

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.

1 The rule primarily<sup>1</sup> at issue, commonly known as the “delivery rule,” requires pharmacies  
2 to timely deliver all lawfully prescribed medications, including the emergency contraceptives  
3 Plan B and *ella*.<sup>2</sup> Under the delivery rule, a pharmacy’s refusal to deliver is grounds for  
4 discipline, up to and including revocation of its license. In operation, the delivery rule bars a  
5 pharmacy from referring patients seeking Plan B to other pharmacies, meaning they must  
6 dispense the drugs.

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

## 11 II. BACKGROUND<sup>3</sup>

### 12 A. The Parties.

13 Plaintiffs are two individual pharmacists and a corporate pharmacy.<sup>4</sup> Each holds the  
14 sincere religious belief that life begins at conception, when an egg from the female is fertilized  
15 by the sperm from the male. Taken after unprotected sex, emergency contraceptives Plan B and  
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17 <sup>1</sup> The other new rule (the “pharmacist responsibility rule”), and the pre-existing “stocking  
18 rule,” are also at issue in this case. They are discussed below.

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

21 <sup>3</sup> A detailed history of the Rules’ promulgation and enforcement is set forth in the Court’s  
22 Findings of Fact and Conclusions of Law, filed herewith. Only those facts essential to the  
Court’s opinion are reiterated here.

23 <sup>4</sup> Plaintiffs are Margo Thelen, Rhonda Mesler, and Stormans, Inc. Stormans owns and  
24 operates two grocery stores, one of which contains a retail pharmacy.

1 *ella* delay ovulation,<sup>5</sup> and can also prevent a fertilized egg from adhering to the wall of the uterus  
2 (implanting). Plan B is most effective if taken within three days, while *ella* is effective for five.  
3 Because of their religious beliefs, Plaintiffs refuse to dispense Plan B.

4         The State Defendants are individuals sued in their official capacities, charged with the  
5 promulgation, interpretation and enforcement of Board of Pharmacy regulations, including the  
6 2007 Rules. The Defendant-Intervenors are various individuals personally concerned about  
7 access to lawful medications in Washington. Two are HIV-positive individuals concerned that  
8 the success of Plaintiffs' claims could result in the denial of lawfully prescribed and medically  
9 necessary drugs to combat their condition, based on the asserted religious or moral judgment of  
10 the dispensing pharmacist or pharmacy. They do not claim that they have been denied access to  
11 lawfully prescribed medications in the past.

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

#### 17 **B. The Pharmacy Board Rules and Their Operation.**

18         The Board's 2007 rulemaking resulted in two new rules: the delivery rule and the  
19 pharmacist responsibility rule. The Board also gave a new interpretation to its pre-existing

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21         <sup>5</sup> There may be disagreement about the actual scientific operation of the drugs, or  
22 whether they are in fact abortifacients. The court did not admit evidence on either side  
23 regarding this issue, and instead accepted Plaintiffs' testimony that their faith precludes them  
24 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.

1 stocking rule. The effect of the new rules and the new interpretation is to force religious  
2 objectors to dispense Plan B.

3 The delivery rule imposes a “duty to deliver” on pharmacies:

4 (1) *Pharmacies have a duty to deliver lawfully prescribed drugs* or devices to  
5 patients and to distribute drugs and devices . . . in a timely manner consistent with  
6 reasonable expectations for filling the prescription, except for the following or  
7 substantially similar circumstances:

8 (a) Prescriptions containing an obvious or known error . . .

9 (b) National or state emergencies or guidelines affecting availability . . .

10 (c) Lack of specialized equipment or expertise needed to safely produce,  
11 store, or dispense drugs . . .

12 (d) Potentially fraudulent prescriptions; or

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

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

17 Wash. Admin. Code § 246-869-010 (entitled “Pharmacies’ Responsibilities”). The delivery rule  
18 operates in tandem with the stocking rule, which requires a pharmacy to stock a “representative  
19 assortment of drugs in order to meet the pharmaceutical needs of its patients.” *Id.* § 246-869-150  
20 (entitled “Physical standards for pharmacies—Adequate stock”). The rules, however, do not  
21 apply directly to pharmacists themselves.

22 Pharmacists have a statutory right to conscientious objection, and thus, may not be  
23 “required by law or contract in any circumstances to participate in the provision of or payment  
24 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.

