No. 15-862

In the Supreme Court of the United States

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

v.

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

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AND WASHINGTON STATE CATHOLIC CONFERENCE SUPPORTING PETITIONERS

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QUESTION PRESENTED

As explained in the petition, Washington forbids pharmacies to decline to stock and dispense abortifacient drugs because of religious objections. Washington seeks to enforce this rule even though the regulation exposes only religious objectors—not secular objectors—to liability. The Ninth Circuit held that this religious gerrymander did not violate the Free Exercise Clause of the First Amendment.

The question presented is:

Does a law prohibiting religiously motivated conduct violate the Free Exercise Clause when it (a) exempts the same conduct undertaken for a host of secular reasons, (b) has been enforced only against religious conduct and (c) has a history showing an intent to target religion?

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

For millions of Washington residents, Catholic hospitals and pharmacies play a critical role in providing needed medical care. Indeed, because Catholic entities provide approximately half of Washington's hospital beds, these hospitals serve as an important safety net in an otherwise inadequate health care system, especially in such areas as treatment for alcohol and drug addiction, and for HIV/AIDS. The same is true of Catholic hospitals and Catholic-owned pharmacies in many other locations throughout the Nation.

Amici are Catholic entities described in more detail in Appendix A. Like Petitioners, *amici* and their affiliated hospitals and pharmacies object on religious grounds to the Washington regulation at issue here, which requires Petitioners and other religiously observant providers to stock and dispense drugs that they believe may operate by causing abortions. Like Petitioners, *amici* believe abortion is morally wrong, whether administered through pills or surgery. *Amici*, moreover, have every reason to believe that Catholic-owned hospital systems and pharmacies will soon be targeted by Washington officials unless the decision below is reversed.

The considerations supporting that belief are the same considerations that led this Court to invalidate the animal-slaughter regulations at issue in *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520,

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[1] No one other than *amici*, their members and counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing in communications on file with the Clerk. Counsel for respondents received timely notice of intent to file this brief, as required by Rule 37.2.

534 (1993)—a decision for which the Ninth Circuit offered no persuasive distinction. First, as in *Lukumi*, the Washington regulations have been applied *only* against religious providers. Second, as in *Lukumi*, Washington regulators have approved of or allowed similar actions—here, failing to stock and dispense the problematic drugs—for myriad secular reasons. Third, as in *Lukumi*, the manifest intent of those who crafted the regulations was to force those with the targeted beliefs to either violate those beliefs or leave—in this case, to exit the Washington healthcare system.

Indeed, relying on the decision below, any or all of the other eight states in the Ninth Circuit—which together account for some twenty percent of the national population—could easily adopt or vigorously enforce similar regulations in a manner that targets Catholic pharmacies and hospitals. Unless immediately reversed, moreover, the decision below will likely lead to similar problems in other states.

Like Petitioners, Catholic healthcare providers seek no special favors. They merely ask to be treated no worse than their secular counterparts. But Washington and the Ninth Circuit refuse to treat them as such, and in so doing ignore the requirements of the Free Exercise Clause, as interpreted in *Lukumi*. The Court should grant review and reverse—with or without briefing and argument.

STATEMENT

In the decision below, the Ninth Circuit approved a religious gerrymander of the very sort condemned in *Lukumi*—except that in this case the gerrymander has been directed not at a small, obscure religion, but at people and institutions holding mainstream Christian beliefs about the sanctity of human life.

1. Petitioners are a small Washington family business that operates a grocery store with a retail pharmacy ("Ralph's"), as well as individual Washington pharmacists. Pet. 5. For religious reasons, Petitioners refuse to stock or dispense pills that may prevent embryo implantation, most notably Plan B and *Ella*. Pet. 6; Pet. App. at 10a.

For over a decade, Petitioners' religious beliefs have run into a conflict with first proposed and now final Washington regulations. Encouraged by Planned Parenthood, the nation's leading abortion provider, in 2005 Washington's governor first proposed a regulation designed to prevent pharmacists from declining to stock or dispense Plan B for religious reasons. Pet. 8. During the administrative proceedings, the Washington Pharmacy Quality Assurance Commission ("Commission") surveyed Washington pharmacies' practices as to Plan B. Pet. App. 148a. Of the 540 that responded, two percent said they did not carry Plan B for religious reasons, while ten times as many—twenty-one percent—said they did not carry the drugs for various secular reasons. Pet. App. 148a. These included "low demand, an easy alternative source or the pharmacy's status as a … niche pharmacy." Pet. App. 148a.

In an effort to pressure the Commission to pass the regulations proposed at the insistence of Planned

Parenthood, the state Human Rights Commission threatened Commission members with personal liability if they allowed religious exceptions. Pet. 9; Pet. App. 126-27a, 374-99a. Nevertheless, the Commission unanimously voted for a draft rule that would *protect* religious objectors. The draft rule did this by allowing them to opt instead for a "facilitated referral"—that is, referring patients who wanted Plan B to another pharmacy that stocks it.

Washington's governor then "threatened to replace the entire Board if the draft rule was not changed." Pet. App. 58a. A modified rule was proposed, eliminating facilitated referrals for religious objectors, but exempting other pharmacies for a variety of business-related reasons—effectively holding that "only religious objections are illegitimate." Pet. App. 58a. Before the final vote, the Governor replaced two members, including the chairman. Pet. 11. He later made clear that: "I for one am never going to vote to allow *religion* as a valid reason for a facilitated referral." Pet. App. 145a (emphasis added). The regulation passed.

The final regulation expressly exempted pharmacies from having to stock or dispense Plan B (and *Ella,* which had recently come to market) for many—if not all—conceivable business reasons, and any reason "substantially similar" to those. Pet. 11-13. But there was no exemption for religious objections.

2. Before litigation, the Commission received complaints that Ralph's and neighboring pharmacies were not stocking Plan B. Pet. 14. The Commission determined that the neighboring pharmacies were in compliance with the rule because their reasons were secular. Pet. 14. But when Ralph's provided its religious

reason for refusing to stock those drugs, the Commission kept the investigation open.

Petitioners sued, raising (among others) a Free Exercise Clause claim. Pet. 15. On that basis, the district court granted a preliminary injunction, which the Ninth Circuit reversed. See Pet. App. 263a-332a.

3. During trial, the Commission Chairman testified that he "understood [that] the *only* instance under the Regulations where a facilitated referral was not permissible was for conscientious objections." Pet. App. 144a; accord Pet. App. 92a (statement by Commission's Executive Director); Pet. App. 360a.

Also during trial, the district court asked whether the regulation would apply to Catholic hospitals and pharmacies. App. 18b, 28b. In response, both defendants and defendant-intervenors (represented by Planned Parenthood, which had instigated the regulation) explained that, aside from purely inpatient pharmacies, Catholic hospitals and pharmacies would in fact be subject to the regulation's mandate. App. 18b-27b, 28b-31b.

4. After the district court ruled in favor of petitioners, the Ninth Circuit again reversed. The panel attempted to dismiss the regulation's disproportionate effect on religious providers—and to distinguish *Lukumi*—on the ground that this regulatory system is "complaint-driven." Pet. App. 40a. Moreover, discounting statements by individual Commission personnel showing a clear intent to target religious objectors, the panel asserted that the Commission *as a whole* had never communicated such an intent, and, therefore, that there was no violation of the Free Exercise Clause, as applied in *Lukumi*. Pet. App. 27a.

SUMMARY OF ARGUMENT

While they agree with all of the reasons Petitioners have offered in support of the petition, *amici* are especially concerned with two implications of the Ninth Circuit's decision that warrant immediate review.

First, as explained in Part I, the Ninth Circuit's decision approves a general pathway by which any government can elude the prohibition on "religious gerrymanders" established by this Court's decisions, especially *Lukumi.* According to the Ninth Circuit, all a government need do to sustain a policy that discriminates against people or institutions of faith is to adopt a "complaint-based" enforcement system—one designed to rely upon the discriminatory initiative of people or groups within the community, rather than overt discrimination by government actors. But such a system—an "outsourced religious gerrymander"—is as much a threat to the religious liberty of *all* people and institutions of faith as the more overt gerrymander condemned in *Lukumi.* And such a system is every bit as much a violation of the First and Fourteenth Amendments.

