of lesser import than nonreligious reasons. *See Tenafly,* 309 F.3d at 167–168. This is exactly what has occurred here.

In addition to the effectively unlimited categorical and individualized exceptions to the delivery rule's requirement that all pharmacies timely deliver all lawfully prescribed medications (discussed above), the Board's rules are not neutral or generally applicable because they have been selectively enforced, in two ways.

First, neither the State nor the Defendant–Intervenors produced any evidence that the delivery rule had been enforced against any pharmacy except those refusing to dispense Plan B. To the contrary, the delivery rule has been enforced only against the Plaintiff pharmacy, which holds a religious objection to dispensing Plan B. And it has only been enforced[21] with respect to the failure to deliver that one drug—Plan B. Furthermore, for 40 years, the stocking rule

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[21] This fact only reinforces the Court's conclusion, above, that the 2007 rules were adopted primarily to force religious objectors to stock and dispense Plan B.

The Ninth Circuit's Opinion acknowledged this possibility, when it discussed the rules' general effect of increasing access in terms of overcoming pre-rule religious or moral objections to dispensing medication: "How much the new rules actually increase access to medications depends on how many people are able to get medication that they might previously have been denied *based on religious or general moral opposition* by a pharmacist or pharmacy to the given medication." *Stormans,* 586 F.3d at 1135 (emphasis added).

The only "given medication" that has been the subject of a complaint or a Board of Pharmacy investigation since the rules' effective date is Plan B.

has never been enforced against any pharmacy, even though it too is intended to ensure access to all medications by requiring all pharmacies to stock a representative supply of medications to serve its patients.

Plaintiffs demonstrated that since 1997 there have been at least nine complaints to the Board regarding a pharmacy's refusal (or failure) to dispense drugs other than Plan B, and that the Board declined to investigate any of them. On the other hand, Plaintiff Stormans was the subject of seven complaints in the immediate aftermath of the 2007 rules' implementation, and two more in following months. The Board investigated and closed seven of those without disciplinary action, but two remain open[22].

Secondly, and more problematically, neither the delivery rule nor the stocking rule has ever been enforced against any of the state's numerous Catholic-affiliated outpatient (or retail) pharmacies, every one of which similarly refuses to stock or dispense Plan B for reasons of conscience. The Free Exercise Clause prohibits the government from selectively enforcing otherwise generally applicable regulations against one group of religious objectors, but not another. *See Lukumi,* 508 U.S. at 536 ("One

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[22] The State appears to argue that the stipulated Stay prevents it from closing these investigations. If that is its position, it makes no sense. It did not seek permission to close them, and the Stay was not in any event intended to preclude it from doing so. The Stay was intended to ensure that the State did not pursue further enforcement of the rules against the Plaintiffs pending trial.

religious denomination cannot be officially preferred over another.").

Catholic-affiliated hospitals provide more than 15% of all U.S. hospital beds, and they account for more than 120 million hospital visits per year. There are four Catholic-affiliated health care systems[23] in Washington, operating at least eighteen hospitals, and they provide approximately 30% of the state's hospital beds. Three of these hospitals are certified as "critical need," a Congressional designation designed to ensure access to health care in rural areas. Catholic hospitals emphasize social services, providing treatment for drug and alcohol abuse, community outreach, social work, HIV/AIDS services, and breast cancer prevention screening, and they do so at a rate higher than their government, for-profit, and non-profit peers. They are a major component of Washington's overall health care system.

Because many primary care physicians do not accept Medicaid, the poor increasingly use the Emergency Room for their primary care needs. Each Catholic-affiliated hospital in the state includes an Emergency Room, and each ER utilizes its hospital's in patient pharmacy. The Revised Code of Washington § 70.41.350 requires every hospital providing emergency care to sexual assault victims to stock emergency contraception and to dispense it to those victims requesting it. As a result, each Catholic Emergency Room (or in patient) pharmacy

[23] These are: Ascension Health, Franciscan Health System, PeaceHealth, and Providence Health & Services.

does in fact stock Plan B, and will dispense it (only) to sexual assault victims. They will not dispense the drug to a patient presenting herself at the Emergency Room after unprotected, consensual sex, even though it is in stock. These pharmacies appear to be in violation of the delivery rule (though they may be exempted from it under Rev. Code of Wash. § 48.43.065).

Fifteen of the state's Catholic hospitals also contain an outpatient, or retail, pharmacy. Because the Catholic Church's official, traditional moral position[24] is that life begins at conception, these pharmacies do not stock, and will not dispense, Plan B. Each such pharmacy is therefore in violation of the stocking and delivery rules.

The State's response to the Court's inquiries[25] about the effect of the 2007 delivery rule (and the State's current interpretation of the stocking rule) on these Catholic health care providers has been inconsistent and evolving, but none of its positions permit it to defend the rules as generally applicable.

At trial, the State's witnesses claimed that they "did not know" what the Catholic pharmacies did. When pressed, they conceded that the rules did require Catholic pharmacies to stock and dispense

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[24] *See* Ethical and Religious Directives for Catholic Health Care Services, referenced in Dkt. # 531. These Directives do permit the dispensation of Plan B to rape victims.

[25] The Court first asked the parties about this issue in the oral argument on Plaintiff's Motion for a Temporary Restraining Order in September, 2007.

Plan B, and that they did not do so. But, they claimed, the Board's investigation process was necessarily "complaint driven," and that there was no demand for Plan B at Catholic pharmacies (probably because patients knew that they would not dispense Plan B). They made this argument even though the Catholic hospitals' in patient pharmacies uniformly stocked the drug, and they refused to dispense except in cases of sexual assault.

The State then argued that, although the rules required the Catholic pharmacies to stock and dispense Plan B, and although it was aware that they refused to do so except in cases of sexual assault, it was unable to enforce the rules against these pharmacies absent a formal complaint, under the Fourth Amendment. [*See* Dkt. # 522].

The State then essentially conceded that it had not even attempted to enforce the rules against Catholic pharmacies. But, it claimed—despite the clear holdings of *Lukumi* and its progeny—that its passive, selective enforcement of the rules against only some religious objectors is constitutionally permitted under *Wayte v. United States,* 470 U.S. 589 (1985). [*See* Dkt. # 544].

Finally, at closing argument, the State claimed that Catholic pharmacies are and always have been statutorily exempted from stocking or delivering Plan B. Each of these proffered excuses for the Board's selective enforcement of its rules is discussed in turn.

First, it is clear that the Board of Pharmacy has been aware since before its 2007 rulemaking that Catholic pharmacies do not and will not stock or deliver Plan B (or, for that matter, contraceptives). Susan Boyer, the Board's current Executive Director and the State's Rule 30(b)(6) designee in this case, admitted as much at trial. Nevertheless, she testified the Board "did not discuss or contemplate" the rules' impact on Catholic pharmacies and their position on Plan B in its lengthy development of the rules. [*See* Dkt. # 531, at Ex. G]. In April 2008, the Washington State Catholic Conference of Bishops filed an amicus brief in the Ninth Circuit, explaining its position on Plan B and the rules' impact on Catholic health care providers. Dkt. # 531, Ex. H. Yet at trial, Boyer testified that she still does not know what impact the rules will have on Catholic pharmacies.

Boyer's (and the State's) primary claim is that patients know that a Catholic pharmacy will not dispense Plan B, and that there is therefore no demand for Plan B at Catholic pharmacies. This position is not persuasive. It might explain why there have not yet been any patient complaints about the Catholic pharmacies' failure to stock or deliver, but it is not evidence that there is no demand for the drug. Demand in the economic context means a "willingness and ability to purchase a commodity or service" or "the quantity of a commodity or service wanted at a specified price and time." The fact that no patient has formally complained to the Board about a Catholic pharmacy's refusal to stock or deliver Plan B is not even circumstantial evidence that there is no

demand for the drug at that pharmacy. Many Catholic hospitals (such as St. Joseph's in Tacoma) are located in areas of modest incomes, with large populations of women of child bearing age. These potential patients are more likely than average to use the Emergency Room for their primary health care needs, and are less likely to have access to transportation to travel to a distant pharmacy to obtain Plan B. There is demand for Plan B, and the fact that a Catholic pharmacy does not meet it does not support the conclusion that there is not.

The Board itself recognized that demand exists even in the absence of a supplier willing to meet it in its 2007 "Final Significant Analysis" of the rules' impact. [Pl.'s Ex. 434]. In discussing the "possible costs of the rule," the Board acknowledged that the rules might cause some pharmacies to close, rather than dispense drugs in conflict with their religious beliefs. It explained that any adverse impact on patients was likely to be short lived, however, because "if there is sufficient consumer demand in the area, a pharmacy that is being closed may be purchased and run by a new operator who will comply with these rules, or another pharmacy company may locate in the area to serve that market." *Id.* at p. 12. The Board's analysis[26] recognized that demand exists in the absence of a pharmacy willing to meet it.

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[26] The Board's analysis did not otherwise address the cost to pharmacies driven out of business as a result of its 2007 rules. It certainly did not address the fact that the state's Catholic pharmacies—and, logically, their associated hospitals—would suffer this same fate, if the rules were enforced against them.

The State's "no demand" argument is also undermined by its claim that the rules were proactively enacted to ensure patient access in the future, even though it concedes that there was no evidence of a problem with access to Plan B prior to its 2007 rules.

The State next claims that, even though the rules apply to Catholic pharmacies, and even if they are failing to meet patient demand for Plan B, its investigative power is necessarily "complaint driven" and the Fourth Amendment prohibits it from enforcing the rules in the absence of a formal complaint. Thus, it argues, because it has received no such complaints, its failure to enforce the rules against Catholic pharmacies is not evidence that the rules are not generally applicable.

The State's position is based on its reading of *Client A v. Yoshinaka,* 128 Wn.App. 833 (2005), and *Seymour, DDS v. Washington State Department of Health, Dental Quality Assurance Commission,* 152 Wn.App. 156 (2009). [*See* Dkt. # 522]. These cases suggest that evidence obtained outside a formal investigation may be excluded, in some circumstances, under the Fourth Amendment. Neither case addresses the fact that the Board of Pharmacy is authorized to inspect every pharmacy every two years, and neither defeats the conclusion that the Board is authorized to initiate the complaint and investigation process in the absence of a formal complaint filed by patient.

It is also clear that the Board has not previously adhered to this position. Its witnesses did not claim

that it could not enforce its rules in the absence of a formal, public complaint; to the contrary, Ms. (Salmi) Hodgson (in the Department of Health's office of facilities and services licensing) acknowledged that the Board is authorized to, and does, conduct biannual inspections of every pharmacy in the state, to monitor compliance with the Board's regulations. [*See* Tr. Trans., vol. 8 at 23:10–17, Dec. 20, 2011]. She and other witnesses[27] admitted that the Board has previously initiated investigations as the result of these biannual inspections.

State witnesses also admitted that Board members, employees, and inspectors can and do file their own complaints to begin the investigation and enforcement process. In fact, one of the investigations of Plaintiff Stormans' pharmacy was initiated by the Board itself. Board members and employees have done so because of media reports or information received from insurance companies. Ms. Salmi even conceded that the Board is authorized to use "test shoppers" to test pharmacies' compliance with Board of Pharmacy regulations, if there is reason to believe a violation is occurring. [*See* Tr.

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[27] Rod Shafer, the former executive director of the Washington State Pharmacy Association, similarly testified that the biannual inspections are conducted "to make sure the pharmacists are following the rules and ensure public safety." Tr. Trans. December 22, 2011, at 122. He also freely admitted that it was common knowledge that Catholic pharmacies would not stock or dispense Plan B: "You would have to have been in a very dark place for a long time not to understand what the Catholic policy was on birth control.... [I]t was common knowledge, they did not stock those products." Tr. Trans. December 22, 2011, at 139.

Trans., vol. 8 at 99:10–15, Dec. 20, 2011; *see* also Dkt. # 551.]

It is therefore clear that the Board could enforce its stocking and delivery rules against the state's many non-compliant Catholic pharmacies, and that it has consciously chosen[28] not to do so. Its refusal is not excused by its attorneys' current claim that the Fourth Amendment prohibits such investigations, or by the claim that investigations are "complaint-driven" and there have been no patient complaints about Catholic pharmacies.

The next iteration of the State's defense of its differential treatment of Catholic pharmacies is that

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[28] The State suggests that its failure to enforce the rules is the result of the "chilling effect" of this Court's stay. This position is not compelling, for at least three reasons. First, the stay was not intended to, and did not purport to, prevent additional investigations under the rules. Second, during the 2010 rulemaking, the Secretary of Health and interest groups like the Northwest Women's Law Center advocated against amending the rules to include a right of conscience. Secretary Selecky wrote to the Board of Pharmacy's Chair, urging him not to do so: "I agree with what you have heard from Governor Gregoire's office—the current rule strikes the correct balance between patient access to medication and valid reasons why a pharmacist might not fill a prescription. The rule has served patient safety well in Washington over the three years it's been in place.... The rule should stand as adopted in 2007." [Pl.'s Ex. 389].

Finally, to the extent the Board claims it will enforce the rules against Catholic pharmacies, that position is undermined by its simultaneous claim that it cannot do so absent a complaint—particularly where the evidence establishes that the Board could initiate a complaint itself, and has failed to do so in the almost five years the rules have been in effect.

selective enforcement is constitutionally permissible under *Wayte v. United States,* 470 U.S. 589 (1985). *Wayte* involved mandatory registration for the Selective Service. Plaintiff refused, and repeatedly boasted about his decision to the Selective Service. He was indicted, and sought dismissal by arguing that the law was being enforced against only vocal opponents to registration. The Supreme Court rejected his claim, holding that prosecutorial discretion enhanced efficiency and that enforcement against only vocal violators had a valuable deterrent effect. It recognized the "critical distinction" between the government's *awareness* that its passive enforcement policy would punish only a subset of non-compliant individuals, and the choice to use such an enforcement mechanism *because* it would do so. Plaintiff could not prove that his indictment was "*because of* his protest," and his selective enforcement claim failed. *Wayte,* 470 U.S. at 610.

Wayte is not helpful. First, it is not a free exercise case. *Smith* and *Lukumi* unambiguously hold that a regulation is not neutral or generally applicable if it treats religious conduct in a discriminatory manner. The Free Exercise Clause protects against unequal treatment, and "inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi* at 543–43. Furthermore, and in any event, the evidence clearly demonstrates that the Board's 2007 rules do target religious objectors "because of"—and not "in spite of"—their religious objection.

The State's final position, that the stocking and delivery rules do not apply to in-patient Catholic pharmacies, is also unavailing, and perhaps counterproductive. Earlier in the litigation, the State and the Intervenors had emphasized that the rules applied to all Catholic pharmacies because, if it were otherwise, the rules would be drastically and inexplicably underinclusive. The rules facially apply to outpatient, retail Catholic pharmacies, and every witness addressing the subject so testified. Indeed, the State emphasized this fact in its Supplemental Trial Brief on selective enforcement: "It is undisputed that the stocking rule and the 2007 rules apply to [Catholic] pharmacies. There is no evidence to support a finding that the rules are not generally applicable due to a carve-out having been granted to Catholic out-patient pharmacies." [*See* Dkt. # 544 at 9]. The Intervenors took the same position in response to the Court's inquiries about the rules' impact on Catholic pharmacies: "The rules at issue in this case do not exempt the outpatient pharmacies operated by Catholic health systems for the stocking rule or the delivery rule[.] ... [I]f a Catholic-owned pharmacy serves a community that needs emergency contraceptives, that pharmacy must stock and deliver emergency contraceptives." [*See* Dkt. # 523 at 5].

In fact, the Board's rules apply to Catholic pharmacies, and Catholic pharmacies are not complying (and will not comply) with them. But there is no evidence whatsoever that the Board has enforced or will enforce its rules against them. This is exactly the sort of unequal treatment prohibited by the Free Exercise clause under *Lukumi.* The rules

are not generally applicable because the State does not enforce them against all pharmacies, or even to all pharmacies with religious objections to dispensing Plan B. Accordingly, they are unconstitutional unless they are narrowly tailored to achieve a compelling state interest.

5. Application of Strict Scrutiny.

A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests. A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. *Lukumi,* 508 U.S. at 546 (internal citations omitted).

As was the case in *Lukumi,* the Court's analysis of the rules demonstrates why they cannot survive strict scrutiny. The rules are not at all narrowly tailored; they are instead riddled with secular exemptions that undermine their stated goal of increasing patient access to all medications. The rules operate primarily to force (some) religious objectors to dispense plan B, while permitting other pharmacies to refrain from dispensing other medications for virtually any reason. They permit Catholic pharmacies to ignore the rules altogether. Nor has the state demonstrated or argued that it has a compelling interest in reaching this result. The

rules cannot survive strict scrutiny, and they are not constitutional.

C. Plaintiffs' Equal Protection Claim.

Plaintiffs assert that the stocking and delivery rules, in operation, violate the Equal Protection Clause of the Fourteenth Amendment, which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." *See* Second Am. Compl. ¶ 61; U.S. Const. amend. XIV. This is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439(1985) (citing *Plyler v. Doe,* 457 U.S. 202, 216 (1982)). When "social or economic legislation is at issue," the Equal Protection Clause allows the States "wide latitude," and thus, laws "will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440 (citing *U.S. Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 174 (1980); *Schweiker v. Wilson,* 450 U.S. 221, 230 (1981)). When a statute classifies by race, alienage, or national origin or impinges a fundamental right, however, the law will be subjected to strict scrutiny. *Id.; see also Nordlinger v. Hahn,* 505 U.S. 1, 10 (1992). Classifications based on gender and illegitimacy "also call for a heightened standard of review" and must meet intermediate scrutiny. *Id.* at 440–41 (citing *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718 (1982); *Mills v. Habluetzel,* 456 U.S. 91, 99 (1982)). Where a law is facially neutral, like the stocking and delivery rules, a plaintiff must show both discriminatory intent and impact. *See Lee v.*

City of Los Angeles, 250 F.3d 668, 687 (9th Cir. 2001). As Justice Kennedy noted in *Lukumi,* the free-exercise and equal-protection analyses are analogous, *see Lukumi,* 508 U.S. at 540, and thus, the Court unsurprisingly concludes that the stocking and delivery rules, as applied to the Plaintiffs, violate the Equal Protection Clause.

The facts of this case lead to the inescapable conclusion that the Board's rules discriminate intentionally and impinge Plaintiffs' fundamental right to free exercise of religion. Thus, the Court must apply strict scrutiny, a threshold the rules cannot pass. In practice, the Board of Pharmacy has classified pharmacies and pharmacists into those that refer patients for religious reasons and those that refer patients for secular reasons. That classification does nothing to increase patient access. Indeed, if the Board applied their exemptions as they have in the past, a pharmacy could refuse to stock Plan B because it made an advantageous contract with the manufacturer of *ella,* but a pharmacy could not refuse to stock Plan B because of moral objection. In both cases, the conduct is the same: the patient is referred. But in the latter situation, the pharmacy is disciplined. Persons similarly situated are not treated alike.

To survive strict scrutiny, the stocking and delivery rules must be narrowly tailored. Given that Defendants have stipulated that a facilitated referral does not undermine access, the rules could be more narrowly tailored to allow religious objectors to refer patients seeking Plan B. The rules thus fail strict scrutiny.

Even if the Court applied a rational basis standard, the rules would still fail. The classification of pharmacies and pharmacists by religious motivation is not rationally related to furthering patient access. Moreover, the rules are vastly underinclusive. Defendants provided no rational basis for failing to apply the stocking and delivery rules to Catholic hospitals. That division between Catholic conscientious objectors and non-conscientious objectors fails to further patient access in any manner. In short, the stocking and delivery rules fail under even the most deferential standard.

D. Plaintiffs' Title VII Claim.

Plaintiffs assert that the delivery and stocking rules "permit (if not require) Washington employers such as Stormans to take adverse employment action against individual pharmacists such as the plaintiff pharmacists based on their religious beliefs and practices," thus violating Title VII, 42 U.S.C. § 2000. Second Am. Compl. ¶ 74. Title VII bars employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(1). Further, any state law "which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter" is preempted by Title VII. *See id.* § 2000e–7. However, Title VII preempts only those state laws that "*expressly sanction* a practice unlawful under Title VII; the term does not pre-empt state laws that are silent on the practice." *Calif. Fed. Sav. & Loan Ass'n v.*

Guerra, 479 U.S. 272, 297 n. 29(1987) (emphasis added).

While the Board of Pharmacy's rules unconstitutionally target religious conduct, the Court cannot say that the rules expressly "require or permit" a pharmacy to take discriminatory action against a pharmacist in such a direct manner as to violate Title VII. As noted above, the rules are facially constitutional—they do not on their face require or permit discriminatory conduct. It is in their operation that the rules force a pharmacy to choose between compliance with the delivery and stocking rules and employing a conscientious objector as a pharmacist. Because the rules do not expressly permit a pharmacy to discriminate, Title VII does not preempt them.

IV. CONCLUSION

The Board of Pharmacy's 2007 rules are not neutral, and they are not generally applicable. They were designed instead to force religious objectors to dispense Plan B, and they sought to do so despite the fact that refusals to deliver for all sorts of secular reasons were permitted. The rules are unconstitutional as applied to Plaintiffs. The Court will therefore permanently enjoin their enforcement against Plaintiffs.

IT IS SO ORDERED.

DATED this 22nd day of February, 2012

Ronald B. Leighton
Ronald B. Leighton
United States District Judge

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STORMANS, INCORPORATED, et al, Plaintiff, v. MARY SELECKY,, Defendant.	CASE NO. C07-5374RBL FINDINGS OF FACT AND CONCLUSIONS OF LAW

After considering the evidence and the argument and authorities presented by the parties' counsel, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. The Parties

1. Plaintiff Stormans, Inc. is a closed corporation, owned by Ken Stormans who serves as President, and his three children, Kevin Stormans, Greg Stormans, and Charelle Foege, who serve as Vice Presidents of the corporation.

2. Stormans, Inc. owns Bayview Thriftway and Ralph's Thriftway in Olympia, Washington. Ralph's is a fourth-generation, family-operated grocery store that includes a general retail pharmacy. Ralph's has had a pharmacy located in the building since it began its operations in 1944.

3. Plaintiff Margo Thelen is a pharmacist licensed by the State of Washington. Ms. Thelen currently works as a staff pharmacist at a hospital pharmacy within Washington. Prior to the Regulations becoming effective, she worked as a staff pharmacist at Safeway. She has spent nearly all of her 40-year career in retail pharmacy, both independent community and chain pharmacies. She has never been employed by Ralph's.

4. Plaintiff Rhonda Mesler is a pharmacist licensed by the State of Washington. Ms. Mesler works as a pharmacy manager at a pharmacy within Washington. She has been employed by her chain pharmacy for nearly eight years. She has spent over 20 years working mainly at chain pharmacies in Washington. She has never been employed by Ralph's.

5. Defendant Mary Selecky is the Secretary of the Washington State Department of Health ("DOH"). Defendant Laurie Jinkins was an Assistant Secretary responsible for the Washington Health Systems Quality Assurance, which includes the Board of Pharmacy. The remaining defendants, George Roe, Susan Teil Boyer, Dan Connolly, Gary Harris, Vandana Slatter, Rebecca Hille, and

Rosemarie Duffy, or their successors are members of the Washington Board of Pharmacy ("Board").

6. All Board members, like the Secretary and Assistant Secretary of the Department of Health, are appointed by the Governor. Five of the seven Board members are licensed pharmacists and the two remaining members are public members, not affiliated with any aspect of pharmacy. The term of appointment is four years. A member can be appointed to a second term, but can serve no more than two consecutive terms.

7. The Department of Health provides all staff to the Board of Pharmacy. Staff assigned to the Board are employees of the Department of Health.

8. The Board of Pharmacy is responsible for the practice of pharmacy in the state of Washington and to enforce all laws placed under its jurisdiction. The Board also determines the qualifications for licensure and administers discipline against the licenses held by licensees under procedures required in Wash. Rev. Code §§ 18.64. 18.130, 34.05. Discipline for pharmacies and pharmacists may include suspension and revocation of one's license.

9. The Mission Statement of the Board, which appears on its website and is central to its decision making process, is "to promote public health and safety by establishing the highest standards in the practice of pharmacy and to advocate for patient safety through effective communication with the public, profession, Department of Health, Governor,

and the Legislature." *See* http://www.doh.wa.gov/hsqa/professions/Pharmacy/default.htm.

10. Defendant-Intervenors Judith Billings, Rhiannon Andreini, Jeffrey Schouten, Molly Harmon, Catherine Rosman, Emily Schmidt, and Tami Garrard (together "Defendant-Intervenors") each claim to have an interest in this lawsuit. Two of the intervenors are HIV positive and the remaining intervenors are women of child-bearing age who seek to ensure access to emergency contraception.

11. Plaintiffs' religious beliefs prevent them from taking part in the destruction of innocent human life, and Plaintiffs believe that human life begins at the moment of fertilization. Plaintiffs have reviewed the labeling, FDA directives and other literature regarding the mechanism of action of Plan B and *ella* ("emergency contraceptives") and believe that emergency contraceptives can prevent implantation of a fertilized ovum. Accordingly, Plaintiffs' religious beliefs forbid them from dispensing these drugs.

12. When Plaintiffs receive requests for these drugs, they provide the customer with a "facilitated referral." By stipulation, Plaintiffs and the State-Defendants have defined a facilitated referral as "referr[ing] the customer to a nearby provider and, upon the patient's request, call[ing] the provider to ensure the product is in stock."[1] None of Plaintiffs' customers has ever been denied timely access to emergency contraception.

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[1] Plaintiffs' Exhibit ("PX) 348 (Stipulation, Dkt.441), ¶1.2.

13. In 2007, the Board enacted a new regulation (WAC 246-869-010) and revised an existing regulation (WAC 246-863-095). Together with WAC 246-869-150(1) (collectively, the "Regulations"), these Regulations prohibit pharmacies from providing facilitated referrals if a pharmacy or pharmacist has a conscientious objection to delivering or dispensing that drug. Plaintiffs challenge the Regulations as a violation of the Free Exercise Clause, the Supremacy Clause, and the Due Process Clause of the U.S. Constitution.

II. Pharmacy Practice before the 2007 Regulations

A. Pharmacies' discretion over stocking and referral.

14. The business of pharmacy is complex. There are over 6,000 FDA-approved drugs, and no pharmacy stocks them all. Thus, every pharmacy must make decisions about which drugs to stock.

15. Pharmacies also face significant financial and competitive pressures. In recent years, pharmacies have faced higher operational costs, decreasing reimbursement rates, and more aggressive auditing from the insurance sector.[2] For many drugs, pharmacies receive minimal net profits and dispensing fees.[3] Often, pharmacies must order more of a drug than what the patient requires. And

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[2] PX 297 (Memo from Al Linggi); Trial Draft Transcript ("Tran.", Shafer, Day 1, pp. 99-100, Day 10, pp. 131-136; Tran. Harris, Day 10, p. 51.

[3] *See e.g.,* Tran. Shafer, Day 1, pp. 98-99, 116.

they also receive "numerous high cost yet low volume prescriptions."[4]

16. As a result of these pressures, pharmacies work to balance inventory expense against patient demand. Many pharmacies emphasize inventory control, imposing inventory benchmarks and urging pharmacists to turn over their inventory on a monthly basis.

17. The impact of inventory costs on pharmacies varies depending on the size of the pharmacy, whether it is an independent or chain pharmacy, the clientele it has chosen to serve, and other factors. As the State's attorney explained in an email, pharmacies cannot carry "all medications needed by their community or patient population…."[5] Thus, more and more pharmacies have begun to limit their inventory to certain medications and patient populations.[6] And all pharmacies must make choices about how to control variable costs, including labor and inventory.

18. Pharmacies decide which drugs to stock based on a variety of factors. These factors include, among other things, the niche market the pharmacy chooses to serve, the expense of the drug, the shelf-life of the drug, the demand for the drug, insurance reimbursement amounts and requirements, monitoring or training required to dispense the drug, inventory carrying costs, contractual limitations of

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[4] PX 297. *See also* n. 2.

[5] PX 343 (Email from Board's attorney); Tran. Harris, Day 10, pp. 91-92.

[6] Tran. Shafer, Day 1, pp. 151-52.

wholesalers and buying groups, and the administrative resources associated with the drug.

19. Board Regulations have long given pharmacies broad discretion to decide which drugs to stock. The primary regulation applicable to stocking decisions is WAC 246-869-150(1). The Stocking Rule provides: "The pharmacy must maintain at all times a representative assortment of drugs in order to meet the pharmaceutical needs of its patients." *Id.* Although the Stocking Rule has been part of the Board's regulations for over forty years, the Board has made no effort to police compliance, and no pharmacy has ever been cited for violating it.

20. Board regulations have also long given pharmacies broad discretion to decide which patients to serve and when to refer patients to a nearby pharmacy. Because pharmacies stock only a fraction of all FDA-approved drugs, they receive requests many times a day for a drug that is out of stock.[7] When a pharmacy receives a request for a drug that is out–of-stock, the standard practice is to do one of three things: (1) obtain the drug for the customer (for example, by ordering it, and asking the patient to

[7] *See e.g.,* Tran. Fuller, Day 4, pp. 33-34; Tran. Teil Boyer, Day 5, 151, 170; Tran. Thelen, Day 6, p. 142-46; Tran. Mesler, Day 6, pp. 177, 185-90, Day 7, p. 154; Tran. Harris, Day 10, pp. 8, 91, Day 11, p. 50; Board Chair Asaad Awan Dep., 17:12-18:4, 58:18-59:4; Rule 30(b)(6) designee, Chair Linggi Dep., 130:19-131:1. *See also* PX 315 (2010 Board minutes); PX 356 (Board transcript of 2010 meeting); State's Exhibit A-27 (September 2010 public comment from WSPA); PX 348 (Stipulation Dkt 441); PX 343 (email from Board's attorney); PX 359 (letter from Board Chair); PX 380 (email from Board Chair); PX 405 (letter from Board's attorney); PX 322 (AAG statement).

return to pick it up later); (2) return the unfilled prescription to the customer; or (3) refer the customer to another pharmacy that will fill the patient's prescription.

21. Referring the customer to another pharmacy is a very common method for dealing with an out-of-stock drug. Pharmacies refer patients to other pharmacies at least several times a day because a drug is not in stock.[8] The State formally stipulated that referral is often the most effective means to meet the patient's request when a pharmacy or pharmacist is unable or unwilling to provide the requested medication or when the pharmacy is out of stock of medication.[9]

B. Referrals for reasons of conscience.

22. Before the 2007 Regulations, pharmacies in Washington were also permitted to refer patients for reasons of conscience.[10]

23. In 1995, when the Washington legislature enacted the Basic Health Care Law, it also enacted statutory protections for the right of conscience. RCW 48.43.065(1)-(2)(a); *see also* RCW 70.47.160(1)-(2)(a). The law recognizes that "every individual possesses a fundamental right to exercise their religious beliefs and conscience," and provides that no health care entity, including pharmacies or pharmacists, "may be required by law or contract in

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[8] *Id.*

[9] PX 348 (Stipulation Dkt 441), ¶ 1.5.

[10] *See e.g.,* PX 11 (Email from Saxe); PX 24 (Board newsletter); PX 348.

any circumstances to participate in the provision of or payment for a specific service if they object to so doing for reason of conscience or religion." *Id.*

24. Although portions of the Basic Health Care Law have been repealed, the State Insurance Commissioner continues to take the position that all insurers must accommodate health care providers, including pharmacists, who decline to provide a medical service based on conscience. It has also recognized and approved of referral as a fully protected mechanism to accommodate conscientious objectors, including pharmacists who decline to dispense Plan B.[11] Prior to the rulemaking process, Board staff advised pharmacists that the conscience statutes protected pharmacists from having to violate their conscience.

25. Referrals for reasons of conscience are also permitted in the vast majority of states. The right to engage in referral for reasons of conscience has been endorsed by the Washington State Pharmacy Association ("WSPA"). In 1998, the American Pharmacists Association (APhA) adopted a policy expressly recognizing "the individual pharmacist's right to exercise conscientious refusal," and supporting increased access to medication "without compromising the pharmacist's right of conscientious refusal."[12] The APhA position endorses referral when a pharmacist has a conscientious objection.

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[11] Insurance Commissioner's Rule 30(b)(6) designee, Elizabeth Berendt Dep., 21:11-25:6; 34:5-24; 37:11-38:2.

[12] PX 22 (WSPA Conscience Clause Committee Report with APhA policy).

26. The APhA policy was proposed by Don Williams, then-Executive Director of the Board in Washington, in response to Oregon's Death With Dignity Act in 1998.[13] Board witnesses testified that they continue to support a pharmacist's right to not dispense lethal drugs in the context of physician-assisted suicide.[14]

27. In 2005, the issue of conscience-based referrals for Plan B began receiving increased media attention. National and state-level pro-choice groups launched a concerted effort to press for legislation banning the practice and many states considered various measures in response. Only a handful of states adopted measures. In Illinois, for example, Governor Rod Blagojevich signed an emergency rule in early 2005 that required pharmacists to dispense emergency contraceptives if their pharmacies stocked any form of contraception.[15]

28. To date, seven states (besides Washington) have adopted a law or policy limiting conscience-based referrals to some degree or another. However, the only state that has clearly gone as far as Washington in requiring pharmacies to stock Plan B is Illinois. The vast majority of states (42) leave pharmacies essentially complete discretion to decide which drugs to stock and when to refer patients elsewhere. And the only state that has gone as far as

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[13] Tran. Shafer, Day 10, pp. 128-129.

[14] *See e.g.,* Tran. Shafer, Day 1, pp. 109-10; Tran. Saxe, Day 1, p. 186; Tran. Fuller, Day 4, pp. 17-18; Tran. Teil Boyer, Day 5, p. 186; Tran. Harris, Day 10, p. 59, Day 11, p. 48.

[15] *See Morr-Fitz, Inc. v. Blagojevich*, 2011 WL 1338081, No. 2005-CH-000495 (Ill. Cir. Ct. 7th Jud. Cir., April 5, 2011).

Washington—Illinois—had its regulations struck down in state court as unconstitutional. *See* Dkt. #510 at 11-12.

29. One of Defendant-Intervenors' witnesses, Alta Charo, testified that in her opinion, states that have not expressly endorsed referral can be assumed to prohibit it. That testimony is contrary to the position of the Board, which has concluded that Washington law permitted referral until the Regulations were adopted.[16] Ms. Charo's opinion is also contradicted by the testimony of Rod Shafer, who served as the Executive Director of the Washington State Pharmacy Association ("WSPA") for 14 years. Mr. Shafer testified that referral for business and conscience reasons has been the standard of practice nationwide, including in states that do not have laws specifically endorsing or prohibiting referral.[17]

30 Ms. Charo's testimony is also contrary to the position of many professional health care organizations, which endorse referral as an appropriate alternative for pharmacists who assert conscientious objections. This includes the American Medical Association, American Society of Health-System Pharmacists, National Community

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[16] *See e.g.,* PX 348 (Stipulation Dkt. 441), ¶ 1.2.

[17] Tran. Shafer, Day 10, 129-131. Mr. Shafer served as the WSPA's Executive Director for nearly 15 years and regularly interacted with pharmacists in similar positions in other states. He left his position in October 2008 and served as the director of the California Pharmacists Association. Mr. Shafer remains licensed in Washington. He has also worked in pharmacy in Texas and Arizona in recent years.

Pharmacists Association, the American Pharmacists Association, and the Washington State Pharmacists Association.

31. Finally, Ms. Charo's assertion conflicts with the State's own research. In 2010, the Board asked the National Association of Boards of Pharmacy to better understand how other states had addressed this issue.[18] Of the 14 states responding to the question, 13 states responded that they permit pharmacies to refer patients to another pharmacy due to a moral or ethical objection. Fifteen of 16 states responded that they do not even require pharmacies to give patients a timely alternative when a drug is not available.

III. The Development of the 2007 Washington Regulations

A. Planned Parenthood and the Governor seek a rule prohibiting conscientious objections to Plan B.

31. The events giving rise to Washington's Regulations began in 2005. Shortly after Governor Blagojevich signed his emergency rule, Planned Parenthood and Northwest Women's Law Center (collectively referred to as "Planned Parenthood") contacted the Governor's Office concerning conscientious objections to emergency contraception.[19] Christina Hulet, Governor Gregoire's Senior Health Policy Advisor, began

[18] PX 460 (2010 survey for Board by National Association of Boards of Pharmacy).

[19] Tran. Hulet, Day 3, pp. 73-74.

meeting with Planned Parenthood.[20] Planned Parenthood's representative, Elaine Rose, had worked closely with the Governor in the Attorney General's Office for many years.[21] Planned Parenthood sought to enlist the Governor's help to prohibit conscientious referrals for Plan B.

32. Ms. Hulet and Planned Parenthood contacted Steven Saxe, the Board's Executive Director, in the spring or summer of 2005. Planned Parenthood informed Mr. Saxe that they were considering national or state legislation on a "pharmacist's right to refuse to fill a prescription for moral/religious views."[22] Planned Parenthood wrote the Board in August 2005, urging the Board to formally address the issue and prohibit referral.

B. The Board supports the right of conscience.

33. In response, Mr. Saxe and the Board expressed support for the right of conscience. Mr. Saxe raised the issue of conscientious objections to Plan B with the Board several times in 2005. He wanted to ensure that the Board approved of the staff's response.[23] The first time Mr. Saxe addressed the Board was by email in April 2005. He forwarded an article on Governor Blagojevich's order and an editorial that urged pharmacists with objections to

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[20] *Id. See also* PX 19, 473 (meeting notes).

[21] Trans. Hulet, Day 3, p. 78.

[22] PX 13 (NWWLC email to Saxe). *See also* Tran. Saxe, Day 2, pp. 26-27.

[23] Trans. Saxe, Day 2, pp. 33-34.

"find another line of work."[24] Mr. Saxe advised the Board that staff were telling pharmacists that they were permitted to refer. No Board member disagreed with this approach.

34. In response to Planned Parenthood's letter, the Board formally addressed the issue at its August 2005 meeting. The Board voted to continue to recommend referral when callers inquired about conscientious objections to Plan B.[25] The Board publicly endorsed this message again in its October 2005 newsletter.[26]

35. In January 2006, Planned Parenthood met personally with the Governor, warning her that the WSPA would support conscience rights at the Board's January 2006 meeting. The Governor then sent a letter to the Board opposing referral for personal or conscientious reasons. She also appointed a new member to the Board—Rosemary Duffy, who was a former Planned Parenthood board member whom Planned Parenthood had recommended.

36. As expected, at the January 2006 Board meeting, the WSPA recommended that pharmacists retain the right to refer patients elsewhere for reasons of conscience. It identified unprofessional conduct as lecturing patients, destroying

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[24] PX 6 (Saxe email).

[25] PX 20 (Board minutes); Tran. Saxe, Day 2, pp. 33-34. *See also* PX 18 (Saxe's memo to Board).

[26] PX 24 (Newsletter).

prescriptions, and refusing to return prescriptions.[27] The Board voted to open rulemaking to specifically address the conduct identified by the WSPA. But no Board members expressed opposition to referrals for reasons of conscience.[28]

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

37. In March 2006, Planned Parenthood provided a counter-presentation to the Board. After the presentation, Ms. Hulet advised the Governor that there was a strong possibility the Board would not adopt her "preferred policy." She explained that several board members believed pharmacists should have the same right of conscientious objection as other providers.[29]

The Governor then considered terminating existing Board members or issuing an emergency rule or executive order.[30]

38. Seeking to increase pressure on the Board, the Governor's Office then urged Planned Parenthood to work together with the Human Rights Commission ("HRC"). The HRC and Planned

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[27] The Board was not aware of any incidents involving lecturing or destroying or refusing to return prescriptions in Washington.

[28] 37, pp. 5-7 (Board minutes). *See also* Tran. Shafer, Day 1, pp. 96-97, 133.

[29] Tran. Hulet, Day 3, pp. 83-84. *See also* PX 53 (Governor's briefing memo).

[30] Tran. Hulet, Day 3, pp. 83-85; PX 55, p. 2 (Hulet notes, "#2-Emergency Rule"); PX 53.

Parenthood met, and within days, the HRC Executive Director warned Mr. Saxe that the agency believed conscientious objectors who referred patients were illegally discriminating against women.[31] The HRC Executive Director followed up with a letter threatening Board members with personal liability if they passed a regulation permitting referral.[32] Planned Parenthood reviewed drafts and helped shape the message of this intergovernmental warning, which was obviously intended to intimidate the Board.

D. The Board holds public hearings.

39. In April 2006, the Board held two public hearings. Testimony at the hearings focused almost exclusively on conscientious objections to Plan B.

40. During the hearings, pro-choice participants repeated and discussed four "refusal stories," allegedly involving the denial of access to medication. These stories involved (1) an abortion-related antibiotic at Swedish Medical Center; (2) prenatal vitamins in Yakima; (3) syringes sought by a man with gelled hair and tattoos, and (4) emergency contraception in Redmond. These stories originally surfaced in a March 2006 letter from

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[31] Tran. Saxe, Day 2, p. 42; Tran. Baros-Friedt, Day 3, pp. 181-82; PX 492 (Friedt email to Planned Parenthood); PX 499 (Friedt email to Governor's office); PX 65 (Friedt email to Planned Parenthood); PX 69 (Planned Parenthood email to Friedt). The HRC sent a second letter to the Board in July 2006.

[32] PX 70 (HRC April 2006 letter).

Planned Parenthood.[33] Nearly all of the alleged refusal stories provided in the rulemaking process were presented at the April 2006 hearings.[34]

E. The Board rejects the Governor's Rule.

41. After the April hearings, Board staff prepared a draft rule that aligned with the Governor's wishes. It prevented pharmacists from referring patients to nearby providers if the drug was in stock and the patient could pay the pharmacy.[35] The Board also asked staff to draft an alternative rule that would permit referral, including for reasons of conscience. The Board scheduled a vote on the two drafts for June 1, 2006.[36]

42. At the June 1 meeting, the Board rejected the Governor's favored rule. Instead, it voted unanimously in favor of the draft that permitted referrals for business, economic, convenience and conscientious reasons.[37]

43. Governor Gregoire reacted swiftly and forcefully. Hours later, she sent her third letter to the Board, "strongly oppos[ing] the draft pharmacist refusal rules recommended by the Washington State

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[33] PX 43 (Planned Parenthood letter).

[34] *See e.g.,* Tran. Saxe, Day 2, 38-39, 46; Tran. Harris, Day 9, pp. 17-18.