1 Accordingly, a pharmacy employing a pharmacist with a religious objection to Plan B can  
2 discharge its obligation under the delivery rule by having another on-duty pharmacist deliver the  
3 medication. The practical effect of the delivery rule (and the board’s current interpretation of the  
4 stocking rule) nevertheless directly and adversely impacts pharmacists with a religious objection  
5 to dispensing Plan B.

6 Pharmacies without the need or ability to have two pharmacists on duty at all times  
7 cannot employ a pharmacist with a religious objection to dispensing Plan B without risking a  
8 violation of the delivery rule, if a patient with a valid Plan B prescription seeks to have it filled at  
9 that pharmacy. Nor does the fact that the rules obligate the pharmacy (and not the pharmacist) to  
10 timely deliver lawfully prescribed medications permit a pharmacist operating his own pharmacy  
11 to comply with the delivery rule without violating his conscience. Because a pharmacy must fill  
12 a prescription for Plan B, if it employs a pharmacist who objects, it must staff a second  
13 pharmacist simply to ensure that the pharmacy can comply. In effect, the conscientious objector  
14 costs the pharmacy twice what a single, non-conscientious objector does. For pharmacies that  
15 need only one pharmacist per shift, such a cost is unreasonable, and the pharmacy’s only real  
16 option is to fire the conscientious objector. The delivery rule thus renders the pharmacist’s right  
17 to conscientious objection illusory.

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

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22 <sup>6</sup> The Board of Pharmacy’s own formal analysis of the rules’ impact recognized that  
23 “pharmacy owners [may] close rather than dispense medications that conflict with their beliefs.”  
24 *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

1 In practice, both the stocking rule and delivery rule contain exemptions not present in  
2 their text. While the stocking rule states pharmacies must carry a representative assortment of  
3 drugs requested by its patients, in practice, pharmacies refuse to carry drugs for a variety of  
4 reasons. Pharmacies regularly refuse to stock such drugs as oxycodone for fear of robbery; they  
5 refuse to dispense syringes because they dislike the clientele they associate with the product.  
6 Pharmacies may decline to stock a drug because it is expensive, because the “return on  
7 investment is less than desired, or because of the “hassle factor”—additional paperwork or  
8 patient tracking. Pharmacies may decline to stock drugs because they have contracted with  
9 manufacturers of competing drugs or because the pharmacy opts to serve a particular niche  
10 market. None of these exemptions exist in the text of the rules; but in practice, the Board allows  
11 pharmacies to shape their stock rather than allowing patients to do so. Further, the Board has no  
12 written policy or procedure about how to enforce the stocking rule. And in at least 40 years, the  
13 Board has *never* enforced the stocking rule against any pharmacy—until the delivery rule  
14 required pharmacies to deliver Plan B.

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

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23 Board found that any disruption in access to medications would be temporary because, “if there  
24 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.

1 **C. Development of the Board of Pharmacy Regulations.**

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

14 Negotiations among the Board, the Governor, the Washington State Pharmacy  
15 Association, Planned Parenthood, the Northwest Women's Law Center, and other groups, led the  
16 Board to adopt a draft rule in June 2006. The draft rule allowed a pharmacist the right to refuse  
17 for conscience reasons. The Governor objected: "I strongly oppose the draft pharmacist refusal  
18 rules . . . . [N]o one should be denied appropriate prescription drugs based on the personal,  
19 religious, or moral objection of individual pharmacists." Pl.'s Ex. 104 (letter from Governor  
20 Gregoire to Dr. Asaad Awan, Chair of Board of Pharmacy). Days later, the Governor threatened  
21 to replace the entire Board if the draft rule was not changed. Pl.'s Exs. 96 & 117.

22 On June 7, 2006, Planned Parenthood and the Northwest Women's Law Center submitted  
23 an alternative rule. Pl.'s Ex. 123. After minor alterations made by the Governor's office and the  
24 Washington State Pharmacy Association, the Governor sent handwritten comments to Ms. Hulet,

1 asking whether “this draft [is] clean enough for the advocates re: conscious/moral issues can’t  
2 allow pharmacist to refuse?” Pl.’s Ex. 139 (citing internal Governor’s office memorandum).

3 Mr. Saxe responded to the alternative rule with an honest, and telling, question:

4 Would a statement that does not allow a pharmacist/pharmacy the right to refuse  
5 for moral or religious judgment be clearer? This would leave intact the ability to  
6 decline to dispense (provide alternatives) for most *legitimate* examples raised;  
7 clinical, fraud, business, skill, etc.