Second, as explained in Part II, *amici* are particularly concerned about both the short- and long-term impact of the Ninth Circuit's decision on Catholic healthcare, especially in Washington and throughout the Ninth Circuit. As both Washington and Planned Parenthood explicitly argued below, the regulation upheld by the Ninth Circuit applies not just to Petitioners, but also to all Catholic-owned outpatient and retail pharmacies operated by Washington's Catholic hospital systems. Thus, the Ninth Circuit's ruling immediately puts these Catholic hospitals and pharmacies on notice that they must either dispense what

Catholic doctrine says are immoral abortifacients or perpetually risk losing their licenses if Planned Parenthood—or any of its pro-abortion allies—lifts a finger of protest. And those groups have made no secret of their desire to force *all* religious healthcare providers either to provide unrestricted access to these drugs, or to abandon their healing ministries.

If the Ninth Circuit's ruling stands, those groups can also be expected to press for similar laws and regulations throughout the Ninth Circuit. Indeed, those groups are already advocating that Washington's rule be extended to other states and even nationwide. And as that happens, religious hospital systems and pharmacies in many other states throughout the Ninth Circuit—and beyond—will be at constant risk of being driven from their healing ministries, just as Catholic-owned pharmacies and hospital systems in Washington *today* face an unacceptable choice between carrying out those ministries and complying with Catholic doctrine.

ARGUMENT

I. The Ninth Circuit's decision merits review—and summary reversal—because it has approved a classic "religious gerrymander," and on grounds that threaten all people and institutions of faith.

Washington's regulation is narrowly tailored, not to meet a compelling government interest, but to target only religious objectors. That is what this Court's decisions call a "religious gerrymander," and it is an affront to the First Amendment. It is also a threat to *all* people and institutions of faith, whether or not they are involved in health care, and whether or not they object to abortion or abortifacients.

1. Religious gerrymanders have been consistently condemned by this Court's free exercise decisions. Most recently, in *Lukumi,* the Court condemned such a gerrymander consisting of a ban on religious animal sacrifice but not secular animal slaughter. See 508 U.S. at 534. Quoting Justice Harlan's opinion in *Walz*, v. *Commissioner,* 397 U.S. 664 (1970), the Court in *Lukumi* explained that in such cases the Court "must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." 508 U.S. at 534 (quoting *Walz*, 397 U.S. at 696 (Harlan, J., concurring)).

This Court likewise condemned such gerrymandering in *Employment Division* v. *Smith*, 494 U.S. 872, 878 (1990). There the Court explained that, if a state actor "sought to ban … acts or abstentions only when they are engaged in for religious reasons," that would violate the Free Exercise Clause. *Id.* at 878.

2. Washington's actions are a textbook example of a religious gerrymander, in at least three respects.

First is the regulation's content. In *Lukumi,* the laws at issue made certain conduct—killing an animal—unlawful when done for religious reasons, while exempting identical conduct undertaken for secular reasons. See 508 U.S. at 527-28, 543-45. So too here: On its face, the Washington regulation ensures that religiously motivated conduct—in this case a facilitated referral rather than stocking and dispensing a drug—is made unlawful, while exempting identical conduct undertaken for secular reasons.

Indeed, the district court's findings demonstrate that the regulatory scheme provides either an enumerated or unenumerated exemption for virtually every other reason for not stocking and dispensing these drugs. See Pet. App. 201a-208a (cataloging exceptions). This leaves the regulation applicable only to individuals and institutions with religious objections.

Even more starkly, surveys during the regulatory proceedings revealed that, for every pharmacy that declined to stock and dispense Plan B or *Ella* for religious reasons, *ten* pharmacies declined to stock and dispense them for secular reasons. Pet. App. 148a-49a. This of course forecloses any claim that the regulation was based simply on a governmental interest in maximizing access to these drugs.

Second is the regulation's record of enforcement. In *Lukumi,* the Court found that the city's animal slaughter laws had been enforced only against people with certain religious beliefs—believers in Santeria—and not against anyone else. See 508 U.S. at 536. So too here: The district court's undisputed findings demonstrate that, since its adoption, the Washington regulation has been enforced *only* against pharmacists who

have religious objections, thus gerrymandering out secular objectors. Pet. App. 168a-69a.

Third is the regulation's history. In *Lukumi,* the laws' history showed that the city's purpose in enacting the challenged laws was to thwart the exercise within the city of a particular religious belief—the Santeria belief in animal sacrifice. See 508 U.S. at 582 (Opinion of Kennedy, J., joined by Stevens, J.). So too here: The extensive evidence compiled and presented by the district court shows without doubt that the purpose of the regulation was to thwart the exercise of a particular religious belief—the traditional Christian belief in respect for nascent human life. See Pet. App. 123a-145a.

In short, as actually applied, the pharmacy regulation at issue here is a flat violation of the First Amendment, as construed and applied in *Lukumi*. That alone warrants summary reversal.

3. Ironically, the Ninth Circuit's principal response to Washington's gerrymander was to engage in a gerrymander of its own—selectively including every snippet of evidence that could be read to support the regulation, while systematically ignoring most of the evidence and findings supporting the district court's decision.

For example, the Ninth Circuit discounted the trial testimony of the Commission's chairman. Pet. App. 35a. He testified that "the *only* instance under the Regulations where a facilitated referral was *not* permissible was" for a religious reason. Pet. App. 144a (emphasis added); accord Pet. App. 92a (Commission's executive director saying the same); Pet. App. 360a (same). And the Ninth Circuit ignored this statement

despite the perfect fit between the chairman's explanation of the rule's design—to stop religious objectors from declining to stock and dispense Plan B and *Ella*—and the list of those prosecuted under the regulation, all of whom are religious objectors.

Similarly absent from the Ninth Circuit's opinion is any reference to the Governor's threat to sue or remove Commission members if they allowed a religious exception, despite the district court's reliance on this critical fact. See Pet. at 9-10; Pet. App. 126a-27a (district court opinion); Pet App. 374a, 377a (Human Rights Commission's threat). Likewise ignored are numerous pieces of administrative history that underscore the Commission's pattern of enforcement. See Petition at 13-15. Indeed, the opinion does not even mention the principal actor in the regulatory process—the Governor, who was a well-known ally of Planned Parenthood. See Pet. App. 10a-48a.

The implications of this are clear: The Ninth Circuit has now sanctioned the very kind of "religious gerrymander" forbidden by the First Amendment and warned against by this Court—especially in *Lukumi*. For that reason, as Petitioners have also explained, the Ninth Circuit's decision conflicts not only with *Lukumi* and other decisions of this Court, but also with decisions in other circuits and state supreme courts. Pet. 22-38.

4. The Ninth Circuit's decision is also a serious threat to religious liberty, not just of the Petitioners and similar healthcare providers, but also of all people and institutions of faith. Not only has that court sanctioned a blatant religious gerrymander—thereby establishing a precedent for such targeting of religion in future cases—but its attempt to distinguish *Lukumi*

promises serious erosion of that decision, at least within the Ninth Circuit and likely elsewhere.

The panel's principal basis for avoiding Petitioners' claim of a religious gerrymander—and thus for distinguishing *Lukumi*—was that the Commission's enforcement process was "complaint-driven" rather than based on prosecutorial initiative. Pet. App. 38a-40a. It was on this basis that the panel held it did not matter that the Commission was consistently enforcing its regulation "against religiously motivated violations but not secularly motivated motivations." *Id.* 37a. But the implication of that analysis is that a religious gerrymander is acceptable under the Free Exercise Clause as long as the resulting religious discrimination is outsourced—that is, delegated to private individuals likely to complain about those who engage in the prohibited action or inaction for religious reasons.