[35] PX 82 (Governor's staff email about rule).

[36] At the Board's request, staff provided the Board with more information on conscience issues as well. PX 99 (Memo to Board).

[37] *See* PX 102 (Board minutes).

Board of Pharmacy. . . ."[38] Representatives from the Governor's Office also met with Planned Parenthood to discuss rewriting the rule.

44. Four days later, Governor Gregoire publicly explained that she could remove the Board members when the Legislature returned if need be, but she did not "want this to be done like we're in a dictatorship."[39] She also asked Planned Parenthood to re-evaluate whether an emergency rule or executive order might work.[40] The media widely reported the Governor's threat. Board staff who had worked for DOH for decades testified that this was the first instance in which a Governor had ever threatened the Board, or any DOH agency board, with removal.

45. Local commentators, lawmakers and others roundly criticized the Board in the media. Several Board members asked Board staff to develop a media response to defend the Board's decision. But no response was ever developed. Instead, DOH began to distance itself from the Board's position.[41] DOH then directed Mr. Saxe and Mr. Brian Peyton[42] to meet

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[38] Tran. Hulet, Day 3, pp. 93-94; PX 111 (notes rewriting rule); PX 104 (Hulet email with Governor letter).

[39] Tran. Hulet, Day 3, pp. 98-100; PX 96 (transcript from press conference); PX 117 (news article).

[40] Tran. Hulet, Day 3, pp. 95; PX 118 (Planned Parenthood and National Women's Law Center memo on Blagojevich rule).

[41] Tran. Saxe, Day 2, pp. 64-69; PX 132 (DOH email); PX 472 (DOH talking points).

[42] Mr. Peyton works with DOH and the Governor's Office and directly reports to Secretary Selecky.

with Board Chair Asaad Awan to urge him to move the Board to reconsider the June 1 rule.[43]

46. Within a week of the vote, Planned Parenthood presented a new draft rule to the Governor.[44] After reviewing that rule, the Governor asked Ms. Hulet whether it was "clean enough for the advocates [*i.e.*, Planned Parenthood, NWWLC and NARAL] re: conscious/moral issues."[45]

47. Similarly, Mr. Saxe, who was intimately involved in the Governor's drafting process explained the Governor's primary issue with the June 1 rule in an email: "[T]he moral issue IS the basis of the concern."[46] "[T]he public, legislators and governor are telling us loud and clear that they expect the rule to protect the public from unwanted intervention based on the moral beliefs [*sic*] of a pharmacist."[47]

48. Mr. Saxe was also asked to compare the Governor's and WSPA's draft rules in June 2006. He testified that the primary difference between the rules was that the WSPA's rule permitted conscientious objections.[48] After reviewing the Governor's rule, he offered the following suggestion on how to accomplish the Governor's intent: "Would

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[43] Tran. Saxe Day 2, pp. 62-63.

[44] Tran. Hulet, Day 3, pp. 100-101; PX 123 (Planned Parenthood email with draft).

[45] Tran. Hulet, Day 3, pp. 104; PX 139 (Governor briefing memo).

[46] Tran. Saxe, Day 2, p. 169; PX 143 (Saxe email).

[47] PX 143; Tran. Saxe, Day 2, p 70.

[48] Tran. Saxe, Day 2, p. 72.

a statement that does not allow a pharmacist/pharmacy the right to refuse for moral or religious judgment be clearer? This would leave intact the ability to decline to dispense (provide alternatives) for most *legitimate* examples raised; clinical, fraud, business, skill, etc."[49] However, Saxe admitted that it was difficult to draft language that would allow referrals for business reasons, but not for reasons of conscience: "[T]he difficulty is trying to draft language to allow facilitating a referral for *only these non-moral or non-religious reasons*."[50] At trial, Mr. Saxe clarified that these "non-religious reasons" included referral because of a drug's expense, shelf-life, low demand, or a pharmacy's chosen business niche.[51]

F. The Governor convenes a task force.

49. In order to forge a consensus in support of her rule, the Governor convened a taskforce. She invited representatives from Planned Parenthood, Northwest Women's Law Center, the WSPA, Board member Donna Dockter, and Don Downing, a University of Washington Pharmacy Professor. But she did not invite any conscientious objectors, faith-based health care providers, or any other outside organizations besides her "advocates," which were the women's reproductive rights groups. Mr. Shafer represented the WSPA. Mr. Saxe attended from the Board. And Ms. Hulet led the two meetings.

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[49] PX 154, 155 (Saxe and Department of Health emails) (emphasis added).

[50] PX 157 (Saxe email) (emphasis added).

[51] Tran. Saxe, Day 1, pp. 72-77; PX 157.

G. The task force agrees to include business exemptions in the rule.

50. The task force roughly divided into two camps. All three pharmacists on the taskforce (not including the Board's Executive Director Saxe) urged the taskforce to revise the Governor's rule to permit referral for both business and conscience reasons.[52] By contrast, the Governor, Planned Parenthood, and the other "advocates" insisted that referrals for reasons of conscience were off the table.[53]

51. The taskforce members discussed a variety of circumstances in which pharmacies regularly refer patients due to the business, economic, practical, and clinical realities of modern pharmacy practice. Mr. Shafer and Ms. Dockter insisted that referral should continue to be permitted for the following reasons:

(1) the cost of the drug;

(2) low demand for the drug;

(3) limited shelf space;

(4) the need to order more of the drug than what the patient requested;

(5) an agreement prohibiting the purchase of certain brands of drugs or from certain suppliers under formularies or contracts with buying groups and wholesalers;

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[52] Tran. Hulet, Day 3, pp. 57-58.

[53] Tran. Shafer, Day 1, p. 103.

(6) a pharmacy's decision that it would take too much time or effort to register to sell the drug, monitor the patient, or prepare the prescription, even though the prescription could be filled without any specialized equipment or expertise;

(7) a pharmacy's decision not to accept certain forms of payment, including rejecting insurance altogether or rejecting specific insurance plans because of low reimbursement rates or hassles with auditing or repayment;

(8) a niche pharmacy's decision to limit its inventory to certain drugs or patient populations;

(9) a pharmacy's decision not to sell certain narcotics because of hassle, fear or burglary or desire not to attract drug seekers;

(10) a pharmacy's decision to offer some narcotics or syringes only by prescription to avoid having to keep a registry or log;

(11) a pharmacy's decision not to offer simple compounding; and

(12) a pharmacy's decision not to offer unit-dosing or blister packing, which doctors may require as a part of some prescriptions.[54]

52. Ultimately, the members of the taskforce reached a compromise: Mr. Shafer, for the WSPA,

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[54] Tran. Shafer, Day 1, pp. 100-109, 153; Tran. Saxe, Day 3, pp. 31-32; Day 2, pp. 82-83; Tran. Hulet, Day 3, p. 172.

agreed to yield on the request to accommodate referrals for reasons of conscience; the Governor, Planned Parenthood, and the advocates agreed to permit referrals for business, economic, and convenience reasons.[55]

53. Taskforce members also agreed to allow referral for conscientious objections to lethal drugs under Washington's Death With Dignity Act, which had not yet been enacted when the taskforce met.[56] They also confirmed that the Board had not enforced the Stocking Rule, that it lacked a standard by which to do so, and that the Regulations would not change stocking requirements.[57]

54. To implement the compromise position—which would allow referral for business and convenience reasons, but not for reasons of conscience—the taskforce included a nonexhaustive list of exemptions from the rule, an exemption for customary payment requirements, and a catch-all exemption for any "substantially similar circumstances."[58] The taskforce agreed that the open-ended language in the rule provided ample flexibility to accommodate referrals for business reasons.[59]

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[55] Tran. Shafer, Day 1, p. 106.

[56] Tran. Shafer, Day 1, pp. 109-110; Tran. Saxe, Day 1, pp. 186-187.

[57] Tran. Shafer, Day 1, pp. 115-116; Hulet, Day 3, pp. 61-63.

[58] *See e.g.,* Tran. Shafer, Day 1, pp. 110-111; Tran. Hulet, Day 3, pp. 56-57, 62.

[59] *Id.*

55. Although the State suggested that the task force did not intend to protect referrals for business reasons, the Court finds that the weight of the evidence is to the contrary. Mr. Shafer provided uncontroverted testimony that the taskforce drafted the Regulations to preserve referral for a variety of business, economic, convenience, and clinical reasons, but not for reasons of conscience. Ms. Hulet testified that she relied on Mr. Shafer and Ms. Dockter to identify the necessary business exemptions and to explain how the pharmacy business worked. Ms. Hulet also testified that Mr. Shafer was "key" to finalizing the exemptions.[60] Ms. Hulet confirmed that the taskforce intended to capture the examples raised by Mr. Shafer and Ms. Dockter at the taskforce. She also testified that Planned Parenthood agreed to permit the WSPA's business exemptions advocated by Mr. Shafer in exchange for Mr. Shafer capitulating on the WSPA's request for conscience protection.[61]

56. This account was confirmed by statements from the Board members at the August and December 2006 meetings. At those meetings, Ms. Dockter repeatedly raised business and convenience reasons for referral. In response, Mr. Harris testified that he confirmed at the August Board meeting that he would not discipline pharmacists for these reasons.[62] Mr. Harris also testified that the Board's

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[60] Tran. Hulet, Day 3, p. 49-51. *See also* Tran. Shafer, Day 1, p. 56-57.

[61] Tran. Hulet, Day 3, p. 62.

[62] *See e.g.,* Tran. Harris, Day 10, pp. 48-59, 66-69; Tran. Shafer, Day 1, pp. 102-103; PX 99, Section 5 (Dockter

counsel, Joyce Roper, advised the Board that it had the discretion to make decisions on a case-by-case basis and would not impose discipline if they acted consistently with current pharmacy practice.[63] Ms. Duffy made similar statements at the Board's meetings, specifically referring to the breadth of the non-exhaustive "substantially similar" exemption language.[64] No Board member expressed disagreement with Ms. Duffy or Ms. Roper (although Ms. Dockter urged greater clarity in the Regulations). In short, abundant evidence supports a finding that the Regulations were intended to permit referrals for business and convenience reasons, but not for reasons of conscience.

H. The Board approves the Governor's rule.

57. The Governor's rule was set for a preliminary vote on August 31, 2006. Just days before the vote, the Governor personally called Board Chair Asaad Awan. She told Awan that he was "to do [his] job" and to "do the right thing" and that she was going to "roll up her sleeves and put on her boxing gloves."[65] According to Ms. Hulet, however, the Governor had previously instructed her not to contact Board members because it would be

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examples); PX 532 (Dockter examples); PX 210 (August 2006 Board minutes); PX 232 (Dec. 2006 Board minutes).

[63] *Id.*

[64] *Id.*

[65] Board Chair Awan Dep., 72:6-73:3.

illegal.[66] The Governor also sent a fourth letter to the Board, urging approval of her rule.

58. Shortly before the preliminary vote, the FDA announced that Plan B would be available in pharmacies over the counter for restricted distribution. At the urging of Planned Parenthood, Ms. Hulet added a new clause—"to distribute drugs and devices approved by the U.S. Food and Drug Administration for restricted distribution by pharmacies"—specifically to ensure that pharmacies would still be required to deliver Plan B under the rules.[67]

59. At the August meeting, the Board approved the Governor's rule by a preliminary vote of 4-2.

60. To guarantee final approval of the Regulations in 2007, the Governor took another unprecedented step: She involved her "advocates"—Planned Parenthood, NWWLC and NARAL—in the process of interviewing candidates for the Board. Board Chair Awan, who applied for a second term, testified that his interview focused almost exclusively on the pharmacy refusal issue.[68] His reappointment was opposed by the "advocates," and the Governor declined to reappoint him.

61. The Governor then selected two new candidates recommended by Planned Parenthood, including Vandana Slatter, who was a NARAL

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[66] Tran. Hulet, Day 3, pp. 97-98.

[67] Tran. Hulet, Day 3, pp. 109-110; PX 203 (Planned Parenthood email).

[68] Board Chair Awan Dep., 11:5-13:7, 14:20-24.

Washington board member.[69] The Senate committee chaired by Karen Keiser also scheduled a Board member confirmation hearing for the day immediately following the Board's final vote on the Regulations.

62. Thus, on April 12, 2007, the Board voted to approve the final Regulations. Three Board members were confirmed the next day.[70] The Regulations became effective in July 2007.

63. Under the Washington Constitution and Washington law, governors are explicitly empowered and entitled to issue statements of public policy and directives to agencies and administrative entities. Moreover, the process rendering the rules is democracy at work. The involvement of Governor Gregoire in the rulemaking process was well within the "supreme executive power of the state"[71] vested to her by the Washington Constitution, is part of the normal political process, and does not taint the rulemaking processes undertaken by the Board.

I. The rulemaking process focused on conscientious objections to Plan B.

64. The State has argued that, throughout the rulemaking process, the Board was not focused on conscientious objections to Plan B; instead, it was focused on all medications and all forms of objection. In support, the State relies on documents such as the

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[69] Tran. Hulet, Day 3, p. 122; Tran. Saxe, Day 2, pp. 89.

[70] Tran. Hulet, Day 3, p. 121; PX 257 (Governor's Monday alert).

[71] Washington Constitution, Art. III, Sec. 2.

Small Business Economic Impact Statement and Concise Explanatory Statement, which were issued after the Board passed the Regulations.

65. The Court finds that these documents are not inconsistent with the Board's focus on conscientious objections to Plan B, and that such a focus is supported by the great weight of the evidence, including other documents issued by the Board.

66. For example, the Board's CR-101, memoranda, newsletters, and emails were dominated by emergency contraception and conscientious objection to Plan B. Board meetings and public testimony also focused almost entirely on emergency contraception and conscientious objections.

67. The Board's primary undertaking to determine the impact of the Regulations on the practice of pharmacy was its survey in October 2006 of Washington pharmacies.[72] That survey focused exclusively on Plan B and potential accommodations for conscientious objectors.

68. The formal guidance document on the Regulations, which the Board provided directly to pharmacies and pharmacists, referred to Plan B and no other drug. It also singled out only one reason for referral that was prohibited: conscientious objection.[73]

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[72] PX 432 (Survey).

[73] PX 436 (Guidance letter).

69. Similarly, Board witnesses testified that the object of the Regulations was to specifically address conscientious objections.[74] In fact, Mr. Harris, who was Vice-Chair in the 2006-07 rulemaking process and Chair in the 2010 process, stated in writing to the Board that Plan B was not an abortifacient, that he would be reluctant to discipline any pharmacy or pharmacist that made a good faith effort to comply with the Stocking Rule, and that he would recommend prosecuting all conscientious objectors who refused to fill prescriptions to the "full extent of the law."[75]

70. In sum, the Court finds that the weight of the evidence supports the conclusion that the Board's regulatory focus was on requiring onsite delivery for Plan B and forbidding referral for reason of conscience—not, as Defendants contend, on access to all drugs and all non-clinical reasons for refusing to deliver them.

J. The 2010 rulemaking process confirmed that the Regulations protect referrals for business reasons.

71. The Board revisited the Delivery Rule in 2010. This case was initially set for trial on July 28, 2010. Approximately a month before trial, and shortly after their motion for summary judgment had been denied, the State informed Plaintiffs that the Board of Pharmacy wanted to initiate a new

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[74] *See e.g.,* Tran. Harris, Day 11, p. 50; Tran. Fuller, Day 4, p. 62.

[75] PX 253 (Former Chair Harris letter to the Board).

rulemaking process and adopt a rule that permitted referrals for all reasons, including referrals for reasons of conscience.

72. The Board intended to develop a new rule because it was concerned that the Regulations did not allow enough leeway for referrals. On June 29, 2010, the Board unanimously voted to initiate rulemaking. The Board intended to amend the Regulations to allow "all pharmacies and pharmacists" to engage in facilitated referral for "any reason," including when the pharmacy was "unwilling to stock . . . or timely deliver or dispense lawfully prescribed medications . . . for conscientious reasons."[76] Six Board members attended the June 29 meeting, and a majority of the Board Members voiced support for referral before the vote. No Board member spoke against referral.[77]

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

1. The Board voted to commence the rule-making process to amend the Rules to permit facilitated referral for "all pharmacies and pharmacists" when a pharmacy or pharmacist is unable or unwilling to stock or

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[76] PX 348 (Dkt. #441, Stipulation), ¶ 1.4; *see also* PX 315 (BOP minutes).

[77] PX 315 (Board minutes).

deliver a drug on site for "any reason," including "for conscientious reasons." (¶1.4)[78]

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

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

4. Facilitated referral "is often the most effective means to meet the patient's request when the pharmacy or pharmacist is unable or unwilling to provide the requested medication or when the pharmacy is out of stock of medication." (¶1.5)

5. Facilitated referral "improve[s] the delivery of health care in Washington, including when a drug is not cost-effective to order, the drug requires monitoring or follow-up by the pharmacist, and other reasons." (¶1.5)

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

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

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

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[78] Numerical references are to the numbered sections of the Stipulation, Dkt. #441, PX 348.

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

73. The Stipulation was not a settlement of claims, but an agreement to stay the trial to permit a change in the rule that the Board asserted would likely accommodate Plaintiffs' constitutional interests. Key State officials reviewed the Stipulation prior to entry on July 12, 2010, including the Secretary of the Department of Health (Mary Selecky), the Assistant Secretary (Karen Jensen), and the current Executive Director of the Board of Pharmacy (Susan Teil Boyer).[79] Ms. Teil Boyer confirmed that the representations in the Stipulations were accurate and neither the Department of Health nor the Board attempted to revoke them at any time.[80]

74. The announcement of the new rulemaking process provoked an immediate outcry from Planned Parenthood and the Governor. Despite the fact that there was no draft amendment or rule, the Governor quickly issued a statement opposing facilitated referral.[81] Although the Department of Health initially supported facilitated referral, Secretary Mary Selecky sent the Board a letter informing it that she "agree[d] with what [they] have heard from Governor Gregoire's office," and that the "rule has

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[79] 79 PX 347 (DOH timeline).

[80] Board's 30(b)(6) designee, Susan Teil Boyer, Dep., 22:13-27:22.

[81] PX 329 (Governor's statement).

served patient safety well in Washington over the three years it's been in place."[82]

75. At the Board's November 2010 meeting, the Board discussed facilitated referral. At that meeting, Chair Harris suggested that while today the Board might be discussing objections to Plan B, the next issue could be religious conservatives serving gays.[83] Chair Harris also testified that he understood the only instance under the Regulations where a facilitated referral was not permissible was for conscientious objections.[84] The Board then asked its staff to research the meaning of the Stocking Rule and to confirm that pharmacies need not stock expensive drugs; that the Regulations "recognize[] that a drug can be out of stock even when a good faith effort at compliance is made";[85] and that "a representative assortment does not mean every drug needed by a pharmacist's patients."[86] The Board's Executive Director Teil Boyer confirmed this in a PowerPoint presentation, which she provided to the Board at its December 2010 meeting. The PowerPoint was written with the Board's assistant

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[82] PX 389 (Selecky letter).

[83] Tran. Harris, Day 10, p. 101.

[84] Tran. Harris, Day 10, p. 99. Mr. Harris agreed that the Board was unaware of any personal nonreligious objections ever being asserted in either the 2006-07 or 2010 rulemaking processes.

[85] PX 403 (AGO letter).

[86] *Id.*

attorney general and explains that the Regulations have a carve-out for expensive "specialty" drugs.[87]

76. After Chair Harris confirmed that he would "never" vote to allow "religion as a valid reason for a facilitated referral," the Executive Director asked Mr. Harris to take a "more active and verbal role" at the December 2010 meeting.[88] At that meeting, the Board voted 5-1-1 to end the rulemaking process with no changes to the Regulations. The Board's Rule 30(b)(6) designee, Board Chair Al Linggi, explained that there was no need to amend the rules because there was no evidence of a lack of timely access to drugs, even though pharmacies routinely receive requests for drugs that are out of stock and refer patients elsewhere.[89]

77. Board witnesses confirmed that the testimony at the 2010 rulemaking process, just like the 2006-07 process, focused on two conscientious objections to emergency contraception. During the 2010 rulemaking process, the Board repeatedly confirmed that facilitated referrals for business reasons continued to be commonplace even after the 2007 Regulations became effective.[90]

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[87] PX 413 (Teil Boyer PowerPoint); Tran. Harris, Day 10, pp. 106-107.

[88] PX 402 (Teil Boyer/Harris email)

[89] Rule 30(b)(6) Board designee, Linggi Dep. 113:14-114:12; 115:2-16; 116:12-118:10; 118:20-119:1; 119:21-120:19; 124:10-125:16; 130:19-131:1.

[90] *See e.g.,* PX 315 (2010 Board minutes); PX 356 (Board transcript of 2010 meeting); State's Exhibit A-27 (September 2010 public comment from WSPA); PX 348 (2010 Stipulation); PX 343 (email from Board's attorney); PX 359 (letter from

IV. Access to Medications Before and After the 2007 Regulations

78. Several Board witnesses testified that the purpose of the Regulations is to increase timely access to medication. However, the evidence at trial revealed no problem of access to Plan B or any other drug before, during, or after the rulemaking process.

A. Access to emergency contraception generally.

79. Washington has long been a leader in promoting access to emergency contraception. It was the first state in the nation to permit pharmacists to prescribe Plan B, and its pharmacy schools were the first in the nation to certify students as emergency contraceptive providers.[91] Due in part to these programs, Washington has long had some of the highest sales of Plan B in the nation.

80. In 2006, Plan B became available to anyone over age sixteen without a prescription. Since then, Plan B's sales have further increased. Currently, Plan B can be purchased at pharmacies, doctors' offices, government health centers, emergency rooms, Planned Parenthood, and through a toll-free hotline. It is also available via the Internet for overnight delivery.

Board Chair); PX 380 (email from Board Chair); PX 405 (letter from Board's attorney); PX 322 (AAG statement).

[91] PX 41(Downing Email); PX 42 (Downing Memo); PX 138 (WSPA Fact Sheet).

81. Plan B is also widely available in Plaintiffs' communities. Prior to trial, Ms. Mesler confirmed that within one mile of her pharmacy, Plan B is available at four different pharmacies; within five miles, it is available at thirteen pharmacies; and within twenty-five miles, it is available at eighteen pharmacies.[92] Similarly, Ms. Thelen confirmed that within one mile of her former job at Safeway, Plan B is available at two pharmacies; within twenty miles, it is available at twenty-eight pharmacies; and within twenty-five miles, it is available at sixty pharmacies.[93] And within five miles of Ralph's Thriftway, there are over thirty pharmacies that stock Plan B and four that stock *ella*.[94] Plaintiffs have regularly referred patients to these nearby pharmacies, and there is no evidence that any of Plaintiffs' customers have ever been unable to obtain timely access to emergency contraceptives or any other drug.

B. Survey data on access to Plan B.

82. The Board's survey data confirms that there has been no problem of access to Plan B. In October 2006, after voting to approve the Regulations, the Board commissioned a study of access to Plan B. That survey intentionally over-sampled rural pharmacies to ensure that it would identify any

[92] Tran. Mesler, Day 6, p. 178.
[93] 93 Tran. Thelen, Day 6, p. 127.
[94] Tran. Stormans, Day 5, p. 21.

access problems.[95] The total sample size was 540 pharmacies.[96]

83. According to the survey, 77% of all Washington pharmacies stock Plan B. Of the 23% that do not stock it, only 2% cited religious objections, while 21% cited low demand, an easy alternative source, or the pharmacy's status as a hospital or niche pharmacy. Of the thirty-eight rural pharmacies, only six did not stock Plan B. None of those six cited a religious reason.[97] Thus, the survey confirms that Plan B is widely available, and religious objections do not pose a barrier to access.

84. In 2006, the Washington State Pharmacy Association also studied access to medication, with a particular focus on time-sensitive medications and rural areas.[98] The WSPA's conclusion, which Mr. Shafer shared with Mr. Saxe, Ms. Hulet, and the Board, was that there was no problem of access to any medication in Washington.[99] The WSPA was also unaware of any instance where a patient failed to receive medication in a timely manner due to a pharmacist's objection or where a pharmacist confiscated or destroyed a prescription or lectured a patient. Mr. Shafer also testified at trial that there was no problem of access to Plan B or any other drug prior to the rulemaking process.[100] The Court finds

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[95] PX. 432 (DOH Survey); Tran. Fuller, Day 4, p. 49.
[96] Tran. (Salmi) Hodgson, Day 8, p. 136.
[97] PX. 219 (Fuller email); Tran. Fuller, Day 4, pp. 50-51.
[98] Tran. Shafer, Day 1, p. 171.
[99] Tran. Shafer, Day 1, pp. 144, 171.
[100] PX 432 (DOH Survey); Tran. Shafer, Day 1, p. 171.

Mr. Shafer's testimony about access, as the head of the State Pharmacy Association, to be credible.

85. In 2008 the WSPA conducted an online survey on access to emergency contraceptives. As Mr. Shafer explained, the underlying responses and data demonstrate that 86% of all pharmacies stock emergency contraceptives. Of the 14% that did not stock, only about 3% cited religious beliefs as the sole reason for their decision.[101] The data also revealed that 98.3% of pharmacists reported that they either provide emergency contraception or have an established system to facilitate the immediate needs of their patients. This further confirms that there is no problem of access to Plan B.

C. Board testimony on access to Plan B.

86. At trial, Board witnesses confirmed that there was no problem of access to Plan B or any other drug, either before or after the rulemaking process. Former Chair Harris, who served on the Board during both rulemaking processes, explained that the Board has never identified a single drug that patients are unable to access in Washington:

> Q. Four years after the rule-making process began and you completed that 2010 process, the board still was not able to identify a single drug that was in Washington that was unable to be obtained due to access issues, right?

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[101] Tran. Shafer, Day 10, p. 141.

A. As far as I know, we have no cases.[102]

87. All three former Board Executive Directors, the Board's Pharmacist Consultant and former and current Board members, similarly testified. For example, pharmacy consultant Tim Fuller testified:

> Q. And you are not aware of any area in Washington, rural or nonrural for which there is an access problem for time-sensitive drugs, correct?
>
> A. Correct.[103]

Mr. Saxe testified that he could not recall any complaints to the Board, about access to medication in rural areas. And that the only information before the Board on that issue was from the 2006 survey.[104] Ms. (Salmi) Hodgson testified:

> Q. At stakeholders meetings, you can't recall, can you, a single community in the State that was identified as a location where one couldn't get their HIV medication, can you?
>
> A. No, but there was concerns about making sure that there's access to medication.[105]
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[102] Tran. Harris, Day 10, pp. 105, 26 (mentioning DEA restrictions on amphetamines, but no awareness of any other access problems).

[103] Tran. Fuller, Day 4, pp.46-47.

[104] Tran. Saxe, Day 2, p. 29-30; PX 432 (DOH Survey).

[105] Tran. (Salmi) Hodgson, Day 8, p.96.

> Q. [A]nd there's not a single area in the State that was identified where there was an access problem at the stakeholders meetings to Plan B, right?
>
> A. No one came forth and said specifically this community. There was general concern. [106]

After her deposition was read into the record, Ms. Teil Boyer also agreed that she was not aware of any pharmacy refusing access to Plan B patients or of any other access problem.[107]

88. Similarly, after years of test shopping and litigation, Defendants have not identified even one instance where a pharmacist refused to fill or referred a patient because of a personal, non-conscientious objection.[108] Despite frequent mentions of HIV during the rulemaking process, there is no evidence that any patient has ever been denied HIV drugs due to a conscientious or "personal" objection. Neither one of the two intervenors diagnosed with HIV/AIDS has ever been denied medication, nor were they aware of anyone else being denied HIV medication due to a personal or conscientious objection.[109] Board witnesses confirmed that no one testified in either the 2006-07 or 2010 rulemaking

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[106] Tran. (Salmi) Hodgson, Day 8, pp. 96-97.

[107] Tran. Teil Boyer, Day 6, pp. 21-22; *see also* PX 408 (Email from Board Member Connolly), pg. 4.

[108] See e.g., Tran. Schouten, Day 4, p. 124; Tran. Billings, Day 7, p. 171-72, 174; Tran. Harmon, Day 8, pp. 4, 15; PX 527 (Andreini Declaration).

[109] 109 Tran. Schouten, Day 4, p. 124; Tran. Billings, Day 7, p.174.

process to being aware of any HIV denials or access issues.[110]

89. Finally, no Board witness, or any other witness, was able to identify any particular community in Washington—rural or otherwise—that lacked timely access to emergency contraceptives or any other time-sensitive medication.

90. In short, the weight of the testimony at trial strongly supports the conclusion that there was no problem of access to Plan B or any other drug, either before or after the rulemaking process.

D. Refusal stories.

91. In the absence of general, empirical, or systematic evidence of an access problem, Defendants introduced into evidence several anecdotal "refusal stories" in support of the argument that there is an access problem. For example, during the 2006-07 rulemaking process, the Governor specifically asked Planned Parenthood to collect refusal stories.[111] In response, Planned Parenthood came up with the Four Refusal Stories that were repeated throughout the 2006 rulemaking process: abortion-related antibiotics at Swedish Medical Center, prenatal vitamins in Yakima, syringes for a man with "gelled" hair and tattoos, and emergency contraception in Redmond, and a map repeating some of those stories and adding a

[110] *Id.*; Tran. (Salmi) Hodgson, Day 8, pp. 94.
[111] Tran. Hulet, Day 3, pp. 79-80.

few new ones.[112] Similarly, during the 2010 rulemaking process, the State and Intervenors sought to supplement the rulemaking record with additional refusal stories. And at trial, Intervenors sought to introduce additional refusal stories that never arose during the rulemaking process.

92. After carefully considering the refusal stories in the rulemaking record and at trial, the Court finds that those stories do not demonstrate a problem of access to medication, for several reasons.

93. First, many of the refusal stories involved complaints that a drug was not in stock, without any reference to conscientious or other objections.[113] That does not demonstrate an access problem. As noted above, pharmacies may be out of stock for a wide variety of reasons, many of which are permissible under the Regulations. In fact, the Board's survey found that pharmacies were more than ten times

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[112] PX. 43 (Planned Parenthood Letter); Ex. B-10 (Map). There was no evidence that the Board reviewed the map prepared by Planned Parenthood.

[113] For example, Defendant-Intervenor Rhiannon Andreini testified that a pharmacist told her the pharmacy "did not carry" Plan B. She also testified that the pharmacist did not tell her that he had a religious objection to stocking Plan B and she could only speculate about the reason why he did not carry the drug. Trans. Andreini, Day 9, p. 84. See also PX 527 (Andreini Declaration); Ex. B-41 (Celia Warren letter); Ex. B-39 (Jennifer Crow letter). Ms. Warren test shopped five pharmacies. Two of the pharmacies were "out of stock". Ms. Crow tried to obtain emergency contraception at a pharmacy and was told they did not stock it, with no reference to a conscientious or other objection to the drug.

more likely to not stock Plan B for business reasons than for reasons of conscience.[114]

94. Second, many of the refusal stories did not involve refusals at all. Rather, they involved complaints that a pharmacist said something a patient found offensive;[115] that a patient had to wait a short period of time before obtaining a drug;[116] or that the patient received the drug from a different pharmacist who was on duty at the same time.[117] Such incidents are generally permissible under the Regulations.

95. Third, several of the key refusal stories were investigated by the Board and found to be inaccurately reported, unsubstantiated, or not a violation of the rules. For example, the Board investigated the Swedish Medical Center incident, which figured prominently in the 2006 rulemaking process, and found that the pharmacist ultimately did dispense the drug, did not violate any rules, and

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[114] Ex. 432 (DOH Survey).

[115] For example, Ms. Harmon, an Intervenor and former Planned Parenthood volunteer, testified that she was offended in 2003 when a pharmacist advised her that Plan B was not a form of birth control. But Plan B's labeling specifically notifies patients that it is not a form of birth control. And Ms. Harmon obtained Plan B without delay: Tran. Harmon, Day 8, pp. 12-13, 15, PX 424.

[116] For example, Dr. Kate McLean testified about an incident where one of her patients seeking misoprostol was asked to wait until a pharmacist returned from lunch break, but the patient declined to do so. Tran. McLean, Day 8, pp. 178-182.

[117] Tran. Harmon, Day 8, p. 15.

did not impose a barrier to access.[118] Similarly, the Board investigated the prenatal vitamins complaint, which also figured prominently in the rulemaking process, and found that the patient had refused to pay for the product.[119]

96. Fourth, many of the refusal stories were uncorroborated or involved mere hypotheticals. One of the most prominent stories involved an alleged denial of syringes for a man with gelled hair and tattoos. But this incident was presented in a letter to the Board as a hypothetical. It has never been corroborated, and no patient has ever filed a complaint related to the denial of syringes.[120] (Pharmacies also have no obligation to deliver a drug if they believe the prescription is fraudulent, WAC 246-869-010(1)(d), and no obligation to deliver syringes if they believe the syringe may be used for an unlawful purpose, RCW 70.115.050).

97. Fifth, several of the refusal stories involved prescriptions for misoprostol, which is commonly used in a medical abortion procedure. But pharmacists have a right under state law not to participate in an abortion. RCW 9.02.150. Several witnesses testified about the delicate situations that can arise when a patient is seeking misoprostol for an abortion or a miscarriage as the recommended dosage is similar, and how inquiring into the patient's situation is not advisable.[121] Thus, when a

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[118] PX 98 (DOH Investigation Report).

[119] PX. 217 (DOH letter).

[120] Tran. Saxe, Day 2, p. 167. This example was also repeated in the HRC's letter. PX. 70 (HRC letter).

[121] Tran. McLean, Day 8, p. 176.

pharmacist is presented with a prescription for misoprostol, and it is unclear whether the prescription is for an abortion or not, referring the patient elsewhere is preferable to having the pharmacist interrogate the patient about what the prescription will be used for. Thus, these stories do not demonstrate a problem of access.

98. Sixth, many of the refusal stories involved conduct that is permitted under the Regulations. For example, in the story involving emergency contraception in Redmond—the fourth of the prominent refusal stories during the 2006 rulemaking—the patient was seeking Plan B without a prescription.[122] At that time, Plan B was not available for sale without a prescription. Thus, the pharmacy would have been violating the law if it had provided the drug. Instead, it offered to refer the patient to a nearby pharmacy that could write a prescription under a collaborative agreement, but the patient refused.

99. Similarly, many of the refusal stories were not the result of natural encounters with access problems, but were instead manufactured by an active campaign of test shopping. During the 2006-07 rulemaking process, Planned Parenthood and other pro-choice activists published advertisements on their websites and in fliers soliciting refusal stories; they solicited women to call pharmacies to ask whether they stocked Plan B; and they sent women into pharmacies to test whether the

[122] PX 25 (Planned Parenthood letter to pharmacy), 28 (Letter from pharmacy to Planned Parenthood).

pharmacists would dispense Plan B. They also developed forms to "document" the incidents including asking women to provide their opinions on whether the pharmacist expressed "disapproval" when they requested the drug.[123] Several pharmacists and owners confirmed the test shopping said that they would receive a rash of calls or requests for Plan B within a few days.[124] Both Ms. Thelen and Ms. Mesler were test-shopped by Planned Parenthood.[125] No evidence was produced regarding whether the Catholic hospitals and retail pharmacies were test shopped.

100. Having closely examined the refusal stories, including those in the rulemaking record and the testimony and documents submitted at trial, the Court finds that the refusal stories do not demonstrate a problem of access. At best, Defendants have offered a handful of anecdotes that do not cast meaningful light on the issue of access—most of which involve conduct that is not prohibited by the Regulations. At worst, the refusal stories show a concerted effort to manufacture an alleged problem of access where there isn't one.

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[123] PX 448 (Cover My Pills Ad); PX 490 (Data Collection Form); PX 513 (Data Collection Form); PX 514 (Data Collection Form).

[124] Tran. Stormans, Day 5, p. 17; Tran. Thelen, Day 6, p. 140; Tran. Shafer, Day 1, p. 125.

[125] PX. 490, 514; Trans. Thelen, Day 6, p. 176. Trans. Blackman, Day 5, p. 118. Planned Parenthood used the test shopping incident involving Ms. Thelen in a letter to the Board. Ex. B-21 (Planned Parenthood letter). After hearing testimony from Ms. Thelen and Ms. Dana (Blackman) Gigler, I find that Planned Parenthood's account to the Board was misleading.

IV. The Text of Washington's Regulations

101. The relevant portions of the Regulations are codified at WAC 246-869-010 (the "Delivery Rule") and WAC 246-869-150(1) (the "Stocking Rule").[126] The Delivery Rule provides, in pertinent part, as follows:

> (1) Pharmacies have a duty to deliver lawfully prescribed drugs or devices to patients and to distribute drugs and devices approved by the U.S. Food and Drug Administration for restricted distribution by pharmacies, or provide a therapeutically equivalent drug or device in a timely manner consistent with reasonable expectations for filling the prescription, except for the following or substantially similar circumstances:
>
> (a) Prescriptions containing an obvious or known error, inadequacies in the instructions, known contraindications, or incompatible prescriptions, or prescriptions requiring action in accordance with WAC 246-875-040.

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[126] Another portion of the Regulations is codified at WAC 246-863-095(4). This portion defines "unprofessional conduct" to include destroying or refusing to return a lawful prescription, violating a patient's privacy, discriminating against a patient, or intimidating or harassing a patient. WAC 246-863- 095(4); *see also* WAC 246-869-010(4) (same). This provision, which was uncontroversial, clarifies that pharmacists can be subjected to professional discipline for engaging in unprofessional conduct. No party contends that it applies to Plaintiffs.

(b) National or state emergencies or guidelines affecting availability, usage or supplies of drugs or devices;

(c) Lack of specialized equipment or expertise needed to safely produce, store, or dispense drugs or devices, such as certain drug compounding or storage for nuclear medicine;

(d) Potentially fraudulent prescriptions; or

(e) Unavailability of drug or device despite good faith compliance with WAC 246-869-150.

(2) Nothing in this section requires pharmacies to deliver a drug or device without payment of their usual and customary or contracted charge.

(3) If despite good faith compliance with WAC 246-869-150, the lawfully prescribed drug or device is not in stock, or the prescription cannot be filled pursuant to subsection (1)(a) of this section, the pharmacy shall provide the patient or agent a timely alternative for appropriate therapy which, consistent with customary pharmacy practice, may include obtaining the drug or device. These alternatives include but are not limited to:

(a) Contact the prescriber to address concerns such as those identified in subsection (1)(a) of this section or to

obtain authorization to provide a therapeutically equivalent product;

(b) If requested by the patient or their agent, return unfilled lawful prescriptions to the patient or agent; or

(c) If requested by the patient or their agent, communicate or transmit, as permitted by law, the original prescription information to a pharmacy of the patient's choice that will fill the prescription in a timely manner.

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

103. In general, the Delivery Rule imposes on pharmacies "a duty to deliver lawfully prescribed drugs . . . in a timely manner." WAC 246-869-010(1) (emphasis added) (the "Delivery Rule"). This duty is then subject to several exceptions. Five exceptions are enumerated in WAC 246-869-010(1)(a)-(e). A sixth exception says that pharmacies need not dispense a drug "without payment of their usual and customary or contracted charge." WAC 246-869-010(1)(a)- (e). The seventh exception is a catch-all provision applying to any circumstances that are "substantially similar" to the first five exceptions. WAC 246-869-010(1). These exceptions will be discussed in greater detail below.

104. A key exception is WAC 246-869-010(1)(e). It provides that a pharmacy need not deliver a drug when it is "[u]navailab[le] . . . despite good faith compliance with WAC 246-869- 150 [*i.e.*,

the Stocking Rule]." *Id.* In other words, pharmacies need not deliver a drug when (a) the drug is "unavailable" (*i.e.*, out of stock), and (b) the pharmacy is in "good faith compliance with [the Stocking Rule]." Thus, the Delivery Rule must be read together with the Stocking Rule.

105. The Stocking Rule has been on the books for over forty years. It provides, in pertinent part: "The pharmacy must maintain at all times a representative assortment of drugs in order to meet the pharmaceutical needs of its patients." WAC 246-869-150(1). The terms "representative assortment," "pharmaceutical needs," and "patients" have never been defined. Until the events giving rise to this litigation, the Board had never attempted to enforce the Stocking Rule against any pharmacy in over forty years.

V. The Operation of the Regulations

106. The Stocking Rule has now been in force for over forty years, and the Delivery Rule has been in force for over four years. Much of the evidence at trial focused on the effect of these rules in their actual operation. In general, the evidence showed that these Regulations have impacted the practices of stocking or referral of most pharmacies. To illustrate, it is common knowledge that a large number of pharmacies do not stock narcotic medicines. One large chain displays prominently a sign at the entrance of its stores advising patients that it does not stock Oxycontin. This practice continues unabated by the stocking rule or the delivery rule or the combination of the two.

A. Stocking in practice.

107. Since the enactment of the Regulations, pharmacies have continued to exercise broad discretion over which drugs to stock. As several witnesses testified, pharmacies routinely decline to stock drugs for a wide variety of business, economic, and convenience reasons:

- Pharmacies decline to stock a drug when it falls outside the pharmacy's business niche;[127]
- Pharmacies decline to stock drugs when they have insufficient demand;[128]
- Pharmacies decline to stock drugs when they do not want to obtain the equipment or expertise necessary to dispense them;[129]

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[127] Pharmacies specialize in HIV drugs, pediatric drugs, fertility drugs, diabetes drugs, mental health drugs, or long-term care drugs. So, for example, pediatric pharmacies typically do not stock drugs for the elderly; HIV pharmacies typically do not stock cancer drugs; and mental-health pharmacies typically do not stock fertility drugs. *See e.g.,* Tran. Saxe, Day 1, 75:19-20, 87:4-10, Tran. Shafer, Day 1, 152:18-153:14; Tran. Fuller, Day 4, 66:12-67:9; Tran. Stormans, Day 5, 101:18-102:6; Tran. Teil Boyer, Day 5, 186:13-22; PX 142, PX 157 (Saxe email); PX 403 (AAG Letter); PX 404 (Harris email).

[128] *See e.g.,* Board Chair Awan Dep. 17:16-20; Tran. Shafer, Day 1, 99:6-12, 100:24-101:1, 109:2-5; Tran. Saxe, Day 2, 163:2-10; Tran. Fuller, Day 4, pp. 51-5; Tran. (Salmi) Hodgson, Day 8, p.133-34; Tran. Harris, Day 9, p. 40; PX 142, PX 157 (Saxe email), PX 432.