8 Pl.’s Exs. 154 & 155 (emphasis added). Mr. Saxe was asking, rightfully, why the Board did not  
9 simply draft clear language to do exactly what it was attempting to do with vague language—bar  
10 pharmacists and pharmacies from conscientiously objecting, while at the same time allowing  
11 pharmacies and pharmacists to refuse to dispense for practically any other reason. Doing so  
12 would be easier, of course, than “*trying to draft language to allow facilitating a referral for only*  
13 *... non-moral or non-religious reasons,*” the ultimate goal of the proposed draft. Pl.’s Ex. 157  
14 (email from Mr. Saxe to Ms. Hulet). Indeed, Mr. Saxe’s division of reasons not to dispense into  
15 illegitimate (i.e., moral reasons) and legitimate (i.e., any other reason) highlights the goal of the  
16 Board, the Governor, and the advocacy groups: to eliminate conscientious objection. At trial,  
17 Mr. Saxe admitted that the rule targeted conscientious objectors:

18 Q. And it was your understanding that the intent of the proposed rule was to allow  
19 professional judgment and as you’ve indicated business reasons that are consistent  
20 with the time honored practices of pharmacy but not moral or religious reasons,  
21 right?

22 A. I believe so, yes.

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

24 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

1 for a broad range of business reasons, but referral for reasons of conscience was objectionable  
2 and should not be permitted.

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

#### 7 **D. Procedural History.**

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

12 The defendants are enjoined from enforcing WAC 246-863-095 (4)(d) and  
13 WAC 246-869-010 (4)(d) (the anti-discrimination provisions) against any  
14 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.

15 See Order, Dkt. # 95, November 8, 2007. The Court's injunction was based on its view that  
16 Plaintiffs were likely to succeed on their free exercise claim. As they did during the rulemaking  
17 process and throughout this litigation, Plaintiffs argued that refuse and refer<sup>8</sup> accommodates their

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20 <sup>7</sup> In fact, the Board's July 2007 "Notice to Pharmacists" regarding the Board's new rules  
was internally titled "<<pharmacyplnB103\_001.pdf>>." See Pl.'s Ex. 275 (emphasis added).

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22 <sup>8</sup> 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  
23 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  
24 was apparently permitted under the Board of Pharmacy's prior rules.

1 religious beliefs while ensuring that patients have timely access to lawfully prescribed  
2 medications, including Plan B.

3 The State and the Intervenors appealed and asked the Ninth Circuit to stay this Court's  
4 injunction. The Motion to Stay was denied on May 1, 2008. *See Stormans v. Selecky*, 526 F.3d  
5 406 (9th Cir. 2008). On March 6, 2009, while the appeal was pending and a trial on the merits  
6 without guidance from the Ninth Circuit was impending, the parties stipulated to a stay of the  
7 case until the Ninth Circuit's decision and, if necessary, the subsequent trial. *See* Order on  
8 Stipulation [Dkt. #355]. The State agreed not to "take investigative or enforcement action  
9 against Plaintiffs or their employers under WAC 246-863-095(4)(d) or WAC 246-869-010(4)(d)  
10 until a trial on the merits has concluded."

11 The parties also agreed that, if the Ninth Circuit vacated this Court's injunction, the State  
12 would notify the Court if they received any complaints that a non-party pharmacy or pharmacist  
13 was failing to comply with § 246-869-010(4)(d) or § 246-863-095(4)(d), and that no  
14 investigation of any such complaint would proceed absent the Court's approval. Though the  
15 State reported the receipt of two such complaints, they did not seek to investigate them from the  
16 date of the Stipulation through the date of trial.

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

22 In reversing the injunction, the Court of Appeals held that this Court had applied the  
23 wrong preliminary injunction standard in light of the Supreme Court's intervening decision in  
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1 *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008) (invalidating the Ninth  
2 Circuit’s “possibility of irreparable injury” standard as too lenient).<sup>9</sup> Further, the Ninth Circuit  
3 held that, based on the evidentiary record at the time, the Court should have applied a rational-  
4 basis test instead of an “ends/means” test, which it equated to heightened scrutiny. *See*  
5 *Stormans*, 586 F.3d at 1131 (noting that the evidentiary record was “thin”). In considering the  
6 merits, the Court of Appeals held that Plaintiffs were unlikely to succeed, and that the injunction  
7 was overly broad because it applied to all pharmacists and pharmacies practicing “refuse and  
8 refer.” The Court of Appeals further held that even if an injunction was warranted, it should  
9 have been limited to the named Plaintiffs.