From the standpoint of religious liberty, that is an exceptionally dangerous doctrine. As *Lukumi* illustrates, those who take or refrain from particular actions on religious grounds are often the subject of ill will—or at least suspicion or fear—in the communities in which they live. To excuse a discriminatory enforcement regime on the ground that it is "complaint-based" is thus to legitimize, condone and protect the very religious bias that would lead community members to complain about actions taken (or avoided) for religious but not secular reasons—like the animal killing in *Lukumi*. Religious discrimination in enforcement violates the Free Exercise Clause whether it results from prosecutorial initiative or from a community's religious (or anti-religious) bias.

In sanctioning such a "complaint-based" religious gerrymander—and the resultant departure from

Lukumi—the Ninth Circuit has put all believers at serious risk. Imagine, for example, a municipal regulation prohibiting the wearing of headscarves in public or the placement of items on utility poles. Such regulations could easily be used by community members to target Muslims (in the first example) or Orthodox Jews (in the second example). See, *e.g., EEOC* v. *Abercrombie & Fitch Stores, Inc.,* 135 S. Ct. 2028 (2015): *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002). Yet under the Ninth Circuit's decision, governments would be free to enforce those regulations solely against religious conduct if enforcement were triggered only by the complaints of those hostile to Muslims or Jews.

The First Amendment forbids such discrimination, just as it forbids the only somewhat more naked discrimination in *Lukumi*. As this Court has held, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore* v. *Sidoti,* 466 U.S. 429, 433 (1984).

II. The ruling below puts Washington's Catholic hospital systems and retail pharmacies to an impossible choice between violating their faith and ceasing or curtailing their healing ministry.

Absent reversal by this Court, the Ninth Circuit's ruling will also put Washington's Catholic retail pharmacies and hospital systems—which account for approximately half of Washington's hospital beds[2]—in a serious moral dilemma. That dilemma could lead many of them to end or curtail their healing ministries in Washington, much as Catholic adoption agencies have been forced out of several jurisdictions as a result of those jurisdictions' refusal to accommodate Catholic views on marriage.[3] By approving a regulation generally requiring that pharmacies stock and dispense on demand two drugs that *amici* regard as morally unacceptable in many or all circumstances, the Ninth Circuit has effectively imposed that requirement on many Catholic hospital systems and all Catholic-owned retail pharmacies.

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[2] Nancy Gohring, *The Catholic Church is Managing Many Local Hospitals. How Will it Affect Your Health Care?*, SEATTLEMAG.COM, June 2014, http://www.seattlemag.com/article/catholic-church-managing-many-local-hospitals-how-will-it-affect-your-health-care.

[3] See, *e.g.*, Discrimination Against Catholic Adoption Services, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (2015), http://www.usccb.org/issues-and-action/religious-liberty/upload/RL-Adoption-Services-Fact-Sheet-2015.pdf

A. Like all hospitals in Washington, Catholic hospitals are effectively required by federal and state law to have in-house pharmacy services available at all times.

Washington regulations require that hospitals provide pharmaceutical services twenty-four hours a day, seven days a week. WASH. ADMIN. CODE § 246-873-050. And, by defendant-intervenors' own admission in the district court—represented, again, by Planned Parenthood—these requirements apply equally to Catholic hospitals systems. App. 23b-24b.

Hospitals have multiple ways to meet the requirement that they have pharmaceutical services available at all times. One is that the staff pharmacist arranges for pharmaceutical services during hours when she is absent. WASH. ADMIN. CODE § 246-873-050. Another option is for the hospital pharmacy to exclusively serve patients who have a bed in the hospital. App. 29b-30b. Most common, however, is a third option: maintaining an outpatient pharmacy that serves patients, hospital employees, and frequently also the general public. See App. 30b. For economic reasons, the vast majority of Catholic hospitals choose this third option[4]—and thus operate an outpatient or retail pharmacy.

Federal law also effectively requires that hospitals serving older or poor populations maintain a pharmacy. To be financially viable, hospitals that seek to serve the elderly and the poor as well as more well-to-do patients—especially in rural areas—generally must accept those patients covered by the federal Medicare

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[4] See App. 8b-9b, 11b, 14b-15b (15 of 18 Catholic hospitals chose some form of the "outpatient" or "retail pharmacy" option).

and Medicaid programs.[5] And, to receive reimbursement for services provided under those programs, a hospital must provide pharmacy services.[6]

For all of these reasons, Catholic hospital systems in Washington are effectively required to maintain a pharmacy if they wish to serve the general public, including the poor. And many of those pharmacies are either outpatient or full retail pharmacies. See App. 8b-9b, 11b, 14b-15b.

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[5] See MEDICARE.GOV, *Get Help Paying Costs*, https://www.medicare.gov/your-medicare-costs/help-paying-costs/ get-help-paying-costs.html; Jayne O'Donnell & Laura Ungar, *Rural hospitals in critical condition*, USA TODAY (Nov. 12, 2014), http://bit.ly/RuralHospitalsUSAToday (noting extensive reliance by rural hospitals on federal funding); Jeffrey Stensland, et al., *Future Financial Viability of Rural Hospitals*, HEALTH CARE FIN. REV., Summer 2002, at 175, 175 (noting that, at the time of the article, "Medicare patients represent[ed] approximately one-half of rural hospital admissions and *one-third of rural hospital revenue*") (emphasis added).

[6] 42 C.F.R. § 482.25.

B. By approving a regulation requiring that all retail pharmacies stock and dispense on demand Plan B and *Ella,* the Ninth Circuit has effectively imposed that requirement on all Catholic-owned retail pharmacies and most Catholic hospital systems.

The Ninth Circuit's decision has effectively placed on most of Washington's Catholic hospital systems and all Catholic-owned outpatient or retail pharmacies the obligation to stock and dispense *Ella* and Plan B, even in circumstances where the provision of those drugs would violate Catholic teachings. The decision does this in at least two ways.

First, by upholding the regulation in its entirety, the Ninth Circuit's decision means that the regulation applies to any pharmacy that is not otherwise exempt. See Pet. App.41a (upholding regulation as constitutional). And the briefing by both Washington and Planned Parenthood (representing the defendant-intervenors) in the trial court (as reproduced in the appendix to this brief) aptly demonstrates that outpatient and retail pharmacies operated by Catholic hospital systems are *not* exempt. App. 24b, 28b.

Second, in discussing Catholic health care providers specifically, the Ninth Circuit suggested that the only reason the Washington regulation had not been enforced against them was that no complaints had been filed. Pet. App.37a-39a. Thus, if certiorari were denied—or the decision below affirmed—any abortion-rights activist could walk into a Catholic-owned hospital or pharmacy in Washington, demand *Ella* and, when refused, file a complaint, thereby triggering an enforcement action.

This consequence is not hypothetical: Most Catholic hospital systems in Washington operate outpatient or retail pharmacies. Indeed, of a sample comprising eighteen hospitals discussed in the district court (owned by three Catholic hospital systems), fifteen have associated outpatient or retail pharmacies, thus squarely subjecting them to Washington's regulation. See App. 8b-9b, 11b, 14b-15b. And of course, all other Catholic-owned retail pharmacies would be potentially subject to such tactics.

Representing defendant-intervenors in this very lawsuit, moreover, Planned Parenthood has specifically argued not only that retail and other outpatient pharmacies associated with Catholic hospitals are not exempt from the regulation, but also that the Commission is required to investigate every complaint alleging a failure to comply. App. 23b; accord App. 30b (State trial brief confirming outpatient hospitals not exempt from this regulation). Even more ominously, the record shows that Planned Parenthood deliberately engaged in test marketing to "catch" Petitioners in noncompliance. Pet. App. 156a-157a.

It is hardly speculation, then, to suggest that once the Ninth Circuit's decision is safely beyond the reach of this Court, Planned Parenthood or one of its allies will start filing complaints against Catholic hospital systems or other Catholic-owned pharmacies that do not comply with the regulation, just as they have done with Petitioner's pharmacy. And given the Ninth Circuit's decision, any such entity will be hard pressed to prevail in the subsequent investigation or litigation.

C. Catholic hospital systems and pharmacies cannot provide these drugs as the Washington regulation requires and remain true to Catholic moral teachings.