[129] *See e.g.,* Tran. Harris, Day 10, 41:4-25; Tran. Shafer, Day 1, 33:11-22; Tran. Saxe, Day 1, p. 83-84, Day 2, 113:4-21; PX 142 (Saxe email).

- Pharmacies decline to stock drugs when they are forbidden to do so by contracts with their suppliers;[130]
- Pharmacies decline to stock drugs when they are too expensive to be profitable;[131]
- Pharmacies decline to stock drugs when they would have to order a larger quantity than the patient requires;[132]
- Pharmacies decline to stock drugs when they have an inadequate shelf life given the pharmacy's demand;[133]
- Pharmacies decline to stock drugs when they lack adequate shelf space;[134]
- Pharmacies decline to stock certain expensive "specialty drugs" for complex conditions;[135]

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[130] *See e.g.,* Tran. Doll, Day 4, 185:9-24; Tran. Mesler, Day 6, 190:15-25; Tran. Harris, Day 10, 45; Tran. Shafer, Day 1, p. 88; Tran. Mesler, Day 6, p. 189-190.

[131] *See e.g.,* PX 297 (Linggi memo); Tran. Hulet, Day 3, 59:23-60:19; Tran. Fuller, Day 4, 15:9-12; Tran. Shafer, Day 1, 62:19-24; Tran. Teil Boyer, Day 5, 196:13-197:8; Tran. Harris, Day 10, 40:11-18; PX 405 (AAG Letter to McDonald); PX 142 (Saxe email); PX 157 (Saxe email); PX 176 (Saxe email re Governor's concern); Tran. Thelen, Day 6, p. 145.

[132] *See e.g.,* Tran. Shafer, Day 1, 101:16-25; Tran. Hulet Day 3, 141-42; Tran. Fuller, Day 4, 27:4-5; Tran. Doll, Day 4, 147, 204-05; Board's 30(b)(6) designee Teil Boyer Dep. 28-29; Board's 30(b)(6) designee (Salmi) Hodgson Dep. 98-100; PX 405 (AAG letter); Tran. Thelen, Day 6, p. 145.

[133] *See e.g.,* Tran. Fuller, Day 4, 24:2-25:6; Tran. Saxe, Day 1, 61; Day 3, p. 31; Tran. Mesler, Day 6, p. 185; Tran. Hulet, Day 3, p. 172; Tran. Harris, Day 9, p. 44; PX 397.

[134] *See e.g.,* Tran. Fuller, Day 4, 31:13-19; Board Chair Awan Dep. 21-22; PX 343 (AAG email); Tran. Shafer, Day 1, p. 100; Tran. Harris, Day 9, p. 44, Day 10, 91; PX 157 (Saxe email).

- Pharmacies decline to stock some drugs unless the patient calls to request the drug in advance;[136]
- Pharmacies do not stock the drug because the pharmacist would have to monitor the patient or register with the drug company (e.g., Accutane, Clozapine/Clozaril);[137]
- Pharmacies do not stock Schedule V cough syrup or Schedule V pain-management drugs because of recordkeeping or clientele concerns;[138]
- Pharmacies do not stock the drug because it would attract criminals (e.g., Oxycontin);[139]
- Pharmacies do not stock a drug because it is not on the pharmacy's formulary list;[140]
- Pharmacies do not stock a drug because it is part of a larger chain, which concentrates all

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[135] *See e.g.,* PX 297 (Linggi memo); PX 142 (Saxe email); PX 413 (PowerPoint); Tran. Fuller, Day 4, 30:19-31:1; Tran. Harris, Day 7, p. 36; Day 10, p. 107; PX 356, p. 3 (Board meeting transcript).

[136] *See e.g.,* PX 404 (Harris email).

[137] *See e.g.,* Tran. Harris, Day 10, 35:24-36:10, 54:12-55:7; PX 532 (Dockter memo); Tran. Mesler, Day 7, p. 156; Tran. Thelen, Day 6, p. 143-44.

[138] *See e.g.,* PX 532; Tran. Harris, Day 10, 55:8-25; Tran. Shafer, Day 1, 107:23-108:5, 105:18-106:5; PX 532 (Dockter memo) p.2.

[139] *See e.g.,* Tran. Doll, Day 4, 172:17-25; Tran. Teil Boyer, Day 5, 180:12-182:20; Tran. Saxe, Day 1, p. 82; PX 99 (Board memo).

[140] *See e.g.,* Tran. Saxe, Day 1, 87:20-88:20; Tran. Mesler, Day 6, p. 189; Tran. Shafer, Day 1, p.102, Day 10, p. 158; Tran. Harris, Day 7, p. 116-117, Day, 9, p. 45; Ex. B-44 (Shafer letter to Governor).

of that drug in one pharmacy in the region;[141]

- Pharmacies do not stock a name-brand drug because most insurance plans pay only for the generic.[142]

108. These stocking decisions were common both before and after enactment of the Regulations. Board witnesses agreed that many of these practices are well-known. But in over forty years, none of these stocking practices has ever been restricted by the Stocking Rule.

B. Referral in practice.

109. Since the enactment of the Regulations, pharmacies have also continued to exercise broad discretion over when to refer patients elsewhere. As the Board has stipulated: "[R]eferral is a time-honored pharmacy practice, it continues to occur for many reasons, and is often the most effective means to meet the patient's request when the pharmacy or pharmacist is unable or unwilling to provide the requested medication." Dkt. #441 ¶ 1.5.

110. Board witnesses confirmed this stipulation, testifying that referral is a time-honored, routine, and vital means of securing access to medication. They also testified that referral should typically be left to the discretion of the

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[141] *See e.g.,* Tran. Harris, Day 10, 41:4-25; PX 435 (SBEIS) p.6.

[142] *See e.g.,* Tran. Shafer, Day 1, 102:5-20; Tran. Fuller, Day 4, 11:3-12.

pharmacist, and that referral continues to occur today for a wide variety of reasons.[143]

111. One of the most common reasons for referral is that a drug is out-of-stock. This may occur when a pharmacy declines to stock a drug for one of the reasons discussed above. But it also may occur when a pharmacy typically stocks a drug but temporarily runs out—for example, because the pharmacy experiences an unexpected spike in demand; a pharmacy is trying to reduce its inventory to become more profitable; or a pharmacy simply makes a mistake and does not order enough of the drug. In either case, as the Board has stipulated, referral "is often the most effective means to meet the patient's request." Dkt. #441 ¶ 1.5.

112. Even when a pharmacy has a drug in stock, there are a wide variety of business, economic, or convenience reasons why a pharmacy may refer patients elsewhere. Examples include:

- Pharmacies do not deliver the drug because it is temporarily out of stock for business reasons;[144]
- Pharmacies do not deliver the drug because it does not accept the patient's insurance;[145]

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[143] *See e.g.,* Tran. Fuller, Day 4, 33:21-34:18, 65:4-7; PX 157; Tran. Teil Boyer, Day 5, 151:13-20m Day 6, 13:15-18, 28-20-23; PX 297 (Linggi memo); Tran. Harris, Day 9, 39:5-24, Day 10 8:7-20, Day 10, 91:7-11, 92:1-3; Day 11, 50:10-12; PX 380.

[144] *See e.g.,* Tran. Saxe, Day 3, 22:5-10; Tran. Doll, Day 4, 142:6-144:13; Ex. 322 (AAG Statement).

- Pharmacies do not deliver the drug because it does not accept Medicaid/Medicare;[146]
- Pharmacies do not deliver Plan B because the patient is under 17 and the pharmacist on duty is not part of a Collaborative Agreement Program;[147]
- Pharmacies do not deliver the drug because the pharmacist believes the patient might be a drug abuser;[148]
- Pharmacies do not deliver lethal drugs (assisted suicide) for reasons of conscience;[149]
- Pharmacies do not deliver the drug because the pharmacist would have to perform simple compounding;[150]
- Pharmacy does not deliver the drug because it declines to do unit dosing;[151]

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[145] *See e.g.,* Tran. Saxe, Day 3, 20:8-21; Tran. Fuller, Day 4, 10:23-11:1; Tran. Hulet, Day 3, 158:13-16; PX 504, p. 8 (CES); PX 99 (Board memo); Tran. Harris, Day 10, pp. 51, 53.

[146] 146 *See e.g.,* Tran. Saxe, Day 1, 185:5-186:18; Tran. Fuller, Day 4, 11:13-12:11; Tran. Shafer, Day 1, p. 102; Tran. Harris, Day 10, p. 52-53; Tran. Mesler, Day 6, p. 187.

[147] *See e.g.,* Tran. Fuller, Day 4, 37:6-19.

[148] *See e.g.,* Tran. Hulet, Day 3, 156:5-12; Tran. Saxe, Day 3, 28:13-25; WAC § 246-875-010(1)(d); Tran. Fuller, Day 4, p. 13-14.

[149] *See e.g.,* Tran. Saxe, Day 1, 186:19-188:19; Tran. Fuller, Day 4, 17:22-19:4; Tran. Teil Boyer, Day 6, 109-119.

[150] *See e.g.,* Tran. Fuller, Day 4, 19:5-21:22; Tran. Harris, Day 10, 42:10-43:6; PX 532; PX 142 (Saxe email); Tran. Mesler, Day 6, p. 190; Tran. Stormans, Day 5, p. 14-15; Tran. Thelen, Day 6, p. 144.

[151] 151 *See e.g.,* Tran. Doll, Day 4, 181:15-183:4; Tran. Teil Boyer, Day 5, 190:7-191:22; PX 99 (Board memo); Tran. Mesler, Day 6, p. 190.

- Pharmacies do not deliver the drug over the counter because it requires extra recordkeeping (e.g., Sudafed);[152]
- Pharmacies do not deliver syringes over the counter because of recordkeeping or clientele concerns;[153]
- Pharmacies do not deliver the drug because the patient violates the store's dress code;[154]
- Pharmacies do not deliver the drug because the patient is disruptive;[155] or
- Pharmacies do not deliver the drug because it believes the patient may be a shoplifter.[156]

113. Referrals for these reasons have been common both before and after enactment of the Regulations. Board witnesses agreed that many of these practices are well-known. But in the four years since the Delivery Rule was enacted, none has ever been the subject of enforcement.

C. Conscientious objection in practice.

114. Thus far, the only conduct that has been actively investigated and treated as a violation of the Regulations is Plaintiffs' conscientious objections to Plan B. As explained in more detail below, Ralph's

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[152] *See e.g.,* Tran. Fuller, Day 4, 17:3-21, 23:5-24:1.

[153] *See e.g.,* Tran. Teil Boyer, Day 5, 179:11-180:11, Day 6, 14:12-16; PX 532 (Donna Dockter memo) p.2.

[154] *See e.g.,* Tran. Fuller, Day 4, 15:13-16:3; PX 99 (Board memo).

[155] *See e.g.,* Tran. Fuller, Day 4, 16:8-15; PX 99 (Board memo).

[156] *See e.g.,* Tran. Fuller, Day 4, 16:16-25; PX 532, p.2; PX 99 (Board memo).

has been subject to multiple complaints under the Stocking and Delivery Rules. The Board has actively investigated those complaints, and has also initiated a complaint of its own, while dropping analogous complaints against other pharmacies that were temporarily out of stock for business reasons. Several complaints against Ralph's have been stayed pending this litigation. The Board has never dismissed a complaint against Ralph's because it found a Stocking or Delivery Rule violation.

115. At trial, State's counsel took the position that Ralph's is operating in "outright defiance" of the Stocking Rule. Several Board witnesses agreed that Ralph's is in violation of the rule and faces significant penalties, up to and including the revocation of its license, if it continues to refuse to stock Plan B for reasons of conscience. Ralph's violation is considered unprofessional conduct. RCW 18.170.160 (The Uniform Disciplinary Act) mandates that the disciplinary authority shall issue an order including sanctions in accordance with the schedule adopted under RCW 18.130.390. Revocation of the license is the most serious the sanction and the one that fits an offender who refuses to comply with the rules' mandate.

VI. The Interpretation of the Regulations

116. While the practical effect of the Regulations is largely undisputed, the interpretation of the Regulations is not. Witnesses offered conflicting testimony on whether the Regulations are intended to prohibit some of the common stocking and referral practices discussed above.

A. Interpretation of the Delivery Rule.

117. Witnesses also offered conflicting testimony on the scope of the Delivery Rule, and particularly the exceptions to that rule. The Delivery Rule contains five enumerated exemptions, for the following circumstances: (a) erroneous, inadequate, or contraindicated prescriptions; (b) national emergencies affecting availability of a drug; (c) drugs requiring specialized equipment or expertise; (d) potentially fraudulent prescriptions; and (e) drugs that are out of stock. WAC § 246-869-010(1)(a)-(e). In addition to these five exemptions, there is also a catch-all exemption for any "substantially similar circumstances." WAC § 246-869-010(1). And there is an exemption that says no pharmacy can be required to deliver a drug without payment of its "usual and customary or contracted charge." WAC § 246-869-010(2).

118. As noted above, the Delivery Rule has been on the books for over four years, and no pharmacy has ever been found to be in violation of it. Pharmacies continue to decline to deliver drugs, and to refer patients elsewhere, for a wide variety of business, economic, and convenience reasons. Nevertheless, at trial, the State took the position that many common referral practices technically violate the Delivery Rule.

119. Some Board witnesses, including Susan Teil Boyer and Lisa (Salmi) Hodgson,[157] took the

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[157] Tran. Teil Boyer, Day 6:15-25; 30(b)(6)Board's 30(b)(6) designee (Salmi) Hodgson Dep., pp. 105-109, 116.

position that the exemptions to the Delivery Rule apply only in very narrow circumstances involving threats to patient safety. According to these witnesses, the Delivery Rule includes no "business exemptions"; thus, it is unlawful to refer patients elsewhere for simple compounds, for unit dosing, for over-the-counter drugs involving extra recordkeeping, or for patients who violate store policies.

120. Other witnesses, including Steve Saxe, Christina Hulet and Rod Shafer,[158] testified that the exemptions in the Delivery Rule were specifically designed not only to protect patient safety, but also to protect standard business reasons for referring patients elsewhere. According to these witnesses, terms like "specialized equipment or expertise," "good faith compliance," "usual and customary [charge]," and "substantially similar circumstances" were included in the Delivery Rule precisely to preserve flexibility for common business practices.

121. The Court finds the testimony that the Delivery Rule was designed to protect common business practices to be more credible, for several reasons. First, it is consistent with how the Delivery Rule has operated in the four years since it was enacted. In the last four years, the Board has never publicly interpreted or applied the Delivery Rule to prohibit these common business referrals. It has never announced a narrow interpretation of the exemptions in any guidance documents, internal

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[158] Tran. Saxe, Day 1, 72:24-73:4; Tran. Hulet, Day 3, 51:1-52:12, 177:10-24.

correspondence or newsletters. And it has never attempted to inform pharmacies that these common business referrals are now unlawful. To the contrary, the Board's public statements on the Delivery Rule, have indicated that the rule's primary, if not exclusive, effect is to prohibit conscientious objections to dispensing a drug.

122. Second, internal Board correspondence strongly indicates that the Delivery Rule was designed to protect referrals for business reasons including:

a. In December 2010, Ms. Teil Boyer presented to the Board a definition of specialized drugs for purposes of interpreting the exemption for "specialized equipment or expertise."[159] According to her definition, the Delivery Rule exempts "specialty medications" proscribed for complex or chronic medical conditions, including "drugs that are injected or infused," and "drugs that are usually not available at retail pharmacies." She concluded that such medications are "called out in the Pharmacy Responsibility Rule."

b. Board Chair, Al Linggi, described these specialty drugs in greater detail in 2009 memorandum to the Board. These, he said, were "examples where directed referrals are most frequently utilized in the practice of pharmacy." Consistent with Ms. Teil Boyer's interpretation, Mr. Linggi's examples included injectable drugs (Lovenox) and other expensive drugs that Mr. Shafer

[159] PX 413.

testified are not available in most pharmacies but do not require specialized training or equipment, such as Humira, Norditopin, Ribavirin, and certain immunosuppressants.[160]

123. Third, this understanding is consistent with every witness's account of the stakeholder meetings that resulted in the Regulations. As Rod Shafer, Christina Hulet, and Steve Saxe agreed, the stakeholder meetings included two opposing camps: the State Pharmacy Association, which wanted to preserve referrals for conscience reasons *and* business reasons; and Planned Parenthood and the other advocates, which strongly opposed referrals for reasons of conscience. The compromise solution was to prohibit referrals for reasons of conscience, but to exempt referrals for business reasons.

124. Fourth, several Board witnesses testified at trial that the Delivery Rule exemptions protected referrals for business reasons. For example:

a. Mr. Fuller testified that the "specialized expertise" exemption permits a pharmacy to refer a patient when the pharmacist on duty is not comfortable dispensing a simple compound, even though that is a skill that all pharmacists are required to learn in pharmacy school.[161]

b. Board witnesses offered conflicting testimony on what level of "equipment" or

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[160] PX 297; Tran. Shafer, Day 10, 136:22-137:25.

[161] Tran. Fuller, Day 4, 38:12-20, 20:22-21:4

> "expertise" qualified as "specialized equipment or expertise" under WAC § 246-869-010(c). Some witnesses agreed that the Board had discretion under this provision to permit referrals for simple compounding, Tim Fuller and Susan Teil Boyer, or for drugs requiring monitoring (such as Accutane and Clozaril), Gary Harris.[162]

125. Finally, this understanding of the Delivery Rule is consistent with the text of the exemptions. To be sure, some of the exemptions are limited to concerns about patient safety. But the exemption for drugs that are "unavailable despite good faith compliance" with the Stocking Rule is not primarily about patient safety; it is an accommodation of the business reality that pharmacies frequently run out of drugs. And if additional exemptions are permitted in "substantially similar circumstances," it is reasonable to infer that the Board has discretion to make exemptions for other business realities.

126. To the extent that the exemptions in the Delivery Rule could be interpreted more strictly to prohibit some referrals for business reasons, State witnesses Susan Teil Boyer, Jim Doll and Christina Hulet consistently testified that the exemptions would have to be interpreted on a case-by-case basis, depending on the reasons for the relevant conduct. Questions that must be decided on a case-by-case basis would include the definition of "specialized

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[162] Tran. Fuller, Day 4, 19:5-8; Tran. Teil Boyer, Day 5, 172:5-173:11; Tran. Harris, Day 10, 35:24-36:10, 54:12-55:7

equipment or expertise," "good faith compliance," "usual and customary or contracted charge," and "substantially similar circumstances."[163]

127. Even under a narrow interpretation of the exemptions, there were several common business referrals that all witnesses agreed were permissible under the Delivery Rule. For example, there is no dispute that pharmacies are permitted to refer patients elsewhere when a drug is temporarily out of stock for business reasons;[164] when the pharmacy does not accept the patient's insurance;[165] when the pharmacy does not accept Medicaid or Medicare; when the pharmacist is reasonably concerned (even incorrectly) that the prescription is fraudulent or the patient is a drug seeker; or when the pharmacy has a conscientious objection to participating in assisted suicide.

128. In sum, the Court finds that, both as a matter of the Board's interpretation and in practice, the Delivery Rule was designed to preserve pharmacies' flexibility to refer patients elsewhere for a wide variety of business, economic, and convenience reasons.

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[163] Tran. (Salmi) Hodgson, Day 8, 104:11-18, Tran. Doll, Day 4, 180:13-20; Tran. Hulet, Day 3, 59:16-22

[164] This can occur for a wide variety of reasons.

[165] Walgreens, for example, which is the largest pharmacy chain in the state, no longer accepts payments from certain insurance plans. Thus, thousands of patients who rely on those insurance plans are barred from accessing any drug from a Walgreens pharmacy. Board witnesses testified to being aware of Walgreens' policy, and several confirmed that it is permissible under the Regulations.

B. Complaint-driven enforcement.

129. When questioned about widespread referrals for business reasons, several Board witnesses testified that the Board has never enforced the Regulations against those referrals because the Board is "complaint-driven."[166]. According to these witnesses, many common referrals are unlawful, but the Board is unable to enforce the Regulations or otherwise promote compliance until it receives a citizen complaint.[167]

130. The Court finds this testimony to be implausible and not credible. As several witnesses testified, the Board is not limited to citizen complaints, but instead has a wide variety of mechanisms available for promoting compliance.

131. For example, the Board inspects pharmacies every two years; it can initiate its own complaints; it can send out its own test-shoppers when it reasonably suspects violations; it publishes regular newsletters flagging important compliance issues for pharmacies; and it works with the State Pharmacy Association to raise compliance issues with individual pharmacists.[168]

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[166] Tran. Fuller, Day 4, 74:18-23; Tran. Harris, Day 9, 8:1-3; see also Dkt. 522, p.5

[167] Tran. Saxe, Day 1, 83:1-7; Tran. Teil-Boyer, Day 5, 177:13-22; Tran. (Salmi) Hodgson Day 8, 146:19-24

[168] Tran. Harris, Day 7, p. 49:11-15; Tran. (Salmi) Hodgson, Day 8, pp. 61:13-16, 98:13-15, 98:23-99:22; Tran. Harris, Day 10, pp. 15:13-16:23.

132. Responding to complaints is only a small fraction of how the Board ensures compliance with its regulations. As Gary Harris testified, less than one percent of pharmacies ever have a complaint filed against them, while every pharmacy is subject to inspection every two years. And as Jim Doll (791-92) testified, the more common method of ensuring compliance is through inspection and education.

133. When the Board inspects pharmacies, it routinely checks for compliance with every subsection of WAC § 246-869-150 *except* the Stocking Rule. That is, inspectors check for expired drugs under WAC § 246-869-150(2); they check for contaminated drugs under WAC § 246-869-150(3); they check for proper labeling under WAC § 246-869-150(4); they check for unapproved drugs under WAC § 246-869-150(5); and they check for proper storage under WAC § 246-869-150(6). But they do not check for a "representative assortment" of drugs under WAC § 246-869-150(1).

134. Several witnesses testified that it would not be difficult to check for a representative assortment of drugs. For example, Steve Saxe, James Doll, Gary Harris, and Rhonda Mesler agreed that the Board could spot check compliance by looking at a pharmacy's sales records and checking which drugs were on the shelf.[169] Saxe, Doll and Harris also agreed that the Board could require pharmacies to keep a log of patients who are referred

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[169] Tran. Saxe, Day 2, p. 175:2-24; Tran. Saxe, Day 3, pp. 7:23-9:8, Tran. Doll, Day 4, pp. 167:25-169:23, Tran. Harris, Day 10, pp. 20-21; Tran. Mesler, Day 6, pp. 182-84.

elsewhere and compare that log with the drugs on the shelf.[170] This would allow inspectors to determine with precision whether a pharmacy was maintaining a representative assortment of requested drugs. Several Board witnesses also testified that the Board can enact regulations prophylactically; thus, it is well within the Board's authority to impose these requirements. But in practice, the Board has made no effort to promote compliance with a strict interpretation of the Stocking Rule.

135. In addition to inspections, the Board can initiate its own complaints. In fact, the Board initiated a complaint under the Stocking Rule against Ralph's.[171] But despite widely known refusals to stock drugs for business reasons, the Board has never initiated a complaint under the Stocking Rule against any other pharmacy in over forty years.

136. Finally, the Board publishes newsletters, and holds annual joint conferences with the WSPA throughout the state to inform licensees on compliance issues. But the evidence at trial demonstrated that in over forty years, the Board made no effort to use these channels to promote compliance with a strict version of the Stocking Rule.[172]

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[170] Tran. Saxe, Day 3, pp. 9:9-10:11, Tran. Doll, Day 4, pp. 172:5-13; Tran. Harris, Day 10, pp. 21:2-22.

[171] Tran. Saxe, Day 1, pp. 83:8-14; Tran. Fuller, Day 4, pp. 112:24-113:4; Tran. (Salmi) Hodgson, Day 8, pp. 115:9:14.

[172] Tran. Shafer, Day 10, pp. 116:11-119:3.

137. The same is true of the Delivery Rule. The Board has made no effort to uncover referrals for business reasons in the inspection process; it has initiated no complaints involving referrals for business reasons; and it has published no newsletters addressing referrals for business reasons.[173]

138. In sum, the Court finds that the Board need not wait for citizen complaints to promote compliance with its Regulations; rather, it has a variety of tools available to promote compliance. But in the case of the Delivery Rule and the Stocking Rule, the Board has made no effort to curtail widespread referrals for business reasons.

139. To the extent that the Board relies on citizen complaints, the evidence at trial demonstrated that the enforcement process is potentially subject to manipulation. In the vast majority of cases, a referral for business reasons is never going to generate a complaint. But as shown at trial, Planned Parenthood and other pro-choice groups have conducted an active campaign to seek out pharmacies and pharmacists with religious objections to Plan B and to file complaints with the Board. This has resulted in a disproportionate number of investigations directed at religious objections to Plan B.

140. For example, from 2006 to 2008, complaints involving Plan B accounted for 46% of all refusal complaints filed with the Board. Ralph's

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[173] Tran. Shafer, Day 10, p. 119:10-15.

alone accounted for one-third of all complaints.[174] Complaints involving Plan B were also investigated at a higher rate than complaints involving other drugs. The result was disproportionate enforcement efforts focused on conscientious objections to Plan B.

C. Accommodations.

141. The Regulations have also prohibited many pharmacies from accommodating their employee's conscientious objections to Plan B or *ella*. Before enactment of the Regulations, pharmacies typically accommodated conscientious objectors by allowing referral. But under the new Regulations, a pharmacy cannot refer patients to other pharmacies for reasons of conscience. Thus, if a pharmacy has only one pharmacist on duty—as do most Washington pharmacies—that pharmacist must dispense the drug regardless of her conscientious objections to doing so.

142. During the rulemaking process, the Board discussed only three options for dealing with lone pharmacists who conscientiously object to Plan B: (1) hiring a second pharmacist for each shift, (2) arranging for an on-call pharmacist for each shift, or (3) firing the conscientious objector.

143. The evidence at trial revealed that the first two options are typically unworkable. As Mr. Fuller explained, the cost of hiring a second pharmacist ($80,000 per year) and the cost of an on-

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[174] Tran. (Salmi) Hodgson, Day 8, pp. 115:25-116:22, 119:10-120:7.

call pharmacist are both unrealistic and unaffordable options for most employers. Ms. Teil Boyer also testified that an on-call pharmacist would expect to be paid more than a regular employee, would expect to be paid for a minimum of half a day, and would need several hours of lead time before her shift. Thus, it would typically be faster to refer a patient elsewhere than to wait for an on-call pharmacist to arrive. Similarly, during the trial, Mr. Harris had to return several times to complete his testimony because of his work schedule. When he was asked if his chain pharmacy in the Seattle-area could find a floater or on-call pharmacist for the following day, he responded that his employer could not locate an on-call pharmacist on such short notice.

144. In light of these difficulties, Mr. Fuller opined that firing the conscientious objector was the most likely option for employers that have only one pharmacist on shift at a time. The Court finds this testimony to be credible.[175]

145. Some witnesses suggested that conscientious objectors might be accommodated via telepharmacy. Mr. Fuller, the Board official designated by the Board as the person most knowledgeable regarding telepharmacy,[176] testified that telepharmacy involves a pharmacist at a remote location interacting with patients via an audio and visual link.[177] The remote pharmacist counsels the patient and oversees the technician when dispensing

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[175] Tran. Fuller, Day 4, pp. 40:13-42:14.
[176] Tran. Fuller, Day 4, p. 69:2-5.
[177] Tran. Fuller, Day 4, p. 93:20-24.

a prescription or behind the counter medications such as Plan B.[178]

146. But the evidence at trial demonstrated that telepharmacy is not a viable accommodation, for several reasons. First, state law requires a pharmacist to be responsible for all activity taking place within a pharmacy, which includes supervising pharmacy personnel pharmacist has visually verified it. RCW 18.64.250(2); RCW 18.64A.030(1). This is equally true for a behind-the-counter sale of Plan B. Pharmacists must counsel all patients with a new prescription and be available to respond to questions about refills and behind the counter drugs, such as Plan B, for patients over the age of 16. An audio link alone between the pharmacist and the patient has not been approved by the Board and would not satisfy the requirement that the pharmacist oversee pharmacy personnel.[179]

147. Second, Mr. Fuller testified that the Board has rejected applications for telepharmacy when pharmacies are located nearby.[180] This is because the Board regards in-person patient contact to provide better care to patients than telepharmacy. Thus, it is unlikely that the Board would approve telepharmacy as an accommodation for conscientious objectors when there are nearby pharmacies that offer in-person contact with willing pharmacists—as

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[178] Tran. Fuller, Day 4, pp. 44:5-45:21.
[179] Tran. Fuller, Day 4, pp. 105:19-106:11
[180] Tran. Fuller, Day 4, pp. 101:17-102:25.

is the case for each of Plaintiffs' pharmacies, and the vast majority of pharmacies in the state.[181]

148. Thus, it is no surprise that no applicant has ever sought approval for a telepharmacy arrangement to accommodate a conscientious objector. Nor has any applicant sought approval to use telepharmacy when a pharmacist is ill or otherwise unavailable on short notice. In short, given the uncertain cost and approval process for telepharmacy, and the limited nature of its availability, for an employer it is not a viable option to accommodate a conscientious objectors. Mr. Fuller agreed conceding that if he were an employer with the only option of hiring a conscientious objector and accommodating her by telepharmacy, he would not hire the conscientious objector.[182]

VIII. The Effect of the 2007 Regulations on the Plaintiffs

149. The evidence at trial demonstrated that the Regulations have had a direct impact on Plaintiffs' livelihood and families. Plaintiffs are Christians who believe that all of human life is uniquely and inherently precious because it is created by God in His image. Plaintiffs believe that dispensing Plan B or *ella* constitutes direct participation in the destruction of human life. Thus, their religious beliefs prevent them from stocking or delivering Plan B or *ella*.

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[181] Tran. Fuller, Day 4, p. 104:2-7.
[182] Tran. Fuller, Day 4, p. 107:2-9.

A. Impact on the Stormans' family.

150. Based on the Stormans' religious beliefs, Ralph's does not stock emergency contraceptives. Ralph's has had multiple requests for Plan B and *ella* from new and existing patients. When Ralph's receives requests for those drugs, it informs customers of the nearby pharmacies where they can purchase the drug and offers to call those pharmacies on the customer's behalf. There are over thirty pharmacies within five miles of Ralph's that stock and dispense Plan B.

151. After the rulemaking process began, pro-choice activists targeted Ralph's. On July 31, 2006, at least nine women filed complaints alleging Ralph's does not stock Plan B. They also filed complaints against Walgreen's, Sav-On and Albertson's in Olympia. All four pharmacies referred patients to nearby providers. As with many of the alleged "refusal" stories in evidence, these women were activists who test shopped these pharmacies, even giving advance notice to Ms. Hulet and the Department of Health that they intended to file complaints against the stores.

152. In response to the complaints, the Board initiated investigations. Walgreen's, Sav-On, and Albertson's informed the Board that they had referred Plan B customers elsewhere because the drug was temporarily out-of-stock. The investigations of those pharmacies were closed. Ralph's, however, informed the Board that it had a conscientious objection to dispensing Plan B. The investigations remain open.

153. When Ralph's position became public, pro-choice groups organized a boycott and staged regular and ongoing protests against both of the Stormans' grocery stores. The Governor's office joined in the boycott, informing Ralph's that after 16 years of doing business with it, the Governor's Mansion would no longer purchase groceries there. Other state officials and agencies similarly participated in the picketing and boycott. Each time the Board takes new action on the issue or in this case, the picketing, boycott, and media attention again focuses on Ralph's.

154. During the pickets, protestors stood in the streets, yelling at Ralph's customers and urging customers to sign-up for the boycott. The Stormans had to hire security to patrol the grounds. One activist created a website specifically targeting Ralph's because of its decision to refer patients for religious reasons.

155. A pharmacy has been in Ralph's grocery store for nearly 70 years. Ralph's relies heavily on the income and customer traffic generated by the pharmacy. Losing the pharmacy would jeopardize the financial viability of the store. While Ralph's has a compounding and closed-door pharmacy inside its building, the retail pharmacy generates far more profit than any other division owned by the Stormans. Kevin Stormans testified that if the State requires them to stock Plan B or *ella*, the Stormans will be forced to close the pharmacy.

156. For the Stormans family, the loss of their fourth-generation business, ending the opportunity

to pass it on to the next-generation, would carry with it a significant emotional impact, in addition to the severe monetary consequences.[183]

157. Defendants suggested that the outcome of the investigation against Ralph's is unknown and that the Board may close the investigation against Ralph's without discipline. The Court finds this suggestion unpersuasive. It begs the question of why the State hasn't already dismissed the complaints if it had any intention of doing so. The Board has completed two separate investigations against Ralph's. The final investigation reports both concluded that Ralph's had customers who requested Plan B and that the store refuses to stock it for conscientious reasons. Kevin Stormans testified that Ralph's has had requests for Plan B and *ella* from new and existing patients. No evidence suggests the circumstances have changed since the Board completed its investigations.

158. At trial, the State's counsel repeatedly referred to Ralph's as acting in "outright defiance" of the Stocking and Delivery Rules. Several of the Board witnesses including Chair Gary Harris, former Board member and current Executive Director Susan Teil Boyer, and former Executive Director Lisa (Salmi) Hodgson testified that they believe Ralph's has violated the Stocking and Delivery Rules.[184] Mr. Harris has publicly stated that he will recommend prosecuting religious

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[183] Tran. Stormans, Day 5, pp. 40:13-22, 106:1-22.

[184] Day 1, pp. 34:25-35:8; Tran. (Salmi) Hodgson Day 8, p. 109:3-6.

objectors to the "full extent of the law," and he sits on two of the three investigations that the State admits are pending against Ralph's. Mr. Harris testified that the only disciplinary measure available against pharmacies is revocation. The sanction guidelines suggest this as well, particularly when all of the aggravating factors would apply to Ralph's including Ralph's unwillingness to be "rehabilitated" and the intentional nature of its violation. In sum, Ralph's likely faces eventual revocation of its pharmacy license if the investigations against it are permitted to proceed.

B. Impact on Ms. Mesler and Ms. Thelen.

159. Ms. Mesler and Ms. Thelen have also been harmed by the Regulations. Both unequivocally testified that their religious beliefs prevent them from dispensing or supervising the sale of Plan B or *ella.*

160. Ms. Mesler has practiced in Washington State for over 20 years and currently serves as a pharmacy manager. Ms. Thelen has worked as a licensed pharmacist for nearly 40 years. Both have spent thousands of dollars earning their degrees and have completed additional pharmacy courses including learning Spanish to better serve their customers. Both thoroughly enjoy their professions.

161. Ms. Mesler and Ms. Thelen have informed all of their employers of their conscientious objection to Plan B. All of these employers have permitted referral, and at each place of employment

Ms. Mesler and Ms. Thelen worked primarily alone during their shifts.

162. After the Regulations were passed, both employers told Ms. Mesler and Ms. Thelen that they would not be able to accommodate them. They declined for financial reasons to hire a second, on-call, or floater pharmacist to work at the same time. Mesler's employer reiterated in December that she would need to transfer to Oregon or Idaho to remain employed if the Court lifts the injunction. Ms. Thelen has already been constructively discharged as a direct result of the Regulations. While she found another position, that position requires her to work later hours, denies her benefit options that she needed, required her to take a $16,000 pay cut and significantly lengthened her commute.[185]

IX. The Effect of the 2007 Regulations on Catholic Pharmacies

163. Plaintiffs are not the only pharmacies or pharmacists with conscientious objections to Plan B and *ella*. The three largest Catholic health systems in this State testified by declarations in this case.[186] Catholic hospitals, like all hospitals, provide an increasing amount of primary care through their emergency rooms—particularly to the poor. Catholic hospitals play an integral role in Washington's health care system. Three in ten of the State's hospital beds are in a Catholic hospital. Together, these three health systems are responsible for 18

[185] Day 6, p. 135:11.
[186] Dkt #531

hospitals, 17 inpatient pharmacies, and 15 outpatient or retail pharmacies in Washington.

164. The three largest systems—the Franciscan, Providence, and PeaceHealth Systems—have a religious objection to dispensing Plan B or *ella*. The only exception is that the Catholic Ethical and Religious Directives permit Catholic inpatient pharmacies to dispense Plan B for the treatment of sexual assault victims after appropriate testing. Mr. Shafer testified that it was widely known in the pharmaceutical community at the time of the 2006-07 rulemaking that Catholic pharmacies did not stock Plan B.

165. The Catholic outpatient pharmacies will not stock Plan B or *ella*. The in-patient pharmacies that serve the emergency rooms do stock Plan B and dispense it only in cases of sexual assault. They will not dispense to a patient who presents at the emergency room requesting Plan B following or prior to unprotected sexual relations.

166. Many of the Catholic hospitals are located in neighborhoods comprised of citizens of modest means with a large population of child-bearing age women. In these neighborhoods, the emergency rooms are oftentimes the primary source of medical care. There is demand for Plan B in these hospitals. Nevertheless, the Board has made no effort to enforce the Regulations against those pharmacies, nor has it informed those pharmacies that they must begin stocking and dispensing those drugs or lose their pharmacy license.

167. The Executive Director of the Board of Pharmacy testified that no one has complained of unprofessional conduct at an in-patient pharmacy or at a retail pharmacy operated by the Catholic Health Systems, speculating that the people they serve know that they can't get emergency contraceptives from the Catholic operated pharmacies because of conscience.

CONCLUSIONS OF LAW

168. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 331 1343, 1367, 2201 and 2202, and under 42 U.S.C. §§ 1983 and 1988.

169. At trial, the parties have raised four main legal issues: (1) whether the Ninth Circuit's preliminary injunction ruling on Plaintiffs' free exercise claim constitutes the "law of the case"; (2) whether the Regulations violate the Free Exercise Clause; (3) whether the Regulations violate the Supremacy Clause; and (4) whether the Regulations violate the Due Process Clause. The Court addresses each legal issue in turn.

I. Law of the Case

170. Defendants' primary argument on remand has been that the Ninth Circuit definitively resolved most of the factual and legal issues in this case, and that the only question at trial is whether the rules satisfy the rational basis test. Specifically, they argue that the Ninth Circuit held the Regulations to be "neutral and generally applicable," *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1137 (9th

Cir. 2009), and that this preliminary-injunction opinion is now the "law of the case."

171. This argument fails for several reasons. First, the Ninth Circuit has repeatedly held that "decisions on preliminary injunctions do not constitute law of the case and parties are free to litigate the merits." *Golden State Transit Corp. v. City of Los Angeles*, 754 F.2d 830, 832 n.3 (9th Cir. 1985) (emphasis added; internal quotation omitted); *see also* 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper § 4478.5 (2d ed. 2002) (preliminary injunction rulings "do not establish law of the case"). This is because preliminary injunction rulings are merely a predication about "the plaintiff's *likelihood* of success on the merits," not a decision on "whether the plaintiff has *actually* succeeded on the merits." *S. Or. Barter Fair v. Jackson Cnty., Oregon*, 372 F.3d 1128, 1136 (9th Cir. 2004) (emphasis added). It is also because preliminary injunction rulings are made "on less than a full record." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007). Thus, upon remand after a preliminary injunction ruling, the lower court is free to make "findings and conclusions to the contrary based upon evidence which may be received at the trial on the merits." *Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472, 476 (9th Cir. 1969).

172. The reasons for this rule are fully applicable here. First, the question of whether the Regulations are neutral and generally applicable is highly fact-intensive. The answer turns not just on

the text of the Regulations, but on "the effect of a law in its real operation." *Lukumi*, 508 U.S. at 535. As the Ninth Circuit noted, this includes factual questions such as: whether the Regulations are "substantially underinclusive" in practice, *Stormans*, 586 F.3d at 1134; whether the Regulations "actually increase access to medications" in practice; *id.* at 1135; whether the exemptions in the Regulations "are narrow" in practice, *id.*; and whether the Regulations have been "fairly and evenly applied" in practice, *id.* Under *Lukumi,* this Court must also consider whether the Regulations create "a system of . . . individualized exemptions" based on "the reasons for the relevant conduct." 508 U.S. at 537. And, although the law on this point is "unsettled," the Court might also need to consider "the historical background" of the Regulations and the "legislative history." *Stormans*, 586 F.3d at 1131-32. All of these questions involve factual issues, which make the decision about whether a law is neutral and generally applicable a mixed question of law and fact.

173. The factual record on these issues is dramatically different now than it was at the preliminary injunction stage. At the preliminary injunction stage, this Court and the Ninth Circuit were limited to the text of the Regulations, the Board's survey on access to Plan B, a handful of public letters and meeting minutes, and some newspaper articles. There was no evidence on how the Regulations or the exemptions applied in practice; there was no evidence on the Board's discretion to interpret and enforce the Regulations;

and there was no evidence on how the Regulations have been enforced in practice.

174. There has now been a twelve-day bench trial with 22 witnesses including deposition testimony and hundreds of trial exhibits. There is voluminous new evidence on the scope and application of the Regulations; the effect of the Regulations; the Board's discretion to interpret and enforce the Regulations; the historical background of the regulations; and the enforcement of the Regulations in practice. The parties have also entered binding factual stipulations on key issues, including access to medication. All of this evidence is relevant to the question of whether the regulations are constitutional. None of it was previously before this Court or the Ninth Circuit. Accordingly, the Ninth Circuit's ruling does not foreclose "findings and conclusions to the contrary based upon evidence which may be received at the trial on the merits." *Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472, 476 (9th Cir. 1969).

175. Beyond the new facts, Plaintiffs have also raised new legal arguments that were not before the Ninth Circuit. For example, Plaintiffs have raised new arguments based on how the exemptions to the Regulations are applied in practice; how the Board has broad discretion to grant individualized exemptions from the Regulations; and how the Regulations have been enforced in practice. None of these legal claims were before the Ninth Circuit; thus, this Court must consider them in the first instance.

176. Finally, the Ninth Circuit's opinion confirms that it had no intention of foreclosing a full trial on the merits. At least seven times, the Court highlighted the unique procedural posture of the case and the "sparse" preliminary-injunction record.[187] The Court also said it expected this Court to receive "more recent and comprehensive data" on access to Plan B. *Id.* at 1115 n.2. And it said it expected this Court to conduct "a trial on the merits" to determine whether "compell[ing] [Plaintiffs] to stock and distribute Plan B . . . violates [Plaintiffs'] constitutional rights." *Id.* at 1138.

177. In short, given the significantly different procedural posture, factual record, and legal arguments, the parties "are free to litigate the merits." *Golden State Transit Corp. v. City of Los Angeles*, 754 F.2d 830, 832 n. 3 (9th Cir. 1985).