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

15 In 2010, the Board of Pharmacy undertook a new rulemaking process, during which they  
16 considered whether to include in the delivery rule an exception for conscience. At the request of  
17 Plaintiffs and the State (and over the objection of the Intervenors), the Court struck the trial date  
18 and stayed this litigation pending the outcome of that rulemaking process. *See* Order on  
19 Stipulation [Dkt. #447]. The Board did not change the rules to include a conscience exception.

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24 <sup>9</sup> 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].

1 The stay was lifted and the case proceeded to an twelve day bench trial. The full evidentiary  
2 record has now been developed.

### 3 III. DISCUSSION

4 Plaintiffs assert three constitutional claims, all through the usual vehicle of 42 U.S.C.  
5 §1983: that the Board of Pharmacy rules violate (1) their right to substantive due process; (2)  
6 their right to free exercise of religion; and (3) their right to equal protection. *See* Second Am.  
7 Compl., at ¶¶ 58–84 [Dkt. #474]. Plaintiffs also assert that the Board’s rules violate and are  
8 preempted by Title VII of the Civil Rights Act, 42 U.S.C. §2000e *et seq.* *Id.* ¶¶ 71–74. The  
9 Court addresses each claim in turn.

#### 10 A. Plaintiffs’ Fourteenth Amendment Substantive Due Process Claim.

11 Though it is not the claim that received the most attention in this litigation, Plaintiffs’  
12 core position is that they have a fundamental right to refrain from actively participating in the  
13 termination of a human life<sup>10</sup> under the Fourteenth Amendment’s Substantive Due Process  
14 Clause. They argue that the State cannot force them to violate their right of conscience, absent  
15 the application of a rule narrowly tailored to achieve a compelling state interest.

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

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

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

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

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

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

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18 <sup>11</sup> An incomplete but representative list: *Church of the Lukumi Babalu Aye, Inc. v. City of*  
19 *Hialeah*, 508 U.S. 520 (1993) (sacrificing animals); *Lee v. Weisman*, 505 U.S. 577 (1992)  
20 (school prayer); *Employment Div. v. Smith*, 494 U.S. 872 (1990) (ingesting illegal drugs); *U.S. v.*  
21 *Lee*, 455 U.S. 252 (1982) (payment of taxes); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (school  
22 attendance); *Sherbert v. Verner*, 374 U.S. 398 (1963) (refusal to work on the Sabbath); *Reynolds*  
23 *v. U.S.*, 98 U.S. 145 (1878) (polygamy); *Ward v. Polite*, \_\_\_ F.3d \_\_\_, 2012 WL 251939 (6th  
24 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); *Tenaflly Eruv Ass'n Inc. v. Borough of Tenaflly*, 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 333777  
(Iowa 2012) (steel cleats on tractor tires).

1 Second, the fundamental liberty interest at stake must also be subject to a “careful  
2 description.” *Id.* at 721 (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)). The “crucial  
3 guideposts for responsible decision-making” in evaluating the existence of a fundamental right  
4 are the nation’s “history, legal traditions, and practices.” *Id.* (internal quotations and citations  
5 omitted). The question is whether the right is “so rooted in the traditions and conscience of our  
6 people as to be ranked as fundamental.” *Snyder v. Commonwealth*, 291 U.S. 97, 105 (1934). If  
7 so, the right may not be infringed “*at all*, no matter what process is provided, unless the  
8 infringement is narrowly tailored to serve a compelling state interest.” *Glucksberg*, 521 U.S. at  
9 721 (quoting *Flores*, 507 U.S. at 302). In short, if a right is deemed fundamental, any law  
10 infringing that right must pass strict scrutiny.

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

19 [T]he rights to marry, *Loving v. Virginia*, 388 U.S. (1967); to have children,  
20 *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the

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22 <sup>12</sup> The Supreme Court is demonstrably and understandably reticent to recognize new  
23 “fundamental” rights, even when it determines that long-standing laws are unconstitutional. The  
24 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”).

1 education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390  
2 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy,  
3 *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid*;  
4 *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v.*  
5 *California*, 342 U.S. 165 (1952), and to abortion, [*Planned Parenthood v.*] *Casey*,  
6 [505 U.S. 833 (1992)].

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

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

18 Less than 15 years after *Glucksberg*, Washington made a policy decision to permit (and  
19 to regulate, rather than ban) assisted suicide. *See* Washington’s “Death with Dignity” Act, Rev.  
20 Code of Wash. § 70.245. In support of their claim that the right to refrain from taking a life is  
21 fundamental, Plaintiffs emphasize that that Act specifically allows medical providers—including  
22 pharmacists—to refuse to participate in an assisted suicide.