The Washington rule thus puts Catholic hospital systems and other Catholic pharmacy owners in a moral dilemma: On one hand, they wish to continue their healing missions. Yet that mission subjects them to the Washington regulation, which forces them to stock and dispense *Ella* and Plan B in circumstances contrary to Catholic moral teachings.

Those teachings are enunciated by *amicus* United States Conference of Catholic Bishops in a document entitled, Ethical and Religious Directives for Catholic Health Care Services.[7] And the teachings are clear: "Catholic health care institutions are not to provide abortion services[.]"[8] In declarations filed in the district court, moreover, the key Washington Catholic hospital systems established that, given these directives, they could not and would not dispense *Ella* at all, and would dispense Plan B only to victims of sexual assault in the hospital setting, and only in cases in which it could be determined that ovulation had not

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[7] U.S. Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services*, *Fifth Edition*, Nov. 17, 2009, http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf. The Conference only formulates and disseminates these Directives; it does not apply or enforce them in particular cases.

[8] *Id.* at 26; see also App. 4b, 9b, 12b, 16b. In Catholic moral teaching, abortion includes a deliberate act to prevent the implantation, and hence the survival, of an early human embryo. *Id.*

recently occurred. App. 5b-6b.[9] Thus, if the Ninth Circuit's decision stands, it will potentially make it impossible for the Catholic hospital systems and other Catholic owners of outpatient and retail pharmacies to operate lawfully in Washington and remain true to Catholic moral teachings.

In essence, the choice the Ninth Circuit offers to these Catholic healthcare providers is this: violate your religious beliefs (by providing what Catholic teaching rejects as abortifacient drugs) or end or curtail your healing ministry. That dilemma is an additional, powerful reason for this Court's review.

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[9] Ella (ulipristal acetate) and the well-known abortion drug RU-486 "have roughly comparable activity in terminating pregnancy when administered during the early stages of gestation." A. Tarantal, *et al.*, "Effects of Two Antiprogestins on Early Pregnancy in the Long-Tailed Macaque (*Macaca fascicularis*)," 54 *Contraception* 107-115 (1996), at 114. See also G. Bernagiano & H. von Hertzen, *Towards more effective emergency contraception?*, 375 THE LANCET 527, 527 (2010) ("Ulipristal has similar biological effects to mifepristone, the antiprogestin used in medical abortion"). It causes abortions after as well as before implantation.

Plan B is marketed as a way to prevent pregnancy after unprotected intercourse. The Food and Drug Administration has said it acts "by delaying or inhibiting ovulation, and/or altering tubal transport of sperm and/or ova (thereby inhibiting fertilization), *and/or* altering the endometrium (*thereby inhibiting implantation*)." 62 Fed. Reg. 8610-12, 8611 (Feb. 25, 1997) (emphasis added). For a recent review of studies exploring this last mode of action, which would be abortifacient and therefore immoral in Catholic teaching, see R. Peck & J. Vélez, "The Postovulatory Mechanism of Action of Plan B: A Review of the Scientific Literature," 13 *The National Catholic Bioethics Quarterly* 677-716 (Winter 2013).

D. Further percolation of the issue presented would only harm religious health care providers—including Catholic hospital systems and pharmacies in Washington and elsewhere—and their patients.

Some might argue that the issue presented in the petition should be allowed to "percolate" while other states consider and/or start enforcing similar laws. That temptation should be resisted.

First, as explained above, allowing the Ninth Circuit's decision to stand would immediately put most Catholic hospital systems in Washington to an impossible choice between their faith and their healing ministries. And it would hoist all Catholic-owned pharmacies on the horns of that same dilemma. It is precisely this sort of choice that the Free Exercise Clause is supposed to guard against. See, *e.g., Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 715 (1981) (religion is burdened when one is pressured to act in a way forbidden by religion). Accordingly, by allowing the issue to "percolate," the Court would be allowing widespread, ongoing violations of core First Amendment rights.

Second, if review were denied here, regulations similar to Washington's would almost certainly crop up in other states—thereby creating a similar dilemma for Catholic healthcare institutions there. Indeed, since 2005—shortly before the Washington regulation here was adopted—Planned Parenthood has

been pressing a nationwide campaign for laws and regulations requiring pharmacists to provide Plan B and *Ella* regardless of conscientious objections.[10]

For example, shortly after the Ninth Circuit's first decision in this case, see App. 263a, Planned Parenthood persuaded Illinois to adopt a regulation almost identical to Washington's.[11] That regulation was struck down by the Illinois courts—in conflict with the Ninth Circuit's decision here. *Morr-Fitz, Inc.* v. *Blagojevich*, 2011 WL 1338081, No. 2005-CH-000495 (Ill. Cir. Ct. Apr. 5, 2011), *affirmed on other grounds*, *Morr-Fitz, Inc.* v. *Quinn*, 976 N.E.2d 1160 (Ill. App. Ct. 2010). But, consistent with its long-standing institutional policy, Planned Parenthood is likely to continue pressing for similar measures elsewhere.

Planned Parenthood's other allies—including the ACLU's Reproductive Rights Project and NARAL Pro-Choice America—have also entered the fray, promising to seek similar laws in other states. For example, the ACLU states that its goal is to "seek[] government policies that ensure access to affordable contraception … *be it in the form of sanctioning religious refusals* or

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[10] See*, e.g.,* PLANNED PARENTHOOD FEDERATION OF AMERICA, *Survey of Top Pharmacy Chains' Policies on Pharmacist Refusals*, (May 25, 2005), https://www.plannedparenthood.org/about-us/newsroom/press-releases/pharmacist-refusals (offering a "state-by-state legislative guide mapping pharmacist refusal laws and proposed bills along with a community action guide about how to fight them.").

[11] See 68 Ill. Adm. Code § 1330.91(j) (explaining that "[p]harmacies have a duty to deliver lawfully prescribed drugs to patients . . . except for the following or substantially similar circumstances" and then listing secular reasons).

treating contraception differently from other care."[12] If it cannot get the change it wants by other means, the ACLU will advocate for "a legislative or regulatory mandate."[13]

For its part, NARAL currently is working to advance the ABC Act, a federal bill that would "ensure women get unfettered access to birth control at the pharmacy counter."[14] While it would prefer a federal solution, NARAL says it will also attempt to get states to pass similar laws.[15]

With an unreviewed Ninth Circuit decision in their pockets, these groups would likely try to persuade more states to adopt similar laws. Each of these laws would force Catholic healthcare institutions into the same moral dilemma outlined above: either violate their faith or shut down their pharmacies, with all the consequences that would entail.

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[12] *Birth Control*, American Civil Liberties Union (last visited Jan. 26, 2016), https://www.aclu.org/issues /reproductive-freedom/birth-control?redirect=blog/tag/birth-control- court-cases.

[13] See Sondra Goldschein, *Religious Refusal and Reproductive Rights: Accessing Birth Control at the Pharmacy*, ACLU REPRODUCTIVE FREEDOM PROJECT 21 (2007), https://www.aclu.org/sites/default/files/field_document/asset_ upload_file576_29402.pdf.

[14] See NARAL PRO-CHOICE AMERICA, *NARAL Pro-Choice America Calls on Congress to Stop Harassment of Women by Pharmacists*, (Feb. 14, 2013), http://www.prochoiceamerica.org/media/press-releases/2013/ pr02142013_abc.html.

[15] NARAL PRO-CHOICE AMERICA, *Access at Pharmacies*, (last visited Jan. 26, 2016) http://www.prochoiceamerica.org/what-is-choice/birth-control/access-at-pharmacies.html ("States can pass laws that guarantee that women can get their birth-control prescription filled at any pharmacy.").

CONCLUSION

The Ninth Circuit's decision represents an enormous, present threat to Catholic healthcare in Washington and, eventually, throughout the Nation. It represents an equally serious threat to people and institutions of faith faced with governmental mandates and prohibitions of all kinds. This Court's immediate intervention is essential to prevent religious institutions from being forced to choose between violating the law and violating their faith.

For all these reasons, this Court should grant the petition and summarily reverse the Ninth Circuit's judgment. Alternatively, plenary review should be granted and the case set for oral argument.