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[187] *See*:

- *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1123 (9th Cir. 2009) ("Given the procedural posture of the case, . . . the record with respect to Mesler and Thelen is sparse.");
- *id.* at 1126 ("Here, the record is admittedly sparse . . .");
- *id.* (noting "the preliminary nature of the record"); *id.* at 1131 ("The evidentiary record . . . [is] thin given the procedural posture of this case . . . .");
- *id.* at 1133 (questioning whether "the record indicates anything about the Board's motivation in adopting the final rules");
- *id.* at 1135 ("Based on the sparse record before it, the district court erred in finding that access to Plan B was not a problem.");
- *id.* at 1141 ("While we have the discretion to affirm the district court on any ground supported by the . . . record, in light of the undeveloped record, we decline to do so.") (internal citations and quotations marks omitted).

II. Free Exercise Clause

178. On the merits, Plaintiffs' primary claim is that the Regulations violate the Free Exercise Clause because they burden Plaintiffs' religious beliefs, are not neutral or generally applicable, and cannot satisfy strict scrutiny.

A. Overview of governing legal principles.

179. The Free Exercise Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . ." U.S. Const. amend. I (emphasis added). The Free Exercise Clause has been applied to the states through the Fourteenth Amendment. *Lukumi*, 508 U.S. at 531.

180. Under Supreme Court precedent, a law burdening religious exercise generally does not violate the Free Exercise Clause if it is "neutral and generally applicable." *Employment Division v. Smith*, 494 U.S. 872, 880 (1990). But if the law is "not neutral or not of general application," it is subject to strict scrutiny; that is, it is unconstitutional unless it is narrowly tailored to advance a compelling governmental interest. *Lukumi*, 508 U.S. at 546. Thus, the key question on the merits is whether the Regulations are "neutral and generally applicable."

181. As the Ninth Circuit has pointed out, two key Supreme Court cases define that phrase—*Smith* and *Lukumi*. *Stormans*, 586 F.3d at 1130. *Smith* involved a blanket criminal ban on possession of

peyote. Two Native Americans lost their jobs and were denied unemployment compensation because they ingested peyote at a religious ceremony. *Id.* at 874. The question before the Supreme Court was "whether that [criminal] prohibition [on possession of peyote] is permissible under the Free Exercise Clause." 494 U.S. at 876. In a 6–3 decision, the Supreme Court upheld the law. According to the Court, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" *Id.* at 879. Because the law was "an across-the-board criminal prohibition on a particular form of conduct," it was both neutral and generally applicable, and the Court upheld the law. *Id.* at 884.

182. *Lukumi* involved four municipal ordinances that restricted the killing of animals. A Santeria priest challenged the ordinances under the Free Exercise Clause, and the key question was whether the ordinances were "neutral and of general applicability." 508 U.S. at 531. In a 9–0 decision, the Supreme Court struck down the ordinances.

183. The first half of the Court's analysis (Part II.A.1) dealt with the requirement of "neutrality." As the Court explained, when determining whether a law is neutral, "[f]acial neutrality is not determinative." *Id.* at 534. Rather, the Free Exercise Clause forbids even "covert" hostility to religion and "subtle departures from neutrality." *Id.* (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)). Thus, the courts "must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious

gerrymanders." *Id.* Because the "effect of [the] law in its real operation" was to accomplish a religious gerrymander, the Court held that it was not neutral. *Id.* at 535-38.

184. The second half of the Court's analysis (Part II.B) dealt with the requirement of "general applicability." As the Court explained, the ordinances fell "well below the minimum standard" of general applicability, because they were substantially "underinclusive" with respect to their stated ends. *Id.* at 543. That is, they "fail[ed] to prohibit nonreligious conduct that endanger[ed] [the government's] interest in a similar or greater degree than Santeria sacrifice d[id]." *Id.*

185. Although the requirements of neutrality and general applicability are "interrelated," they must be addressed separately. *Stormans*, 586, F.3d at 1130 (quoting *Lukumi*, 508 U.S. at 531). Plaintiffs offer six arguments for why the Regulations are not neutral or generally applicable—three involving the requirement of general applicability, and three involving the requirement of neutrality:

a. *Categorical Exemptions:* The Regulations are not generally applicable because they provide categorical exemptions for secular refusals to stock or dispense a drug, but not for conscientious objections.

b. *Individualized Exemptions:* The Regulations are not generally applicable because they give the government discretion to make individualized exemptions depending on the

reasons why a pharmacy does not stock or dispense a drug.

c. *Selective Enforcement:* The Regulations are not generally applicable because they have been selectively enforced against conscientious objections to Plan B.

d. *Religious Gerrymandering:* The Regulations are not neutral because they have been gerrymandered to apply almost exclusively to conscientious objections to Plan B.

e. *Discriminatory Intent:* The Regulations are not neutral because they were enacted with discriminatory intent.

f. *Differential Treatment:* The Regulations are not neutral because they provide differential treatment among religions.

186. This Court will address the requirement of general applicability first, since that is where Plaintiffs place the most emphasis.

B. General applicability – categorical exemptions.

187. Under the general applicability requirement, this Court must evaluate whether the Regulations are "substantially underinclusive." *Stormans*, 586 F.3d at 1134. One way to prove that a law is substantially underinclusive is to show that the law "creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection." *Fraternal*

Order of Police, 170 F.3d at 365 (Alito, J.); *accord Lukumi*, 508 U.S. at 542; *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1035 (9th Cir. 2009) (Noonan, J., concurring); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004) (Alito, J.); *Rader v. Johnston*, 924 F.Supp. 1540, 1551-53 (D. Neb. 1996)

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

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

190. Here, the relevant religious conduct is providing a facilitated referral when a patient requests Plan B—either because the pharmacy does not stock Plan B as a matter of conscience, or because an individual pharmacist cannot dispense it for reasons of conscience. The question is whether the Regulations permit nonreligious referrals that undermine timely access to medication just as much as these religiously motivated referrals would.

191. At the preliminary injunction stage, when the only relevant evidence consisted of the text of the Regulations, the Ninth Circuit concluded that all of the exemptions in the Regulations "are narrow," and that none permits secular conduct that undermines "access to medications." 586 F.3d at 1135.

192. But after twelve days of trial, including voluminous testimony and documentary evidence on the scope and application of the exemptions, it is clear that the exemptions are not as "narrow" as they may once have appeared, and that they permit a wide variety of nonreligious referrals "that endanger[] [the government's] interests in a similar or greater degree than" Plaintiffs religiously motivated referrals. *Lukumi*, 508 U.S. at 543.

193. The following chart summarizes the evidence on what types of referrals are permitted under the Regulations:

	Reason for Referral	Prohibited by the Regulations	Permitted Categorically	Permitted in Practice
1	Pharmacy does not stock or deliver Plan B or *ella* for reasons of conscience	X		
2	Pharmacy does not deliver the drug because it is temporarily out of stock for business or convenience reasons		X	
3	Pharmacy does not deliver the drug because it chooses not to accept the patient's insurance due to low reimbursement rates or administrative challenges		X	
4	Pharmacy does not deliver the drug because it does not accept Medicaid or Medicare		X	

	Reason for Referral	Prohibited by the Regulations	Permitted Categorically	Permitted in Practice
5	Pharmacy does not deliver Plan B because the patient is under 17 and the pharmacist on duty is not part of a Collaborative Agreement Program		X	
6	Pharmacy does not deliver the drug because the pharmacist believes the patient might be a drug seeker		X	
7	Pharmacy does not deliver lethal drugs (assisted suicide) for reasons of conscience. RCW 70.245.190(1)(d).		X	

	Reason for Referral	Prohibited by the Regulations	Permitted Categorically	Permitted in Practice
8	Pharmacy does not deliver syringes because pharmacist was unable to satisfy herself that it is intended for legal use. RCW 70.115.150.		X	
9	Pharmacy does not stock the drug because it falls outside the pharmacy's chosen business niche		X	
10	Pharmacy does not stock the drug because it determines that it has insufficient demand to trigger the Stocking Rule		X	
11	Pharmacy does not stock the drug because it does not want to obtain specialized equipment or expertise		X	

	Reason for Referral	Prohibited by the Regulations	Permitted Categorically	Permitted in Practice
12	Pharmacy does not stock the drug because it is forbidden to do so by a contract with its supplier		X	
13	Pharmacy does not deliver the drug because the pharmacist would have to perform simple compounding			X
14	Pharmacy does not deliver the drug because it declines to do unit dosing or blister packing			X
15	Pharmacy does not deliver the drug over the counter because it requires extra recordkeeping (e.g., Sudafed)			X
16	Pharmacy does not deliver syringes over the counter because of clientele concerns			X

	Reason for Referral	Prohibited by the Regulations	Permitted Categorically	Permitted in Practice
17	Pharmacy does not deliver the drug because the patient is disruptive, violates the store's dress code, or the pharmacy believes the patient may be a shoplifter			X
18	Pharmacy does not stock the drug because in the discretion of the pharmacy there is low demand			X
19	Pharmacy does not stock the drug because of its carrying costs (e.g., the pharmacy must order more of the drug than the patient requires)			X
20	Pharmacy does not stock the drug because it has a short shelf-life			X

	Reason for Referral	Prohibited by the Regulations	Permitted Categorically	Permitted in Practice
21	Pharmacy does not stock the drug because it lacks adequate shelf space to carry all drugs needed by patients			X
22	Pharmacy does not stock the drug because it is an expensive drug			X
23	Pharmacy does not stock the drug unless the patient calls to request the drug in advance			X
24	Pharmacy does not stock the drug because the pharmacist would have to monitor the patient (e.g., Accutane)			X

	Reason for Referral	Prohibited by the Regulations	Permitted Categorically	Permitted in Practice
25	Pharmacy does not stock Schedule V cough syrup or Schedule V pain-management drugs because of recordkeeping or clientele concerns			X
26	Pharmacy does not stock the drug because it would attract crime (e.g., Oxycontin)			X
27	Pharmacy does not stock a drug because it is not on the formulary list of the insurers primarily used by the pharmacy's patients			X

	Reason for Referral	Prohibited by the Regulations	Permitted Categorically	Permitted in Practice
28	Pharmacy does not stock a drug because it is part of a larger chain, which concentrates all of that drug in one pharmacy in the region			X

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

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

b. *National emergency:* "National or state emergencies or guidelines" limit availability of the drug;

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

d. *Fraudulent prescription:* The prescription is "potentially fraudulent"; or

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

WAC 246-869-010(1)(a)-(e).

195. In addition to these five exemptions, there is also a "catch-all" exemption and a "customary payment" exemption:

a. *Catch-all:* Any circumstances that are "substantially similar" to the first five exemptions; and

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

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

196. Plaintiffs do not contest three of these exemptions, and with good reason. The "erroneous prescription" exemption simply protects patients' health; the "national emergency" exemption covers situations beyond the control of the pharmacy; and the "fraudulent prescription" exemption prevents fraud and drug abuse. As the Ninth Circuit pointed out, none of these exemptions permits conduct that would interfere with timely, safe access to lawful medication. *Stormans*, 586 F.3d at 1135.

197. By contrast, the other four exemptions, in practice, exempt a wide variety of referrals that undermine the government's alleged interest in ensuring timely access to lawful medication.

198. *First* is the "specialized equipment or expertise" exemption. WAC 246-869-010(1)(c). This exemption ensures that pharmacies are under no obligation to *stock* drugs that require specialized equipment or expertise. So, for example, even though a pharmacy might receive numerous requests for a particular drug, and even though it might be the only pharmacy in a rural area, it has no obligation to purchase the specialized equipment and begin stocking the drug. Thus, a pharmacy may refer such patients elsewhere even when such a referral would undermine access to medication. This exemption also arguably permits pharmacies to refer patients elsewhere for simple compounding, to avoid having to register with the manufacturer for a drug or monitor the patient's blood work.

199. *Second* is the "customary payment" exemption. WAC 246-869-010(2). As the Ninth Circuit pointed out, "[n]obody could seriously question a refusal to fill a prescription because the customer did not pay for it." *Stormans*, 586 F.3d at 1135. But the evidence at trial demonstrated that this exemption is far broader than just protecting against non-payment. Rather, the Board interprets this exemption broadly to allow referrals for all sorts of business decisions that have nothing to do with non-payment.

a. For example, pharmacies are categorically permitted to decline to accept insurance plans for any reason at all, even when the pharmacy wishes to avoid the insurer's onerous audit requirements, or the reimbursement rates are just as high as

those of other insurance plans. Thus, a customer who is effectively offering full payment can be referred elsewhere, even when such a referral would undermine timely access to medication.

b. The same is true for pharmacies that refuse to accept Medicare Part B, State Labor and Industries or Medicaid. This imposes a significant barrier to access for patients who rely on these programs.

c. Many compounding pharmacies refuse to accept insurance at all. Thus, patients who cannot afford to pay cash, but do have insurance, can be completely denied access to essential drug compounds.

200. All of these practices are categorically permitted under the Regulations. And as several Board members conceded, they can impose a far more serious barrier to access than Plaintiffs' religiously motivated referrals for Plan B. At trial, for example, Board witnesses considered two hypothetical scenarios. In one scenario, a woman is referred elsewhere for Plan B because she offers to pay with unacceptable insurance. The pharmacy is in a rural area with no other pharmacies nearby, and the woman is unable to obtain Plan B and becomes pregnant. Both Board witnesses agreed that this represents a serious problem of access, and both agreed it is categorically permitted under the Regulations.

201. In the other scenario, a woman is given a facilitated referral for Plan B because of a conscientious objection. There are dozens of nearby pharmacies that stock Plan B, and she obtains it without delay. Both Board witnesses agreed that this sort of a facilitated referral is not a barrier to access, yet both agreed it is prohibited under the Regulations. In short, this is a straightforward concession that the Regulations permit nonreligious referrals "that endanger[] [the government's] interests in a similar or greater degree" Plaintiffs religiously motivated referrals. *Lukumi*, 508 U.S. at 543.

202. Moreover, under the "customary payment" exemption, pharmacies are not even required to refer patients to another pharmacy. Under subsection (3) of the Delivery Rule, when a pharmacy does not deliver a drug, the pharmacy must provide a "timely alternative." WAC 246-869-010(3). But this duty applies only if the drug is "not in stock" or "the prescription cannot be filled" under subsection (1)(a) (*i.e.*, a prescription with a known error, inadequate instructions, or contraindications). *Id.* The duty to provide a timely alternative does not apply if the patient is unable to pay the "usual and customary or contracted charge." WAC 246-869-010(2). Thus, a patient who presents unacceptable insurance need not even be referred to another pharmacy. That is a far more serious barrier to access than the facilitated referrals provided by Plaintiffs.

203. The *third* major exemption to the Delivery Rule is the "catch-all" exemption. It applies

in any circumstances that are "substantially similar" to the enumerated list. WAC 246-869-010(1). It will be addressed in more detail below.

204. *Fourth* is the "out of stock" exemption. WAC 246-869-010(1)(e). It broadly allows pharmacies to refuse to deliver a drug whenever the drug is out of stock—as long as the pharmacy is in "good faith compliance" with the Stocking Rule. *Id.*; WAC 246-869-150(1). Thus, the scope of this exemption depends on the scope of the Stocking Rule.

205. The evidence at trial demonstrated that the Stocking Rule, together with the "out of stock" exemption, allows pharmacies to refer patients elsewhere for a wide variety of nonreligious reasons. For example, niche pharmacies are categorically permitted to decline to stock drugs that fall outside their chosen business niche. Pharmacies are also categorically permitted to decline to stock a drug if they have not had any patients request it, if their supplier contractually excludes a drug from their formulary, or if the drug would require specialized training or equipment that the pharmacy does not wish to purchase. In all of these situations, pharmacies are permitted to refer patients elsewhere, regardless of the effect on access to medication.

206. Similarly, even when a pharmacy typically stocks a drug, it is permitted to refer patients when the drug is temporarily out of stock. This can occur for any number of reasons: *e.g.*, a pharmacy experiences an unexpected spike in

demand; a pharmacy is trying to reduce its inventory to become more profitable; an inexperienced pharmacy manager does a poor job of managing inventory. In all of these situations, pharmacies are categorically permitted to refer patients elsewhere, regardless of the effect on access to medication.

207. Again, Board witnesses considered two scenarios at trial that illustrate the breadth of this exemption. In one scenario, a woman is referred elsewhere for Plan B because the drug is temporarily out of stock due to poor inventory management. The pharmacy is in a rural area with no other pharmacies nearby, and the woman is unable to obtain Plan B and becomes pregnant. Board witnesses agreed that this represents a serious problem of access and that it is categorically permitted under the Regulations.

208. In the other scenario, a woman is referred elsewhere for Plan B because of a conscientious objection and obtains the drug immediately thereafter. Board witnesses agreed that this does not present an access problem, but agreed that it is prohibited under the Regulations. Again, this is a straightforward concession that the Regulations permit nonreligious referrals "that endanger[] [the government's] interests in a similar or greater degree" than Plaintiffs religiously motivated referrals. *Lukumi*, 508 U.S. at 543.

209. At the preliminary injunction stage, the Ninth Circuit suggested that eliminating these categorical exemptions "would likely drive pharmacies out of business . . . . Therefore, the

exemptions actually increase access to medications by making it possible for pharmacies to . . . maintain their business." *Stormans*, 586 F.3d at 1135. The Defendants did not assert this argument at trial. If they had, they would face two obstacles.

210. First, Defendants offered no evidence that the categorical exemptions are necessary to keep pharmacies in business. It is quite possible that narrowing or eliminating some of the exemptions would be fully compatible with keeping pharmacies in business *and* expanding access to medication. For example, requiring all pharmacies to accept Medicaid as many do, could significantly increase access to medication for the poor without driving pharmacies out of business.

211. Second, even assuming Defendants had offered evidence on this point, the same "out of business" argument applies to exemptions for reasons of conscience. Specifically, it is undisputed that if Ralph's is forced to stock Plan B, it will have to close its pharmacy. And it is undisputed that if Thelen and Mesler are forced to dispense Plan B, they have to leave the profession or move to another state. Indeed, the Board conceded in the Final Significant Analysis that some pharmacy owners would close their business rather than violate their conscience.[188] Thus, it is undisputed that the Regulations will force at least some pharmacies and pharmacists out of business, further reducing access to medication.

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[188] PX 434, pp. 11-12.

212. In short, the State cannot have it both ways. It cannot provide secular exemptions on the ground that they will help keep pharmacies in business, while denying parallel religious exemptions that are just as necessary to keep pharmacies in business. That would represent an impermissible "value judgment in favor of secular motivations, but not religious motivations." *Fraternal Order of Police*, 170 F.3d at 366.

213. In light of the vast range of secular conduct exempted from the Regulations, this case is significantly stronger than *Fraternal Order of Police*. There, the Third Circuit held that the beard prohibition was not neutral and generally applicable because there was *one* secular exemption for a *narrow slice* of secular conduct—beards worn for medical reasons. Here, there are *numerous* secular exemptions for a *wide variety* of secular conduct—everything from business reasons for not stocking a drug, to convenience reasons for not wanting to deal with a particular insurer, to practical reasons for wanting to serve a particular niche market. These secular exemptions routinely result in patients being unable to obtain a drug on demand from the pharmacy of their choice. Thus, they "endanger[] [the government's] interests" just as much as a narrow exemption for conscience would. *Lukumi*, 508 U.S. at 543.

214. Several other cases support the same result. *See Blackhawk v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004) (Alito, J.) (fee requirement for keeping wildlife was not generally applicable where it included categorical exemptions for zoos

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

215. Finally, in addition to the broad categorical exemptions for business and convenience reasons, the Washington Death with Dignity Act, RCW 70.425 ("DWDA"), creates another categorical exemption to the Regulations. The DWDA provides that "[o]nly willing health care providers [defined to include pharmacists] shall participate in the provision to a qualified patient of medication to end his or her life in a humane and dignified manner." RCWA 70.245.190(1)(d). Thus, notwithstanding the Regulations, any pharmacy or pharmacist may refuse to dispense lethal drugs on any ground, secular or religious. And there appears to be no referral obligation. This exemption undermines the government's stated interest in assuring timely access to lethal drugs at least as much as conscientious objections to Plan B. Thus, it provides

an additional ground for finding the Regulations not generally applicable.

C. General applicability – individualized exemptions.

216. In addition to categorical exemptions, another way that a law might fail to be generally applicable is if it "creates a regime of individualized, discretionary exemptions. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.); *see also Lukumi*, 520 U.S. at 537. A law allowing "individualized exemptions" requires strict scrutiny because it "creates the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct." *Blackhawk*, 381 F.3d at 209 (citing *Smith*).

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

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

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

220. In short, when a law permits the government to make "individualized exemptions" on a case-by-case basis, the law is subject to strict scrutiny. This is because, when the government applies an "across-the-board" prohibition, there is little risk that it is discriminating against religious conduct. *Smith*, 494 U.S. at 884. But when an open-ended law gives the government discretion to grant exemptions on a case-by-case basis, it creates a

serious risk that it will be "applied in practice in a way that discriminates against religiously motivated conduct." *Blackhawk*, 381 F.3d at 209 (citing *Smith*). Such a risk justifies strict scrutiny. *Id.*

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

222. State Defendants argue that this exemption is narrow, because four of the enumerated exemptions are limited to patient safety concerns, such as "fraudulent prescriptions," "contraindications," and "[l]ack of specialized equipment." WAC 246-869-010(1) But this ignores the *fifth* enumerated exemption, which applies any time a drug is out of stock "despite good faith compliance with" the Stocking Rule. WAC 246-869-010(1)(e). This exemption is not about patient safety; it is about giving pharmacies flexibility to "maintain their business" by deciding which drugs to keep in stock. *Stormans*, 586 F.3d at 1135. Thus, when a pharmacy claims the open-ended exemption, the Board must consider on a case-by-case basis whether

the relevant conduct is "substantially similar" to the many stocking decisions that are currently permitted under the Regulations.

223. For example, if Plaintiffs were to claim the open-ended exemption, the Board would have to consider on a case-by-case basis whether a religious refusal to stock a drug is "substantially similar" to a niche pharmacy's refusal to stock a drug. Such an inquiry creates a significant risk that the Regulations will be "applied in practice in a way that discriminates against religiously motivated conduct." *Blackhawk*, 381 F.3d at 209 (citing *Smith*).

224. Second, in addition to the open-ended exemption, there is an exemption for "good faith" compliance with the Stocking Rule. No Board witness was able to give a definition of "good faith." In fact, Board witnesses consistently testified that that "good faith" compliance must be assessed on a case-by-case basis depending on the reasons for the relevant conduct. That, too, is a quintessential "individualized assessment" under *Lukumi*.

225. Finally, the Stocking Rule itself is extraordinarily vague and open-ended. It provides that a pharmacy must maintain "at all times" a "representative assortment" of drugs to meet the needs of its "patients." WAC 246-869-150(1). Neither "all times," nor "representative assortment," nor "patients" is defined. Board witnesses repeatedly emphasized that these terms must be interpreted on a case-by-case basis depending on the reasons for the relevant conduct. Thus, in practice, the Board has broad discretion to allow pharmacies to refuse to

stock drugs for business, economic, and convenience reasons, but to punish pharmacies for refusing to stock drugs for religious reasons. And in practice, that is precisely how the Stocking Rule has been enforced.

226. In light of these individualized exemptions, this case is significantly more problematic than *Blackhawk*. There, the government had discretion to waive the wildlife permitting fee if a waiver would be "consistent with sound game or wildlife management activities or the intent of [the Game and Wildlife Code]." *Id.* at 205. The Third Circuit held that this provision was "sufficiently open-ended" to require strict scrutiny. *Id.* at 210. Here, there are at least three provisions that are equally open-ended, and the Board has allowed pharmacies to refer patients elsewhere for a wide variety of business, economic, and convenience reasons.

227. This case is also similar to *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004). There, the plaintiff was a Mormon theater student who wished to be exempt from the requirement to recite portions of a script that were offensive to her religious beliefs. *Id.* 1281-83. The state university refused, claiming that it had a neutral rule requiring all theater students to adhere to all curricular requirements, including performing scripts as written. The Tenth Circuit, however, disagreed. It pointed out that the university had granted an exemption to a Jewish student who wanted to miss an assignment for Yom Kippur, *id.* at 1298, and it had sometimes granted the plaintiff herself an

exemption from reciting every portion of a script, *id.* This "pattern of ad hoc discretionary decisions," said the Court, amounted to a "system of individualized exemptions" requiring strict scrutiny. *Id.* at 1299. The same is true here. The Board exercises broad discretion under the Regulations to permit a wide variety of secular referrals on an *ad hoc*, case-by-case basis. Such a system of individualized exemptions requires strict scrutiny.

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

229. Finally, this case is similar to *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996). There, a state university required all full-time freshmen to live on-campus their freshman year, subject to three enumerated exceptions. *Id.* at 1544. But in practice, the university administrators "grant[ed] exceptions to the policy, at their discretion, in a broad range of circumstances not enumerated in the rule and not

well defined or limited." *Id.* at 1552. Thus, the court held that the policy "cannot be viewed as generally applicable." *Id.* at 1553. Here, too, the Board has discretion to grant exemptions in a broad range of circumstances not enumerated in the Regulations and not well defined. And, in fact, pharmacies across the state continue to refer patients elsewhere every day for a wide variety of business, economic, and convenience reasons, and the Board has shown no interest in prohibiting those referrals.

D. General applicability – selective enforcement.

230. Aside from categorical exemptions and individualized exemptions, a law is also not generally applicable when it has "been enforced in a discriminatory manner." *Blackhawk*, 381 F.3d at 209 (Alito, J.) (citing *Tenafly*, 309 F.3d at 167-72). In *Tenafly*, for example, a local ordinance broadly banned the placement of any "sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place . . . ." 309 F.3d at 151. In practice, the local government permitted the placement on utility poles of a variety of signs and symbols, such as house number signs, lost animal signs, and the like; but it refused to permit Orthodox Jews to do the same with religiously significant items called *lechis* (thin black strips of plastic demarcating the area within which Orthodox Jews may carry objects on the Sabbath). *Id.* at 151-52. Although the ordinance was plainly neutral and generally applicable on its face, the court struck it down because the government's "selective, discretionary application" of an "often-

dormant [o]rdinance" was "sufficiently suggestive of discriminatory intent" to require strict scrutiny. *Id.* at 168.

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

232. Here, the evidence at trial establishes that the Regulations have been selectively enforced. Specifically, it is undisputed that in the four years since the Delivery Rule went into effect, no pharmacy has ever been cited for violating it. And in the *40* years since the Stocking Rule went into effect, no pharmacy has even been *investigated* for violating it, other than Ralph's and three other nearby pharmacies because of complaints filed by Plan B test-shoppers. The investigations against the three pharmacies were promptly closed when they informed the Board they were temporarily out of Plan B and would order it, but investigations against Ralph's remain open to this day. Thus, pharmacies across the state have enjoyed broad discretion to decline to stock drugs and to refer patients

elsewhere for a wide variety of nonreligious reasons; but Ralph's alone faces punishment for declining to stock Plan B for religious reasons.

233. Defendants offer two arguments in response. First, they argue that there can be no selective enforcement because the Board has not yet enforced the Regulations against Ralph's. In support, they point to several complaints against Ralph's that have been dismissed.

234. This is unconvincing. Most, if not all, of those complaints were dismissed on technicalities—not because the Board has decided that Ralph's has complied with the Regulations. To the contrary, it is undisputed that Ralph's is in violation of the Stocking Rule and has several pending complaints against it that have been stayed by this litigation. Thus, the Board must either ignore outright defiance of the Regulations (which suggests that they are not generally applicable), or enforce the Regulations against Ralph's.

235. Second, as discussed above, the State argues that the reason the Board has never enforced the Regulations against any other pharmacy is because the Board's enforcement is "complaint-driven"—*i.e.*, it enforces the Regulations only in response to citizen complaints.

236. This argument fails for three reasons. First, enforcement of the Board's Regulations is not exclusively complaint-driven. It is not even primarily complaint-driven. Rather, the Board ensures compliance with its Regulations through a wide

variety of channels. For example, it conducts inspections every two years; it publishes regular newsletters informing pharmacies of their duties under the Board's regulations; it publishes guidance on its regulations; it works with the WSPA to promote compliance; and it can even initiate its own complaints. As Gary Harris testified, less than one percent of pharmacies ever have a complaint filed against them at all. Thus, responding to citizen complaints is only a very small part of how the Board ensures compliance with its regulations.

237. When considering the broad range of enforcement tools available to the Board, it is clear that the Board has made no effort to enforce the Stocking Rule against pharmacies that decline to stock drugs for business reasons. It makes no effort to check for compliance with the Stocking Rule during inspections, even though it could do so; it has never mentioned compliance with the Stocking Rule in its quarterly newsletters; it has never issued guidance so that pharmacies can understand their obligations under the Stocking Rule; and it has never initiated its own complaint based on a violation of the Stocking Rule (except against Ralph's). In short, the Board has never shown any interest in enforcing the Stocking Rule, until it invoked that rule against Ralph's. As in *Tenafly*, "the [Board's] invocation of the often-dormant [Stocking Rule] against conduct motivated by [religious] beliefs is 'sufficiently suggestive of discriminatory intent,' . . . that we must apply strict scrutiny." 309 F.3d at 168.

238. Second, even assuming the Board were complaint-driven, that would not solve the selective enforcement problem. In this case, relying on citizen complaints has only made the selective enforcement problem worse. For the vast majority of patients and pharmacies, a referral is never going to generate a complaint. But the evidence at trial demonstrated that Planned Parenthood and other pro-choice groups have conducted an active campaign to seek out pharmacies and pharmacists with religious objections to Plan B and to file complaints. This has resulted in a severely disproportionate number of investigations directed at religious objections to Plan B.

239. The Supreme Court condemned a similar arrangement in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), which the Ninth Circuit has expressly relied on in the Free Exercise context, *Alpha Delta Chi-Delta*, 648 F.3d at 804. There, a home for the mentally retarded sought a special use permit under a zoning ordinance. But the city denied the permit in response to the "negative attitudes" and "fear" of neighbors. *Id.* at 448. The Supreme Court struck down the enforcement of the ordinance as unconstitutional: "Private biases may be outside the reach of the law," the Court said, "but the law cannot, directly or indirectly, give them effect." *Id.* (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). That, unfortunately, is how the Regulations have operated here. By relying on citizen complaints, the Board ensures that secular referrals are protected, while unpopular conscience-based referrals are prohibited. That is selective enforcement.

240. Finally, Defendants' reliance on *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142 (9th Cir. 2007) is misplaced for several reasons. First, *Rosenbaum* involved a selective enforcement challenge under the Equal Protection Clause, not the Free Exercise Clause. The legal standards under each clause are different. To prevail under the Equal Protection Clause, the plaintiff must demonstrate *both* (1) that the government's enforcement "had a discriminatory effect" *and* (2) that "the [government was] motivated by a discriminatory purpose." *Rosenbaum*, 484 U.S. at 1152-53. Once this has been shown, the government is held strictly liable; the government gets no opportunity to show that it satisfies strict scrutiny.

241. Under the Free Exercise Clause, by contrast, the plaintiff need only show that the government enforced the law against religious conduct while exempting similarly situated nonreligious conduct. *Tenafly*, 309 F.3d at 167. That is enough to infer a discriminatory purpose, without regard to "the subjective motivations of the [government officials]" who enforced the law. *Id.* at 168 n.30; *see also Alpha Delta Chi-Delta*, 648 F.3d at 805-04. The government then has an opportunity to show that its actions satisfy strict scrutiny. *Tenafly*, 309 F.3d at 172.

242. Here, the appropriate analysis is set forth in *Tenafly*, not *Rosenbaum*. Plaintiffs have adequately shown that the Regulations are enforced against their conduct, but not similarly situated nonreligious conduct.

243. Second, even assuming the equal protection analysis in *Rosenbaum* applied, this case is distinguishable from *Rosenbaum* in numerous ways. For example:

a. There, the noise ordinance had been enforced against numerous citizens in the past, both religious and nonreligious. Here, neither the Delivery Rule nor the Stocking Rule has ever been enforced against any pharmacy except Stormans'.

b. There, there had been complaints under the noise ordinance based on a wide variety of religious and nonreligious speech. Here, there has never been a complaint under the Stocking Rule except with respect to Plan B.

c. There, plaintiffs identified "only two incidents" where citizen complaints may have been based on disagreement with the plaintiffs' religious message. *Id.* at 1158. Here, Plaintiffs' pharmacy faced a boycott, picketing, and an organized campaign that filed dozens of complaints based on opposition to Plaintiffs' conscientious objections to Plan B.

d. There, plaintiffs were allowed to continue to engage in their religious conduct as long as they lowered the volume of their preaching. *Id.* at 1159. Here, Plaintiffs' refusal to stock Plan B is completely prohibited.

e. There, plaintiffs offered no evidence that the officials responding to the complaints "knew about, agreed with or adopted any views of the complainants." *Id.* at 1159. Here, at least one Board member is on record as stating that he disagrees with conscientious objections to Plan B, and that he intends to prosecute conscientious objectors to Plan B to the full extent of the law.

f. There, the ordinance included guidelines that limited the government's discretion in issuing permits. *Id.* at 1160-61. Here, there are no guidelines governing the interpretation or enforcement of the Stocking Rule, and the Board has complete discretion to enforce it as it sees fit.

244. In short, plaintiffs in *Rosenbaum* failed to show that the government enforced the noise ordinance against religious conduct, but ignored similarly situated nonreligious conduct. Here, by contrast, the evidence shows that the government has enforced the Regulations against Plaintiffs' pharmacy—and only against Plaintiffs' pharmacy—while making no effort to enforce the Regulations against widespread, widely known, nonreligious conduct that threatens access to medication just as much as, or more than, Plaintiffs' conduct. That is enough to distinguish *Rosenbaum* and to establish selective enforcement under *Tenafly*. Thus, the Regulations are not generally applicable.

E. Neutrality – religious gerrymandering.

245. Next, the Court must consider whether the Regulations are neutral. At a minimum, a law is not neutral if it discriminates against religion on its face. *Lukumi*, 508 U.S. at 533. But "[f]acial neutrality is not determinative." *Id.* at 534. Rather, the Free Exercise Clause also forbids "covert" hostility to religion and "subtle departures from neutrality." *Id.* (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)). Thus, the courts "must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id.*

246. In *Lukumi*, to determine whether the law accomplished a religious gerrymander, the Court examined three primary factors: (a) whether "the burden of the [law], in practical terms, falls on [religious objectors] but almost no others" (*id.* at 536); (b) whether "the interpretation given to the [law] by [the government]" favors secular conduct (*id.* at 537); and (c) whether the laws "proscribe more religious conduct than is necessary to achieve their stated ends" (*id.* at 538). The Court will examine each factor in turn.

1. The practical burden of the Regulations.

247. The evidence at trial established that "the burden of the [Regulations], in practical terms, falls on [religious objectors] but almost no others." *Id.* at 536. As noted above, there are a host of business, economic, and convenience reasons why

pharmacies refer patients elsewhere. Table 1 lists over twenty-seven examples, all of which remain common to this day. But in practice, none of these secular referrals has been burdened by the Regulations. They are either exempt from the Regulations or tolerated by the Board in practice. In other words, the burden of the Regulations, "in practical terms," does not fall on business objections; it falls on religious objections.

248. Relying on the "thin" preliminary injunction record, the Ninth Circuit concluded that the burden of the Regulations also falls on "personal" objections. *Stormans*, 586 F.3d at 1131. Similarly, throughout trial, the State emphasized that the Regulations prohibit not just conscientious objections, but also "personal" objections—such as when a pharmacist refuses to serve a patient because she "shows up . . . wearing an Oregon Ducks hat." [Nov 30 at 173]

249. At trial, however, Defendants were unable to adduce any evidence of "personal" objections—aside from religious objections—that have actually served as a basis for a pharmacy's refusal to dispense a drug. Board witnesses testified that they were not aware of any personal refusals to dispense a drug. Nor did the rulemaking process produce such evidence. In short, the issue of "personal" refusals is speculative.

250. The same is true of nonreligious "moral" objections to dispensing a drug. *Stormans*, 586 F.3d at 1131. While one can imagine a pharmacist with a nonreligious "moral" objection to dispensing a drug,

Defendants offered no evidence of any pharmacies or pharmacists that have such an objection, nor did they offer any evidence that "moral" objections have ever served as a basis for refusing to dispense a drug.

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

252. That is largely undisputed here. In contrast with hypothetical "personal" objections, there is overwhelming evidence that the Regulations burden real-world pharmacies and pharmacists with conscientious objections to Plan B. Nearly all of the testimony before the Board dealt with conscientious objections to Plan B. And the only real-world conduct that has ever been subject to the Regulations is Plaintiffs' conscientious objections to Plan B.

253. In short, "the burden of the [Regulations], in practical terms, falls on [conscientious objectors] but almost no others." 508 U.S. at 536. Defendants cannot sanitize the Regulations by positing hypothetical secular conduct that might also be prohibited under the

Regulations—any more than the government in *Lukumi* could sanitize its ordinances by positing hypothetical secular animal killings that might have been prohibited under its ordinances.

2. The interpretation of the Regulations.

254. Similar evidence shows that, as in *Lukumi*, "the interpretation given to the [Regulations] by [the government]" favors secular conduct over religious conduct. 508 U.S. at 537. As noted above, several open-ended provisions give the Board broad discretion to interpret the Regulations on a case-by-case basis. For example, the Board has discretion to punish conduct—or not—based on whether it is "substantially similar" to other conduct, WAC 246-869-010(1), whether it is undertaken in "good faith," 246-869-010(1)(e), and whether it complies with the open-ended Stocking Rule.

255. In practice, these provisions have never been interpreted to prohibit widespread business, economic, and convenience reasons for referring patients elsewhere. But they have been interpreted to prohibit Plaintiffs' conscientious objections to Plan B.

3. The overbreadth of the Regulations.

256. Finally, as in *Lukumi*, the Regulations "proscribe more religious conduct than is necessary to achieve their stated ends." 508 U.S. at 538. That is, they prohibit Plaintiffs' religious conduct even when it poses no threat to timely access to Plan B.

257. First, there is no evidence that Plaintiffs' conscience-based referrals have ever impeded timely access to Plan B. In fact, the government has stipulated the opposite: "[R]eferrals help assure timely access to lawfully prescribed medications . . . includ[ing] Plan B."[189]

258. Second, conscience-based referrals have been permitted in Washington for decades, and the State has offered no evidence that they have impeded timely access to medication. To the contrary, the State argues that it is acting prophylactically—preventing a problem that has not yet arisen. But that is the essence of overbreadth.

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

260. Fourth, the Regulations are overbroad in light of the available alternatives. The State claims that, as an alternative to referral, pharmacies can accommodate the conscience of their employees by hiring a second pharmacist, applying for Board approval of a telepharmacy program or using an on-call pharmacist or hiring a second full-time pharmacist. But in many (if not most) cases, the first

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[189] Dkt #441, ¶ 1.5.

two options are prohibitively expensive and, in the case of telepharmacy, it is a speculative option given the Board has never and would likely never approve a telepharmacy application for the purpose of covering for an absent pharmacist when another nearby pharmacy can provide a clinically superior, in-person consultation with a pharmacist. As to the on-call pharmacist, it is more timely to refer a patient to a nearby pharmacy than to wait for an on-call pharmacist to arrive. Banning conscience-based referrals thus *slows* access to medication.

261. Finally, if the Stormans are forced to stock and deliver Plan B in violation of conscience, it is undisputed that they will be forced to close their pharmacy. Similarly, if individual pharmacists like Ms. Mesler and Ms. Thelen cannot be accommodated, they will be forced to find a different job, leave the state, or leave the profession. Shutting down pharmacies and driving conscientious pharmacists from the profession does not enhance timely access to medication; it undermines it. This is further evidence of the Regulations' overbreadth.

262. In sum, because the burden of the Regulations falls almost exclusively on conscientious objectors, because the Regulations have been interpreted to disfavor conscientious objections, and because the Regulations prohibit conscientious objections even when they do not threaten access to medication, the Regulations are not neutral under *Lukumi*.

263. This conclusion is not based merely on the fact that "pharmacists with religious objections

to Plan B will disproportionately require accommodation under the rules." *Stormans*, 586 F.3d at 1131. Rather, it is based on the conclusion that the "design of these [Regulations] accomplishes instead a 'religious gerrymander[.]'" *Lukumi*, 508 U.S. at 535 (quoting *Walz v. Tax Comm'n*, 397 U.S. at 696).

F. Neutrality – discriminatory intent.

264. A law also fails the neutrality requirement if it was enacted with discriminatory intent—in other words, if the law was "enacted 'because of,' not merely 'in spite of,' [its] suppression of" religious conduct. *Lukumi*, 508 U.S. at 540. As the Ninth Circuit pointed out, "the law is unsettled" on how a plaintiff can attempt to prove discriminatory intent—and in particular, whether a plaintiff may offer evidence of the "historical background" of the regulations and their "legislative history." *Stormans*, 586 F.3d at 1131-32.

265. In *Lukumi*, two justices (Justices Kennedy and Stevens) joined Part II.A.2 of the opinion, which examined "both direct and circumstantial evidence" of the law's intent. 508 U.S. at 540. According to these justices, "[r]elevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Id.* Two justices (Chief Justice Rehnquist and

Justice Scalia) disagreed with that approach. *Id.* at 558-59. Five justices expressed no opinion.

266. This Court is of the opinion that cautiously considering the historical background of a law is the best approach, for several reasons. First, the Ninth Circuit, in dictum, has suggested that the use of equal protection jurisprudence in the free exercise context is appropriate, citing the portion of *Lukumi* that relied on legislative history. *See San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1030 n.4 (9th Cir. 2004) ("The Supreme Court has approved reference to equal protection jurisprudence.").

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

representation"). No circuit has ruled historical background off limits.