23 Plaintiffs argue that this is only the latest example of the nation’s tradition recognizing  
24 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

1 colonial times. The right has also been consistently protected for health care practitioners in the  
2 context of abortion, abortifacient drugs, assisted suicide, and capital punishment.

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

11 It is unlikely that there would ever be the political will to mandate that a doctor  
12 participate in an assisted suicide, a capital punishment, or an abortion. While the right of  
13 conscience in the abortion context has been recognized as constitutionally *permissible* (see, for  
14 example, *Doe v. Bolton*, 410 U.S. 179 (1973)), the Supreme Court has not yet had to address the  
15 corollary question of whether a doctor has a fundamental, constitutionally-protected right of  
16 conscience.

17 Neither the State nor the Intervenors directly dispute that there is a long national tradition  
18 and practice of recognizing the right to refrain from taking a life. Instead, they appear to  
19 honestly believe that there is a significant, qualitative difference between administering a lethal  
20 injection to a terminally ill patient or a convicted murderer, or killing an enemy combatant, on  
21 the one hand, and dispensing an over the counter emergency contraceptive hours after  
22 unprotected sex, on the other. Indeed, they describe the rules' requirement that Catholic-

1 affiliated pharmacies stock and dispense Plan B as a “technical” violation of the Church’s  
2 directives against doing so.<sup>13</sup> [See Dkt. #523, at 5].

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

7  
8 <sup>13</sup> The State argues that it is constitutionally prohibited from recognizing a “right of  
9 conscience” exception to the delivery rule. It claims “an accommodation specific to Plaintiffs’  
10 religious beliefs and objections would implicate the prohibitions in the First Amendment’s  
11 Establishment Clause,” and would violate its First Amendment obligation to maintain  
12 “governmental neutrality between religion and religion, and between religion and nonreligion.”  
13 See Dkt. #534, at 2 & 4, *Citing McCreary v. ACLU*, 545 U.S. 844, 860 (2005) (internal citations  
14 omitted).

15 This position is flawed for at least two reasons. First, the Supreme Court has never held  
16 that statutes giving special consideration to religious groups are *per se* invalid. That would run  
17 contrary to the teaching of its cases that there is “ample room for accommodation of religion  
18 under the Establishment Clause.” *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-  
19 Day Saints v. Amos*, 483 U.S. 327, 338 (1987) (internal references omitted). The *Amos* Court  
20 certainly did not so hold; to the contrary, it upheld §702 of the Civil Rights Act of 1964 (which  
21 creates an exception for religious employers) against an Establishment Clause challenge. *Id.* at  
22 330. See also *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, \_\_\_ S. Ct. \_\_\_,  
23 2012 WL 75047 (2012). The Supreme Court has repeatedly “recognized that the government  
24 may (and sometimes must) accommodate religious practices and that it may do so without  
violating the Establishment Clause.” *Amos*, 438 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.

1 | *Smith*, 494 U.S. 872, 887 (1990) (quoting *U.S. v. Lee*, 455 U.S. 252, 263 n. 2 (1982); *Hernandez*  
2 | *v. Comm’r*, 490 U.S. 680, 699 (1989)).

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

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

16 |         Because the beginning of life has not been defined for purposes of constitutional law, it is  
17 | unclear whether the Supreme Court would apply abortion or contraception precedent to  
18 | emergency contraceptives. When the Supreme Court addressed the murky question of when life  
19 | begins, it recognized a constitutional right for women to choose to terminate a pregnancy in  
20 | some circumstances. The question in this case is whether a corollary to that fundamental  
21 | freedom to choose is a similar constitutional protection of an honest, good faith belief that life  
22 | begins at the moment of conception.

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

## 8 **B. Plaintiffs' First Amendment Free Exercise of Religion Claim.**

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

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

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

18 Under the Free Exercise Clause, "a law that is neutral and of general applicability need  
19 not be justified by a compelling governmental interest even if the law has the incidental effect of  
20 burdening a particular religious practice." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*,  
21 508 U.S. 520, 531 (1993). In short, if a law is neutral and generally applicable, it need only be  
22 rationally related to a legitimate government interest; if not, it must meet strict scrutiny. *See*  
23 *Stormans Inc. v. Selecky*, 586 F.3d 1109, 1129–30 (9th Cir. 2009).