Respectfully submitted,

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February 5, 2016

APPENDIX A: *Amici* Statements of Interest

The United States Conference of Catholic Bishops (USCCB) is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. USCCB advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, immigration, protection of the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the Conference include the protection of the rights of religious organizations and their adherents under the First Amendment, and the proper development of this Court's jurisprudence in that regard.

The Washington State Catholic Conference (WSCC) is a nonprofit corporation, the members of which are the active Catholic Bishops of the State of Washington. WSCC promotes the teachings of the Catholic Church and advocates on behalf of the sacredness of all human life, the importance of family life and the education of youth, justice for immigrants, the imprisoned and victims of human trafficking. WSCC supports programs serving people living in poverty and those in need of health care. It also supports the enforcement of state and federal laws protecting the rights of religious organizations.

APPENDIX B: Trial Court Materials

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THE HONORABLE RONALD B. LEIGHTON

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

STORMANS, INCORPORATED, et al., Plaintiffs, vs. MARY SELECKY, Secretary of the Washington State Department of Health, et al., Defendants, and JUDITH BILLINGS, et al., Intervenors.	Civil Action No. C07-5374 **DECLARATION OF JOHN BREHANY**

I, John Brehany, Ph.D., S.T.L, make the following Declaration under penalty of perjury and pursuant to 28 U.S.C. §1746:

1. I am, and since September 2006, have served as, the Executive Director and Ethicist for the Catholic Medical Association ("CMA"), 29 Bala Ave., Suite 205, Bala Cynwyd, PA 19004-3206. The CMA has approximately 1,600 members.

2. The CMA was founded in 1932 and is the largest association of Catholic physicians in North America. The CMA exists to uphold the principles of the Catholic faith in the science and practice of medicine. One of the purposes of the CMA is also to support Catholic hospitals in faithfully applying Catholic moral principles in health care delivery.[1]

3. As CMA's Executive Director and Ethicist, my responsibilities include overseeing all operations of the CMA, providing guidance on health care ethics for individual members and on public policy issues, supporting membership and guild development, serving as CMA's spokesman to the media, and coordinating publications, advertising, and ongoing development of the Catholic Medical Association.

4. Before joining the Catholic Medical Association, I served as the Executive Director of Mission Services and Ethics for Mercy Medical Center, Sioux City, Iowa, where I was responsible for mission integration, ethics consultation and education, pastoral care, and the community benefit ministry program. From 1992 to 1997 I taught courses in systematic and moral theology at Mount Angel Seminary in St. Benedict, Oregon.

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[1] Catholic Medical Association, *Mission & Purpose*, http://www.cathmed.org/aboutlbackgroundabout/backgroundaboutlbackgroundaboutlbackground/mission_purpose/.

5. I received a received a Ph.D. in Health Care Ethics from Saint Louis University in 2003, a Licentiate in Sacred Theology from the John Paul II Institute for Studies on Marriage and Family in Washington, D.C. in 1991, and a M.A. in Philosophy from University of St. Thomas, Houston, Texas in 1987.

6. The CMA's ethical guidance to Catholic medical professionals and hospitals is guided by the teachings of the Catholic Church as found in the Catechism of the Catholic Church (CCC) and, in particular, by the Ethical and Religious Directives for Catholic Health Care Services ("Ethical and Religious Directives"),[2] a document issued by the United States Conference of Catholic Bishops. The Ethical and Religious Directives "reaffirm the ethical standards of behavior in health care that flow from the Church's teaching on the dignity of the human person" and "provide authorization guidance on certain moral issues that face Catholic health care today."[3]

7. The Ethical and Religious Directives state, among other things, that "Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation."[4] Further, the Ethical and Religious Directives define

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[2] United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services, Fifth Edition*, available at http://www.usccb.org/issues-and-action/human-life-and-dignity/healthcare/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf.

[3] *Id.* at 4.

[4] *Id.* ¶45

abortion as "the termination of pregnancy before viability . . . includ[ing] the interval between conception and implantation."[5]

8. Pope Benedict XVI has encouraged Catholic pharmacists to advocate for their right of conscientious objection, specifically the right "not to collaborate either directly or indirectly by supplying products for the purpose of decisions that are clearly immoral such as, for example, abortion or euthanasia."[6]

9. The Ethical and Religious Directives permit Catholic health care institutions to treat sexual assault victims with emergency contraception under certain conditions. The Directives state that "[al female who has been raped should be able to defend herself against a potential conception from the sexual assault."[7]

10. After "appropriate testing" shows "no evidence that conception has occurred already," a Catholic hospital may treat a sexual assault victim with "medications that would prevent ovulation, sperm capacitation, or fertilization."[8] It is "not permissible, however, to initiate or recommend treatments" that could cause "the removal, destruction, or interference with the implantation of a fertilized ovum."[9]

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[5] *Id.*

[6] *Address of His Holiness Benedict XVI to Members of the International Congress of Catholic Pharmacists* (Oct. 29, 2007), http://bit.ly/PopeBenedictSpeechtoPharmacists.

[7] *Id.* ¶ 36.

[8] *Id.*

[9] *Id.*

11. The Ethical and Religious Directives also require Catholic health care institutions to "respect the diocesan bishop's pastoral responsibility."[10] The Directives state that, "[a]s teacher, the diocesan bishop ensures the moral and religious identity of the health care ministry."[11]

12. In the judgment of the Catholic moral tradition, a law that requires a health care institution or professional to violate a judgment of conscience—particularly in a matter as serious as cooperation in the destruction of innocent human life—is an unjust law, and one is not morally bound to obey it.[12]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 15, 2011 by

/s/ Dr. John Brehany, Ph.D., S.T.L

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[10] *Id.* ¶ 37.
[11] *Id.* at 8.
[12] *See Catechism of the Catholic Church* §§ 1778, 1795, 2242 (2d ed. 2000).

THE HONORABLE RONALD B. LEIGHTON

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

STORMANS, INCORPORATED, et al., Plaintiffs, vs. MARY SELECKY, Secretary of the Washington State Department of Health, et al., Defendants, and JUDITH BILLINGS, et al., Intervenors.	Civil Action No. C07-5374 **DECLARATION OF TIMOTHY W. LYNCH**

I, Timothy W. Lynch, make the following Declaration under penalty of perjury and pursuant to 28 U.S.C. §1746:

1. I serve as the Regional Director, Pharmaceutical Services, for Franciscan Health System ("FHS"), 1717 South J Street, Tacoma, Washington 98405. I have served in this role since December 2009. Prior to assuming the director role, I held the position of Operations Manager for St. Joseph Medical Center (2007 - 2009) and Operations Manager for St. Francis Hospital (2000 – 2007).

2. FHS is a nonprofit Washington corporation that owns and operates four acute care hospitals, one critical access hospital, and numerous other health care related operations. FHS was founded by the Sisters of St. Francis in 1891 and has served as a Catholic health system since that time.

3. FHS currently operates nine pharmacies, five inpatient hospital pharmacies (one in each of its hospitals) and four outpatient retail pharmacies. All of FHS's pharmacies are located in the State of Washington.

4. As Regional Director, Pharmaceutical Services, my duties include operational oversight over all pharmacy related services, ensuring the provision of high quality, patient centric care. I have knowledge of and am familiar with FHS's hospital and retail pharmacies' policies and procedures.

5. As a Catholic health system, FHS, including its pharmacy operations, complies with the Ethical and Religious Directives for Catholic Health Care Services ("ERDs"), which may be found at: http://www.ncbcenter.org/document.doc?id=147.

6. Directive No. 45 of the ERDs prohibits the provision of abortion services, providing in pertinent

part that, "Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, includes the interval between conception and implantation of the embryo. Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation."

7. Based on the ERDs and currently available information on the mechanism of action of levonorgestrel (Plan B) and ulipristal acetate (Ella), FHS does not stock or dispense ulipristal acetate (Ella) in any of its retail pharmacies. Additionally, while FHS's inpatient hospital pharmacies stock and dispense levonorgestrel (Plan B), they may do so only in connection with the treatment of sexual assault victims following a determination that conception has not occurred.