268. Third, both the Supreme Court and the Ninth Circuit routinely consider the historical background of a law when assessing the law's purpose under the Establishment Clause—which requires that all laws have a secular purpose. Relevant evidence includes the "contemporaneous legislative history [and] the historical context of the statute, . . . and the specific sequence of events leading to [its] passage." *Edwards v. Aguillard*, 482 U.S. 578, 594-95 (1987); *see also Cammack* v. *Waihee*, 932 F.2d 765, 774 (9th Cir. 1991) ("In determining the legislative purpose, courts may consider the statute on its face, its legislative history, or . . . the historical context of the statute and the specific sequence of events leading to the passage of the statute."). It would make little sense to allow courts to consider a law's historical background under the Establishment Clause, but forbid courts to consider the same evidence under the Free Exercise Clause.[190]

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[190] Courts also consider a law's historical background under the Equal Protection Clause and the Free Speech Clause. *See, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 489 (1997) ("[C]onsiderations relevant to the purpose inquiry [under the Equal Protection Clause] include … the historical background of the [jurisdiction's] decision; [t]he specific sequence of events leading up to the challenged decision[;] … and [t]he legislative or administrative history."); *NEA v. Finley*, 524 U.S. 569, 581 (1998) (determining whether a law was viewpoint discriminatory based in part on "the political context surrounding the adoption of the [law]").

269. In short, *Lukumi* requires this Court to determine whether a law was enacted with discriminatory "purpose." 508 U.S. at 533. And courts routinely determine a law's purpose based at least in part on the law's historical background. Accordingly, this Court will carefully consider the historical background of the Regulations, taking into account the inherent limitations in legislative history.

270. At the preliminary injunction stage, the Ninth Circuit concluded that the history of the Regulations "provides no meaningful guidance on the object or neutrality of the final rules adopted by the Board," because that history revealed "a patchwork quilt of concerns, ideas, and motivations." *Stormans*, 586 F.3d at 1133. However, four years of discovery and twelve days of trial have revealed voluminous evidence that was unavailable at the preliminary injunction stage. Thus, this Court will consider the evidence anew.

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

city attorney, and a deputy city attorney). *Id.* at 541-42. Taken together, the events and comments showed that the purpose of the ordinances was to target Santeria sacrifice. *Id.* at 542.

272. Here, a much larger body of evidence adduced at trial shows that the purpose of the Regulations was to target conscientious objections to Plan B. Although some of the Board members, the Governor, and the "stakeholders" were careful not to make obviously inflammatory comments like the city officials in *Lukumi*, the record of their correspondence and actions demonstrates that there were no "personal" objections, and the primary purpose of the Regulations was to prohibit conscientious objections to Plan B.

273. First, as detailed in the Findings of Fact above, the focus of the regulatory process, from beginning to end, was on conscientious objections to Plan B:

a. Before the regulatory process began, prominent events focused the Board's attention specifically on conscientious objections to Plan B—not any other objections or any other drug.

b. Public comments during the rulemaking process focused overwhelmingly on conscientious objections to Plan B.

c. The Governor and her advocates, in internal discussions and when pressuring the Board, focused

overwhelmingly on conscientious objections to Plan B.

d. Internal Department of Health and Board staff discussions over the draft rules focused on conscientious objections to Plan B.

e. After the Regulations were finalized, the Board's October 2006 survey on access dealt almost exclusively with conscientious objections to Plan B.

f. The Regulations, in practice, have been enforced only against conscientious objections to Plan B.

274. Second, additional evidence at trial demonstrated that, unlike most of the Board's regulations, these Regulations were not the product of a neutral, bureaucratic process based solely on pharmaceutical expertise. Rather, they were a highly political affair, driven largely by the Governor and Planned Parenthood—both outspoken opponents of conscientious objections to Plan B:

a. In accordance with both the National and State Pharmacy Association, the Board originally voted in favor of accommodating conscientious objections.

b. Within hours of the Board's pro-conscience vote, the Governor and Planned Parenthood set in motion a plan to reverse the Board's decision. The

Governor publicly threatened to replace members of the Board, and the Governor, based on the unprecedented participation of Planned Parenthood and other pro-choice advocates in the Board interview process, did, in fact, refuse to reappoint Board Chair Awan.

c. The Governor's own handwritten notes indicate her primary concern was ensuring the Regulations were "clean enough for the advocates [*i.e.*, Planned Parenthood] re: conscious/moral issues."

d. The Governor ultimately advocated a draft regulation that prohibited conscience-based referrals.

e. To ensure her victory, the Governor personally called the Board Chair to pressure him to pass her Regulations, after she had advised her staff that calling Board members was unlawful.

f. When the Chair resisted, the Governor replaced him with appointees recommended by Planned Parenthood.

g. Neither the Board nor the Governor ever researched access to Plan B (or any other drug) before passing the Regulations. The Board never identified a single incident in which a patient was unable to gain timely access to Plan B. And its post hoc survey of access to Plan

B showed that there was no problem of access.

275. Third, the record of the stakeholder meetings, which ultimately produced the text of the Regulations, shows that the purpose of the Regulations was to protect referrals for business reasons while prohibiting referrals for reasons of conscience.

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

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

G. Neutrality – differential treatment of two religions.

278. A law can also fail the neutrality requirement when it produces "differential

treatment of two religions." *Lukumi*, 508 U.S. at 536. As the Supreme Court has repeatedly said, the "clearest command" of the religion clauses is that "one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

279. In *Lukumi*, for example, the ordinances prohibited Santeria sacrifice, but included an exemption for kosher slaughter. 508 U.S. at 536. The Supreme Court suggested that this "differential treatment of two religions" might be "an independent constitutional violation." *Id.* Similarly, in *Larson v. Valente*, 456 U.S. 228, 230 (1982), the Supreme Court struck down a state law that imposed registration and reporting requirements upon only those religious organizations that solicited more than fifty per cent of their funds from nonmembers. According to the Court, these requirements impermissibly distinguished between "well-established churches," which had strong support from their members, and "churches which are new and lacking in a constituency," which had to rely on solicitation from nonmembers. *Id.* at 246 n.23.

280. Here, the evidence at trial revealed two different types of "differential treatment" among religions. First, as noted above, the Death With Dignity Act categorically exempts pharmacists who have a conscientious objection to participating in assisted suicide. Thus, one religious belief is protected (conscientious objections to assisted suicide), but another is forbidden (conscientious objections to Plan B). Several Board witnesses

supported this result simply because they personally disagree with Plaintiffs about when life begins.

281. Second, the evidence at trial revealed that Roman Catholic institutions operate numerous hospitals in Washington, which include outpatient pharmacies serving the general public. These pharmacies, like Ralph's, refuse to stock or dispense Plan B or *ella*. Thus, like Ralph's, Catholic pharmacies are operating in "outright defiance" of the Stocking Rule.

282. The evidence at trial also revealed that the Board is aware of the practices of Catholic pharmacies, but has made no effort to enforce the Regulations against them.

283. Board witnesses were unable to provide a reasoned explanation for why it would enforce the Regulations against Plaintiffs' small, independent pharmacy, but would ignore known violations of the same Regulations by Catholic pharmacies. Some witnesses had no explanation. Others stated that the Board would not enforce the Regulations until it received a complaint.

284. The more plausible explanation is that the Board does not object to shutting down a small, independent pharmacy like Ralph's, which was the object of a boycott honored by the Governor and was picketed and demonized by the local media. But the Board recognizes that shutting down Catholic pharmacies would have a devastating impact on access to health care. Thus, in practice, the Regulations are enforced against small, independent

conscientious objectors "lacking in a constituency," but not against "well-established churches" that are a pillar of health care within the state. *Larson*, 456 U.S. at 246 n.23. That constitutes "differential treatment of two religions," rendering the Regulations non-neutral under *Lukumi*. 508 U.S. at 536.

285. Because the Regulations are not neutral or generally applicable, they are subject to strict scrutiny. This requires Defendants to show that the Regulations (1) "advance interests of the highest order" and (2) are "narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (quotations omitted). This is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). It requires the courts to "look[] beyond broadly formulated interests justifying [the law]" and instead "scrutinize[] the asserted harm of granting *specific* exemptions to *particular* religious claimants." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (emphasis added). For several reasons, Defendants have not satisfied this test.

1. Over-inclusivity.

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

287. The government has stipulated that "referral is a time-honored pharmacy practice, it continues to occur for many reasons, and is often the most effective means to meet the patient's request."[191] With respect to Plaintiffs' conduct, the government further stipulated that "facilitated referrals *do not pose a threat to timely access to lawfully prescribed medications*[,] . . . *includ[ing] Plan B*." *Id.* ¶ 1.6 (emphasis added). In other words, Defendants *agree* that Plaintiffs' conduct does not threaten timely access to Plan B. Thus, as applied to Plaintiffs' conduct, the Regulations are "overbroad"—not narrowly tailored. *Lukumi*, 508 U.S. at 546.

288. Even aside from the stipulations, the evidence at trial has shown that Plaintiffs' conduct does not pose a threat to timely access to medication. First, Defendants have not identified any problem of access to Plan B. Indeed, all evidence is to the contrary. Plan B is available without a prescription to anyone over age sixteen, and it is widely available at pharmacies, doctors' offices, government health centers, emergency rooms, Planned Parenthood, and a toll-free hotline. It is also available for overnight delivery via the Internet. According to the Board's own survey, there is no problem of access to Plan B. And throughout the rulemaking process, Defendants were unable to identify any significant problem of timely access to Plan B.

289. More importantly, strict scrutiny focuses on whether the law furthers the government's

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[191] Dkt. #441, ¶ 1.5

interest *as applied to the particular Plaintiffs*. *See O Centro*, 546 U.S. at 431 (Government must show with "particularity" that its interest "would be adversely affected by granting an exemption.") (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972)). Here, it is undisputed that Plaintiffs' practices pose no access problem. Plaintiffs can and do refer patients to dozens of nearby pharmacies that willingly stock and dispense Plan B. Plaintiffs regularly refer patients to those nearby locations for any number of drugs, and there is no evidence that Plaintiffs' practices have ever denied a patient timely access to Plan B.

2. Under-inclusivity.

290. The Regulations also fail strict scrutiny because they are "underinclusive in substantial respects"—*i.e.*, "[t]he proffered objectives are not pursued with respect to analogous nonreligious conduct." *Lukumi*, 508 U.S. at 546. Although the government asserts, in the case of Plaintiffs, that it has an interest in promoting immediate, on-site delivery of time-sensitive medication, it permits pharmacies to undermine that alleged interest for a wide variety of business, convenience, and personal reasons. For example, pharmacies can refuse to stock Plan B if it does not fall within their business niche; they can refuse to stock time-sensitive insulin medication because they want extra shelf space; and they can refuse to accept payment for Plan B if they do not want the hassle of dealing with the patient's insurance plan.

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

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

3. Undermining the interest.

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

III. Fourteenth Amendment

294. The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). To receive protection under the Due Process Clause, a right must be, "objectively, 'deeply rooted in this Nation's history and tradition,' . . . and 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [it was] sacrificed.'" *Id.* (quoting *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) and *Palko v. Connecticut*, 302 U.S. 319 (1937)). It must also be subject to a "careful description" of the asserted fundamental liberty interest at stake. *Id.* at 721 (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

295. When analyzing a due process claim, the "crucial guideposts for responsible decisionmaking" are the nation's "history, legal traditions, and practices." *Id.* (internal quotations and citations omitted). The question is whether the right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Commonwealth*, 291 U.S. 97, 105 (1934). If so, the right may not be infringed "*at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. at 721. (quoting *Flores*, 507 U.S. at 302).

296. Here, the fundamental liberty interest at stake is the right to refrain from taking human life. This right is deeply rooted in our nation's "history, legal traditions, and practices." *Id.* It was first protected in the colonial era in the context of compulsory military service. It has also been consistently protected for health care practitioners in the context of abortion, abortifacient drugs, assisted suicide, and capital punishment. It is widely recognized in the U.S. medical community, and it is recognized in foreign and international law. *See generally* Mark Rienzi, *The Constitutional Right to Refuse:* Roe*,* Casey*, and the Fourteenth Amendment Rights of Healthcare Providers*, *forthcoming* 87 Notre Dame L. Rev __ (2011).[192]

297. Because the beginning of life has not been defined for purposes of constitutional law, it is

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[192] *Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1749788.*

unclear whether the Supreme Court would apply abortion or contraception precedent to emergency contraceptives. When the Supreme Court addressed the murky question of when life begins, it recognized a constitutional right for women to choose to terminate a pregnancy in some circumstances. The question in this case is whether a corollary to that fundamental freedom to choose is a similar constitutional protection of an honest, good faith belief that life begins at the moment of conception.

298. In this Court's view, the answer is clear. However, the Supreme Court has consistently and consciously refrained from adding "the right to refuse to participate in the taking of a life" to the limited list of constitutionally-protected fundamental rights it has recognized. The Supreme Court will have to answer that question in the affirmative before this Court can recognize the fundamental right the Plaintiffs assert.

IV. Title VII Claim.

299. While the Board of Pharmacy's rules unconstitutionally target religious conduct, the Court cannot say that the rules expressly "require or permit" a pharmacy to take discriminatory action against a pharmacist in such a direct manner as to violate Title VII. As noted above, the rules are facially constitutional—they do not on their face require or permit discriminatory conduct. It is in their operation that the rules force a pharmacy to choose between compliance with the delivery and stocking rules and employing a conscientious objector as a pharmacist. Because the rules do not

expressly permit a pharmacy to discriminate, Title VII does not preempt them.

V. Permanent Injunction.

300. Because the Regulations violate the Constitution, they should be permanently enjoined so that the government cannot enforce them against Plaintiffs. This Court has broad discretion to fashion appropriate equitable relief. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). A permanent injunction is appropriate when the plaintiff demonstrates:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *Antoninetti v. Chipotle Mexican Grill, Inc.*, 643 F.3d 1165, 1174 (9th Cir. 2010) (quoting eBay, 547 U.S. at 391).

301. Here, all four factors favor a permanent injunction.

302. *Irreparable Injury*. First, Plaintiffs have suffered an irreparable injury because the Regulations deprive them of their right to the free exercise of religion under the First Amendment. Both the Ninth Circuit and the Supreme Court "have

repeatedly held that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). As the Ninth Circuit stated in its preliminary-injunction ruling: "If [Plaintiffs] are compelled to stock and distribute Plan B . . . , and a trial on the merits shows that such compulsion violates their constitutional rights, *[Plaintiffs] will have suffered irreparable injury*, since unlike monetary injuries, constitutional violations cannot be adequately remedied through damages." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (emphasis added; internal quotations omitted). Beyond the loss of First Amendment freedoms, Plaintiffs face severe emotional harms if they are forced to choose between following their religious beliefs, which forbid them from participating in the destruction of human life, and continuing to provide for their families. *See American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) ("[T]he loss of one's [business] does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of [losses].") (alterations in original; internal quotations omitted).

303. *Inadequate Remedy at Law.* For similar reasons, Plaintiffs have no adequate remedy at law—"since unlike monetary injuries, constitutional violations *cannot be adequately remedied through damages*." *Id.* (emphasis added; internal quotations omitted). Beyond emotional harms and the loss of

First Amendment rights, Plaintiffs also face the loss of their job, their business, and their livelihood. Although such financial losses might ordinarily be remedied through damages, "the Eleventh Amendment sovereign immunity of the [State Defendant] bars the [Plaintiffs] from ever recovering damages in federal court." *California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 851-52 (9th Cir. 2009). Thus, an injunction is particularly appropriate because Plaintiffs have *no remedy* available at law. *Id.*

304. *Balance of Hardships.* The balance of hardships also tips overwhelmingly in Plaintiffs favor. Absent an injunction, Plaintiffs will be forced to choose between their First Amendment rights and their ability to provide for their families. Such a "stark choice" tips "sharply" in favor of granting an injunction. *Nelson v. National Aeronautics and Space Admin*, 530 F.3d 865, 881-82 (9th Cir. 2008), *rev'd on other grounds*, *National Aeronautics and Space Admin. v. Nelson*, 131 S.Ct. 746 (2011). On the other side of the scale, Defendants offer *no evidence* of hardship. There is no evidence that Plaintiffs' referrals have ever impeded timely access to Plan B. In fact, Defendants have stipulated precisely the opposite: "that facilitated referrals help assure timely access to lawfully prescribed medications . . . includ[ing] Plan B."[193]

305. *Public Interest.* For the same reasons, the public interest weighs heavily in favor of a permanent injunction. The Ninth Circuit has

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[193] Dkt. #441, ¶ 1.5

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

JUDGMENT

306. As prevailing parties, Plaintiffs are entitled to their reasonable attorneys' fees and costs pursuant to 42 U.S.C. §§1983, 1988.

307. The Court has entered a Judgment enjoining the Regulations as applied to Plaintiffs in a separate order.

DATED this 22nd day of February, 2012

s/Ronald B. Leighton
Ronald B. Leighton
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JUDGEMENT IN A CIVIL CASE

STORMANS, INCORPORATED, et al,

Plaintiffs,

v.

CASE NO. C07-5374 RBL

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

Defendants

[( ] **Decision by Court.** This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT

1. WAC 246-869-010, WAC 246-869-150, and WAC 246-863-095 ("Regulations"), as applied to Plaintiffs, are hereby DECLARED unconstitutional under the Free Exercise Clause of the First Amendment to the United States Constitution;

2. The Regulations, as applied to Plaintiffs, are hereby DECLARED unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

3. Defendants Al Linggi, Rebecca Hille, Gary Harris, George Roe, Vandana Slatter, Rosemarie Duffy, and Dan Connelly ("Defendants"), and their employees, agents, and successors in office, are hereby permanently ENJOINED and RESTRAINED from enforcing the Regulations against Plaintiffs, or against the pharmacies in which Plaintiffs have an ownership or managerial interest, or where Plaintiffs are employed, insofar as those Regulations would prohibit Plaintiffs from declining based on their religious beliefs to stock or deliver Plan B or *ella* and instead providing a referral to a nearby pharmacy or other location that provides Plan B or *ella*;

4. This Court shall retain jurisdiction of this matter for all proceedings involving the interpretation, enforcement or amendment of this Permanent Injunction.

Dated: February 23, 2012

William M. McCool
Clerk

s/Jean Boring
(By) Deputy Clerk

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STORMANS INC, doing business as Ralph's Thriftway; et al., Plaintiffs - Appellees, v. JOHN WIESMAN, Secretary of the Washington State Department of Health; et al., Defendants - Appellants, and JUDITH BILLINGS; et al., Defendant-intervenors.	No. 12-35221 D.C. No. 3:07-cv-05374-RBL Western District of Washington, Tacoma ORDER

STORMANS INC, doing business as Ralph's Thriftway; et al.,	No. 12-35223 D.C. No. 3:07-cv-05374-RBL Western District of

Plaintiffs - Appellees, v. JOHN WIESMAN, Secretary of the Washington State Department of Health; et al., Defendants, and JUDITH BILLINGS; et al., Defendant-intervenors-Appellants	Washington, Tacoma

Before: GRABER, CLIFTON, and MURGUIA, Circuit Judges.

The panel has voted to deny Appellees' petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellees' petition for panel rehearing and petition for rehearing en banc are DENIED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STORMANS, INC., doing business as Ralph's Thriftway; RHONDA MESLER; MARGO THELEN, *Plaintiffs-Appellees,* v. MARY SELECKY, Secretary of the Washington State Department of Health; LAURIE JINKINS, Assistant Secretary of Washington Health Systems Quality Assurance; GEORGE ROE; SUSAN THIEL BOYER; DAN CONNOLLY; GARY HARRIS; VANDANA SLATTER; REBECCA HILLE; ROSEMARIE DUFFY, Members of the Washington Board of Pharmacy; ELLIS CASSON; DEBORAH SIOUS CANO-LEE; JERRY HEBERT; SHAWN MURINKO, Commissioners for the Washington Human Rights Commission; MARK BRENMAN, Executive Director of the Washington Human Rights Commission; YVONNE LOPEZ MORTON acting Commissioner of the Human Rights	No. 07-36039 D.C. No. CV-07-05374-RBL

Commission of the State of Washington,
Defendants,

and

JUDITH BILLINGS; RHIANNON ANDREINI; JEFFREY SCHOUTEN; MOLLY HARMON; CATHERINE ROSMAN; EMILY SCHMIDT; TAMI GARRARD,
Defendant-intervenors

STORMANS, INC., doing business as Ralph's Thriftway; RHONDA MESLER; MARGO THELEN,
Plaintiffs-Appellees,

v.

MARY SELECKY, Secretary of the Washington State Department of Health; LAURIE JINKINS, Assistant Secretary of Washington Health Systems Quality Assurance; GEORGE ROE; SUSAN THIEL BOYER; DAN CONNOLLY; GARY HARRIS; VANDANA SLATTER; REBECCA HILLE; ROSEMARIE DUFFY, Members of the Washington Board of Pharmacy; ELLIS CASSON; DEBORAH SIOUS CANO-

LEE; JERRY HEBERT; SHAWN MURINKO, Commissioners for the Washington Human Rights Commission; MARK BRENMAN, Executive Director of the Washington Human Rights Commission,

Defendants,

and

YVONNE LOPEZ MORTON, acting Commissioner of the Human Rights Commission of the State of Washington,

D*efendant-Appellant,*

JUDITH BILLINGS; RHIANNON ANDREINI; JEFFREY SCHOUTEN; MOLLY HARMON; CATHERINE ROSMAN; EMILY SCHMIDT; TAMI GARRARD,

Defendant-intervenors-Appellants.

No. 07-36040

D.C. No. CV-07-05374-RBL

ORDER AND OPINION

Appeal from the United States District Court for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted
July 8, 2008—Seattle, Washington

Filed October 28, 2009

Before: Kim McLane Wardlaw, Richard R. Clifton, and N. Randy Smith, Circuit Judges.

Opinion by Judge Wardlaw

COUNSEL

Kristen K. Waggoner, Seattle, Washington, for the plaintiffs-appellees.

Alan D. Copsey, Assistant Attorney General, Olympia, Washington, for defendants-appellants.

Rima J. Alaily, Seattle, Washington, for the defendants-intervenors-appellants.

ORDER

Appellees' petition for panel rehearing is GRANTED. The prior opinion filed on July 8, 2009, and reported at 571 F.3d 960 is vacated concurrent with the filing of a New Opinion today.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing en banc is DENIED. Subsequent petitions for panel rehearing and for

rehearing en banc may be filed with respect to the New Opinion.

IT IS SO ORDERED.

OPINION

WARDLAW, Circuit Judge:

We must decide whether the district court abused its discretion by preliminarily enjoining the enforcement of new rules promulgated by the Washington State Board of Pharmacy ("Board") that require pharmacies to deliver lawfully prescribed Federal Drug Administration ("FDA")–approved medications and prohibit discrimination against patients, on the ground that the rules violate pharmacies' or their licensed pharmacists' free exercise rights under the First Amendment to the U.S. Constitution. We have jurisdiction pursuant to 28 U.S.C. § 1292. Because we conclude that the district court incorrectly applied a heightened level of scrutiny to a neutral law of general applicability, and because the injunction is overbroad, we vacate, reverse, and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

The practice of pharmacy in the state of Washington is regulated by the Washington State Board of Pharmacy pursuant to a comprehensive regulatory scheme which directs the Board to "[r]egulate the practice of pharmacy and enforce all laws placed under its jurisdiction," "[e]stablish the

qualifications for licensure," conduct disciplinary proceedings, and "[p]romulgate rules for the dispensing, distribution, wholesaling, and manufacturing of drugs and devices and the practice of pharmacy for the protection and promotion of the public health, safety, and welfare." Wash. Rev. Code Ann. § 18.64.005. Under the Code, a license is required for "any person to practice pharmacy or to institute or operate any pharmacy." *Id.* at § 18.64.020. A "pharmacist" is defined as "a person duly licensed by the Washington state board of pharmacy to engage in the practice of pharmacy," *id.* at § 18.64.011(10), and a "pharmacy" is defined as "every place properly licensed by the board of pharmacy where the practice of pharmacy is conducted," *id.* at § 18.64.011(12). The "practice of pharmacy" "includes the practice of and responsibility for: [i]nterpreting prescription orders [and] the compounding, dispensing, labeling, administering, and distributing of drugs and devices," in addition to information-sharing and monitoring responsibilities. *Id.* at § 18.64.011(11).

In January 2006, the Board became concerned with the lack of clear authority regarding destruction or confiscation of lawful prescriptions and refusals by pharmacists to dispense lawfully prescribed medications. Recognizing the importance of providing Washington patients timely access to all medications, the Board initiated a rulemaking process to address these issues. For sixteen months, the Board considered its various rulemaking options, receiving 21,000 written comments and testimony from the public and various interest groups. Pursuant to the Washington Administrative

Procedure Act, Wash. Rev. Code Ann. § 34.05.325, the Board conducted well-attended hearings on the proposed rules.

Some public comments addressed the availability of a variety of prescription medicines and devices, such as syringes, prenatal vitamins, oral contraceptives, and AIDS medications. Most of the comments, however, focused on whether pharmacists should be allowed to refuse to dispense a lawful prescription for Plan B based on their personal, moral, or religious beliefs.

Approved by the FDA on July 28, 1999, Plan B is a post-coital hormonal emergency contraceptive which contains the same hormones as ordinary birth control pills, estrogen and progestin, in much stronger dosages. It is used to prevent pregnancy after the intended method of birth control fails or after unprotected sexual activity. Plan B is most effective within the first 12 to 24 hours after sexual intercourse and becomes less effective with each passing hour. It should be taken within 72 hours of sexual intercourse. After 120 hours, it has no effect. Plan B is approved for over-the-counter dispensation nationwide to adults eighteen and over. The drug must be held behind the pharmacist's counter and can be sold to any adult, male or female, upon age verification. At the time of the district court's decision, females younger than eighteen were

required to present a medical prescription to obtain the drug.[1]

The drug is generally available to Washington residents through pharmacies, physicians' offices, government health centers, hospital emergency rooms, Planned Parenthood, the Internet, and a toll-free hotline. Seventy-seven percent of Washington pharmacies, responding to a sample survey of 121 pharmacies conducted before the adoption of the challenged new rules,[2] typically stock Plan B. Those who did not cited low demand (15 percent)[3] or an easy alternative source (2 percent). Only two pharmacies (2 percent) surveyed did not stock the drug because of personal, religious, or moral objections. If the survey is accurate and representative, that translates into approximately 27 of the 1,370 licensed pharmacies in Washington. The survey does not reveal how many pharmacists in the state decline to dispense the drug.

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[1] As of April 22, 2009, pursuant to a court order, the FDA had notified the manufacturer of Plan B that it may, upon submission and approval of an appropriate application, market Plan B without a prescription to women seventeen years of age and older.

[2] We acknowledge that the survey may not accurately reflect the current state of affairs. We expect that on remand, the district court will be provided with more recent and comprehensive data.

[3] According to the survey, 72 percent of pharmacies in the state of Washington had less than 25 requests for Plan B per year. Nearly 13 percent had between 26 and 50 requests; 6 percent had between 51 and 100 requests; and 11 percent had greater than 100 requests.

One of the comments received by the Board during its rulemaking process was set forth in an April 17, 2006, letter from the Washington State Human Rights Commission's ("HRC") Executive Director, Marc Brenman. HRC was created by the legislature and is authorized to act to prevent discrimination in violation of the Washington Law Against Discrimination ("WLAD"). Wash. Rev .Code Ann. § 49.60.010. It may issue and investigate complaints, attempt conciliation, or refer matters to the Attorney General's Office for a hearing before an administrative law judge. *Id.* §§ 49.60.230, .250; Wash. Admin. Code §§ 162–08–071 to –190. HRC is not authorized to make a final determination that discrimination occurred or to issue penalties. *See* Wash. Rev. Code Ann. § 49.60.240. HRC is authorized to comment on rules being considered by other agencies or state officials. *See id.* § 49.60.110 ("[HRC] shall formulate policies to effectuate the purposes of this chapter and may make recommendations to agencies and officers of the state or local subdivisions of government in aid of such policies and purposes."). It was under this authority that the Executive Director submitted a letter to the Board, which concluded:

> It is illegal and bad policy to permit pharmacists to deny services to women based on the individual pharmacists' religious or moral beliefs. We have examined the issue from federal and state law perspectives, from the public interest, and from possible defenses and compromises that could be raised and made. On no ground would

> refusal to fill a lawful prescription for emergency contraception be appropriate.

The letter also posited that any pharmacy or pharmacist who declined to dispense Plan B for any reason engaged in sex discrimination in violation of federal and state law, even if another on-site pharmacist filled the prescription. It concluded that the Board itself risked liability under WLAD if it were to permit such refusals.

After considering a number of draft rules,[4] the Board adopted two rules by unanimous vote on April 12, 2007. The first rule, an amendment to Washington Administrative Code section 246–863–095, governs pharmacists. Under this rule, a pharmacist may be subject to professional discipline for destroying or refusing to return an unfilled lawful prescription, violating a patient's privacy, or

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[4] The first draft of the rule allowed a pharmacist to refuse to fill a lawful prescription if another on-site pharmacist would dispense the medication without delay. One of the second drafts required pharmacists to fill lawful prescriptions, but the alternative second draft allowed a pharmacist to refuse and refer a patient to another provider. The third draft did not require pharmacies to fill lawful prescriptions and allowed pharmacies and pharmacists to refuse to dispense a medication. In response to that draft, Washington State Governor Christine Gregoire offered the assistance of her office to help the Board work toward a solution to prevent the potentially deleterious effects of allowing pharmacists to refuse to dispense legally prescribed medication on the basis of unlimited and illegitimate reasons. A fourth draft was negotiated, but subsequent substantive changes to it precluded agreement. Finally, two more drafts were prepared for public comment, the text of which corresponded substantially with the final rules.

unlawfully discriminating against, or intimidating or harassing a patient. The rule, however, does not require an individual pharmacist to dispense medication in the face of a personal objection.

The second rule, Washington Administrative Code section 246–869–010, governs pharmacies. It requires pharmacies "to deliver lawfully prescribed drugs or devices to patients and to distribute drugs and devices approved by the U.S. Food and Drug Administration for restricted distribution by pharmacies ... in a timely manner consistent with reasonable expectations for filling the prescription." A pharmacy may substitute a "therapeutically equivalent drug" or provide a "timely alternative for appropriate therapy," but apart from certain necessary exceptions,[5] a pharmacy is prohibited from refusing to deliver a lawfully prescribed or approved medicine. A pharmacy is also prohibited from destroying or refusing to return an unfilled lawful prescription, violating a patient's privacy, or unlawfully discriminating against, or intimidating or harassing a patient.

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[5] *See* Wash. Admin. Code §§ 246-869-010(1)(a)-(e), (2) (exempting pharmacies from the general duty to deliver when the prescription cannot be filled due to lack of payment, because it may be fraudulent or erroneous, or because of declared emergencies, lack of specialized equipment or expertise, or unavailability of a drug despite good faith compliance with Washington Administrative Code section 246-869-150, which provides in part that "[t]he pharmacy must maintain at all times a representative assortment of drugs in order to meet the pharmaceutical needs of its patients").

In the Concise Explanatory Statement accompanying the regulations, the Board noted that it created a right of refusal for individual pharmacists by allowing a pharmacy to "accommodate" a pharmacist who has a religious or moral objection. A pharmacy may not refer a patient to another pharmacy to avoid filling a prescription because the pharmacy has a duty to deliver lawfully prescribed medications in a timely manner. A pharmacy may accommodate a pharmacist's personal objections in any way the pharmacy deems suitable, including having another pharmacist available in person or by telephone.

The regulations took effect on July 26, 2007.

Stormans, Inc., doing business as Ralph's Thriftway, a grocery store in Olympia, Washington, which also operates a pharmacy, and individual pharmacists Rhonda Mesler and Margo Thelen (collectively, "Appellees"), filed a lawsuit pursuant to 42 U.S.C. § 1983 on July 25, 2007, the day before the effective date of the rules, in the U.S. District Court for the Western District of Washington.[6] They allege

[6] Named defendants are members of the Pharmacy Board, representatives of the Department of Health as well as the Executive Director and every member of HRC (collectively, "State Appellants"), including Mary Selecky, Secretary of the State of Washington Department of Health ("Department"); Laurie Jinkins, Assistant Secretary of the Department; George Roe, Susan Thiel Boyer, Dan Connolly, Gary Harris, Vandana Slatter, Rebecca Hille, Rosemarie Duffy, members of the Washington State Board of Pharmacy; Mark Brenman, Executive Director, and Yvonne Lopez Morton, Ellis Casson, Deborah Sious Cano-Lee, Jerry Hebert, Shawn Murinko, members of the Washington State Human Rights Commission.

as-applied violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the Supremacy Clause, and Title VII. They ultimately seek a permanent prohibition against enforcement of the new rules and the Washington State antidiscrimination law, WLAD, Wash. Rev. Code Ann. § 49.60, against "pharmacists and pharmacies that object to dispensing Plan B on moral or religious grounds."

Appellees assert that their personal religious views do not permit them to dispense Plan B, and, consequently, they refuse to provide Plan B to patients who request it. They claim that the Board's rules impinge on their constitutional right of free exercise of religion, arguing that the rules force them to choose between their religious beliefs as Christians and their livelihood.

The two individual pharmacists claim that by compelling their employers to hire another pharmacist to work with them during their shift—an accommodation about which their employers have expressed varying degrees of concern—the regulations will cause them to voluntarily leave their jobs or be terminated. Mesler has so far remained with her employer, who accommodated her during the five months between the effective date of the new rules and the issuance of the preliminary injunction. Mesler alleges, however, that without the court's injunction, she expects to be fired, because her employer has told her that it would not be able to accommodate her. Thelen voluntarily resigned from her former employment to work at a pharmacy that

accommodates her religious belief by ensuring there is always another pharmacist on duty.

Stormans, which is owned by Ken Stormans and his three children, claims that it has been under investigation since May 2006, and that the Board is investigating complaints that its pharmacy has refused to stock or sell Plan B. In his declaration, Vice President Kevin Stormans states that he received a phone call in May 2006 asking whether Ralph's Thriftway carried Plan B. He did not know the answer and did not know much about the drug. After a pharmacy employee told him that Ralph's did not carry Plan B because customers had not requested it, he told the caller that the store did not carry the product. Soon afterwards, Stormans received a few other inquiries as to why Ralph's did not stock Plan B. These inquiries prompted Kevin Stormans to research Plan B. After he learned that Plan B can prevent a fertilized egg from implanting in the uterus, and because Stormans's owners believe life begins with fertilization, Stormans decided that it would not sell the drug.

In the summer of 2006, the Board began investigating Ralph's Thriftway and questioned Kevin Stormans, requiring a written statement. Though the Board closed that investigation without taking any action, in January 2007, the Board initiated a new investigation against Ralph's. Kevin Stormans asserts that the matter has been referred to the Board's legal counsel for final review. After Stormans filed suit, the Board began a new investigation of Ralph's under the new rules. This investigation is pending. Stormans expects that the

Board's investigation will result in disciplinary charges, including possible revocation of its pharmacy license, as well as the initiation of an enforcement action by HRC if the preliminary injunction is overturned.

The district court granted the motion of seven individuals to intervene pursuant to Federal Rule of Civil Procedure 24(a). These individuals (collectively, "Intervenors") are five women who have been refused Plan B and/or may need timely access to Plan B in the future, and two HIV-positive individuals who need timely access to prescribed medications to manage their illness.[7]

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[7] Intervenors are: Judith Billings, Rhiannon Andreini, Jeffrey Schouten, Molly Harmon, Catherine Rosman, Emily Schmidt, and Tami Garrard.

In 2003, a pharmacist on duty at a Seattle pharmacy near the University of Washington refused to fill Molly Harmon's Plan B prescription. The pharmacist lectured Harmon about her choice of birth control. Though upset, Harmon insisted on speaking with the head pharmacist who ultimately dispensed the drug. In March 2007, Emily Schmidt was unable to obtain Plan B at two pharmacies in Wenatchee, Washington, because the pharmacy owner or pharmacist refused to dispense the drug. In November 2005, Rhiannon Andreini went to a pharmacy in Mukilteo, Washington, to purchase Plan B when her regular method of contraception failed. The pharmacist appeared to disapprove and stated that the store did not carry it. Andreini drove more than seventy miles back to her home to go to a pharmacy she knew would dispense the drug. Catherine Rosman, a case manager who assists women and adolescent girls suffering from domestic violence, is concerned that refusals to dispense Plan B will compound the trauma that her clients and thousands of girls and women like them will suffer as a result of sexual violence every year in Washington. Rosman has taken Plan B on two occasions, once following a

Plaintiffs moved for a preliminary injunction, asking that the court enjoin enforcement of the new rules against them pending litigation. On November 8, 2007, the district court issued an order granting a preliminary injunction based solely on plaintiffs' free exercise claim. *Stormans, Inc. v. Selecky,* 524 F.Supp.2d 1245, 1266 (W.D. Wash. 2007). The court enjoined the State Defendants "from enforcing [Washington Administrative Code] §§ 246–863–095(4)(d) and 246–869–010(4)(d) (the anti-discrimination provisions) against any pharmacy which, or pharmacist who, refuses to dispense Plan B but instead immediately refers the patient either to the nearest source of Plan B or to a nearby source for Plan B." *Id.*[8]

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sexual assault. In both instances, she chose to obtain the medication from Planned Parenthood because she heard several accounts of pharmacists refusing to dispense the drug or otherwise harassing patients.

Dr. Jeffrey Schouten, a Clinical Assistant Professor of Surgery at the University of Washington and a primary care physician at Washington's largest HIV-specialty clinic, and Judith Billings are HIV-positive. Dr. Schouten testified in favor of the new rules, explaining the importance of timely access to drugs for HIV-positive patients and individuals who have just been exposed to the virus. According to Dr. Schouten, because some people associate HIV status with certain lifestyle choices, these patients are at risk of pharmacy refusals and the serious health risks that accompany delayed access to needed medication.

[8] While the injunction refers only to the antidiscrimination provisions of the new rules, it appears the parties and district court understand that the injunction is intended to stop all enforcement actions under the new rules against any pharmacy or pharmacist refusing to dispense Plan B for whatever reason.

The State Defendants and the Intervenors timely appealed and asked the district court to stay the preliminary injunction pending appeal. Plaintiffs opposed the stay, but apparently recognizing that the injunction was overbroad, moved to modify the preliminary injunction, seeking to narrow its scope only to the named plaintiffs and their employees. The district court denied the motions.

On May 1, 2008, another panel of our court denied Intervenors' motion to stay the district court's injunction pending appeal. *Stormans Inc. v. Selecky,* 526 F.3d 406, 408 (9th Cir. 2008). Judge Tashima dissented from the denial of the stay. *Id.* at 409–18 (Tashima, J., dissenting in part).

II. JURISDICTION AND STANDARD OF REVIEW

The district court's jurisdiction is based on 28 U.S.C. §§ 1331 and 1343. We have jurisdiction under 28 U.S.C. § 1292(a)(1).

The district court's grant of a preliminary injunction is reviewed for "abuse of discretion" and should be reversed if the district court based "its decision on an erroneous legal standard or on clearly erroneous findings of fact." *FTC v. Enforma Natural Prods., Inc.,* 362 F.3d 1204, 1211–12 (9th Cir. 2004). "[W]e consider a finding of fact to be clearly erroneous if it is implausible in light of the record, viewed in its entirety, or if the record contains no evidence to support it." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,* 422 F.3d 782, 794 (9th Cir. 2005) (citations omitted). The district court's

interpretation of the underlying legal principles, however, is subject to de novo review. *See Cal. Pharmacists Ass'n v. Maxwell–Jolly,* 563 F.3d 847, 849 (9th Cir. 2009); *Brown v. Cal. Dep't of Transp.,* 321 F.3d 1217, 1221 (9th Cir. 2003). Finally, because "[i]njunctive relief ... must be tailored to remedy the specific harm alleged," *Lamb–Weston, Inc. v. McCain Foods, Ltd.,* 941 F.2d 970, 974 (9th Cir. 1991), "[a]n overbroad injunction is an abuse of discretion," *id.*

The district court's determination whether a party has standing is reviewed de novo. *See Buono v. Norton,* 371 F.3d 543, 546 (9th Cir. 2004). Ripeness is also a question of law reviewed de novo. *See Manufactured Home Cmtys. Inc. v. City of San Jose,* 420 F.3d 1022, 1025 (9th Cir. 2005). Questions of standing and ripeness may be raised and considered for the first time on appeal, including sua sponte. *See Wash. Legal Found. v. Legal Found. of Wash.,* 271 F.3d 835, 850 (9th Cir. 2001) (en banc), *aff'd sub nom. Brown v. Legal Found. of Wash.,* 538 U.S. 216 (2003); *Columbia Basin Apartment Ass'n v. City of Pasco,* 268 F.3d 791, 796–97 (9th Cir. 2001) (reviewing standing sua sponte even though not raised by either party).

III. DISCUSSION

A. Justiciability

Federal jurisdiction is limited to "actual 'cases' and 'controversies.' " *Allen v. Wright,* 468 U.S. 737, 750 (1984). We conclude that Appellees have standing to assert their claims under the Free Exercise Clause. Although their claims against the

State Appellants are ripe for review, the claims they assert against HRC are not ripe for consideration and should be dismissed.

1. Standing

[1] "Article III standing is a controlling element in the definition of a case or controversy." *Alaska Right to Life Political Action Comm. v. Feldman,* 504 F.3d 840, 848 (9th Cir. 2007) (alteration and internal quotation marks omitted). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 180–81 (2000) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992)).

Intervenors argue that Stormans, a for-profit corporation, lacks standing to assert a claim under the Free Exercise Clause. We decline to decide whether a for-profit corporation can assert its own rights under the Free Exercise Clause and instead examine the rights at issue as those of the corporate owners.

In *First National Bank of Boston v. Bellotti,* the Supreme Court held that the "proper question" was "not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with

those of natural persons." 435 U.S. 765, 776 (1978). "Instead, the question must be whether [the challenged statute] abridges [rights] that the First Amendment was meant to protect." *Id.* The Court refused to "address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment." *Id.* at 777.

[2] We have held that a corporation has standing to assert the free exercise right of its owners. *See EEOC v. Townley Eng'g & Mfg. Co.,* 859 F.2d 610, 620 n. 15 (9th Cir. 1988). In *Townley,* a closely held manufacturing company whose owners made a covenant with God to run their business according to the principles of Christian faith, argued that under the Free Exercise Clause, they were entitled to an exemption from the requirement that employers accommodate employees asserting religious objections to devotional services. We reasoned that "[b]ecause Townley is merely the instrument through and by which Mr. and Mrs. Townley express their religious beliefs, it is unnecessary to address the abstract issue whether a for-profit corporation has rights under the Free Exercise Clause independent of those of its shareholders and officers." *Id.* at 619–20. We found that "Townley presents no rights of its own different from or greater than its owners' rights" because the corporation is an "extension of the beliefs" of the owners, and "the beliefs of [the owners] are the beliefs and tenets of the Townley Company." *Id.* at 620 (internal quotation marks omitted). We therefore held that "Townley has standing to assert Jake and Helen Townley's Free Exercise rights," *id.*

at 620 n. 15, and examined the rights at issue as those of Jake and Helen Townley.