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

5 *Smith* illustrates a law that burdens religious conduct but is constitutionally permissible.  
6 There, plaintiffs sought and were denied unemployment compensation after they were fired for  
7 using peyote. *Smith*, 494 U.S. at 874. Plaintiffs argued that they had taken the drug as part of a  
8 religious ceremony at their Native American Church, and thus, the state law barring peyote use  
9 was unconstitutional under the Free Exercise Clause (as it applied to them). *Id.* The Supreme  
10 Court disagreed. *Id.* at 890.

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

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

22 *Id.* at 877–78.

23 While the Free Exercise Clause immunizes religious beliefs themselves, the Clause  
24 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

1 with an otherwise valid law prohibiting conduct that a State is free to regulate.” *Id.* at 878–79.

2 To do otherwise would “permit every citizen to become a law unto himself.” *Id.* at 879 (quoting  
3 *Reynolds v. United States*, 98 U. S. 145, 166–167 (1879)). Recognizing that Oregon’s law  
4 barring peyote was neutral (it did not target religious conduct), and it was generally applicable (it  
5 applied to all citizens regardless of religious affiliation), the Supreme Court determined that the  
6 law was constitutionally applied. *Id.* at 890.

7 At the other end of the spectrum, *Lukumi* illustrates a government regulation that burdens  
8 religious conduct but is not constitutionally permissible. In *Lukumi*, the City of Hialeah passed a  
9 series of ordinances prohibiting the ritual sacrifice of animals after a Santeria church, which  
10 practices animal sacrifice, announced plans to open in the City. *Lukumi*, 508 U.S. at 526–28.  
11 The City’s residents were “distressed” at the news, and in response, the city council passed an  
12 ordinance making it “unlawful for any person, persons, corporations or associations to sacrifice  
13 any animal within the corporate limits of the City of Hialeah, Florida.” *Id.* at 528. The  
14 ordinance defined “sacrifice” as “to unnecessarily kill, torment, torture, or mutilate an animal in  
15 a public or private ritual or ceremony not for the primary purpose of food consumption.” *Id.* at  
16 527. The ordinances, according to the City, were necessary to protect “the public health, safety,  
17 welfare and morals of the community.” *Id.* at 528. The ordinance exempted, however, the  
18 slaughter or processing for sale of “small numbers of hogs and/or cattle per week,” as well as  
19 hunting, euthanasia, and the eradication of pests. *Id.* at 528, 537.

20 The Supreme Court found that the ordinances allowed the killing of animals for a wide  
21 range of secular reasons but barred the same conduct when religiously-motivated, and thus, the  
22 ordinances were unconstitutionally targeted. *Id.* at 536 (“careful drafting ensured that, although  
23 Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other  
24

1 | circumstances are unpunished”). The Hialeah ordinances fell well short of the constitutional  
2 | minimum because they were substantially underinclusive to meet the City’s stated interests in  
3 | protecting the public health and preventing cruelty to animals. *Id.*

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

## 9 | **2. Law of the Case.**

10 | Having articulated the legal standards against which the State’s 2007 rules and the  
11 | Plaintiffs’ claims must be evaluated, the Court must here detour to address Defendants’ argument  
12 | that the Ninth Circuit has already conclusively established that the rules are neutral and generally  
13 | applicable, and that they are therefore subject only to rational basis review as a matter of law.

14 | The State and the Intervenors rely on the statement in the Ninth Circuit’s Opinion that  
15 | “[b]ecause the rules are neutral and generally applicable, the district court should have subjected  
16 | the rules to the rational basis standard of review.” *Stormans*, 586 F.3d at 1137. They argue that  
17 | the sole question on remand is whether the rules can withstand that deferential level of  
18 | scrutiny—an issue upon which the Defendants sought summary judgment. [*See* Dkt. #s 391 &  
19 | 393]. Because the Opinion “signaled that the rules survive rational basis review but properly left  
20 | the final determination to this Court,” the trial was largely for show. [Dkt. #391 at 11]. They  
21 | continue to assert that because the Plaintiffs could not “negate every conceivable rational basis  
22 | for the rules” their Free Exercise claim, it must be rejected.

23 | Plaintiffs argue that Orders reviewing Preliminary Injunctions have traditionally not been  
24 | accorded law of the case preclusive effect in later proceedings (*see*, for example, *Golden State*

1 *Transit Corp. v. City of Los Angeles*, 754 F.2d 830, 832 (9th Cir. 1985), in part because they are  
2 necessarily decided on less than a complete record. They argue that the factual record in this  
3 case was not then, but is now, complete, which changes the Court’s analysis, and that the Ninth  
4 Circuit did not purport to establish the law of the case.