8. FHS's outpatient retail pharmacies do not stock levonorgestrel (Plan B) or ulipristal acetate (Ella). Prior to executing this declaration, a check was run on all retail pharmacy accounts within the FHS system and no sale or purchase of levonorgestrel (Plan B) or ulipristal acetate (Ella) was found.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 16 of December, 2011

/s/ Timothy W. Lynch

THE HONORABLE RONALD B. LEIGHTON

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

STORMANS, INCORPORATED, et al., Plaintiffs, vs. MARY SELECKY, Secretary of the Washington State Department of Health, et al., Defendants, and JUDITH BILLINGS, et al., Intervenors.	Civil Action No. C07-5374 **DECLARATION OF SCOTT JAMIESON**

I, Scott Jamieson, make the following Declaration under penalty of perjury and pursuant to 28 U.S.C. §1746:

1. I am, and since May, 2004, have served as the System Director of Pharmacy for Providence Health

& Services ("Providence"), 1801 Lind Ave. SW, Renton, WA 98057.

2. Providence is a not-for-profit Catholic health care ministry currently serving communities in Alaska, California, Montana, Oregon, and Washington. Providence was founded in 1856 by the Sisters of Providence.

3. Currently, Providence operates nine hospitals and eight retail and outpatient pharmacies in the State of Washington. Each hospital also has a separate inpatient pharmacy.

4. Providence serves approximately 22,300 customers per year in its retail and outpatient pharmacies.

5. As System Director of Pharmacy, my responsibilities include oversight of Providence's system-wide pharmacy resource council, and facilitating best practice collaboration and sharing with respect to pharmacy operations. I am knowledgeable and familiar with the policies and practices of Providence's inpatient and retail and outpatient pharmacies in the State of Washington.

6. As a Catholic health care organization, Providence's pharmacy operations are conducted in accordance with the Ethical and Religious Directives for Catholic Health Care Services ("Ethical and Religious Directives").[1]

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[1] *United States Conference of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services, Fifth Edition*, available at http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf.

7. The Ethical and Religious Directives state, among other things, that "Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation." *Id.* at ¶ 45. Further, the Ethical and Religious Directives define abortion as "the termination of pregnancy before viability . . . includ[ing] the interval between conception and implantation." *Id.*

8. Based on the Ethical and Religious Directives and the current science regarding the mechanism of action of Plan B and *Ella*, Providence:

a. does not stock or dispense *Ella* in its pharmacies; and

b. allows its inpatient pharmacies to stock and dispense Plan B, but only for provision to sexual assault victims following a determination that conception has not occurred.

9. I have spoken to pharmacists staffed in Providence's Washington State pharmacies and confirmed that none stock Ella, and that none of the retail and outpatient pharmacies stock Plan B.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 14, 2011 by

/s/ Scott Jamieson

THE HONORABLE RONALD B. LEIGHTON

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

STORMANS, INCORPORATED, et al., Plaintiffs, vs. MARY SELECKY, Secretary of the Washington State Department of Health, et al., Defendants, and JUDITH BILLINGS, et al., Intervenors.	Civil Action No. C07-5374 **DECLARATION OF BRIDGET CARNEY**

I, Bridget Carney, make the following Declaration under penalty of perjury and pursuant to 28 U.S.C. §1746:

1. I am the System Director of Ethics at Peace Health, which is a Washington non-profit corporation that operates four hospitals and multiple physician clinics in the state of Washington. The hospitals are located in Bellingham, Washington (St. Joseph Medical Center), Longview, Washington (St. John Medical Center) and Vancouver, Washington (PeaceHealth Southwest Medical Center, which has two campuses: Main and Memorial). There are also multiple medical clinics operated by Peace Health in Whatcom, Cowlitz and Clark counties.

2. The Peace Health system serves thousands of patients each year. Through our "Bridge Assistance" program, we provide patients whose income level is at or below 200% of the federal poverty level with free medical care in our hospitals and physician clinics. The same program provides reduced cost care on a sliding scale to patients whose income level is between 200% and 400% of the federal poverty level. This Bridge Assistance program can include providing free or reduced cost prescriptions through our pharmacies. Last year, Peace Health provided over $65 million dollars in charity care to patients in Washington state.

3. Currently, Peace Health operates three hospital inpatient pharmacies in the State of Washington. In addition, it operates three outpatient pharmacies in the State of Washington. One of the three outpatient pharmacies, located at the Memorial campus of Peace Health Southwest Hospital in Vancouver, is a retail pharmacy that serves the general public. The other two Peace Health outpatient pharmacies in Washington are located at PeaceHealth St. John's

Medical Center and PeaceHealth Southwest Washington Medical Center. St. John's Medical Center serves PeaceHealth employees and their family members but can serve general members of the community when they have been unable to fill a prescription at other pharmacies in the community who do not stock a needed medication for which they have a prescription. PeaceHealth Southwest is the same but also provides prescriptions for patients being discharged.

4. As System Director of Ethics, my responsibilities include oversight of the ethical policies for PeaceHealth. I am knowledgeable and familiar with the intended application of those policies throughout PeaceHealth, including its inpatient, outpatient and retail pharmacies in the State of Washington.

5. PeaceHealth has long had an ethical policy that prohibits the provision of abortion services. Peace Health's intended implementation of that policy prohibits the sale of abortion medication at all Peace Health's pharmacies, except as discussed below for the State of Washington.

6. As a Catholic health care organization, it is Peace Health's intent that its pharmacy operations concerning abortion related medications are conducted in accordance with the Ethical and Religious Directives for Catholic Health Care Services ("Ethical and Religious Directives"). [1]

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[1] *United States Conference of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services, Fifth Edition*, available at http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services- fifth-edition-2009.pdf.

7. The Ethical and Religious Directives state, among other things, that "Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation." *Id.* at ¶ 45. Further, the Ethical and Religious Directives define abortion as "the termination of pregnancy before viability . . . includ[ing] the interval between conception and implantation." *Id.*

8. Based on the Ethical and Religious Directives and the Church's understanding of current science regarding the mechanism of action of Plan B and *Ella*, it has been Peace Health's policy:

> a. not to stock or dispense abortifacients, including *Ella*, in its pharmacies; and
>
> b. to allow its inpatient pharmacies to stock and dispense Plan B for use in the emergency room only and then only for provision to sexual assault victims following appropriate testing to ensure that the treatment will not interfere with a fertilized ovum.

9. During the week of December 12, 2011, I personally spoke to pharmacists who are responsible for each of PeaceHealth's pharmacies in Washington State. None of the PeaceHealth retail and outpatient pharmacies currently stock Plan B.

10. During my phone contacts with PeaceHealth pharmacists this week, I did learn that two pharmacies in Vancouver had not been in compliance with PeaceHealth's ethical policy on abortion because they had been stocking Plan B.

11. These two pharmacies, located at PeaceHealth Memorial Hospital and PeaceHealth Southwest Washington Medical Center, only recently became a part of Peace Health in the current calendar year. Prior to joining PeaceHealth, they had not been a part of a Catholic health system for many years.

12. In May of 2011, shortly after these two pharmacies had joined PeaceHealth, I provided training to pharmacy managers at Southwest Medical Center and available staff on PeaceHealth's ethical policies, including a discussion of Plan B. I have now personally spoken with the pharmacy manager at Southwest Medical Center who oversees these pharmacies and confirmed that: (1) they have removed Plan B from their inventory and (2) they will no longer provide it.