Here, Ken Stormans is the president, and his three children, including Kevin Stormans, serve as vice presidents of Stormans. Stormans asserts that because Ralph's is a fourth-generation, family-owned business whose shareholders and directors are made up entirely of members of the Stormans family, Kevin Stormans's opposition to Plan B is that of Ralph's and all the owners. In the amended complaint, Stormans alleges that Ralph's cannot sell Plan B "based on religious and moral grounds," and that Kevin "Stormans' [s] religious beliefs prevent him from selling a drug that intentionally terminates innocent human life." Stormans argues that Ralph's is an extension of the beliefs of members of the Stormans family, and that the beliefs of the Stormans family are the beliefs of Ralph's. Thus, Stormans, Inc. does not present any free exercise rights of its own different from or greater than its owners' rights. We hold that, as in *Townley,* Stormans has standing to assert the free exercise rights of its owners.[9]

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[9] The Supreme Court has elsewhere considered the free exercise rights of business owners. *See, e.g.*, *United States v. Lee*, 455 U.S. 252 (1982) (considering the claim of an Amish employer seeking an exemption on his employees' behalf from the payment of social security taxes on religious grounds); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (considering the free exercise claim of nonprofit corporations operating religious schools affiliated with Christianity challenging a tax policy granting exemptions only to educational institutions that do not racially discriminate). Moreover, *Townley* also indicates that an organization that asserts the free exercise rights of its

[3] *Harris v. McRae,* 448 U.S. 297 (1980), is not to the contrary. In *Harris,* the Women's Division of a church, as an organization, sought to challenge a restriction on the use of federal funds for abortion. The Court held that because "the [Free Exercise] claim asserted here is one that ordinarily requires individual participation"—because a plaintiff must "show the coercive effect of the enactment as it operates against him in the practice of his religion"—and because members of the Women's Division had a "diversity of view[s]" concerning the law, the organization did not satisfy the requirements for associational standing. *Id.* at 321 (internal quotation marks omitted); *see also Hunt v. Wash. Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977). But here, Stormans is not seeking relief as an organization and does not need to satisfy the requirements for associational standing. Thus, we will consider the rights of the owners as the basis for the Free Exercise claim.

[4] Stormans meets the standing criteria to pursue free exercise claims in this case. Its injuries are "concrete and particularized," "actual or imminent, not conjectural or hypothetical," and "fairly traceable" to the new rules. *See Friends of the Earth, Inc.,* 528 U.S. at 180. Because the new rules require the pharmacy to deliver medications, such as Plan B, in a timely manner, Stormans will not be able to avoid stocking Plan B on the basis of its religious objections. Its injuries will certainly be

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owners need not be primarily religious, as Townley's main function—manufacturing of mining equipment—was a secular activity.

ameliorated should the new rules be held unconstitutional.

[5] The individual pharmacists, Mesler and Thelen, also enjoy standing to sue under the Free Exercise Clause.[10] The injuries suffered by Mesler and Thelen are "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *See id.* Mesler alleges that, without the court's injunction, she expects to be fired because her religious convictions prohibit her from dispensing Plan B and her employer has told her that it will not be able to accommodate her. Thelen alleges she was forced to leave her former job (after her pharmacy was unable to hire a second pharmacist) to work at a pharmacy that accommodates her religious belief by ensuring that there is always another pharmacist on duty. Thelen has taken a job farther away from her house for less pay because her religious beliefs did not allow her to dispense Plan B.

[6] While indirect, there is a causal connection between the new rules and Mesler's threatened termination. Though "it does not suffice if the injury complained of is 'the result of the independent action of some third party not before the court,' that does not exclude injury produced by determinative or coercive effect upon the action of someone else." *Bennett v. Spear,* 520 U.S. 154, 169, (1997) (quoting

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[10] Whether Mesler's and Thelen's claims under the Free Exercise Clause are meritorious is a question distinct from whether they have standing to sue. Intervenors confuse the two issues.

Lujan, 504 U.S. at 560–61) (emphasis, alterations, citations, and internal quotation marks omitted). The new rules require a pharmacy to deliver medication in a timely manner—an act for which pharmacies generally depend upon their pharmacists. If certain pharmacists believe they cannot deliver certain medications and their employer is unable to accommodate this moral or religious belief, the pharmacy may not employ in the first place—and may terminate—the objecting pharmacists. Thus, if the new rules had not been passed, Mesler would not expect to lose her job and Thelen would not have been forced to find a new job. Furthermore, a favorable decision likely will redress the alleged injuries. If the new rules are invalidated, Mesler and Thelen will not be limited to employment only at pharmacies able to accommodate their religious views.

In addition to the immutable requirements of Article III, "the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.,* 454 U.S. 464, 474, (1982). "[P]rudential standing concerns require that we consider ... whether the alleged injury is more than a mere generalized grievance, whether [plaintiffs] are asserting [their] own rights or the rights of third parties, and whether the claim falls within the zone of interests to be protected or regulated by the constitutional guarantee in question." *Alaska Right to Life Political Action Comm.,* 504 F.3d at 848–49 (internal quotation marks omitted).

[7] The prudential "zone of interest" test, as the Supreme Court has observed, is "not meant to be especially demanding." *Clarke v. Sec. Indus. Ass'n,* 479 U.S. 388, 399, (1987). "Prudential standing is satisfied unless [the party's] 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that [the legislature] intended to permit the suit.' " *Ocean Advocates v. U.S. Army Corps of Eng'rs,* 402 F.3d 846, 861 (9th Cir. 2005) (quoting *Clarke,* 479 U.S. at 399,). Appellees also meet the prudential standing requirements. Appellees' conduct is directly regulated by the new rules and their constitutional interests are, according to the Appellees, directly infringed by the new rules. It is difficult to imagine a more appropriate group of plaintiffs to challenge new rules governing the conduct of pharmacies and pharmacists than a pharmacy and two pharmacists.

2. Ripeness

[8] "[R]ipeness is peculiarly a question of timing, designed to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.' " *Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1138 (9th Cir. 2000) (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 148, (1967), *abrogated on other grounds by Califano v. Sanders,* 430 U.S. 99, 97 (1977)) (internal quotation marks omitted). "Our role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Id.*

Constitutional ripeness, in many cases, "coincides squarely with standing's injury in fact prong" and "can be characterized as standing on a timeline." *Id.*

[9] As detailed above, Appellees' injuries are "real and concrete rather than speculative and hypothetical." *Id.* at 1139 (internal quotation marks omitted). However, when a litigant brings a preenforcement challenge, we have found that "a generalized threat of prosecution" will not satisfy the ripeness requirement. *Id.* "Rather, there must be a genuine threat of imminent prosecution." *Id.* (internal quotation marks omitted). There are three factors we consider when analyzing the genuineness of a threat of prosecution: "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute." *Id.*

In *Thomas,* landlords claimed that their pro-marriage religious beliefs prevented them from renting housing to unmarried couples and therefore would compel them to violate a law banning housing discrimination on the basis of marital status. We found that the claims were not ripe because the landlords had only a general " 'intent' to violate the law on some uncertain day in the future—if and when an unmarried couple attempts to lease one of their rental properties." *Id.* at 1140. The landlords could not even specify "when, to whom, where, or under what circumstances" "they have refused to rent to unmarried couples in the past." *Id.* at 1139.

We held that "[a] general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan." *Id.*

[10] Here, by contrast, although Appellees cannot control when a patient requesting Plan B will visit their pharmacy—prompting a refusal constituting a violation of the new rules—the Appellees can point to specific past instances when they have refused to sell Plan B or have made the decision not to stock the medication, which are direct violations of the challenged rules.

[11] Intervenors also contend that Mesler's and Thelen's claims are unripe because there has not been any state action threatening them and the new rules do not threaten them directly. However, the Board need not take any further action for individual pharmacists to be affected by the new rules; the very existence of the new rules may cause an employer to terminate a pharmacist who objects to dispensing a medication. Given the procedural posture of the case, and considering that the new rules became effective one day *after* the lawsuit was brought, the record with respect to Mesler and Thelen is sparse. We do not know whether Mesler's and Thelen's employers have been contacted by the Board; nor do we even know their employers' identity. Still, we conclude that their claims are ripe for review because as a result of the new rules and the guiding principles communicated by the Board, Thelen has been forced to leave her job, and Mesler is in danger of termination.

Until June 2007, Thelen served as a staff pharmacist in a Washington retail pharmacy and was the only pharmacist on duty during her work hours. She had informed her employer when hired that her religious beliefs would prevent her from dispensing Plan B. When customers requested Plan B, Thelen referred them to local pharmacies that she knew sold the drug. When she learned that the Board passed the new rules, but before they went into effect, Thelen contacted the Board to make sure she understood what the new rules would require. A member of the Board responded to her emails, and instructed her that she would not face discipline by refusing to dispense Plan B for moral or religious objections, but that her pharmacy would be subject to discipline "[i]f another pharmacist is not available or if the patient will not wait for the change of shift." According to Thelen, her "employer said the company could not hire another pharmacist to work with [her] or to remain on call." "Because they could not accommodate [her] religious beliefs, [her] employer said it would not work for [her] to remain employed there." "Even though [she] absolutely loved [her] job and the fact that it allowed [her] to work in [her] local community," Thelen declares that she "was forced to find other employment." Because she could not find any pharmacy positions in her community and the new rules limited her employment opportunities, Thelen found work at a hospital pharmacy with a "much longer commute, less income and work hours," and less desirable work shifts that keep her away from her family until around 10 p.m. many nights.

Rhonda Mesler was hired by her current employer in November 2004. When she was hired, she told her supervisor that she objected to dispensing Plan B, and her employer agreed to accommodate her by not forcing her to dispense the drug. When a customer requested Plan B, Mesler referred them to nearby pharmacies. She is the only pharmacist on duty during her shift. After receiving a June 25, 2007, email from the Department of Health concerning the new rules that would go into effect on July 26, 2007, Mesler emailed her supervisor. She "asked how the store would handle [her] religious objection." Mesler's "employer ... said that the company cannot afford to hire another pharmacist to work with [her]." Mesler thus "expect[s] to be fired from [her] position very soon."

In the amended complaint, Appellees seek a declaratory judgment, and a preliminary and permanent injunction. We determine whether a declaratory judgment action is ripe for adjudication by evaluating "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Md. Cas. Co. v. Pac. Coal & Oil Co.,* 312 U.S. 270, 273 (1941). Although Mesler has not yet suffered the consequences of the new rules, her employer has informed her that it will not be able to accommodate her refusal to dispense Plan B under them. She is at serious risk of losing her job because of these new rules. This risk is sufficiently real and immediate such that, assuming her claims have merit, a declaratory judgment or injunction is warranted.

Thelen's claims are also ripe. Her employer told her "it would not work for [her] to remain employed there." She was forced to find another job. That job is less desirable to Thelen for many reasons. Thus, there is a substantial controversy of sufficient immediacy and reality to warrant the issuance of declaratory and injunctive relief. If the rules are struck down, Thelen would not be limited to working only in those pharmacies that could accommodate her religious beliefs.

In addition to the State Appellants, Appellees sued HRC, the entity responsible for enforcing WLAD. Appellees base their challenge against HRC entirely on an April 17, 2006, letter sent to the Board by HRC's Executive Director while the rulemaking process was pending. The letter advised that it would be "illegal and bad policy to permit pharmacists to deny services to women based on the individual pharmacists' religious or moral beliefs." According to the letter, it is HRC's opinion that any pharmacy or pharmacist who declines to dispense Plan B for any reason engages in sex discrimination in violation of federal and state law, even if another onsite pharmacist filled the prescription. The district court relied on the views expressed in the April 2006 letter, the posting of the letter on HRC's website, and HRC's history in "aggressively pursu[ing] violators of the WLAD" to conclude that plaintiffs' claims against the HRC Appellants are ripe for judicial review. *Stormans,* 524 F.Supp.2d at 1256.

We disagree. In *Alaska Right to Life Political Action Committee v. Feldman,* the executive director of the state Commission on Judicial Conduct issued

a letter interpreting the Code of Judicial Conduct to require recusal of judges committed to a position on an issue that could come before the court. 504 F.3d at 846. A political action committee brought suit against, inter alia, members of the Commission, when judges refused to answer the committee's questionnaire regarding their views on abortion. We dismissed the suit on ripeness grounds, finding no threat of enforcement because the letter was written by a commission that had no enforcement power and that had never taken, and could never take, action against a judge because it was actually the duty of the state supreme court to discipline judges for violations of the Code. *Id.* at 850.

[12] Similarly, here, because no enforcement action against plaintiffs is concrete or imminent or even threatened, Appellees' claims against HRC are not ripe for review. First, HRC has no authority to enforce the Board rules and therefore cannot bring an enforcement action under the new rules or revoke a pharmacist's license. Second, while Appellees allege that HRC intends to charge pharmacies and pharmacists who refuse to dispense Plan B with sex discrimination under WLAD, HRC also lacks authority to discipline violations of WLAD or to issue penalties. As in *Alaska Right to Life,* the final determination of discrimination is made by an independent tribunal—in this case, an administrative law judge. *See* Wash. Rev. Code Ann. § 49.60.250. According to Brenman, HRC's Executive Director, HRC has received no complaints and has taken no action against any pharmacy or pharmacist for any conduct related to the new rules. Brenman has even declared that he did not intend his 2006

letter to be construed as a rule and that it cannot be understood as such. The Washington Supreme Court has held that "an agency's written expression of its interpretation of the law does not implement or enforce the law and is advisory only." *Wash. Educ. Ass'n v. Wash. State Pub. Disclosure Comm'n,* 80 P.3d 608, 611 (Wash. 2003) (en banc) (internal quotation marks omitted) (analyzing interpretive guidelines posted on agency website). Moreover, the April 2006 letter, written a year before the new rules were adopted, was not a specific warning to Appellees and binds no one. Even if the letter—which was not directed to Appellees or any other specified pharmacy or pharmacist—could be construed to be a threat of enforcement, it is nothing more than a generalized threat.[11] Moreover, the Board has even *disagreed* with the letter by approving accommodations the letter identified as discriminatory, such as allowing a second pharmacist (or perhaps a pharmacy technician) to sell the drug.

The district court further erred by considering the history of HRC's enforcement of WLAD claims as evidence of a "history of past prosecution." In

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[11] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), which Appellees cite in support of their argument, does not suggest otherwise. In that case, the obscenity commission's notices were sent to specific companies listing particular books the commission wished to censor, with a warning of criminal prosecution. There were also subsequent visits by the police. The notices directly impaired sales. *Id.* at 62-64. Here, Appellees have not shown any injury from the issuance of the Brenman letter, which was addressed to the Board, not to any pharmacies or pharmacists.

Thomas, we dismissed the landlords' claim on ripeness grounds because the defendant agency had never enforced the actual law challenged and had investigated only citizen complaints. 220 F.3d at 1141. HRC has never initiated an action against any pharmacist refusing to provide Plan B. Thus, how aggressively HRC generally enforces WLAD against claims of discrimination is irrelevant to examining whether HRC is specifically threatening to enforce WLAD against Appellees.

[13] HRC is authorized to comment on rules being considered by other agencies or state officials, and that is exactly what it did when it issued the April 2006 letter. Therefore, Appellees' claims against the HRC appellants are not ripe and they must be dismissed on remand.

Finally, we examine the issue of prudential ripeness. Though a concrete case or controversy is present, we also evaluate whether we should decline to exercise jurisdiction on the basis of two interrelated factors: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* (quoting *Abbott Labs.,* 387 U.S. at 149).

[14] "To meet the hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss." *US West Commc'ns v. MFS Intelenet, Inc.,* 193 F.3d 1112, 1118 (9th Cir. 1999) (internal quotation marks omitted). We consider whether the "regulation requires an immediate and significant change in the

plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Ass'n of Am. Med. Colls. v. United States,* 217 F.3d 770, 783 (9th Cir. 2000) (internal quotation marks omitted). This factor is certainly met, because unless Appellees prevail in this litigation, they will suffer the very injury they assert—they will be required to dispense Plan B over their religious and moral objections.

[15] "A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *US West Commc'ns,* 193 F.3d at 1118 (internal quotation marks omitted). We consider "whether the administrative action is a definitive statement of an agency's position; whether the action has a direct and immediate effect on the complaining parties; whether the action has the status of law; and whether the action requires immediate compliance with its terms." *Ass'n of Am. Med. Colls.,* 217 F.3d at 780. Although the new rules may undergo some amendment or agency construction, they currently have the force of law and would be binding on Appellees as written absent the existence of preliminary relief. There is no indication that these rules are anything other than a "definitive statement of an agency's position," "requir[ing] immediate compliance" by Appellees. This situation is unlike that in *Thomas,* in which the court held that "the landlords' claim rests upon hypothetical situations with hypothetical tenants," and, due to the lack of an "adequately developed factual record," was not ripe. 220 F.3d at 1142. Here, the record is admittedly sparse, but the circumstances presented by Appellees are not hypothetical. If a patient enters

their pharmacies requesting Plan B, which the record reflects has occurred, Appellees will refuse to deliver the medication. Whether this action would directly violate the new rules is a "primarily legal" inquiry. Because there are no incomplete hypotheticals or open factual questions akin to those in *Thomas, see id.* at 1142 n. 8 (noting that it was unclear from the record, for example, "whether the landlords' view on appropriate tenants extends to female roommates"), we hold that despite the preliminary nature of the record, Appellees' claims satisfy the requirements of prudential standing.

B. Grant of Preliminary Injunction

When the district court applied the legal standard for granting a preliminary injunction, it did not have the benefit of the Supreme Court's decision in *Winter v. Natural Res. Def. Council, Inc.,* ___ U.S. ___, 129 S.Ct. 365, 374, (2008). As a result, the district court applied the legal standard subsequently rejected by the Supreme Court in *Winter* as "too lenient." *Id.* at 375.

[16] Before *Winter* was decided, we had held that to prevail on a motion for preliminary injunction, the plaintiff must demonstrate:

> either: (1) a likelihood of success on the merits and the *possibility* of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor. These two alternatives represent extremes of a single continuum, rather than two separate tests.

> Thus, the greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be shown.

See, e.g., Clear Channel Outdoor Inc. v. City of L.A., 340 F.3d 810, 813 (9th Cir. 2003) (emphasis added and alterations and internal quotation marks omitted). In *Winter,* the Supreme Court definitively refuted our "possibility of irreparable injury" standard, stating "the Ninth Circuit's 'possibility' standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter,* 129 S.Ct. at 375. The Court instructed that "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 375–76 (citing *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997) (per curiam)).

[17] Applying *Winter,* we have since held that, "[t]o the extent that our cases have suggested a lesser standard, they are no longer controlling, or even viable." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles,* 559 F.3d 1046, 1052 (9th Cir. 2009) (footnote omitted). Thus, the district court's appropriate application of our pre-*Winter* approach in granting relief is now error. The proper legal standard for preliminary injunctive relief requires a party to demonstrate "that he is likely to succeed on the merits, that he is likely to suffer irreparable

harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter,* 129 S.Ct. at 374.

1. Likelihood of Success on the Merits

The district court held that Appellees demonstrated "a likelihood of success on the merits" of their Free Exercise claim. Because this holding was based on the district court's findings that the new rules are not neutral and generally applicable, which in turn triggered application of the strict scrutiny standard of review, it was in error. Thus, the district court's conclusion that the new rules fail strict scrutiny review because they were neither justified by a compelling interest nor narrowly tailored constitutes an abuse of discretion. *Stormans,* 524 F.Supp.2d at 1264.

(a) Free Exercise Challenge

[18] The Free Exercise Clause, applicable to the states through the Fourteenth Amendment, *Cantwell v. State of Conn.* 310 U.S. 296, 303 (1940), provides that "Congress shall make no law ... prohibiting the free exercise [of religion]," U.S. Const., amend. I. The right to freely exercise one's religion, however, "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' " *Employment Div., Dep't of Human Res. of Or. v. Smith,* 494 U.S. 872, 879 (1990) (*quoting United States v. Lee,* 455

U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring in judgment)). Under the governing standard, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531 (1993).

Underlying the Supreme Court's jurisprudence is the principle that the Free Exercise Clause "embraces two concepts[ ]—freedom to believe and freedom to act." The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. *Cantwell,* 310 U.S. at 303–04. This principle traces its roots to the idea that allowing individual exceptions based on religious beliefs from laws governing general practices "would ... make the professed doctrines of religious belief superior to the law of the land, and in effect [ ] permit every citizen to become a law unto himself." *Reynolds v. United States,* 98 U.S. 145, 167 (1878). The *Smith* Court explained that it is

> [p]recisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid,* as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

494 U.S. at 888 (citation and internal quotation marks omitted). Such a presumption would have wide-ranging and injurious effects on our society, as exemptions could be mandated from "compulsory military service, ... payment of taxes, ... health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, [and] social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity." *Id.* at 889 (citations omitted).

The principles enunciated by the Court in *Smith* and *Lukumi* thus flow from the Court's free exercise jurisprudence. In its first case addressing the Free Exercise Clause, the Court held that congressional legislation prohibiting the practice of polygamy was constitutional, and that those who made polygamy part of their religious practice, such as members of the Mormon Church at the time, were not excepted from the statute's operation. *See Reynolds,* 98 U.S. at 166. The Court explained that Congress was "free to reach actions which were in violation of social duties or subversive of good order," *id.* at 164, because "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices," *id.* at 166.

The Court focused on the distinction between belief and conduct again in *Cantwell,* 310 U.S. at 303–04, when it invalidated a state statute requiring a license for religious solicitation because the officer would have had to determine, as a condition for the license, whether the applicant had a religious belief.

The Court explained that if the law had been a "general regulation" of conduct that did "not involve any religious test," it would not have been "open to any constitutional objection." *Id.* at 305, 60 S.Ct. 900. In a subsequent case, the Court concluded that requiring public school children to salute the flag as part of a daily school exercise did not violate the Free Exercise Clause because "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." *Minersville Sch. Dist. v. Gobitis,* 310 U.S. 586, 594 (1940), *overruled on other grounds by W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624 (1943). It emphasized that "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." *Id.* at 594–95.

The Supreme Court continued to uphold the constitutionality of such "general law[s] not aimed at the promotion or restriction of religious beliefs." *Id.* at 594. In *Prince v. Massachusetts,* 321 U.S. 158 (1944), the Court found that a mother could be prosecuted pursuant to child labor laws when she used her Jehovah's Witnesses children to dispense religious literature in the streets. The state was permitted to prevent these children "from doing there what no other children may do." *Id.* at 171. In *Braunfeld v. Brown,* 366 U.S. 599 (1961), the Court upheld a law that prohibited retail sales on Sunday. Orthodox Jews challenged the law because they already closed their businesses on Saturdays for

religious reasons, and claimed that to close their business on Sunday as well would result in economic hardship and thus interfere with the free exercise of their religion. The Court found that the law "simply regulate[d] a secular activity" and declined to find the law invalid. *Id.* at 605.

The Court articulated the current governing standard—that a neutral law of general applicability will not be subject to strict scrutiny review—in *Smith* and *Lukumi.* In *Smith,* the plaintiff was fired from his job after using peyote for sacramental purposes. Peyote use violated state law, and, as a result, Smith was denied unemployment compensation. *Smith,* 494 U.S. at 874. Although the Court confirmed that the government may not regulate religious beliefs, it stated that it has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878–79. The Court thus held that because Oregon's prohibition on peyote use is constitutional, and Smith's dismissal resulted from illegal peyote use, it was permissible to deny Smith unemployment compensation. *Id.* at 890.

The Court held that neutral and generally applicable statutes that regulate conduct are not required to pass strict scrutiny review, thus limiting the viability of *Sherbert v. Verner,* 374 U.S. 398 (1963), which previously had applied the compelling interest test to governmental denial of unemployment compensation. The Court reasoned that while "[t]he 'compelling government interest' requirement seems benign [and] familiar" from cases

analyzing race discrimination and content regulation of speech, it is unsuitable for the free exercise context. *Smith,* 494 U.S. at 885–86. "What it produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly." *Id.* at 886. The Court concluded that it would "contradict[ ] both constitutional tradition and common sense" to make a person's obligation to obey a generally applicable neutral law "contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling.' " *Id.* at 885.

[19] In *Lukumi,* the Court reiterated "the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." 508 U.S. at 531. However, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny," *id.* at 546, and is "invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest," *id.* at 533. As the district court correctly recognized, *Smith* and *Lukumi* govern this case. To determine whether rational basis review or strict scrutiny applies, we must first decide whether the new rules are neutral and generally applicable. Though "[n]eutrality and general applicability are interrelated, and ... failure to satisfy one requirement is a likely indication that the other has not been satisfied," *id.* at 531, we consider each of the two criteria in turn. We must

evaluate the text of the challenged law as well as its "effect ... in its real operation." *Id.* at 535.

(I) Neutrality

[20] "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Lukumi,* 508 U.S. at 533. "There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct." *Id.* The *Lukumi* court considered both the text and the operation of the ordinance at issue. *Id.* at 533–540. We employ the same analysis in determining that the rules are neutral.

i. Facial Neutrality

[21] "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* at 533. In its textual analysis, the *Lukumi* court asked whether the ordinance was facially neutral. *Id.* at 533 ("[T]he minimum requirement of neutrality is that a law not discriminate on its face."). Applying the *Lukumi* analysis to the plain text of the ordinances, the district court correctly concluded that the new rules are facially neutral. *See Stormans,* 524 F.Supp.2d at 1257. The new rules make no reference to any religious practice, conduct, or motivation.

ii. The Rule's Operation

"Apart from the text, the effect of a law in its real operation is strong evidence of its object." *Lukumi,* 508 U.S. at 535. In its operational analysis, the *Lukumi* court assessed the design of the ordinance and asked whether it was over or under-inclusive relative to its stated object. *See id.* at 535 ("The design of these laws accomplishes instead a 'religious gerrymander' ..., an impermissible attempt to target petitioners and their religious practices."). The Court determined that the ordinances at issue were underinclusive in their effect where "the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others." *Id.* at 536. The ordinance was "careful[ly] draft [ed] to ensure[ ] that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished." *Id.* at 536. The *Lukumi* court also found the ordinance at issue to be overinclusive where it "prohibit[ed] Santeria sacrifice even when it does not threaten the city's interest in the public health." *Id.* at 538–39. For example, the city banned ritual sacrifices of animals when "regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city's concern [for the adequate care of animals]." *Id.* at 538.

[22] Unlike the ordinance at issue in *Lukumi,* the new rules operate neutrally. They do not suppress, target, or single out the practice of any religion because of religious content. The evidentiary record—though thin given the procedural posture of this case—sufficiently reflects that the object of the

rules was to ensure safe and timely patient access to lawful and lawfully prescribed medications. As such, the new rules eliminate all objections that do not ensure patient health, safety, and access to medication. They require delivery of all lawfully prescribed medications, save for when one of several narrow exemptions permits refusal. Thus, aside from the exemptions, any refusal to dispense a medication violates the rules, and this is so regardless of whether the refusal is motivated by religion, morals, conscience, ethics, discriminatory prejudices, or personal distaste for a patient.

[23] That the rules may affect pharmacists who object to Plan B for religious reasons does not undermine the neutrality of the rules. The Free Exercise Clause is not violated even though a group motivated by religious reasons may be more likely to engage in the proscribed conduct. *See Reynolds,* 98 U.S. at 166–67 (upholding a polygamy ban though the practice is followed primarily by members of the Mormon church); *cf. United States v. O'Brien,* 391 U.S. 367 (1968) (rejecting a First Amendment challenge to a statutory prohibition of the destruction of draft cards though most violators likely would be opponents of war). The Fourth Circuit's decision in *American Life League, Inc. v. Reno,* 47 F.3d 642 (4th Cir. 1995), is instructive. The *Reno* court upheld the Freedom of Access to Clinic Entrance Act, which established criminal penalties and civil remedies for certain conduct intended to injure, intimidate, or interfere with persons seeking to obtain or provide reproductive health services. *Id.* at 656. The court found no free exercise violation—even though it acknowledged that Congress passed

the law in response to antiabortion protests—because it recognized that the Act "punishe[d] conduct for the harm it causes, not because the conduct is religiously motivated." *Id.* at 654; *see also Vision Church v. Vill. of Long Grove,* 468 F.3d 975, 999 (7th Cir. 2006) (finding no free exercise violation even if a zoning ordinance targeted a proposed plan for a new church because the commission was concerned about the nonreligious effect of the church on the community); *Knights of Columbus, Council No. 94 v. Town of Lexington,* 272 F.3d 25, 35 (1st Cir. 2001) (finding no free exercise violation although a regulation limiting displays on the town green was adopted in response to a flood of religious groups seeking to erect displays). Thus, the district court erred in finding that "the object of the regulations is to eliminate from the practice of pharmacy ... those pharmacists who, for religious reasons, object to the delivery of lawful medications, specifically Plan B." *Stormans,* 524 F.Supp.2d at 1258. The neutrality of the new rules is not destroyed by the possibility that pharmacists with religious objections to Plan B will disproportionately require accommodation under the rules.

iii. Legislative History

In addition to the text and operation of the new rules, the district court considered something that the *Lukumi* majority did not—the historical background of the ordinances. It is unclear whether the district court was permitted to undertake this analysis. While the analysis of legislative history is proper in the equal protection context, the law is

unsettled regarding the scope of its consideration in the free exercise arena.

That the law is unclear on this point is evident from the *Lukumi* Court's splintering on this issue. Analysis of legislative history was sanctioned as part of the free exercise analysis only in Justice Kennedy's nonprecedential Part II.A.2, which was joined only by Justice Stevens.[12] *Lukumi,* 508 U.S. at 540–42 (Kennedy, J., joined by Stevens, J.). Meanwhile, Chief Justice Rehnquist and Justices Scalia and Thomas joined all but that portion of the opinion because, in their view, such an inquiry was inappropriate in the free exercise context. *See id.* at 558 (Scalia, J., concurring in part and concurring in the judgment) ("I do not join [Part II.A.2] because it departs from the opinion's general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers* .... As ... noted elsewhere, it is virtually impossible to determine the singular motive of a collective legislative body." (internal quotation marks omitted)). Justice Scalia, the author of the *Smith* opinion, explained that the Free Exercise Clause "does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted." *Id.*

We may discern with certainty only that Chief Justice Rehnquist and Justice Scalia did not join Part II.A.2 of the opinion due to disagreement with

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[12] Though the district court did not actually cite Part II.A.2 of *Lukumi*, it quoted Justice Kennedy's historical analysis verbatim. *Compare Stormans*, 524 F. Supp. 2d at 1258, *with Lukumi*, 508 U.S. at 540 (Kennedy, J., joined by Stevens, J.).

Justice Kennedy's use of legislative history. Justices Souter, Blackmun, and O'Connor disagreed with *Smith*'s holding and may have agreed with Justice Kennedy's approach. *See Lukumi,* 508 U.S. at 559 (Souter, J., concurring in part and concurring in the judgment) (declining to join Part II because of concerns "about whether the *Smith* rule merits adherence"). Justice White joined all but Part II.A of the opinion. Justice Blackmun filed an opinion concurring in the judgment, in which Justice O'Connor joined, explaining that he "continue[s] to believe that *Smith* was wrongly decided," and "while [he] agree[s] with the result the Court reaches in this case, [he] arrive[s] at that result by a different route." *Id.* at 578 (Blackmun, J., concurring in the judgment). Therefore, the Supreme Court in *Lukumi* left open the question of whether it is appropriate to consider legislative history as part of a Free Exercise Clause analysis.[13]

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[13] In the only Free Exercise case decided by the Supreme Court since *Lukumi*, *Locke v. Davey*, 540 U.S. 712 (2004), the Court did not resolve this question. In *Locke*, a majority of the Court held that a Washington publicly funded scholarship program which excluded students pursuing a "degree in theology" did not violate the Free Exercise Clause. *Id.* at 725. In reaching this conclusion the Court stated, "[W]e find neither in the history or text of . . . the Washington Constitution, nor in the operation of the [challenged law], anything that suggests animus toward religion." *Id.* While the Court considered the "history" of the state constitution, it did not consider the history of the challenged law itself. Therefore, *Locke* does not shed any light on the question of whether it is permissible to consider the legislative history of the challenged law in a Free Exercise Clause analysis.

Cases within our Circuit do not offer meaningful guidance on the unsettled question of whether courts may examine legislative history in determining whether a challenged law violates the Free Exercise Clause's neutrality requirement. For example, in *San Jose Christian College v. City of Morgan Hill,* 360 F.3d 1024 (9th Cir. 2004), we expressed a lack of concern with the district court's citation of an opinion of our court discussing the Equal Protection Clause because "[t]he Supreme Court has approved reference to equal protection jurisprudence ... '[i]n determining if the object of a law is a neutral one under the Free Exercise Clause.' " *Id.* at 1030 n. 4 (quoting *Lukumi,* 508 U.S. at 540). We neither elaborated on that statement nor examined the historical or legislative background of the challenged ordinance in reaching our conclusion that the ordinance at issue was generally applicable and neutral. *See id.* at 1032 ("[T]here is not even a hint that College was targeted on the basis of religion...."). In *KDM v. Reedsport School District,* 196 F.3d 1046, 1048 (9th Cir. 1999), a disabled student challenged a state law which provided special education services to students in private secular schools, but not to students in private sectarian schools. Although we stated that "evidence of a substantial animus that motivated the law in question" could distinguish *Lukumi, id.* at 1051 (internal quotation marks omitted), we held that "there [was] no showing that application of the regulation to KDM's case burdens KDM's or his parents' free exercise of their religion," *id.* at 1050.

Nor do cases from our sister circuits aid us in determining whether legislative history may be

appropriately considered in the neutrality analysis. These cases serve only to illustrate that the issue is unsettled. *Compare St. John's United Church v. City of Chicago,* 502 F.3d 616, 633 (7th Cir. 2007) (stating that it is appropriate to consider legislative history when determining neutrality), *Wirzburger v. Galvin,* 412 F.3d 271, 281 (1st Cir. 2005) (considering "evidence of animus against Catholics in Massachusetts in 1855 when the [challenged law] was passed"), *and Prater v. City of Burnside,* 289 F.3d 417, 429 (6th Cir. 2002) (primarily analyzing the law's effect in operation, but also considering "the manner in which the City rejected its proposed alternative" to the challenged law), *with Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1234 n. 16 (11th Cir. 2004) ("Under *Lukumi,* it is unnecessary to identify an invidious intent in enacting a law....").

We need not decide whether it was permissible for the district court to rely upon the administrative history of the new rules because that history provides no meaningful guidance on the object or neutrality of the final rules adopted by the Board. While the Board's deliberative process may have been initiated over concerns regarding Plan B, the administrative history hardly reveals a single design to burden religious practice; rather, it is a patchwork quilt of concerns, ideas, and motivations. The record reveals that the draft rules morphed and evolved throughout the deliberative process, as did the concerns raised both by rulemakers and the public participants. The collective will of the Board cannot be known, except as it is expressed in the text and associated notes and comments of the final rules. To

the extent the record indicates anything about the Board's motivation in adopting the final rules, it shows the Board was motivated by concerns about the potential deleterious effect on public health that would result from allowing pharmacists to refuse to dispense lawfully prescribed medications based on personal, moral objections (of which religious objections are a subset). It would, therefore, be incorrect to impute—as the district court did—to the entire Board a motivation to "impose burdens only on conduct motivated by religious belief." *Lukumi,* 508 U.S. at 543.

Therefore, regardless of the proper role of legislative history in a Free Exercise Clause analysis—which, as discussed, remains unclear—the district court erroneously relied upon it because it reveals little about the Board's motivation in adopting the rules, and, to the extent it does reveal anything, it indicates that the Board's concern was to promote the public welfare, not to burden religious belief.

(II) General Applicability

[25] A law is not generally applicable when the government, "in a selective manner[,] impose[s] burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. The "selective manner" analysis tests the rules for substantial underinclusiveness. For example, the *Lukumi* Court concluded that the challenged ordinances were not of general applicability because "each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief."

Id. at 545. Because the ordinances "fail[ed] to prohibit nonreligious conduct that endanger[ed] these interests in a similar or greater degree than Santeria sacrifice does," *id.* at 543, it was religion, and religion alone, that bore the burden of the ordinances, giving the ordinances the "appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself," *id.* at 545 (alteration in original) (citations and internal quotation marks omitted). According to the Court, "[t]his precise evil is what the requirement of general applicability is designed to prevent." *Id.* at 545–46. Thus, it was the ordinances' substantial underinclusiveness with respect to the city's supposed interests in protecting the public health and preventing cruelty to animals that led to the Court's conclusion that the ordinances were not generally applicable.

[26] Instead of analyzing whether the new rules were substantially underinclusive, the district court decided that it should "examine the law's means and the law's ends: if the means fail to match the ends, the statute likely targets religious conduct and is therefore not generally applicable." *Stormans,* 524 F. Supp. 2d at 1260. It held that the new rules "do not appear to the Court to be of general application" because "[t]he evidence now before the Court convinces it that the 'means' used by the rulemakers do not square with the 'end' currently espoused by the defendants." *Id.* at 1263. By adopting a means/ends test instead of the *Lukumi* underinclusiveness analysis, the district court committed legal error. The means/ends test is, in essence, a version of intermediate scrutiny under

which a regulation must be substantially related to an important governmental objective. *See, e.g., Craig v. Boren,* 429 U.S. 190, 197 (1976). The district court thus applied a level of scrutiny that runs contrary to the rule of *Smith* and *Lukumi.*

[27] Utilizing the correct legal standard, the new rules are generally applicable because they are not substantially underinclusive. There is no evidence that State Appellants pursued their interests only against conduct with a religious motivation. Under the rules, all pharmacies have a "duty to deliver" all medications "in a timely manner." Neither regulation challenged in this case applies to refusals only for religious reasons. The new rules apply to all lawful medications, not just those that pharmacies or pharmacists may oppose for religious reasons. Pharmacies and pharmacists who do not have a religious objection to Plan B must comply with the rules to the same extent—no more and no less—than pharmacies and pharmacists who may have a religious objection to Plan B. Therefore, the rules are generally applicable.

The narrow class of exemptions—necessary reasons for failing to fill a prescription—does not impair the general applicability of the rules. These provisions exempt a pharmacy from its comprehensive duty to deliver medications in certain enumerated situations, such as when a state of emergency is declared, a prescription is potentially fraudulent or erroneous, or the patient cannot pay. Wash. Admin. Code §§ 246-869-010(1)(a)—(e), (2).[14]

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[14] *See supra* note 5 (listing exemptions).

The district court acknowledged that these exemptions "all reflect legitimate, time-honored reasons for not filling a prescription." *Stormans,* 524 F.Supp.2d at 1262. Nonetheless, it concluded that because the new rules do not mandate delivery of all medications under all circumstances, the rules do not actually further access to medications. *Id.*

The district court's reasoning is unpersuasive. How much the new rules actually increase access to medications depends on how many people are able to get medication that they might previously have been denied based on religious or general moral opposition by a pharmacist or pharmacy to the given medication. Whatever that number, it will not be smaller than the number of pharmacists or pharmacies affected by the regulation, so it cannot be shrugged off as insignificant.

The existing exemptions are narrow. Nobody could seriously question a refusal to fill a prescription because the customer did not pay for it, the pharmacist had a legitimate belief that it was fraudulent, or supplies were exhausted or subject to controls in times of declared emergencies. Nor can every single pharmacy be required to stock every single medication that might possibly be prescribed, or to maintain specialized equipment that might be necessary to prepare and dispense every one of the most recently developed drugs. Instead of increasing safe and legal access to medications, the absence of these exemptions would likely drive pharmacies out of business or, even more absurdly, mandate unsafe practices. Therefore, the exemptions actually increase access to medications by making it possible

for pharmacies to comply with the rules, further patient safety, and maintain their business.

That the pharmacy regulations recognize some exceptions cannot mean that the Board has to grant all other requests for exemption to preserve the "general applicability" of the regulations. There is no claim that the existing regulation recognizing these exceptions has not been fairly applied or that it will not be fairly and evenly applied in the future. These exemptions are a reasonable part of the regulation of pharmacy practice, and their inclusion in the statute does not undermine the general applicability of the new rules.

The text of the new rules itself suggests that their objective was to increase access to all lawfully prescribed medications, including Plan B. According to the survey cited by the district court, 23 percent of the pharmacies in the state do not carry Plan B, amounting to 315 pharmacies throughout the state. Moreover, even among the pharmacies that carry the drug, it is unclear how many pharmacists refuse to dispense it. Based on the sparse record before it, the district court erred in finding that access to Plan B was not a problem, especially given that state officials have already made findings suggesting the opposite.[15] *See* Final Significant Analysis for Rule

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[15] The district court's reliance on "[t]he fact that the Pharmacy Board initially proposed a draft rule permitting a pharmacist/pharmacy to not fill a lawful prescription for reasons of conscience" as "further evidence" that access to Plan B was not a problem was also clearly erroneous. *See Stormans,* 524 F. Supp. 2d at 1261. The first draft rule proposed by the Board would have allowed a pharmacist to refuse to fill a

Concerning Pharmacists' Professional Responsibilities, WAC 246-863-095 & Pharmacies' Responsibilities, WAC 246-869-010.

The district court also erred in finding that the Board has "chosen [to rely] on state and federal antidiscrimination laws to define when refusal to dispense is or is not allowed." *Stormans,* 524 F. Supp. 2d *at* 1262. The district court found this "choice of weapons" suspicious and concluded that because the antidiscrimination provisions prohibit only certain refusals and do not "require pharmacies or pharmacists to dispense lawful medications without delay every time they are requested," the rules are underinclusive and therefore not generally applicable. *Id.* The district court's finding is not supported by the record. The new rules, as any other rule promulgated by the Board, will be enforced by the Board pursuant to Washington Revised Code Annotated section 18.64.165, which permits the Board to "refuse, suspend, or revoke [a pharmacy's or pharmacist's] license" when "[t]he licensee . . . has violated any of the rules and regulations of the board of pharmacy." While the new rules prohibit discrimination against patients in a manner already prohibited by state or federal laws, they also require pharmacies to deliver lawfully prescribed and approved drugs in a timely manner, and mandate stocking of drugs to serve the needs of the

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lawful prescription only if another pharmacist onsite would dispense the medication without delay. This rule does not support the district court's conclusion that access to Plan B was not an issue. Moreover, *Lukumi* teaches us that we must review the rules as adopted, not in their prior versions.

community. In contrast, the HRC is in charge of compliance with WLAD and is authorized to recommend action to other officials in response to possible violations of WLAD. WLAD is a comprehensive but general antidiscrimination law—"an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights." Wash. Rev. Code Ann. § 49.60.010. WLAD does not "define when refusal to dispense is or is not allowed." *Stormans,* 524 F. Supp. 2d at 1262. Thus, WLAD is decidedly not the enforcement mechanism of the new rules.