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

### 16 **3. Neutrality.**

#### 17 *a. Facial Neutrality.*

18 As the Ninth Circuit opined, the rules at issue are facially neutral. On its face, the  
19 delivery rule requires all pharmacies to timely deliver all lawfully-prescribed medications (with  
20 certain enumerated exemptions). The stocking rule similarly requires all pharmacies to  
21 “maintain at all times a representative assortment of drugs in order to meet the pharmaceutical  
22 needs of [their] patients.” Wash. Admin. Code § 246-869-150(1) (emphasis added). Neither rule

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23  
24 <sup>14</sup> By Plaintiffs’ count, the Ninth Circuit’s Opinion made seven such references.

1 contains any reference to religious practice, conduct, or motivation. *See Stormans*, 586 F.3d at  
2 1130. The rules are facially neutral, and if the Board of Pharmacy applied those rules to all  
3 pharmacies as written, there is little doubt that the rules would pass constitutional muster.

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

9 *b. Operational Neutrality*

10 The effect of a law in its real operation is strong evidence of its object. *Lukumi*, 508 U.S.  
11 at 535. A law “targeting religious beliefs as such is never permissible.” In other words, “[i]f the  
12 object of a law is to infringe upon or restrict practices because of their religious motivation, the  
13 law is not neutral,” and it is “invalid unless it can withstand strict scrutiny.” *Lukumi*, 508 U.S. at  
14 533 (internal citations omitted). Thus, a court must ask whether a law’s impact on religious  
15 practices is merely incidental (in which case the regulation is neutral) or intentional and targeted  
16 (in which case it is not).

17 A law is not neutral if, in practice, it accomplishes a “religious gerrymander.” *Lukumi*  
18 508 U.S. at 535. In *Lukumi*, the Supreme Court addressed three related questions in determining  
19 whether the City of Hialeah’s ban on animal sacrifice impermissibly did so: (1) whether the  
20 regulation’s burden falls, in practical terms, on religious objectors but almost no others; (2)  
21 whether the government’s interpretation of the law favors secular conduct; and (3) whether the  
22 law proscribes more religious conduct than is necessary to achieve its stated ends. *See Lukumi*,  
23 508 U.S. at 536–38. Here, the answers to these inquiries show that the Board of Pharmacy’s  
24 rules similarly accomplish a religious gerrymander.

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

7 In free exercise challenges, courts consistently find unconstitutional those regulations that  
8 exempt secular conduct but do not exempt similar religious conduct. In *Lukumi*, the Supreme  
9 Court held that Hialeh’s ordinance banning sacrificial killing was not neutral, in part, because the  
10 ordinance exempted killing for food, hunting, euthanasia, and eradication of pests. *Lukumi*, 508  
11 U.S. at 537. The Court noted that Hialeh enforced the rules and exemptions “on what seems to  
12 be a *per se* basis.” *Id.* The Board of Pharmacy enforces the stocking and delivery rules in the  
13 same manner.

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

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

5 The Board’s enforcement of its rules in this case presents the same constitutional  
6 problem. Permitting pharmacies to refuse and refer for religious reasons does not create any  
7 greater difficulties in terms of patient access than permitting pharmacies to refuse and refer for  
8 secular reasons.

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

18 After residents “expressed vehement objections,” prompted by “their fear that an *eruv*  
19 would encourage Orthodox Jews to move to Tenaflly,” the borough council essentially took no  
20 action to approve the creation of an *eruv*. *Id.* at 153. In response, Jewish leaders and a local  
21 utility company constructed the *eruv* themselves. *Id.* After learning that the *eruv* had been  
22 constructed, the Borough ordered the utility company to remove the *lechis* pursuant to a  
23  
24

1 longstanding ordinance that prohibited the placement of “signs, advertisements, or any other  
2 matter” on utility poles in public streets. *Id.* at 154.

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

9         Like the ordinances in *Lukumi*, *Fraternal Order*, and *Tenafly*, Plaintiffs have shown that  
10 the rules at issue here are riddled with exemptions for secular conduct, but contain no such  
11 exemptions for identical religiously-motivated conduct. As the Board of Pharmacy now  
12 interprets the stocking rule (a rule that was enforced for the first time in 40 years against  
13 Plaintiffs here), a pharmacy can decline to stock a drug for a host of secular reasons: because the  
14 drug falls outside the pharmacies’ chosen business niche (i.e, it is a pediatric, diabetic, or fertility  
15 pharmacy);<sup>15</sup> the drug has a short shelf life; the drug is expensive; the drug requires specialized  
16 training or equipment; the drug requires compounding; the drug is difficult to store; the drug  
17 requires the pharmacy to monitor the patient or register with the manufacturer; the drug has an  
18 additional paperwork burden; or simply that the pharmacy has a contract with the supplier of a  
19 competing drug. Pharmacies regularly decline to stock oxycodone, cough medicine, and  
20 Sudafed due to concerns that such drugs would make the pharmacy a target for crime.