13. In addition, I learned from my calls this week that the Emergency Department at PeaceHealth St. Joseph Medical Center has been dispensing *Ella* instead of Plan B as medication for sexual assault victims. I have spoken with the Chair of the Medical Executive Committee and informed him that *Ella* may no longer be used.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 16, 2011 by

/s/ Bridget Carney

THE HONORABLE RONALD B. LEIGHTON

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

STORMANS, Inc., d/b/a/ RALPH'S THRIFTWAY; RHONDA MESLER; MARGO THELEN, Plaintiffs, vs. MARY SELECKY, Secretary of the Washington State Department of Health, et al., Defendants,	Civil Action No. C07-5374-RBL BENCH BRIEF REGARDING APPLICATION OF CERTAIN WASHINGTON STATE HEALTH CARE LAWS TO RELIGIOUSLY-AFFILIATED HOSPITALS AND HEALTH SYSTEMS

During trial, the Court asked for an explanation of how the pharmacy rules (WAC 246-869-010 and

WAC 246-863-095) interact with the operation of out-patient (also known as "retail") pharmacies owned by Catholic health systems. This brief addresses that question, and identifies other Washington State laws that require religiously-affiliated hospitals and health systems to comply with rules that may conflict with those entities' religious directives. Despite such laws, Catholic-owned hospitals, in particular, have continued to operate and indeed have expanded throughout Washington State. There is no evidence that the rules or other laws protecting patient access to health care have resulted in a single decision on the part of a Catholic health care entity to stop providing health care services in any community in Washington State.

A. Brief Background on Religiously-Affiliated Health Systems in Washington State

Religiously-affiliated health systems, especially Catholic-owned systems, provide significant health care throughout Washington State and the nation. According to the Catholic Health Association of the United States, there are presently 18 Catholic hospitals operating in Washington State, and one in six patients in the United States is cared for in a Catholic hospital annually. *See* Catholic Health Association of the United States, Directories, Washington State Advocacy Agenda 2011-2011, *available at* http://www.chausa.org. In addition, some Catholic-owned health systems operate retail pharmacies that serve the general population as well as hospital patients. See, e.g., Franciscan Health System, "Franciscan Pharmacies," *available at* http://www.fbshealth.org/sevices.aspx?id=92&menu_id=1O&submenu_id=56&dropmenu_id=382&li=l

(listing retail pharmacies that serve the public in the Pierce County area). And, because these hospitals and health systems are also employers, they typically offer health insurance plans to their employees. See, e.g. Providence Health Systems, "Your Benefit Options," available at http://www2.providence.org/healthforlife2/benefits-information/pscs/SoundHomeCare/Your-Options/Pages/default.aspx.

The United States Conference of Catholic Bishops publishes the *Ethical and Religious Directives for Catholic Health Care*. United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care,* Fifth Edition (Nov. 2009), *available at* http://www.usccb.org/about/doctrine/ethical-and-religious-directives/. The directives include provisions that disapprove of Catholic health entities providing certain end-of-life care, as well as reproductive health services such as abortion, contraception, many infertility treatments, and sterilization.[1] Occasionally, these directives clash with state law and policies governing the provision of health care. Yet, Catholic health systems have continued to operate

[1] It would be an oversimplification to suggest that every Catholic entity or individual agrees with these directives. *See*, *e.g.*, American Medical Association, Ron Hamel, PhD, *Op Ed: The Catholic Health Association's Response to the Papal Allocution on Artificial Nutrition and Hydration*, 9 Virtual Mentor 5, 388-392 (May 2007) (describing the Catholic Health Association's reluctance to follow new papal teaching that called into question routine end-of-life care provided by Catholic hospitals in the United States); Nicholas Kristof, "Tussling Over Jesus," The New York Times (Jan. 27, 2011) (reporting the disagreement between American Catholics over the excommunication of a nun after she supported her hospital's decision to save a woman's life by terminating her pregnancy).

and expand in Washington State. *See*, *e.g.*, Aaron Corvin, "Southwest, PeaceHealth Finalize Merger," The Columbian (December 8, 2010), available at http://www.columbian.com/news/2010/dec/08/southwest-washington-medical-center-and-peacehealt/.

B. Laws that Apply to Religiously-Affiliated Health Systems Where Health Care Services and Religious Beliefs May Conflict

In instances where laws or policies conflict with religious directives, Catholic entities have lobbied for legal exceptions to rules that would require participation in services to which they object. *See*, *e.g.*, Washington State Catholic Conference, "Testimony," *available at* http://thewscc.org/index.php?option=com_content&view=article&id=55&Itemid=2 (describing testimony in recent state and national legislative and administrative proceedings). For example, the Catholic Conference testified against the pharmacy rules at the March 10, 2006 and March 29, 2007 Board of Pharmacy hearings. See Washington State Catholic Conference, Testimony on WAC 246-869-010, March 29, 2007, *available at* http://thewscc.org/images/stories/Resources/Testimony/07-conclse.pdf; and Testimony on Conscience Clause, March 10, 2006, *available at* http://thewscc.org/images/stories/Resources/Testimony/06- conclse.pdf; see also Exhibit A (Washington State Catholic Conference, "Alert: Urge Board of Pharmacy to Enact Conscience Clause"). However, like any other advocacy group, the Catholic Conference has not always succeeded in obtaining its desired policy outcome. Washington State has at times decided that the needs of patients are paramount,

and either (1) refused to grant an exception for religiously-affiliated health care entities or (2) attempted to balance the concerns of the objecting entity with the needs of its patient community. The following are three examples of state laws and regulation—including the rules at issue in this litigation—that may impact Catholic-owned health care entities but have not impeded those entities' ability to operate in Washington State.

1. **All Washington Hospitals with an Emergency Room, Regardless of Religious Affiliation, Must Provide Emergency Contraception to Sexual Assault Survivors.**

In 2002, the Washington State Legislature passed RCW 70.41.350, finding that approximately thirty-eight percent of women in Washington suffer sexual assault during their lifetimes – a rate twenty times higher than the national average. RCW 70.41.350, Findings 2002 c 116(1)(c). Given the high incidence of sexual assault, the Legislature found it "essential that all hospital emergency rooms provide emergency contraception as a treatment option to any woman who seeks treatment as a result of a sexual assault." *Id.* at (2). Accordingly, the law requires "every hospital providing emergency care" to comply with the law. RCW 70.41.350(1) (emphasis added). There is no exception for religiously-affiliated hospitals.

Pursuant to the statute, the Department of Health conducted rulemaking following the law's enactment. *See* RCW 70.41.350(3) and RCW 70.41.360; *see also* WAC 246-320-286. Under the rules, every hospital that provides emergency care must, among other requirements, immediately provide emergency contraception to each victim of sexual assault if the

victim requests it and the drug is not contraindicated. WAC 246-320-286(4). The Department of Health enforces this requirement through hospitals' licensure applications and reviews. WAC 246-320-011(5). The statute also requires the Department of Health to investigate complaints of violations. RCW 70.41.360. Between 2009 and 2011, several hospitals were cited for noncompliance with various requirements of this law; none of them were Catholic hospitals. Religiously-affiliated hospitals were in compliance with the law's requirements throughout this time period. See Exhibit B (Decl. of Linda Foss).

Like the pharmacy rules at issue in this litigation, the plain language of the law puts the burden on the hospital—not its employees—to comply. RCW 70.41.360(1). There are no provisions that excuse a hospital from compliance with this law if there are no willing providers on staff when a woman comes to the emergency room for treatment. In short, the entity must comply with this law without exception. Since 2002, Catholic hospitals have continued to operate emergency rooms in Washington State despite the presence of this law.

2. Similarly, the Pharmacy Rules Apply to All Pharmacies, Regardless of Religious Affiliation.

As noted above, Catholic health systems do operate retail pharmacies. The rules at issue in this case do not exempt the outpatient pharmacies operated by Catholic health systems from the stocking rule (WAC 246-869-150), or the delivery rule (WAC 246-869-010), except in enumerated circumstances or in "substantially similar" situations. WAC 246-869-010(1). So, for example, a Catholic-owned retail pharmacy

serving the general community would likely have to carry and dispense hormonal birth control pills, given that nearly half of American women of reproductive age use contraceptives. *See*, *e.g.*, Jennifer Frost, DrPH, *Trends in U.S. Women's Use of Reproductive Health Services, 1995-2002*, 98 Am. Jour. of Public Health No. 10, 1814 (2008). Similarly, if a Catholic-owned retail pharmacy serves a community that needs emergency contraceptives, that pharmacy must stock and deliver emergency contraceptives. There have been no reports in Washington of Catholic-affiliated pharmacies failing to stock or dispense regular hormonal contraceptives, even though the Ethical and Religious Directives would technically prohibit it. In fact, at least three Catholic-affiliated outpatient retail pharmacies in Washington State already stock and dispense Plan B. See Exhibit C (Decl. of Sara Ainsworth).