Pharmacies were already subject to antidiscrimination laws as places of public accommodation. Wash. Rev. Code Ann. § 49.60.215. The antidiscrimination subsections of the new rules reiterate that antidiscrimination laws forbid pharmacies or pharmacists from discriminating against protected groups. They are not limited to refusals to dispense or distribute certain medications. For example, the antidiscrimination subsections would prohibit a pharmacist from filling all lawful prescriptions for, but requiring additional payment from, persons of a particular race or ethnic group, or refusing to accept personal checks only from persons with a disability. Antidiscrimination laws also prohibit a pharmacy or a pharmacist from refusing to dispense a drug because of a personal animus or objection to a patient based upon that patient's membership in a protected class.

[28] As a corollary, the Board's rules regulate the practice of pharmacy, primarily by requiring pharmacies to deliver lawfully prescribed and approved drugs in a timely manner. The rules do not equate a pharmacist's refusal to dispense a drug because of a religious objection to the drug with a pharmacist's discrimination against a patient in a manner prohibited by state or federal law. Further, a pharmacy could violate the new rules by not stocking Plan B despite community demand even if, in doing so, it was not violating any state or federal antidiscrimination laws. Thus, the district court's finding that the Board relies on antidiscrimination laws to determine which refusals to deliver medication are and are not lawful was incorrect. Therefore, the court clearly erred in concluding that the challenged rules are underinclusive and not generally applicable.

The district court failed to give proper weight to the rules' distinction between pharmacies and pharmacists. The rules do not prohibit individual pharmacists from refusing to dispense a medication for religious reasons. A pharmacist may refuse to dispense Plan B on a religious ground because ultimately it is the duty of the pharmacy, not the pharmacist, to "deliver lawfully prescribed drugs." *Compare* Wash. Admin. Code § 246-869-010 (governing pharmacies), *with id.* § 246-863-095 (governing pharmacists). The district court found that accommodation of objecting pharmacists was too burdensome on the pharmacy because the *only* method of accommodation available is the hiring of another pharmacist to work side-by-side with the objecting pharmacist. *Id.* at 1256; *see also id.* at 1253

(stating the rules allow for only a "narrow right of conscience . . . if the pharmacist worked with another pharmacist on shift who would dispense the medication in place of the conscientious objector"). But this finding is contrary to the evidence. The record demonstrates that several different methods of accommodation are available. For example, the Board itself stated, in a post-adoption letter to pharmacists and pharmacy owners, that for females eighteen and over, "[a] pharmacy technician can sell Plan B as an over-the-counter product, but the pharmacist must be available to provide the patient with consultation and advice if requested." It may also be sufficient to have a second pharmacist available by telephone if the onsite pharmacist objects to dispensing a medication or providing a requested consultation. Thus, the rules do not selectively impose an undue obligation on conduct motivated by religious belief because the rules actually provide for religious accommodation—an individual pharmacist can decide whether to dispense a particular medication based on his religious beliefs and a particular pharmacy may continue to employ that pharmacist by making appropriate accommodations.

(b) Application of Rational Basis Review

[29] Because the rules are neutral and generally applicable, the district court should have subjected the rules to the rational basis standard of review. The district court instead introduced a heightened scrutiny to a neutral law of general applicability, contrary to the rule of *Smith* and *Lukumi*. When a law is neutral and generally applicable, the rational

basis test applies. *See Miller v. Reed,* 176 F.3d 1202, 1206–07 (9th Cir. 1999) (holding that a regulation requiring the use of a social security number to obtain a driver's license survives rational basis review on a free exercise challenge). Under rational basis review, the rules will be upheld if they are rationally related to a legitimate governmental purpose. *See Gadda v. State Bar of Cal.,* 511 F.3d 933, 938 (9th Cir. 2007). To invalidate a law reviewed under this standard, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe by Doe,* 509 U.S. 312, 320 (1993) (alteration in original) (internal quotation marks omitted). The record before us does not suggest that Appellees have negated every conceivable basis supporting the new rules, so it appears that the new rules are rationally related to Washington's legitimate interest in ensuring that its citizen-patients receive lawfully prescribed medications without delay.

[30] The district court, however, has not yet had the opportunity to analyze or to make the appropriate factual findings as to whether the new rules are rationally related to a legitimate governmental purpose. Whether the rules pass muster under the rational basis test must be determined by the district court in the first instance.

2. Balance of Hardships

To qualify for injunctive relief, the plaintiffs must establish that "the balance of equities tips in [their] favor." *Winter,* 129 S. Ct. at 374. In assessing

whether the plaintiffs have met this burden, the district court has a "duty . . . to balance the interests of all parties and weigh the damage to each." *See L.A. Mem'l Coliseum Comm'n v. Nat'l Football League,* 634 F.2d 1197, 1203 (9th Cir. 1980). Without discussion or analysis, the district court found that "[t]he facts presented show, to the Court's satisfaction, . . . the possibility of irreparable injury." *Stormans,* 524 F. Supp.2d at 1264. As discussed above, however, the correct standard is not whether there is a "possibility" but whether there is a "likelihood of irreparable injury." *Winter,* 129 S. Ct. at 375. Given that the district court applied the incorrect pre-*Winter* legal standard for granting injunctive relief and that it applied a strict scrutiny standard of review, the district court must reweigh the balance of hardships among the parties and reconsider the interests at stake.

In reweighing the harms, the district court should focus on the harms to the individual Appellees and the Intervenors. The alleged injury to the Appellees is interference with their constitutional right of free exercise of their religion. Though "[b]y bringing a colorable First Amendment claim, [the movant] certainly raises the specter of irreparable injury," "simply raising a serious [First Amendment] claim is not enough to tip the hardship scales." *Paramount Land Co. LP v. Cal. Pistachio Comm'n,* 491 F.3d 1003, 1012 (9th Cir. 2007). If Appellees are compelled to stock and distribute Plan B without the benefit of the preliminary injunction, and a trial on the merits shows that such compulsion violates their constitutional rights, Appellees will have suffered irreparable injury, since "[u]nlike

monetary injuries, constitutional violations cannot be adequately remedied through damages."[16] *See Nelson v. Nat'l Aeronautics & Space Admin.,* 530 F.3d 865, 882 (9th Cir. 2008). Even if Thelen and Mesler leave their jobs or Stormans closes the pharmacy, they will not necessarily avoid constitutional injury. *See id.* ("[T]he loss of one's job does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages.").

There are also several possible harms to Intervenors since an injunction against enforcement of the new rules places the Intervenors at risk that the dispensing of Plan B will be delayed or denied. Some of these threatened harms to Intervenors may be mitigated by limiting the scope of the injunction. The district court must determine the likelihood that these harms will occur and weigh any harm likely to be suffered by the Intervenors if the injunction is granted against the injury that will likely befall the Appellees if it is not.

3. Public Interest

The district court also failed to weigh in its analysis the public interest implicated by the injunction, as *Winter* now requires. *See* 129 S. Ct. at

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[16] If Appellees' injury was primarily financial, the balance would not tip to Appellees, because the injury would not be considered irreparable. *See L.A. Mem'l Coliseum Comm'n,* 634 F.2d at 1202 (9th Cir. 1980); *see also Braunfeld,* 366 U.S. at 606 (rejecting a challenge to a regulation that "may well result in some financial sacrifice in order to observe [appellants'] religious beliefs").

374. When the reach of an injunction is narrow, limited only to the parties, and has no impact on non-parties, the public interest will be "at most a neutral factor in the analysis rather than one that favor[s] [granting or] denying the preliminary injunction." *See Bernhardt v. L.A. County,* 339 F.3d 920, 931 (9th Cir. 2003). If, however, the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction. *See Sammartano v. First Judicial Dist. Court,* 303 F.3d 959, 965 (9th Cir. 2002) (" 'In cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff.' ") (alteration omitted) (quoting *Fund for Animals v. Lujan,* 962 F.2d 1391, 1400 (9th Cir. 1992)); *see also Golden Gate Rest. Ass'n v. City & County of S.F.,* 512 F.3d 1112, 1126 (9th Cir. 2008). "[When] an injunction is asked which will adversely affect a public interest . . . the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Weinberger v. Romero–Barcelo,* 456 U.S. 305, 312–13 (1982). In fact, "courts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* at 312.

In this case, the overbreadth of the district court's injunction implicates the public interest. The district court did not merely enjoin enforcement of the Washington regulations against the plaintiffs, as it should have, *see infra* Part III.B.4. Rather, it purported to enjoin the enforcement of the

regulations against "any pharmacy . . . or pharmacist who, refuses to dispense Plan . . ." *See Stormans,* 524 F. Supp.2d at 1266. The injunction clearly reached non-parties and implicated issues of broader public concern that could have public consequences.

Even if the district court had limited the application of the injunction to the named Appellees, the public interest is still a necessary consideration given the facts of this case. The "general public has an interest in the health" of state residents. *See Golden Gate Rest. Ass'n,* 512 F.3d at 1126. There is a general public interest in ensuring that all citizens have timely access to lawfully prescribed medications. With regard to Plan B, it may be in the public interest to deny the injunction to the extent that it is likely that sexually active women of childbearing age will be denied reasonable access to Plan B. Likewise, the injunction may not be in the public interest if it would likely cause unreasonable delay to a woman's ability to acquire and use the drug, where such delay may render the drug ineffective in preventing an unwanted pregnancy.

There may be additional evidence showing the public's interest in the grant or denial of the injunctive relief in this case. The plaintiffs bear the initial burden of showing that the injunction is in the public interest. *See Winter,* 129 S. Ct. at 378. However, the district court need not consider public consequences that are "highly speculative." *See Golden Gate Rest. Ass'n,* 512 F.3d at 1126. In other words, the court should weigh the public interest in light of the *likely* consequences of the injunction.

Such consequences must not be too remote, insubstantial, or speculative and must be supported by evidence. *See id.; cf. Eccles v. Peoples Bank of Lakewood Vill.,* 333 U.S. 426, 434 (1948) (concluding that a grievance that is "too remote and insubstantial" or "too speculative in nature" does not justify an injunction or declaratory relief).

Finally, the district court should give due weight to the serious consideration of the public interest in this case that has already been undertaken by the responsible state officials in Washington, who unanimously passed the rules that are the subject of this appeal. *See Golden Gate Rest. Ass'n,* 512 F.3d at 1127 ("The public interest may be declared in the form of a statute." (internal quotation marks omitted)); *see also Burford v. Sun Oil Co.,* 319 U.S. 315, 318 (1943) ("[I]t is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." (internal quotation marks omitted)).

This case may present a situation in which "otherwise avoidable human suffering" results from the issuance of the preliminary injunction. *Golden Gate Rest. Ass'n,* 512 F.3d at 1125. The district court clearly erred by failing to consider the public interest at stake.

4. Scope of Injunction

[31] "Injunctive relief . . . must be tailored to remedy the specific harm alleged." *Lamb–Weston,*

941 F.2d at 974. "An overbroad injunction is an abuse of discretion." *Id.*

The district court should have limited the injunction to the named Appellees, as was requested by Appellees themselves in their initial motion for a preliminary injunction, or even to the named Appellees and their employers as requested in Appellees' subsequent motion for modification of the injunction. Instead, the court issued an overbroad injunction, enjoining enforcement of the new rules "against any pharmacy which, or pharmacist who, refuses to dispense Plan B but instead immediately refers the patient either to the nearest source of Plan B or to a nearby source for Plan B." *Stormans,* 524 F. Supp.2d at 1266. The district court abused its discretion in enjoining the rules themselves as opposed to enjoining their enforcement as to the plaintiffs before him who asserted religious objections to dispensing Plan B.

[32] By enjoining enforcement of the rules, the district court erroneously treated the as-applied challenge brought in this case as a facial challenge. This flies in the face of the well-established principle that "[g]enerally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We . . . enjoin only the unconstitutional applications of a statute while leaving other applications in force." *Ayotte v. Planned Parenthood of N. New England,* 546 U.S. 320, 328–29 (2006). There is no evidence that every pharmacist in the state of Washington considers dispensing Plan B to be a breach of their religious or moral values, and it is unlikely that this is the case.

[33] The district court abused its discretion by enjoining the enforcement of the antidiscrimination provisions as to *all* pharmacists and pharmacies in the state of Washington who refuse to sell or dispense Plan B for *any* reason—religious or otherwise—as long as a patient is immediately referred to a "nearby source" for Plan B. It failed to tailor the injunction to remedy the specific harm alleged by the actual Appellees—an infringement of their First Amendment right to free exercise of religion. Because the injunction does not limit permissible refusals to those based on religious grounds, it permits pharmacies or pharmacists to refuse to provide Plan B for any reason, including refusals grounded in individual morals, conscience, or even personal distaste or discriminatory prejudices. The Free Exercise Clause, however, only protects the free exercise of religion. U.S. Const. amend. I. It does not protect those with moral or other objections. *Cf. Ariz. Life Coal. Inc. v. Stanton,* 515 F.3d 956, 972 (9th Cir. 2008) (finding that speech opposing abortion is not speech that promotes faith or a specific religion). Further, the First Amendment certainly does not protect discriminatory conduct, such as a refusal to serve patients based on race or sex—it may not even protect such discriminatory practices when they are grounded in religious beliefs. *See Bob Jones Univ.,* 461 U.S. at 604 (upholding denial of tax-exempt status to private schools that racially discriminated because of sincerely held religious beliefs). Therefore, the injunction, supposedly based on a free exercise challenge to the new rules, is fatally overbroad because it is not limited to the only type of

refusal that may be protected by the First Amendment—one based on religious belief.

[34] Limiting any injunction to the three Appellees—and to the harms alleged and the relief requested—would also mitigate much of the potential harm that Intervenors, patients and their families, and the general public in the state of Washington would otherwise face under an injunction that allows any and all pharmacies and pharmacists to refuse to dispense Plan B for any reason. The record reflects that the Stormans' pharmacy at Ralph's Thriftway is located in Olympia, Washington, within a five-mile radius of approximately thirty other pharmacies. Enjoining enforcement of the rules as against Stormans only would not present great hardships to the Intervenors or the public, as they would continue to have access to desired medications, including Plan B, at numerous alternative pharmacies in the same area until the trial on the merits is complete. Similarly, enjoining enforcement of the rules against Mesler and Thelen will not present a great hardship to Intervenors or the public, who will only need to avoid the one additional pharmacy where Mesler works out of more than a thousand pharmacies in the state of Washington, since Thelen's employer already accommodates her religiously based refusal.

[35] The record does not support an injunction that is directed to persons other than the parties before the court and their employers. We therefore remand to the district court for consideration of whether the new rules pass rational basis review, whether the Appellees are likely to suffer irreparable

harm, whether the balance of equities tips in the Appellees' favor, and whether the public interest supports the injunction. If the district court finds an injunction is warranted, the injunction must be limited to the named Appellees, and, if the court finds necessary, to their employers.

5. Remaining Claims

Because the original injunction was predicated only upon Appellees' free exercise claim, we find it unnecessary to reach Appellees' equal protection, preemption, procedural due process, and Title VII claims. While we have the discretion to "affirm the district court on any ground supported by the record," *Sony Computer Entm't, Inc. v. Connectix Corp.,* 203 F.3d 596, 608 (9th Cir. 2000) (internal quotation marks omitted), in light of the undeveloped record, we decline to do so. *Cf. Big Country Foods, Inc. v. Bd. of Educ. of the Anchorage Sch. Dist.,* 868 F.2d 1085, 1087–88 (9th Cir. 1989) ("We question the appropriateness of [movant's] attempt to use the appellate process to resolve a question that must first be resolved in the district court.").[17]

IV. CONCLUSION

We hold that the district court abused its discretion in applying an erroneous legal standard of

[17] The State Appellants' partial opposition to Appellees' Motion to Exceed Type-Volume Limitation was construed by this court, on April 23, 2008, as a motion to strike Section V.B. of Appellees' answering brief, which addresses the Title VII claim. We grant the motion to strike.

review, failing to properly consider the balance of hardships and the public interest, and entering an overbroad injunction. On remand, the district court must apply the rational basis level of scrutiny to determine whether Appellees have demonstrated a likelihood of success on the merits. The district court must also determine whether Appellees have demonstrated that they are likely to suffer irreparable harm in the absence of preliminary relief, whether the balance of equities tips in the favor of the three Appellees, and whether the public interest supports the entry of an injunction. If the court finds in favor of Appellees, it must narrowly tailor any injunctive relief to the specific threatened harms raised by Appellees. The order granting the preliminary injunction is **REVERSED;** the preliminary injunction is **VACATED;** and the case is **REMANDED** to the district court for further proceedings consistent with this opinion. The claims against HRC Appellants are **DISMISSED** as not ripe. The motion to strike that portion of Appellees' brief that addresses the Title VII claim is **GRANTED.**[18]

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[18] The new rules, Washington Administrative Code sections 246-863-095 and 246-869-010, are effective as of the filing date of this opinion, and, except to the extent that the district court, upon reconsideration in light of this disposition, issues a preliminary injunction as to the named plaintiffs and their employers, may be enforced in accordance with the law of the state of Washington.

Order with Exhibit on Stipulation re Plaintiffs' and State Defendants' Order (W.D.W.A. ECF NO. 448)

The Honorable Ronald B. Leighton
Trial: July 26, 2010

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STORMANS INCORPORATED, et al., Plaintiffs, v. MARY SELECKY, Secretary of the Washington State Department of Health, et al., Defendants, and JUDITH BILLINGS, et al., Intervenors.	NO. C07-5374 RBL PLAINTIFFS AND STATE DEFENDANTS' STIPULATION AND ORDER

COMES NOW Plaintiffs Stormans, Inc., Rhonda Mesler, and Margo Thelen, by and through their attorneys, Steven T. O'Ban and Kristen K. Waggoner of Ellis, LI, and McKinstry, and State Defendants

Mary Selecky, et al., by and through their attorneys, Joyce A. Roper and Rene D. Tomisser, Assistant Attorneys General, and enter into the following:

STIPULATION

1.1 Plaintiffs brought this action alleging that the Board of Pharmacy's rules, Wash. Admin. Code §246-863-095 and Wash. Admin. Code §246-869-010, violate their constitutional rights, including the free exercise of religion and substantive due process protections under the First and Fourteenth Amendments, and Title VII of the Civil Rights Act of 1964.

1.2 Plaintiffs, pharmacists and a pharmacy owner, have a conscientious objection to stocking and dispensing Plan B, the morning after pill. When a customer has requested Plan B, Plaintiffs have referred the customer to a nearby provider and, upon the patient's request, called the provider to ensure the product is in stock ("facilitated referral"). Prior to the adoption of the rules, Plaintiffs' facilitated referrals did not violate Washington law.

1.3 The Board of Pharmacy claims that it interprets the current rules to prohibit Plaintiffs from refusing to deliver lawful medications and referring patients to a nearby pharmacy for any reason, including conscientious objections, other than the reasons provided by WAC 246-869-010.

1.4 On June 29, 2010, the Board of Pharmacy commenced rule-making to amend its rules to allow a facilitated referral. 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. A copy of the Board of Pharmacy meeting minutes is attached as Exhibit A.

1.5 As Board members indicated in their comments at the June 29th meeting, referral is a time-honored pharmacy practice, it continues to occur for many reasons, and is often the most effective means to meet the patient's request when the pharmacy or pharmacist is unable or unwilling to provide the requested medication or when the pharmacy is out of stock of medication. Board members also explained that anticipated changes in the pharmaceutical industry will effect the practice of pharmacy in ways that permitting flexibility with facilitated referrals will improve the delivery of health care in Washington, including when a drug is not cost-effective to order, the drug requires monitoring or follow-up by the pharmacist, and other reasons.

The Board believes that pharmacies and pharmacists should retain the ability to engage in facilitated referrals; 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. Such lawfully prescribed medications would include Plan B.

1.6 The State Defendants' rule-making processes require public hearings and comments and these processes generally take at least six months for the Board to adopt rule amendments. The State Defendants agree to use their best efforts to complete the rules within eight months.

1.7 The rule-making processes under Wash. Rev. Code 34.05 do not allow the parties to stipulate to specific language of the rules in advance of the first public hearing. Nor do the parties stipulate what rule language would sufficiently accommodate Plaintiffs' conscientious objections to stocking and dispensing Plan B.

1.8 Upon entry of the following Order, Plaintiffs and State Defendants agree to a stay of the trial in this matter to allow the Board time to complete its rule processes to allow for facilitated referrals. State Defendants agree they will not object to this Court lifting the stay upon Plaintiffs' request nor object to Plaintiffs' request for this Court to set trial on an expedited basis if Plaintiffs reasonably believe at any time during the rule-making process that the proposed rules do not allow them to engage in a facilitated referral instead of stocking or dispensing Plan B.

State Defendants will not object to the Plaintiffs' amending their Complaint upon information and belief that acts or omissions of the State Defendants, from the date of this stay and during the rulemaking process, supports a new claim. State Defendants reserve the right to raise any defenses to a new claim other than a defense that the claim is untimely

or is barred because the pleadings were closed under the Court's current schedule.

1.9. During the stay, this Court's March 6, 2009, Stipulation and Order Granting Defendants' and Defendant-Intervenors' Joint Motion for Stay of Proceedings Pending Decision by the Ninth Circuit Court of Appeals remains in effect.

1.10 If Plaintiffs' claims are tried, the parties agree not to refer to, use, or rely on alleged incidents involving the refusal to stock, deliver, or dispense lawfully prescribed drugs or devices, or complaints of such incidents, or alleged problems with timely access to drugs or devices that occur after the stay.

1.11 State Defendants agree to maintain current contact information of all witnesses under the Board's control that have been identified as witnesses in Plaintiffs' case-in-chief.

ORDER

2.1 This Court has jurisdiction over the parties and the subject matter of this lawsuit.

2.2 This case was filed by Plaintiffs nearly three years ago. The Court is very familiar with the factual allegations and legal contentions of the parties and the relief sought by Plaintiffs.

2.3 Plaintiffs brought this action alleging that the Board of Pharmacy's rules, Wash. Admin. Code §246-863-095 and Wash. Admin. Code §246-869-010, violate their constitutional rights, including the free

exercise of religion and substantive due process protections under the First and Fourteenth Amendments, and Title VII of the Civil Rights Act of 1964.

2.4 Plaintiffs, pharmacists and a pharmacy owner, have a conscientious objection to stocking and dispensing Plan B, the morning after pill. When a customer has requested Plan B, Plaintiffs have referred the customer to a nearby provider and, upon the patient's request, called the provider to ensure the product is in stock ("facilitated referral"). Prior to the adoption of the rules, Plaintiffs' facilitated referrals did not violate Washington law.

2.5 The Board of Pharmacy claims that it interprets the current rules to prohibit Plaintiffs from refusing to deliver lawful medications and. referring patients to a nearby pharmacy, for any reason, including conscientious objections, other than the reasons provided by WAC 246-869-010.

2.6 Throughout this proceeding, Plaintiffs have requested that this Court grant an injunction against State Defendants in order to permit Plaintiffs to continue engaging in facilitated referrals for patients requesting Plan B.

2.7 This Court denied the summary judgment motions of the State Defendants and Intervenors on June 15, 2010. Trial is set to begin July 26, 2010.

2.8 On June 29, 2010, the Board of Pharmacy commenced rule-making to amend its rules to allow a facilitated referral. 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.

2.9 The State Defendants' rule-making processes require public hearings and comments. The parties have not stipulated to any specific rules language. The State Defendants have assured this Court they will use their best efforts to conclude the rule-making process within eight months.

2.10 Therefore, the trial in this case shall be and hereby is STAYED to allow the Board time to complete its rule-making processes to allow for facilitated referrals. This Court will lift the stay and set trial on an expedited basis upon Plaintiffs' request at any point in the future if Plaintiffs reasonably believe at any time during the rule-making process that the proposed rules do not allow them to engage in a facilitated referral instead of stocking or dispensing Plan B.

2.11 During the stay, this Court's March 6, 2009, Stipulation and Order Granting Defendants' and Defendant-Intervenors' Joint Motion for Stay of Proceedings Pending Decision by the Ninth Circuit Court of Appeals remains in effect.

2.12 If this case later proceeds to trial, the parties may not refer to, use, or rely on alleged incidents involving the refusal to stock, deliver, or dispense lawfully prescribed drugs or devices, or

complaints of such incidents, or alleged problems with timely access to drugs or devices that may arise after entry of this Order.

2.13 State Defendants must maintain current contact information of all witnesses under the Board's control that have been identified as witnesses in Plaintiffs' case-in-chief.

DONE IN OPEN COURT this
12th day of July, 2010.

s/Ronald B. Leighton
RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE

AGREED TO BY:

ELLIS, LI & McKINSTRY PLLC

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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
Olympia, Washington 98504

WASHINGTON STATE BOARD OF PHARMACY
MEETING MINUTES
June 29, 2010
Special Meeting
Teleconference

CONVENE

The telephonic meeting was called to order by the Board Chair Gary Harris.

Board Members present by telephone:
Gary Harris, R.Ph, Chair
Albert Linggi, R.Ph, Vice-Chair
Vandana Slatter, Pharm.D.
Christopher Barry, R.Ph.
Rebecca Hille, BA, Public Member
Kim Ekker, Public Member

Board Members absent:
Dan Connolly, R.Ph.

Staff Member present:
Joyce Roper, AAG(by phone)
Susan Teil Boyer, R.Ph., Executive Director
Doreen Beebe, Program Manager

A special meeting of the Washington State Board of Pharmacy was scheduled to begin at 3:30 p.m. on Tuesday, June 29. The public was invited to hear the discussion at the Department of Health, 111 Israel Rd SE - Room 158 in Tumwater. The meeting was

held to allow the board to consider whether to initiate rule making to amend its rule(s) to require facilitated referral when a facilitated referral will provide more timely access of medications to patients when pharmacies do not have the mediations and when pharmacists do not dispense the medications.

The board, represented by a quorum, discussed that a facilitated referral is consistent with current practice and with the change occurring the practice of pharmacy with the newer pharmaceuticals including but not limited to biologics. They acknowledged that in many instances a facilitated referral will benefit patients in assuring more timely access to a variety of medications. They also discussed how telepharmacy services might also promote patient access to medications, particularly in the rural area, and acknowledged that rule-making on telepharmacy services is already on their rule-making list.

Al Linggi moved that the Board initiate rulemaking to amend rules to require facilitated referral and instructed staff to file a CR101 in the state registry. The motion was seconded by Kim Ekker. Five members voted in favor the motion and zero opposed. Note the Chair does not vote unless to break a tie.

BUSINESS MEETING ADJOURNED

There being no further business, the board adjourned at 3:55 p.m. The Board of Pharmacy will meet again on September 16 for its regularly scheduled business meeting - location to be determined.

Respectfully submitted by:

_____

Doreen Beebe, Program Manager

Approved on _____

EXHIBIT A

WAC 246-869-010 ("Delivery Rule")

Pharmacies' responsibilities.

(1) Pharmacies have a duty to deliver lawfully prescribed drugs or devices to patients and to distribute drugs and devices approved by the U.S. Food and Drug Administration for restricted distribution by pharmacies, or provide a therapeutically equivalent drug or device in a timely manner consistent with reasonable expectations for filling the prescription, except for the following or substantially similar circumstances:

(a) Prescriptions containing an obvious or known error, inadequacies in the instructions, known contraindications, or incompatible prescriptions, or prescriptions requiring action in accordance with WAC 246-875-040.

(b) National or state emergencies or guidelines affecting availability, usage or supplies of drugs or devices;

(c) Lack of specialized equipment or expertise needed to safely produce, store, or dispense drugs or devices, such as certain drug compounding or storage for nuclear medicine;

(d) Potentially fraudulent prescriptions; or

(e) Unavailability of drug or device despite good faith compliance with WAC 246-869-150.

(2) Nothing in this section requires pharmacies to deliver a drug or device without payment of their usual and customary or contracted charge.

(3) If despite good faith compliance with WAC 246-869-150, the lawfully prescribed drug or device is not in stock, or the prescription cannot be filled pursuant to subsection (1)(a) of this section, the pharmacy shall provide the patient or agent a timely alternative for appropriate therapy which, consistent with customary pharmacy practice, may include obtaining the drug or device. These alternatives include but are not limited to:

(a) Contact the prescriber to address concerns such as those identified in subsection (1)(a) of this section or to obtain authorization to provide a therapeutically equivalent product;

(b) If requested by the patient or their agent, return unfilled lawful prescriptions to the patient or agent; or

(c) If requested by the patient or their agent, communicate or transmit, as permitted by law, the original prescription information to a pharmacy of the patient's choice that will fill the prescription in a timely manner.

(4) Engaging in or permitting any of the following shall constitute grounds for discipline or other enforcement actions:

(a) Destroy unfilled lawful prescription.

(b) Refuse to return unfilled lawful prescriptions.

(c) Violate a patient's privacy.

(d) Discriminate against patients or their agent in a manner prohibited by state or federal laws.

(e) Intimidate or harass a patient.

WAC 246-869-150 ("Stocking Rule")

Physical standards for pharmacies - Adequate stock.

(1) The pharmacy must maintain at all times a representative assortment of drugs in order to meet the pharmaceutical needs of its patients.

(2) Dated items - All merchandise which has exceeded its expiration date must be removed from stock.

(3) All stock and materials on shelves or display for sale must be free from contamination, deterioration and adulteration.

(4) All stock and materials must be properly labeled according to federal and state statutes, rules and regulations.

(5) Devices that are not fit or approved by the FDA for use by the ultimate consumer shall not be offered for sale and must be removed from stock.

(6) All drugs shall be stored in accordance with USP standards and shall be protected from excessive heat or freezing except as those drugs that must be frozen in accordance with the requirements of the label. If drugs are exposed to excessive heat or frozen when not allowed by the requirements of the label, they must be destroyed.

WAC 246-863-095

Pharmacist's professional responsibilities.

1) A pharmacist's primary responsibility is to ensure patients receive safe and appropriate medication therapy.

(2) A pharmacist shall not delegate the following professional responsibilities:

(a) Receipt of a verbal prescription other than refill authorization from a prescriber.

(b) Consultation with the patient regarding the prescription, both prior to and after the prescription filling and/or regarding any information contained in a patient medication record system provided that this shall not prohibit pharmacy ancillary personnel from providing to the patient or the patient's health care giver certain information where no professional judgment is required such as dates of refills or prescription price information.

(c) Consultation with the prescriber regarding the patient and the patient's prescription.

(d) Extemporaneous compounding of the prescription, however, bulk compounding from a formula and IV admixture products prepared in accordance with chapter 246-871 WAC may be performed by a pharmacy technician when supervised by a pharmacist.

(e) Interpretation of data in a patient medication record system.

(f) Ultimate responsibility for all aspects of the completed prescription and assumption of the responsibility for the filled prescription, such as: Accuracy of drug, strength, labeling, proper container and other requirements.

(g) Dispense prescriptions to patient with proper patient information as required by WAC 246-869-220.

(h) Signing of the poison register and the Schedule V controlled substance registry book at the time of sale in accordance with RCW 69.38.030 and WAC 246-887-030 and any other item required by law, rule or regulation to be signed or initialed by a pharmacist.

(i) Professional communications with physicians, dentists, nurses and other health care practitioners.

(j) Decision to not dispense lawfully prescribed drugs or devices or to not distribute drugs and devices approved by the U.S. Food and Drug Administration for restricted distribution by pharmacies.

(3) Utilizing personnel to assist the pharmacist.

(a) The responsible pharmacist manager shall retain all professional and personal responsibility for any assisted tasks performed by personnel under his or her responsibility, as shall the

pharmacy employing such personnel. The responsible pharmacist manager shall determine the extent to which personnel may be utilized to assist the pharmacist and shall assure that the pharmacist is fulfilling his or her supervisory and professional responsibilities.

(b) This does not preclude delegation to an intern or extern.

(4) It is considered unprofessional conduct for any person authorized to practice or assist in the practice of pharmacy to engage in any of the following:

(a) Destroy unfilled lawful prescription;

(b) Refuse to return unfilled lawful prescriptions;

(c) Violate a patient's privacy;

(d) Discriminate against patients or their agent in a manner prohibited by state or federal laws; and

(e) Intimidate or harass a patient.

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

SER53-55, 61-62, 94, 96-97
Excerpts from Trial Testimony of
State Pharmacy Association CEO Rod Shafer

Q. In the examples that you just mentioned, did you receive any assurances from Ms. Hulet and the task force members that pharmacies would be able to continue to refer for these reasons after the rule went into effect?

A. It seems like at every meeting, and even at the Board of Pharmacy meetings when these issues would come up, when say Donna Dockter, because she was very concerned about those, and we would go through the litany of issues that we talked about, there was always general consensus that yea, that would make sense that you would refer that patient on. You know, I don't carry the drug because it's very expensive; should I refer? Yes, you should refer.

Or for instance, I just -- I carry the drug, but I just dispense the last product that I had. Should I refer, rather than have the patient order again? Yes, you should refer. All of those examples, we got a general agreement that yes -- and even at the Board meetings, there was no objections to those kind of exemptions. Only when we said but if I don't carry it because of religious objections, then they said no, we can't do that.

Q. Who said no, you can't do that?

A. That was very clear from the Governor's office, from Christina Hulet. She basically told us numerous times that was not on the table, because we brought it up over and over again, and Planned Parenthood and NARAL.

Q. After the rules became effective, have these practices that you talked about, the referral and the reasons for the referral, continued in practice?

A. Yes.

. . .

[SER61]

Q. And after the rules became effective, have these exemptions that we just talked about continued where pharmacies continue to refer even when they have a patient demand?

A. Yes.

. . .

Q. Did you discuss assisted suicide at the task force?

A. The issue came up. We did talk about that. We were told, first of all, that that was not an issue that was current, that that was something that may come down the road. And also we were assured that there would be some sort of an opt-in or opt-out component

written into that so that pharmacists wouldn't be required to dispense lethal drugs.

Q. Did anybody at the task force raise concerns that a pharmacist might not have to fill a lethal drug prescription?

A. No.

Q. Of these examples that you've raised this morning, did you hear these examples discussed at Board of Pharmacy meetings, as well?

A. Yes. Particularly, Donna Dockter raised those issues, I would hazard a guess, at every meeting up until the very last vote.

Q. Did you ever hear a Board of Pharmacy member suggest that the rule would require pharmacies to stock or order drugs for existing patients in these situations?

A. No.

[SER94]

Q. When you talk about disagreeing over referral, are you referring to referral for conscientious reasons or for all reasons?

A. For all reasons.

Q. In the final regulations, did you have an understanding that, based on the assurances you were given at the task force, that referral would be permitted for business reasons?

A. Yes.

Q. You referred to Ms. Dockter not agreeing to the final rule, correct?

A. Yes.

Q. Did Ms. Dockter tell you why she still had concerns about the final rule?

A. I think Donna was very concerned about the fact that not everything was completely identified in all of the exceptions that she felt were very important. I think Donna, like a lot of pharmacists is very black and white. They want everything spelled out. They want nothing gray. In her mind, that's not what this was, that there was a lot of room for -- it wasn't clear to her.

We felt that because there was similar language like substantially similar, that there was language in there that included a reasonable expectation, that there was wiggle room in there for us.

. . . .

[SER96-97]

Q. How do you know that that rule was specific to Plan B, though?

A. It was the only one that was restricted to pharmacies. In fact, I think it's the only drug still restricted to pharmacies -- an over-the-counter drug that's restricted for sale by a pharmacy.

. . . .

Q. In speaking with the task force and the Board of Pharmacy members, was it your understanding that a niche pharmacy would not have to order a drug for a patient that was out of its particular business niche?

A. That was never my understanding that a niche pharmacy -- by definition of niche, you pick this particular area of practice, that's what you're going to do. There was never any indication that they would have to carry any drug that the patient wanted.

Q. But did you receive assurance that they would not have to?

A. There was general agreement on the table when we talked about it. There was nobody who objected to that?

Q. When you raised it?

A. When we raised it.

. . . .

SER225-28
Excerpts from Trial Testimony of Pharmacy Commission Executive Director Steven Saxe

Q. Let's assume that a patient comes to the first pharmacy and attempts to pay for Plan B with insurance that the pharmacy does not accept. The pharmacy declines to deliver the drug under subsection (2) of the delivery rule, the customary payment exception, and it also declines to refer the patient, both because it doesn't know which pharmacy stocked the drug and it's not obligated to refer under those regulations. Unlike any other patient that's ever been identified in this entire rule-making process, this particular patient can't find Plan B and becomes pregnant. You would agree that this would be a serious access issue, wouldn't you?

A. That would be an access problem.

Q. But you would also agree with me that it's permissible under subsection (2) of the delivery rule, right?

A. Yes.

Q. Let's assume a different patient comes to the second pharmacy and this pharmacy stocks Plan B but there's a lone pharmacist on duty who has a conscientious objection to dispensing Plan B. The pharmacist provides a facilitated referral to one of a dozen nearby pharmacies and the patient obtains the drug in a few minutes without any problem.

You'd agree that this actually is a violation of the delivery rule, right?

A. Yes.

Q. But you would also agree with me that the scenario where the woman is denied access to Plan B and becomes pregnant is a much more serious issue than the woman who received the drug within five minutes, right?

A. Yes.

Q. You would also agree, wouldn't you, that at the task force meetings that we discussed yesterday, board member Ms. Dockter and Mr. Shafer from the WSPA raised a variety of examples of why pharmacies need discretion not to order or deliver drugs?

A. Yes.

Q. Those examples included situations like simple compounds, insurance payments, cost of drugs and shelf life, right?

A. I believe so, yes.

Q. And at those Board of Pharmacy meetings and at those task force meetings, no one disagreed that those were legitimate reasons that pharmacies should continue to refer patients for, or not stock, right?

A. I don't recall any discussion on those examples, no. I mean, discussion, yes, but any -- what did you say, opposition --

Q. I said, you don't remember that anyone has disagreed with those exceptions, right?

A. Right.

Q. At any of those meetings?

A. Right. . . . .

Q. Let me ask the question again. In the end with the rules that were finally adopted by the Board, didn't those rules allow pharmacies to make decisions based on what they wanted to stock and what they could afford, other business decisions and professional judgments?

A. Yes.

Q. But they do not allow pharmacists or a pharmacy owner to refer a patient due to a moral or religious objection, right?

A. That wouldn't be one of the exceptions on there, yes.

Q. And it was your understanding that the intent of the proposed rule was to allow professional judgment and as you've indicated business reasons that are consistent with the time-honored practices of pharmacy but not moral or religious reasons, right?

A. I believe so, yes.

SER349-352, 355-356
Excerpts from Trial Testimony of
Pharmacy Commission Pharmacist Consultant
and Spokesperson Timothy S. Fuller

A. We looked at it making sure patients had access to the medications. It's the same.

Q. You didn't mention any of the other medications other than Plan B, right?

A. No.

Q. So I am just getting at in terms of gauging the object of the rule through the economic impacts that you were concerned about and wanted pharmacies to focus on and give you accurate data about, the object of the rule was ending refusals for conscientious objections, correct?

A. Yes.

Q. Were you involved in putting together the guidelines document?

A. This is Exhibit 436, which I believe was admitted yesterday.

THE COURT: It is.

BY MR. O'BAN:

Q. You participated in preparing this, didn't you?

A. I had some input.

Q. I will read into the record -- let me back up. This was provided to all pharmacies and pharmacists to help them comply with the new regulations, correct?

A. Yes.

Q. And it says "Dear Pharmacists & Pharmacy Owner: The Board of Pharmacy recently adopted rules concerning the professional responsibilities of a pharmacist and a pharmacy. We are sending you this document to help you understand these important rules and assist you in complying with the rules. These rules will be in effect on July 26, 2007." Do you see that?

A. Yes.

. . .

Q. So the two specific types of conduct that this guidance document was directed to was conscientious objector and getting Plan B in a timely way to patients, correct?

A. Correct.

Q. It didn't discuss other delivery concerns of drugs like HIV or syringes did it?

A. Correct.

[SER355-56]

Q. That had been the time honored practice, right?

A. Yes -- well, for medications in general.

…

Q. One last item I wanted to ask you about and we are almost done, at least with me, and that is niche pharmacies. You are aware there were niche pharmacies such as pediatric, cancer, long-term care. correct?

A. Yeah, we call them specialty.

Q. Specialty pharmacies. But you've seen the term niche pharmacy, right?

A. I suppose so.

Q. And you would agree that niche pharmacies are permitted under the rules, right?

A. Yes.

Q. If a patient were to come off the street and let's say it's a long-term care -- let's say it's a cancer specialty pharmacy in cancer drugs, and were to request antibiotic in particular, something that niche pharmacy didn't carry, they would have a right to refer, wouldn't they?

A. Yes.

Q. And if it was an existing patient who was coming in to fill their cancer drug prescription and also had a prescription for the antibiotic, the pharmacy can refer for that antibiotic?

A. They could.

Q. Mr. Fuller, other than eliminating referral as an option for pharmacies which cannot stock Plan B for religious reasons, from a practical standpoint, nothing has changed after the enactment of these rules, correct?

A. Nothing has changed in terms of what has happened or what might happen?

Q. From the standpoint of pharmacies?

A. Right.

Q. The only change these rules have affected is that they can't stock Plan B for conscientious reasons, right?

A. Right.

. . . .

SER 496
Excerpts from Trial Testimony of former Pharmacy Commission Member and Executive Director Susan Teil Boyer

A. The pharmacy was a different story that we believed -- I believed the patient comes first.

Q. So you are saying the pharmacy has to stock lethal drugs, but then it needs to accommodate a conscientious objecting pharmacist?

A. No, the death with dignity law is very specific, that you can opt out.

Q. You agree that pharmacies should be able to opt out for reasons of conscience with respect to lethal drugs?

A. Yes.

Q. Pharmacies are permitted to focus on a niche market?

A. Pardon me?

Q. Pharmacies are permitted to focus on a niche market?

A. Yes, they are.

Q. Examples are pediatrics, long term care, HIV, cancer treatments, compounding, hormone replacement. Those are all examples of niche pharmacies that are permitted by the Board, right?