3. An Employer that Offers a Prescription Drug Benefit to its Employees Must Offer Contraceptive Coverage; Religious Objection is Accommodated But Not at Patient Expense

Under Washington law, any health carrier or employer that includes prescription drug coverage in its employee benefits package must also include coverage for FDA-approved contraceptive drugs and devices. WAC 284-43-822. *See also* Wash. AGO 2002 No. 5 ("offering a generally comprehensive prescription drug plan that excludes prescription contraceptives would constitute an unfair practice and is not an option for either insurance carriers or employers"). Washington law also provides that religiously-sponsored health carriers and employers cannot be required to purchase coverage for health care services

to which they object because of conscience or religion. RCW 48.43.065(2)(a) and (3)(a). However, those exemptions are limited; they cannot be exercised in such a way that denies a patient timely access to the service. RCW 48.43.065(2)(b) and (3)(b); 2006 AGO 10 ("WAC and statutes operate to constrain one way in which employers might otherwise exercise their conscience option . . . .")

At least prior to the repeal of the requirement that all health carriers provide services identical to those in Washington's Basic Health Plan, health carriers with an objection were required to offer some alternative method of coverage, at no cost to the employee, to ensure that the employee's needs were met. WAC 284-43-800; Exhibit D (Fed. R. Civ. P. 30(b)6 Dep. Of Elizabeth Berendt, pp.10-21). Since repeal, employers that provide prescription drug coverage must still ensure their employees' access to contraceptive coverage pursuant to the contraceptive coverage rule and, when applicable, Title VII of the Civil Rights Act. WAC 284-43-822; *Erickson v. Bartell Drug Stores*, 141 F.Supp.2d 1266, 1276-77 (W.D. Wash. 2001). Health carriers must do the same. WAC 284-43-822; Exhibit D (Berendt Dep. pp.14-15).

This law and its interaction with the *Ethical and Religious Directives* have not stopped Catholic-owned entities from operating as both employers and providers of health care to Washington communities. As of today, Providence, the state's largest Catholic health system, includes more than 30 hormonal contraceptives in its ProvSelect Health Plan formulary. Providence Health & Services HSA Qualified Medications, available at http://www.provi-

dence.org/healthplans/pdfs/pharmacy/provselect-formulary.pdf. Providence is apparently complying with Washington State law and is not only operating numerous health care entities in the region, but also plans to merge with Swedish Medical Center in Seattle and Renton. Swedish News, "Providence and Swedish to Join Forces to Improve Health Care for Western Washington" (October 5, 2011). *available at* http://www.swedish.org/About/Swedish-News/Providence-and-Swedish-Join-Forces-to-Improve-Heal. Thus, it is not surprising that, as reported by National Public Radio on December 2, 2011, "dozens of Catholic hospitals and universities currently offer contraceptive coverage as part of their health insurance packages." Julie Rovner, "Catholics Fight Contraceptive Rule, But Many Already Offer Coverage," National Public Radio (December 12 2011), reported at http://www.npr.org/blogs/health/2011/12/02/143022996/catholic-groups-fight-contraceptive-rule-but-many-already-offer-coverage.

In sum, religiously-affiliated health care entities are required to follow the same rules as other health care organizations. While at times they may limit their services because of a state exemption (*see*, *e.g.*, RCW 9.02.150, permitting private health care facilities to refuse to provide abortions), they may at other times be required to provide services despite a religious objection. Like RCW 70.41, the rules at issue in this litigation apply to all pharmacies regardless of religious affiliation. Catholic-owned retail pharmacies are required by the stocking rule to stock emergency contraceptives when necessary to meet the needs of their patient community. Similarly, under WAC 246-869-010, Catholic-owned retail pharmacies must ensure delivery of emergency contraceptives.

These laws were enacted to protect patients, and compliance with these laws has not forced Catholic hospitals or health systems out of the business of health care.

RESPECTFULLY SUBMITTED this 7th day of December, 2011.

[Signature block of counsel for defendant-intervenors omitted]

THE HONORABLE RONALD B. LEIGHTON

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

STORMANS, Incorporated, doing business as Ralph's Thriftway Plaintiffs, vs. MARY SELECKY, Secretary of the Washington State Department of Health, et al., Defendants,	Civil Action No. C07-5374-RBL STATE DEFENDANTS' BENCH BRIEF REGARDING APPLICATION OF WASH. CODE § 48.43.065 TO OUTPATIENT PHARMACIES OPERATED BY RELIGIOUSLY-AFFILIATED HOSPITALS

The Court asked for an explanation of how Wash. Rev. Code § 48.43.065(2)(a) applied to outpatient pharmacies operated by religiously-affiliated hospitals. The Court acknowledged that Wash. Rev. Code § 70.41.350 requires all hospitals licensed by the state, regardless

of religious affiliation, to stock emergency contraceptives in their inpatient pharmacies so the emergency contraceptives are available for sexual assault victims treated in their emergency rooms. The question of whether Wash. Rev. Code § 48.43.065(2)(a) applies to outpatient pharmacies operated by religiously-affiliated hospitals can be answered by close examination of the statutory language.

Wash. Rev. Code § 48.43.065(2)(a) Does Not Apply to The Outpatient Pharmacies Operated By Hospitals

Wash. Rev. Code § 48.43.065(2)(a) states that "[n]o individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstances to participate in the provision or payment for a specific service if they object to so doing for reason of conscience or religion." "Health care facility" is defined in Wash. Rev. Code § 48.43.005(20) as including "hospitals licensed under chapter 70.41 RCW." Chapter 70.41 RCW defines "hospital" as "any institution, place, building, or agency which provides accommodations, facilities and services over "continuous period of twenty-four hours or more, for observation, diagnosis, or care, of two or more individuals . . . ." Wash. Rev. Code § 70.41 .020(4).

This definition of hospitals would include the inpatient pharmacies, which provides services over a continuous period of twenty-four hours or more for the care of patients. Therefore, the inpatient hospital pharmacies are included in the scope of Wash. Rev. Code § 48.43.065(2)(a).[1]

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[1] Nonetheless, all hospitals are mandated to counsel and provide,

However, outpatient pharmacies are not within the definition of "hospital," because they do not operate *over a continuous period twenty-four hours or more*. These outpatient pharmacies provide services to clinic and walk-in patients in a manner similar to the retail community pharmacies.[2] The outpatient pharmacies operated by religiously-affiliated and secular hospitals are not operating under the scope of the hospital license and regulations if they serve clinic and walk-in patients.

The outpatient pharmacies are regulated under the laws which apply to retail community pharmacies, i.e. Wash. Admin. Code 246-869. See Declaration of James Doll (Exhibit A). The inpatient pharmacies are inspected using the form and standards specified for hospital pharmacies, i.e. Wash. Admin. Code 246-873. Id. See also Wash. Admin. Code § 246-320-211 [the hospital licensing regulations which apply to pharmacy services, citing to Wash. Admin. Code 246-873].

Since the outpatient retail pharmacies are not regulated under Wash. Rev. Code 70.41, the laws which apply to the licensing and regulation of hospitals, the outpatient pharmacies are not "facilities" within the scope of Wash. Rev. Code § 48.43.065(2)(a)

Therefore, the outpatient pharmacies operated by religiously-affiliated health care organizations are required to comply with Wash. Admin. Code § 246-869-

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if requested, emergency contraceptives to sexual assault victims presenting in their emergency rooms by virtue of Wash. Rev. Code § 70.41 .350 and Wash. Admin. Code § 246-320-286.

[2] If the "outpatient" pharmacies do not accept clinic and walk-in patients, but only serve hospital employees, physicians with privileges, and patients being discharged from the hospitals, then these pharmacies are treated inpatient hospital pharmacies.

150 (stocking rule) and Wash. Admin. Code § 246-869-010 (delivery rule).

RESPECTFULLY SUBMITTED this 7th day of December, 2011.

[Signature block of counsel for state defendants omitted]