A. Yes.

Q. And they are permitted to advertise to the public that they specialize in the limited care of pediatrics or so forth?

A. Yes.

. . . .

SER709-710, 726, 798, 800
Excerpts from Trial Testimony of Pharmacy Commission Chair Gary Harris

[SER709]

Q. I have listened to the tapes of the Board of Pharmacy meetings, and at those meetings you would agree with me that Donna Dockter provided the Board with examples of instances where pharmacists would not or should not dispense, correct?

A. I know she was on the Board when I first came to the Board, and I know she was involved in the initial discussions with pharmacy and pharmacists responsibilities rules.

. . .

Q. What I am asking you is, do you remember Ms. Dockter, in several meetings, getting up and going through a long list of instances where she felt like pharmacies and pharmacists should not be required to dispense medications under these rules, right? I am not asking you anything besides you remember Ms. Dockter raising those examples, right?

A. I recall her speaking about the responsibility rules, yes. I cannot recall what she said in 2005 or 2006.

Q. I would like you to look at Exhibit 99. This appears to be a memo we talked a little bit about yesterday in terms of conscience rights. It's dated

May 25, 2006, and the top line says: "The information contained within this packet has been gathered pursuant to the Board's request" Do you see that?

A. Yes.

. . .

[SER726]

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, Mr. Harris felt that the Board would not pursue disciplinary action against the pharmacists."

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. . . .

[SER798]

Q. So you would agree that Ralph's would be acting intentionally and would be directly responsible for not stocking or dispensing Plan B or Ella, right?

A. Yes.

Q. And under Section I the guidelines encourage you to consider the motivation for the violation, right?

A. Uh, yes.

Q. And I think you testified earlier and wrote in your notes that were to help you with your testimony here today that refusing to provide women emergency contraception is sex discrimination in your view, right?

A. In my opinion.

Q. And in your opinion you would agree that sex discrimination is immoral, correct?

A. Uh, yes.

Q. So that also could be an aggravating factor that would be considered in a sanction, right?

A. It -- it could be.

. . . .

[SER800]

Q. But you agree that a carve-out for pharmacists not to have to participate in assisted suicide is appropriate, right?

A. Yes.

Q. You also wrote in your notes that "there are always consequences for conscientious objectors." It says, "jail time, move to Canada, falsify medical data." And I think you said on Thursday that one of those consequences your friend experienced in the Vietnam War was they simply dropped off the grid, right?

A. Yeah. Yeah.

Q. But you don't really think it's a good thing to force conscientious objectors to move to Canada or serve jail time or drop off the grid, do you?

A. That is that individual's choice to move to Canada or -- or whatever.

SER935
(Trial Exhibit 24)
Pharmacy Commission newsletter re "conscience issues" and "emergency contraception"

. . . .

No.895 - Conscience Issues Related to Filling Prescriptions

The Board of Pharmacy has received calls from the public and profession regarding refusing to fill an emergency contraception prescription for reasons of conscience. The American Pharmacists Association has a code of ethics with concepts that address this topic. A pharmacist should function by serving the individual, community, and societal needs while respecting the autonomy and dignity of each patient. The best practice by a pharmacist is to promote good health for every patient in a caring compassionate, and confidential manner.

Currently, Washington State statutes and rules do not require pharmacists to fill prescriptions if they choose not to, as long as they do not violate the laws prohibiting discrimination. However, the Board

advises pharmacists who do not wish to fill prescriptions

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for reasons of conscience, to refer the patient to a colleague or another pharmacy. Further, the Board recommends that pharmacists address issue proactively with their employer, colleagues, and prescribers to have convenient and timely options available for patients.

The Board has concerns about inflexible mandates to fill any prescription. There are circumstances when it may be clinically appropriate for a pharmacist to delay or refuse filling a prescription or to take possession of a fraudulent prescription. Pharmacists are expected to review prescriptions and patient profiles and use their knowledge and professional judgment when considering the appropriateness and validity of a particular prescription or drug regimen.

Pharmacists should also consult with their legal counsel if they choose not to fill a lawful and therapeutically responsible order, consistent with the patient's conditions and other medications. The refusing pharmacist may incur liability by not filling the prescription, particularly if the prescription was confiscated or destroyed.

Washington State has been a leader in prescriptive authority agreements. In Washington, women can obtain emergency contraception without

seeing a physician through more than 300 participating pharmacists who have obtained the necessarily additional training. Pharmacists with emergency contraception authority may be found at www.not-2-late.com. In addition, the Board of Pharmacy works with pharmacy organizations to provide the necessary education to apply for collaborative agreements.

The Board recognizes the conflict between the pharmacist's desire to not participate in therapy he or she is morally opposed to versus the patient's right to obtain a legitimate prescription. However, access to health care is one of the charges of the Department of Health. Emergency contraception medication has been authorized for use by the Food and Drug Administration. Pharmacists are encouraged to identify convenient options so patients can receive medications that are lawful and therapeutically accepted.

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Steve M. Saxe, RPh, FACHE - State News Editor

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SER954
(Trial Exhibit 48)
Excerpt of Email with CR-101 draft
re "emergency contraception"

TO: Mary C. Selecky
Secretary

Bill White
Deputy Secretary

From: Doreen Beebe, Program Manager

SUBJECT: STATEMENT OF INQUIRY FOR WAC 246-863-xxx Pharmacist Responsibilities

1. Explain why rulemaking is necessary and include a brief history of the issue.

   This issue relates to a pharmacist's responsibility to fill or dispense prescriptions for emergency contraception.

   This issue came to the attention of the-Washington State Board of Pharmacy (BOP) in July 2005. Staff of the BOP began receiving phone calls asking for the opinion of the BOP concerning a pharmacist is right to refuse to fill a prescription based on the pharmacist's moral, religious, or personal beliefs.

   In August 2005, the BOP received correspondence from the Northwest Women's Law Center, Planned Parenthood, Washington State Council on Family Planning, and several

> county family planning organizations concerning a pharmacist's refusal to fill prescriptions for emergency contraceptives based on the pharmacist's personal beliefs. The Northwest Women's Law Center urged the BOP to adopt a policy to ensure that no one is denied appropriate and safe prescriptions because of a pharmacists personal belief.
>
> In January 2006, the Washington State Pharmacist's Association presented to the BOP the findings of an ad hoc committee on the subject of conscience clause for pharmacists. . . .

CR101 CoverMemo (DB System Version).dot

Revised 6/3/05

SER971-983
(Trial Exhibit 70)
Human Rights Commission letter
to Pharmacy Commission

Washington State Human Rights Commission
711 S. Capitol Way, Suite 402
Olympia, Washington 98504-2490

April 17, 2006

Steve Saxe
Executive Director
Board of Pharmacy
Health Professions Quality Assurance
Washington State Department of Health
P.O. Box47865
Olympia, WA 98504-7865

Dear Mr. Saxe;

The Washington State Human Rights Commission (WSHRC) was created by the legislature to protect "the public welfare, health, and peace" in our state by eliminating and preventing discrimination. RCW 49.60.010. To implement this authority, the WSHRC was provided with "general jurisdiction and power for such purposes", which extends to state agencies. Id. RCW.49.60 is the Washington Law Against Discrimination (WLAD). It is the position of the WSHRC that allowing pharmacists to discriminate, based on their personal religious beliefs, against women and others trying to fill lawful prescriptions would be discriminatory, unlawful, and against good

public policy and the public interest. It is also WSHRC's position that allowing a practice of "refuse and refer" as a means of addressing this issue, allows and perpetuates discriminatory behavior. Informed decisions that cause discrimination against women and others are deemed intentional, so we urge the Board of Pharmacy (Board) to consider the WSHRC's arguments, as detailed in this letter. An entity which receives a warning about the logical and foreseeable consequences of its actions, and then proceeds to take such action, is deemed under law to have intended the consequences of those actions. We base our understanding on Washington State and federal law, health and public policy concerns, and the great risk of costs and liability to the state.

The WSHRC understands that the Board of Pharmacy (the Board) is currently dealing with issues arising from some pharmacists in the state refusing to fill or desiring to deny filling some legal prescriptions for emergency contraception and other prescriptions for women, based on the pharmacists' asserted religious and moral beliefs. The Board is engaged in inquiry on this issue, is holding stakeholder workshops, and plans to discuss whether rules are necessary regarding a pharmacist's responsibilities in processing a lawful prescription. As you are aware, our first preference was to have a more informal meeting on the subject prior to the hearing. Our arguments follow. We have addressed known arguments made by some pharmacists. As others come to your attention, you are welcome to bring them to our attention. We will respond in a timely way.

Adding a Conscience Clause is Against Good Public Policy and Risks Women's Health

Before addressing the illegality of the proposed rule, we draw your attention to the larger public interest issue at state: women's health and women's right to health care. Not only should the state minimize discrimination, and avoid the "slippery slope" that could easily develop a possible "Conscience Clause" rule by the Board, the state and its agencies, boards, and commissions should also advocate good public policy that benefits the heath of all of its residents equally and equally effectively. Denying a class of people a medically related service is offensive to the public interest and the traditions, morality, and ethics of the State of Washington. Denial of such services to women could cause additional adverse consequences of pregnancy and childbirth, and a decline in the health of women.

As we understand it, the drug at the center of this issue is Plan B, an emergency contraceptive. The efficacy of this drug depends on how soon a woman is able to take it, with the medicine having little medical usefulness after 72 hours. By placing his or her own personal views ahead of a patient's, a pharmacist is essentially making a decision for the woman when a prescription is refused. Likewise, a prescription could be for an off-label use unrelated to the pharmacist's objections. This leaves the patient without the immediate treatment she may need. The result of the pharmacist's decision thus can have a devastating effect of the health and livelihood of that woman in addition to the fact that she was not allowed to make her own choices.

Legal Arguments under the Washington Law Against Discrimination: Sex Discrimination and Protections under Public Accommodations

That statute states in part as follows, at RCW 49.60.010:

"It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of...sex…are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in...places of public...accommodation...and the commission established hereunder is hereby given general jurisdiction and power for such purposes."

Our interpretation of this statute is that granting pharmacists the ability to deny lawful prescriptions to women would constitute illegal discrimination on the basis of sex under the Washington Law Against Discrimination, would expose pharmacists to significant legal liability for such discriminatory, and hence, illegal acts, would similarly expose stores and corporations, under whose purview pharmacists operate, under the law of agency, and could expose the Board of Pharmacy to liability for writing regulations that are knowingly discriminatory.

Pharmacies are under the jurisdiction of the WSHRC as public accommodations. Public accommodations are defined as follows:

"Any place of public resort, accommodation, assemblage..." includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted...for the benefit, use, or accommodation of those seeking health...or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services..., or where medical service or care is made available." (RCW 49.60.060 (10))

The WLAD protects women in public accommodations as follows:

(1) The right to be free from discrimination because of...sex...is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation..." (RCW 49.60.030)

"Full enjoyment of" includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public...without acts directly or indirectly causing persons of any particular...sex...to be treated as not welcome, accepted, desired, or solicited. (RCW 49.60.040 (9))

Thus, "full enjoyment of' includes the service of having a lawful prescription filled. In addition, a prescription is a commodity which is sold by an establishment. The customer has every right to expect to that delivery of service to be provided without independent, moral judgment. Further, denying the filling of a lawful prescription would be treating women and their business as not welcome, not accepted, and not desired. This is not allowed under the public accommodation protections of WLAD.

Are employers of pharmacists and individual pharmacists covered by the WLAD?

All employers in the State of Washington with eight or more employees, except those non-profit institutions controlled by a religious group, are covered by the WLAD. Pharmacies which are under contract with larger corporate entities, would be covered by the WLAD if that corporate entity had eight or more employees. WAC 162-16-220 states, "(6) Connected corporations. Corporations and other artificial persons that are in common ownership or are in a parent-subsidiary relationship will be treated as separate employers unless the entities are managed in common in the area of employment policy and personnel management. In determining whether there is management in common we will consider whether the same individual or individuals do the managing, whether employees are transferred from one entity to another, whether hiring is done centrally for all corporations, and similar evidence of common or separate management."

Our jurisdiction over independent contractors is covered at WAC 162-16-230, where many factors are considered. 1bat section concludes by stating, "(4) Burden of persuasion. The party asserting that the complainant is an independent contractor has the burden of proving that status."

Individual pharmacists are covered by the WLAD as public accommodations, much as an individual dentist or doctor would be considered a public accommodation.

The Issue of Discrimination Against Women is Not Theoretical

Several instances illuminating our concerns have come to our attention. While we have not investigated these incidents and therefore draw no conclusion from them, they show that perception of discrimination exists and that-the concern and fears are real. Fear should not be part of the medical treatment experience that woman has to go through to regain health.

> A Swedish Medical Center outpatient pharmacy employee in Seattle allegedly stated to a customer that she was "morally unable" to fill a Cedar River Clinic patient's prescription for abortion-related antibiotics.

> Allegedly, in November 2005 in Yakima, a Safeway pharmacist refused to fill a Cedar River patient's prescription for pregnancy-related vitamins. The pharmacist reportedly asked the customer why she had gone to Cedar River Clinics and then told the

patient she "didn't need them if she wasn't pregnant."

> Suspicion by a pharmacist of illegal drug use without evidence of such illegal use. In another state, a pharmacist declined to fill a prescription for syringes for diabetes for a young man with gelled hair and tattoos. The pharmacist felt that the man would use the needles for illegal intravenous drug use. The man noted his doctor's signature and contact information on the prescription; and suggested to the pharmacist that he confirm the accuracy of prescription with the doctor. The pharmacist declined.

Liability for Failing to Provide Lawful Prescriptions

We realize that religious, moral, and ethical beliefs are raised in the issue before you. The WLAD does indeed protect people from discrimination on the basis of creed, which is broader than and includes religion. However, nothing in state or federal law permits religion to be used as a tool to take adverse action against those who profess a different belief. We do not see a clash of protected classes here. One class, women, desires and needs only that lawful prescriptions written by doctors be filled accurately and promptly. Another class, pharmacists who believe that emergency contraception offends their belief structure, seek to impose those views on such women. We make no argument that the pharmacists with these beliefs should not hold those beliefs. However, the WSHRC wishes to be very clear, we believe that they may not legally impose the adverse

effects of their own. beliefs on women. In fact, we note that those women, who may be adversely affected should a rule such as the one under discussion be put into place, may have standing to bring complaints and lawsuits against the pharmacists and their stores and parent corporations, and perhaps the Board of Pharmacy.

Liability for failure to allow full enjoyment of a public accommodation to a protected class could apply to not only the pharmacist who discriminated, but the employer, manager, or corporation who condones the practice. The Board's grant of a rule allowing pharmacies to prevent full enjoyment of their services where personal or religious beliefs conflict with filling certain prescriptions for women would not be a defense where the rule itself violates discrimination laws. Rather, the Board itself may be subject to legal action for establishing discriminatory policies.

Refuse and Refer is not an Acceptable Compromise

We understand that one possible compromise under discussion is permitting one pharmacist who does not want to fill a prescription to pass it along to another pharmacist to fill or refer to-another pharmacy altogether ("refuse and refer"). We do not recommend permitting this under the Board's regulations, because discrimination cannot be mitigated, but can only be remedied, prevented, and eliminated. Further, imposing additional work on a second pharmacist on the basis of religion may be adversely affecting the working conditions of the

second or receiving pharmacist, and thus create an unnecessary clash of personal beliefs in the workplace, perhaps even resulting in a hostile working environment for that pharmacist If the Board were to create rules: to assist some pharmacists in discriminating on the basis of sex and religion, it would inadvertently (or, as stated above, intentionally) be decreasing the rights of others. As the State Legislature recently showed · in passing the sexual orientation non-discrimination bill, which the Governor signed, and with which we agree, the natural movement is toward greater rights in the State of Washington, and not retrograding. We certainly do not want to bring back the back old days of illegal and dangerous non-medical treatments for women. ·

We also understand that some pharmacists maintain that while they will not fill a lawful prescription for emergency contraception, pharmacists are available at a different location who will. We do not accept this argument as an adequate defense because it illegally segregates women and subjects them to ·the hardships of travel, time and medical treatment delay, without a basis in · law or necessity. It would be analogous to a pharmacist declining to serve African-Americans and sending them for their pharmacy needs to a different part of town. This is not a theoretical example, and used to be standard Jim Crow practice in many states. We do not want to suffer or permit such a recrudescence of old illegal segregation in our state. If one were to overlay any of the other protections under the. WLAD to the intended pharmacist rule to "refuse and refer," due to personal morality issues, the unacceptability of

the application would be obvious. For example, imagine a commercial real estate property manager saying, "I don't want a beauty salon catering to African-American hair in this high end property, but you could go to that property on the other side of town." Using the same logic, a justice of the peace could refuse to marry a mixed race couple. An apartment owner could refuse to rent to a lesbian couple, and think that action is alright because he referred them to another complex which would rent to them. In any of these circumstances, we would not say that the pharmacist maintained clean hands.

Undue Subjectivity Can Lead to Discrimination

The Board's possible proposed rule does not consider the subjectivity of personal, moral, and religious beliefs. There are no objective standards for the proposed permission to impose religious and moral beliefs on customers of pharmacists. It is well-established that the consequent subjectivity and lack of standards could permit discrimination to occur. We do not recommend attempting to establish such standards, because, as noted above, the definition of religious and moral belief is very broad. The Board could find itself in the position of accidentally permitting the expression of certain religious beliefs, while excluding others. It is a rule of legislative and regulatory construction that where specifics are stated in law or regulation, the intent is to exclude what is not stated. Thus, if the Board permitted pharmacists to express their anti-contraception beliefs in the form of denying services to certain customers, then the Board would be put in the

untenable position of stating that other, equally fervently held moral positions, could not be expressed. Alternatively, if the Board tried to craft very broad and permissive rules, there could be absurd results, such as a fervent believer in Zero Population Growth refusing to fill a prescription for fertility drugs, or a Christian Scientist pharmacist refusing to fill any prescriptions whatsoever. A pharmacist or fertility clinic might want to deny fertility drugs to a lesbian couple on the basis of his or her religious beliefs. The same reasoning could permit an apartment manager to deny renting an apartment to a mixed race couple or a gay couple, because he believes that such relationships are an abomination. Drug stores used to have lunch counters, and sit-ins at those lunch counters protested some proprietors and servers refusal to serve African-Americans.

The courts do not distinguish between religious beliefs based in Christianity, Islam; Judaism, First People's religious beliefs, and Wiccans, or other fervently held beliefs. Would then, theoretically, the Board permit a Christian pharmacist to deny filling the prescription of a customer who is a known Wiccan? Or a Jewish pharmacist to deny filling the prescription of a customer who has a Neo-Nazi saying on a T-shirt? An African-American pharmacist to deny filling the prescription of a customer who appears to be a Skinhead or White Supremacist? All these groups believe that their beliefs are well-founded in moral and ethical principles, as strong as those espoused by those who feel that emergency contraception is improper.

The U.S. Supreme Court has said that belief is religious for Title VII of the Civil Rights Act of 1964 purposes if there is a "sincere and meaningful belief that occupies—in the life of the person who has the belief—a place parallel to that filled by God." Title VII interpretive guidelines published by the federal Equal Employment Opportunity Commission (EEOC) provide that: (1) religious practices protected under Title VII include "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views;" (2) a person may ascribe to a particular religious belief even if " no religious group espouses such beliefs or the fact the religious group to which the individual professes to belong may not accept such belief," and (3) the term "religious practice" includes "both religious observances and practices." Although our questions and a few of our examples are on the surface theoretical, we believe that the Board should fully consider the risks if it permits pharmacists with one set of religious or moral beliefs to impose the effects of those beliefs on one set of customers. We urge the Board to not set the example for denying services by making women the first to suffer.

Refusal of services that affect only women is sex discrimination under state and federal law.

State and federal courts, and the Attorney General of Washington, have stated that treating women differently based on their reproductive capacity is sex-based discrimination. Most of these cases are in the context of insurance coverage that excludes or charges more for coverage of contraceptives due to

"conscientious objection." This is analogous to the issue at hand, where the Board is considering whether pharmacists can use a "conscience clause" to refuse to provide lawful prescriptions for contraceptives. For example, Wash. AGO 2002 No. 5 (AGO) stated that offering generally comprehensive plans that excluded coverage of prescription contraceptives would be an unfair practice against women. The AGO referenced an older Supreme Court case that found sex discrimination where a woman was treated differently in employment because she was able to become pregnant. *Hanson v. Hutt,* 83 Wn.2d 195, 517 P.2d 599 (1973). A more recent State Supreme Court decision, *Glaubach v. Regence Blueshield,* (2003), required health care insurers to provide contraception as part of a health plan, because WAC 284-43-720(1) "already forbade sex discrimination in insurance plans."

The state's "strong policy against sex discrimination" was pointed out by the Washington Supreme Court in reference to RCW 48.30.300, which addresses discrimination in insurance practices. *Roberts v. Dudley,* 140 Wn.2d 58, 66, 993 P.2d 901 (2000) (quoting *Marquis v. City of Spokane,* 130 Wn.2d 97, 109, 922 P.2d. 43 (1996)). The first section of the statute provides as follows:

... (1) No person or entity engaged in the business of insurance in this state shall refuse to issue any contract of insurance or cancel or decline to renew such contract because of the sex or marital status, or the presence of any sensory, mental, or physical handicap of the insured or prospective insured. The amount of benefits payable, or any term, rate,

condition, or type of coverage shall not be restricted, modified, excluded, increased or reduced on the basis of the sex..."

RCW 48.30.300(1). Likewise, provision of lawful prescriptions to women should not be restricted because the prescription relates to a women's capacity to reproduce.

Because the WLAD largely parallels federal law, Washington courts will often look to federal civil rights law for analogous and persuasive authority in deciding cases. In 200l, the U.S. District Court for the Western District of Washington addressed Bartell Drug's decision not to provide employees with prescription contraceptive coverage. *Erickson v. Bartell Drug Co.,* 141 F. Supp.2d 1266 (W.D. Wash. 2001). Bartell had a self-insured benefit plan that covered most prescription drugs but excluded coverage of prescription contraceptives. *Id.* at 1268. The district court stated, "[t]he PDA [Pregnancy Discrimination Act] is not a begrudging recognition of a limited grant of rights to a strictly defined group of women who happen to be pregnant. Read in the context of Title VII as a whole, it is a broad acknowledgment of the intent of Congress to outlaw any and all discrimination against any and all women in the terms and conditions of their employment, including the benefits an employer provides to its employees." *Id.* at 1271. The court concluded that regardless of whether Bartell's exclusion-of contraceptives was the result of intentional discrimination, "exclusion of women-only benefits from a generally comprehensive prescription

plan is sex discrimination under Title VII." *Id.* at 1272.

Consumer Protection

In Connecticut and Massachusetts, the attorneys general have approached this issue as a consumer protection one. It is our understanding that the issue has been brought to the attention of the Consumer Protection Division of the Washington Attorney General's Office, and that that office is taking the matter seriously and is considering lega1 options. Pharmacies hold themselves out to the public as providing the service of filling lawful prescriptions. If pharmacies do not provide such-service, they may create greater professional risks. The Attorney General is responsible for protecting the public against fraudulent and deceptive practices. Under the Board of Pharmacy's RCW 18.64, women are entitled to rely upon the availability and good offices of pharmacies. This reliance creates a legal relationship of obligation and fulfillment.

Every state has enacted consumer protection statutes, which are modeled after the Federal Trade Commission Act (15 U.S.C.A. § 45(a)(l)). These acts allow state attorneys general and private consumers to commence lawsuits over false or deceptive advertisements or other unfair and injurious consumer practices. Many of the state statutes explicitly provide that courts turn to the federal act and interpretations of the Federal Trade Commission (FTC) for guidance in construing state laws.

The FTC standard for unfair consumer acts or practices is that substantial injury of consumers is the most heavily weighed element, and it alone may constitute an unfair practice. Such an unfair practice is illegal pursuant to the Federal Trade Commission Act unless the consumer injury is outweighed by benefits to consumers or competition, or consumers could not reasonably have avoided such injury. In the case of women attempting to and not being able to fill prescriptions for emergency contraception and other medical needs because of individual pharmacist objections, there are no benefits to the consumers. The sole benefit is to the pharmacist who has the luxury of imposing his beliefs on women. Refusing to dispense emergency contraception may either delay or deny entirely access to treatment. The delay incurred may reduce the effectiveness of treatment, and the refusal could create an insurmountable barrier for women living in rural areas where there may be few pharmacies.

Religious Beliefs Are Not a Permitted Reason to Not Carry Out an Employer's Equal Opportunity Policies

It is important to note that employees may not act on all their religious beliefs in the workplace. For example, in Peterson v. Hewlett-Packard, decided by the Ninth Circuit of the U.S. Court of Appeals (the circuit for Washington State), 358 F.3d 599, the court stated that the company did not engage in disparate treatment by terminating an employee on account of his religious views and that it did not fail to accommodate his religious beliefs. The employee, a self-described "devout Christian," disagreed with

his employer's diversity and nondiscrimination policy, posted Biblical scriptures opposing homosexuality, and in other ways did not cooperate with the company diversity policy. The court stated, "it is evident that he was discharged, not because of his religious beliefs, but because he violated the company's harassment policy by attempting to generate a hostile and intolerant work environment and because he was insubordinate in that he repeatedly disregarded the company's instructions to remove the demeaning and degrading postings from his cubicle."

Employees may seek to have their religious beliefs accommodated in the workplace. In regard to such a request, the court stated, "With respect to Peterson's first proposal, an employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights. *See Hardison, supra; Opuku-Boateng v. California,* 95 F.3d 1461, 1468 (9th Cir.l996). Nor does Title VII require an employer to accommodate an employee's desire to impose his religious beliefs upon his co-workers. *Chalmers, supra; Wilson v. U.S. West Communications,* 58 F.3d 1337, 1342 (8th Cir.1995)...While Hewlett-Packard must tolerate some degree of employee discomfort in the process of taking steps required by Title VII to correct the wrongs of discrimination, it need not accept the burdens that would result from allowing actions that demean or degrade, or are designed to demean or degrade..." *See Oncale v. Sundowner Offshore Servs., Inc.*, 523. U.S. 75 (1998). It is not a stretch to infer that the court would reach a similar conclusion in

regard to demeaning and degrade customers, for whom the company depends to remain in business.

To our knowledge, many companies in the State of Washington, including some that house pharmacies, have similar non-discrimination and diversity policies to those of Hewlett-Packard, most especially in that they prohibit discrimination against women. Thus, a pharmacist who took actions similar or analogous to those of the employee discussed above, would be acting contrary to such company policy. That pharmacist would, under the law of this Circuit, have no claim to an allegation of disparate treatment for termination or discipline, and no claim to religious accommodation.

Religious Accommodation and Undue Hardship

We understand that some pharmacists have raised the possibility of seeking an accommodation to their religious beliefs. The 1972 amendments to Title VII of the Civil Rights Act of 1964 included language to protect "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business (42 U.S.C. § 2000e(j))."

In Trans World Airlines v. Hardison, the U.S. Supreme Court re-interpreted Title VII religious liberty protections by applying a "de minimis" cost standard to the definition of "undue hardship" on the

employer. The Court held that "to require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." The term "undue hardship" has traditionally -been interpreted more favorably for employers in terms of religious accommodation than for other protected categories. For purposes of religious accommodation only, "undue hardship" means any additional, unusual costs, other than de minimis costs, that a particular accommodation would impose upon a recipient See Trans World Airlines, Inc. v. Hardison, 432 U:S. 63, 81, 84 (1977).

Federal courts have **rejected** all of the claims below, applying the existing Title VII reasonable accommodation standard: [

> a police officer's request to refuse to protect an abortion clinic,

> another police officer's request to abstain from arresting protestors blocking a clinic entrance,

> a state-employed visiting nurse's decision to tell an AIDS patient and his partner that ·God "doesn't like the homosexual lifestyle" and that they needed to pray for salvation, delivery room nurse's refusal to scrub for an emergency inducement of labor and an emergency caesarian section delivery on women who were in danger of bleeding to death,

> two different male truck drivers and a male emergency medical technician requests to avoid overnight work shifts with women because they could not sleep in the · same quarters with women,

> employee assistance counselor's request to refuse to counsel unmarried or gay or lesbian employees on relationship issues.

The theme and thrust of these decisions is clear—a pharmacist's request to avoid filling some women's lawful prescriptions based on religious or moral belief will not survive court challenge.

Can there be a Bona Fide Occupational Qualification for Pharmacists?

Under the WLAD, employers can petition the WSHRC for a bona fide occupational qualification for certain employees. Under the WLAD, there is an exception to the rule that an employer, employment agency, labor union, or other person may not discriminate on the basis of protected status; that is if a bona fide occupational qualification (BFOQ) applies. The WSHRC believes that the BFOQ exception should be applied narrowly to jobs for which a particular quality of protected status will be essential to or will compellingly contribute to the accomplishment of the purposes of the job. An employer or group of employers could request permission to have a BFOQ on the basis of creed for pharmacists. Such a BFOQ would have to be narrowly crafted. In theory, it could require that pharmacists agree to act on or possess no religious or moral beliefs that would keep them from filling all lawful prescriptions. Without further analysis of the complicated legal ramifications, the WSHRC would be inclined to review such a request favorably. However, a far more elegant solution to the problem

at hand would be the Board requiring that pharmacists fill all lawful prescriptions.

Quality of Service Standards

Not filling all lawful prescriptions is poor quality service.

When is Judgment Acceptable?

If pharmacists substitute their judgment for that of medical doctors who are empowered to write prescriptions, without consulting with the physician when they have concerns, they may be practicing beyond their professional scope. We do not here state that pharmacists should not fulfill their professional duty to check prescriptions for adverse drug interactions with other drugs the customer is already taking. That is an exercise of professional judgment. The imposition of religious and moral belief is not an exercise of professional judgment, but is purely personal.

Defenses Based on Other Availability or Demand for Drugs

We understand that some pharmacists believe that they do not have to stock emergency contraceptive drugs because demand is low, and that this would absolve them of the need to make a decision as to whether or not to fill such a prescription. However; this argument fails when it is shown that the intent of failing to stock the drug was to prevent women from acquiring it. If this defense were to arise in a complaint filed with the WSHRC, we would examine

it on a case-by-case basis, including the following factors:

+ Was the decision not to stock made on a pretextual basis? That is to say, was it made due to low demand, or because of nominal religious or moral grounds in opposition to use of the drug?

+ What other drugs are not stocked due to low demand?

+ Are these other drugs used exclusively by women?

+ Was the low demand at this particular pharmacy based on the fact that women knew that this was not a friendly environment for women seeking any form of contraception?

+ What is the breakpoint at which a decision is made not to stock?

+ Does this point have a rational basis?

+ What are the negative consequences of not stocking the drug?

+ Does the pharmacy suffer adverse financial consequences as a result of not stocking the drug?

+ Does the pharmacy suffer adverse financial consequences as a result of stocking the drug?

+ Can the pharmacy articulate a legitimate business reason for not stocking the drug? If it

cannot, we may infer, using the adverse inference rule, that the reason is intentful discrimination.

+ How difficult would it be to stock the drug? Is similar difficulty encountered with stocking other drugs?

+ Are other infrequently purchased drugs stocked?

+ In deciding what drugs not to stock because of infrequent purchase, is the question of how quickly the medication must be taken considered? What is the impact of delay in seeking the medication elsewhere?

+ What is the degree of hardship imposed on female customers by not stocking the drug?

+ Does not stocking the drug send a message ("chill") to women that their health needs are not important or their business not welcome?

Our standard of proof would be a simple preponderance of the evidence. That is to say, based on a weighing of the material and relevant evidence, with the side with the most evidence prevailing. Under our RCW, we are instructed that it is "construed liberally for the accomplishment of the purposes thereof." (RCW 49.60.020)

Other States and National Companies Have Dealt with the Issue

Wal-Mart Stores announced in March 2006 that that it would begin carrying Plan B, the emergency contraception pill, in all of its United States

pharmacies. Wal-Mart, which has 3,700 pharmacies, had been the only major chain that refused to sell the so-called morning-after pill, which can prevent pregnancy when taken within 72 hours of intercourse. Responding to a lawsuit filed by three women, Massachusetts ordered Wal-Mart in March 2006 to carry Plan B in its pharmacies. Wal-Mart said it expected Connecticut and New York to enforce similar mandates. Before the lawsuit even reached court, a state agency ruled that Wal-Mart was required by law to stock and sell emergency contraception in Massachusetts. The company is also required to sell the product in Illinois, and pressure to introduce similar mandates is building in Connecticut and New York.

Summary

It is illegal and bad public policy to permit pharmacists to deny services to women based · on the individual phat1llacist's religious or moral beliefs. We have examined the issue from federal and state "law perspectives, from the public interest, and from possible defenses and compromises that could be raised and made. On no ground would refusal to fill a lawful prescription for emergency contraception be appropriate. Medical decisions must be made between a woman and her physician not by the pharmacy owner or pharmacist. The Board should establish a policy requiring that-pharmacists in the State of Washington to fill all lawful prescriptions, or be denied the right to practice pharmacy. Thank you for your consideration of our comments. Please contact me at 360-753-2558 or

mbrenman@hum.wa.gov if you have questions or need further information.

Sincerely,

Marc Brenman
Executive Director

SER1087
(Trial Exhibit 143)
Excerpt of Email from Executive Director (Saxe) to Department of Health staff (Peyton, Lovinger, Jinkins) re "moral issue" and rule

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From: Saxe, Steven (DOH}

Sent: Wednesday, June 21, 2006 10:06 AM

To: Peyton, Brian (DOH); Lovinger, Pamela G (DOH); Jinkins, Laurie (DOH)

Subject: RE: Leg Contact: Ross Hunter; Letter to BOP and letter to Gov

Would like an assessment on this DRAFT response. I would like to send this to Donna (and Asaad since that is only two members?) Or could I rewrite as open message to board on why no public response to media (without Donna's message) Say I have gotten several (George, Donna and Susan) requests for media releases and this is how I see it. Steve

Donna,
I think what I am hearing from the public, the legislators and the Governors office is that there is an appropriate place for professional (note professional judgment) but not moral judgment Whenever I have talked to anyone on this issue, those types of examples are understood and usually agreed with. They fall into the realm of clinical reasons, potentially fraudulent or within the WAC

246-869-150 stocking rule. I feel that with draft alternative one that we were looking at, that the examples below would not be grounds for discipline.

For #1, there is clinical reasons and societal public safety reasons for the decisions.

For #2, again there are clinical reasons for the situation and the pharmacist would work with the prescriber and the hospital medical staff structure to resolve the issue.

I think even the examples of sterile drugs, compounded drugs, etc are covered in Draft #1.

I think the moral issue IS the basis of the concern. Our current draft allows a pharmacist to not fill a prescription for moral reasons. In fact, the way it is written it does not say they need to help find it elsewhere. I sense that was not the intent of the board, but that IS what we heard at the NW Pharmacy Convention.

I am concerned that the rule currently is addressing how pharmacists can refuse and protects them from discipline. However, the public, legislators and governor are telling us loud and clear that they expect the rule to protect the public from unwanted intervention based on moral believes of a pharmacist. And I think most are not opposed to having another pharmacist in the same store fill - as long as it is transparent to the patient.

If we did a media blitz / educational campaign I think the public is not going to hear any of the

examples of collaborative agreements, out-of-stock, or clinical reasons to not fill as anything more than trying to divert away from the issue of allowing moral reasons for refusing to fill a prescription. And the public does not want that to occur.

In addition, I think we are heading towards a path that will not put us in a favorable light if we need any assistance on legislative issues - and we have plenty, such as PMP and Wholesalers.

So bottom line, I think any media release is only going to be seen at best as diverting the real reason argument or at worst an argument with the governor being waged in the press.
Steve

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SER1093-94
(Trial Exhibit 154)
Email from Department of Health (Laurie Jinkins) to Governor's Advisor (Christina Hulet) re review of rules by Pharmacy Commission Executive Director (Saxe)

ATG MI MOS Printing

From: Jinkins, Laurie (DOH)
Sent: Wednesday, July 05, 2006 1:55 PM
To: Hulet, Christina (GOV)
Cc: Peyton, Brian (DOH)
Subject: Comments on Draft Pharmacy Rules

Christina—

I had Pam Lovinger and Steve Saxe go through all of the options pretty thoroughly. Below are our combined comments. Brian's been out, so these don't include his. The drafts have not been shared with the board or anyone externally. Let me know if you have questions.

First, we don't think that "pharmacy" (vs. pharmacist) version would necessitate a new CR 101.While the CR 101 we have open refers to writing rules for Pharmacist responsibilities, the statutory authority used would cover both. And the draft really does include both pharmacists and pharmacy responsibilities. We'll do a little further analysis, but that's our first take.

WA State Pharmacy Association version:

- Emphasizes a pharmacist responsibility to provide patients with timely access to care
- Timely access of care could include referral to another pharmacist or pharmacy.
- This would allow a moral or religious reason to not dispense a prescription.
- Other practitioners have this right.
- Other states (particularly Calif and OR) have similar rules / policies that were endorsed by Planned Parenthood.
- Concept of written procedures has been mentioned by some board members.
  - Problems or clarification needed. What are the criteria to guide policies and procedures ahead of time? What is timely? Another pharmacist on-site? Pharmacy down the block? Pharmacy on the other side of town? Next town? Call ahead? Etc.

Gov Office version - Pharmacist versus Pharmacy

- Pharmacist version is consistent with the current interpretation of the UDA. It makes clear that each pharmacist is responsible to dispense and allows discipline under the UDA.
- Pharmacy version would address the issue but softens the perception.
  - Allows for accommodation by the firm for the individual beliefs of the pharmacists.
  - Conflict still remains if there is only one pharmacist on duty (i.e., small rural pharmacy owner).

  - Would action fall on the responsible manager in this case? Today any pharmacy violation defaults to the responsible manager.
  - If there was a refusal by an individual pharmacist would we take action against the responsible manager, the individual pharmacist, or both?
- Clinical expertise is added in Pharmacist version. Feel language should be left as in Pharmacy version as part of professional responsibility (not clinical expertise).
- As an aside, the Board and Board staff feel the Board needs the option to take action against pharmacies without going through the responsible manager as an individual. Oregon currently has the ability to use an administrative fine against pharmacies. Understand this would require legislative action which might help with the acceptance of this version (slightly).
- Currently the draft is part of the pharmacist responsibility rule 246-863-095. A pharmacy responsibility rule would probably fit best as a new section of the Pharmacy licensing chapter 246-869. I believe this would need a new CR101 filed. If in the pharmacy licensing chapter, we may still need some clarification to the pharmacist responsibility rule.

Substitution versus Alternatives.

- Planned Parenthood legal advise states, "alternative" could include referral.

- I agree with that. but there are times when an "alternative" would be better than a "substitution".
- Professional pushback includes concern that the rule limits the professional judgment and could subject a pharmacist for action in legitimate situations.
- Does section #2, Nothing in this rule shall interfere with a pharmacists screening for .... allow for alternatives versus substitution in those legitimate situations?

Professional Judgment versus Moral/Religious Judgment

- Are we really trying to clarify that a pharmacist may decline to dispense a prescription for reasons of professional judgment, but NOT for moral judgment?
- Seems like problems arise when we try to write something that works for both.
- Would a statement that does not allow a pharmacist/pharmacy the right to refuse for moral or religious judgment be clearer? This would leave intact the ability to decline to dispense (provide alternatives) for most legitimate skill, examples raised; clinical, fraud, business, etc.

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Laurie Jinkins
Assistant Secretary
Health Systems Quality Assurance
Department of Health

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(Trial Exhibit 402)
Excerpt of Email between Executive Director (Boyer) and Pharmacy Commission Chair (Harris) re decision not to "allow religion" as referral basis

From: gcharri RCW 42.56.250(3) [mailto;gcharri RCW 42.56.250(3)
Sent: Wednesday, December 01, 2010 10:16 AM
To: Boyer; Susan T (DOH)
Subject: Re: Attorney client work product

Susan,

I'm off on Thursday. Do you want to set a time and call me to discuss "access to medications" issue? Even if we were to put facilitated referral into the rule, we still have not discussed criteria for facilitated referral, and I for one am never going to vote to allow religion as a valid reason for a facilitated referral. Do you have a clue as to how Kim would lean in a vote situation? Any action we should take before 11am when Vandanna is still there. I am going to contact the Governor's Boards and Commission appointments person, to have a chat about potential BoP candidates.

Should Melissa give some background on the voting by the chair before we move to adopt the full version of Robert's Rules?

Thanks, Gary.

----- Original Message -----

From: "Susan T Boyer (DOH)" <Susan.Boyer@DOH.WA.GOV>
To: "Gary Harris" <gcharri RCW 42.56.250(3)
Sent: Tuesday, November 30, 2010 9:20:07 AM
Subject FW: Attorney client work product

Gary, need you to take an active role with this topic. Let's discuss, thanks.

Susan Teil Boyer, MS, RPh, FASHP
Washington State Board of Pharmacy
And Clinical Facilities, Health Professions and Facilities Department of Health PO Box 47852
Olympia, Wa 98504-7852 office 360-236-4853
susan.boyer@doh.wa.gov

Working to protect and improve the health of people in Washington State

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SER1217
(Trial Exhibit 406)
Excerpt of Emails between Pharmacy Commission member (Dan Connelly) and Commission staff re targeted complaints

From: Dan Connolly
[mailto:DanC@bartelldrugs.com]
Sent: Wednesday, December 08, 2010 1:45 PM
To: Teachman, Janelle (DOH); Boyer, Susan T (DOH)
Subject: RE: complaints/cases re: refusal to fill

I've been reading all of the correspondence concerning WAC 246-869-010 and am amazed by the number of respondents from out-of-the-state and the seemingly lack of "complaints" from people who have actually been turned down personally for ANY drug. I know there are problems (one of my current cases is one), but I know of no epidemic...only of patients trying to prove they can't get a certain drug at a certain pharmacy. Maybe in the last two years since the bill was passed? Keep it simple. . . .

From: Boyer, Susan T (DOH)
Sent: Thursday, December 02, 2010 4:09 PM
To: Teachman, Janelle (DOH)
Subject: complaints/cases re: refusal to fill

Janelle,

Dan Connolly has asked for the number of complaints/cases we have had the past 2 years on this. Can you help with this? Thank you.

Susan Teil Boyer, MS, RPh, FASHP
Executive Director