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22         <sup>15</sup> Indeed, Steve Saxe (former Executive Director of the Board of Pharmacy) agreed that  
23 the stocking rule allows pharmacies the “leeway” to stock drugs based on whatever “type of  
24 pharmacy they have chosen to open.” Tr. Trans. vol. 1 at 59:1–4, Nov. 28, 2011.

1 Pharmacies can refuse to deliver syringes based on “cliente concerns.” Pharmacies can refuse  
2 to stock for any of these secular reasons—even when there is patient demand.<sup>16</sup> Those  
3 pharmacies then can (but are not required to) refer customers to where they can obtain the drugs  
4 they seek.

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

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

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18 <sup>16</sup> The Court further notes that if the Board of Pharmacy applied the stocking rule as  
19 written, the rule would produce absurd results. The rule requires a pharmacy to “maintain at all  
20 times a representative assortment of drugs in order to meet the pharmaceutical needs of its  
21 patients.” Wash. Admin. Code § 246-869-150(1). With respect to Plan B, the Board has  
22 interpreted the rule to mean that if “patients” request the drug, then the pharmacy must stock  
23 Plan B. If applied to all drugs, a pharmacy’s stock would be subject to the arbitrary requests of  
24 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).

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

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

11 First, the exemptions to the stocking rule and delivery rules are largely individualized.  
12 Where an exemption “requires an evaluation of the particular justification for the [conduct] . . .  
13 [it] represents a system of individualized governmental assessment of the reasons for the relevant  
14 conduct.” *Lukumi*, 508 U.S. at 537. The stocking rule itself requires the Board to make an  
15 individualized determination of who is a “patient” before it can determine whether a pharmacy  
16 has violated the rule. Moreover, the stocking rule’s unwritten exemptions are entirely  
17 individualized.<sup>17</sup> The unwritten exemptions are *ad hoc* creations that allow pharmacies to shape

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20 <sup>17</sup> 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.

21 Thus, a large pharmacy might violate the stocking rule because it could better afford the  
22 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  
23 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.”);  
24 66:17–19 (“Q. . . . [W]hether a drug is filled in a timely manner [under the delivery rule], you

1 their own business. In fact, there are no guidelines for when the Board might actually enforce  
2 the stocking rule outside of Plan B.<sup>18</sup>

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

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

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21  
22 concluded that that would be determined on an *individualized basis*, right? A. Yes. Q. So like the  
23 stocking rule, pharmacists need leeway to be able to decide whether and when a drug needs to be  
24 filled, right? A. Yeah, it could depend again on the drug, the patient, the situation.”).

<sup>18</sup> 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).

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

9           Third, the argument that the delivery and stocking rules seek to bar “personal objection of  
10 all kinds” is unpersuasive. Intervenors’ Br. at 3 [Dkt. #543]. Intervenors argue that the rules  
11 would ensure that, for example, a pharmacist could not refuse to stock and dispense HIV drugs  
12 because they associated them with a lifestyle of which they disapproved. Luckily, common  
13 bigots do not lurk amongst the rank-and-file pharmacists of Washington. Perhaps due to the  
14 absence of bigots, the State was unable to present any evidence that pharmacists in Washington  
15 have ever, even once, refused to stock or dispense drugs for personal reasons other than  
16 religious. If common bigotry was the evil the Board sought to defeat, then including an  
17 exception for conscientious objectors would hardly have been an issue. Finally, Defendants  
18 cannot explain why the stocking and delivery rules are necessary to combat non-religious  
19 personal objections (if they exist). The Board could take action against a pharmacist under the  
20 rules governing professional responsibilities, Wash. Admin. Code § 246-863-095, if a pharmacist  
21 intimidated, harassed, or discriminated against a patient. In this sense, the rules are  
22 overinclusive.

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

7 Further, the Board's application of the rules proscribes more religious conduct than is  
8 necessary to achieve patient access. The State has compelled pharmacies (and, effectively,  
9 pharmacists) to dispense Plan B where it might have simply compelled them to refer patients to  
10 nearby pharmacies that do dispense the drug. Defendants have not shown why a continuation of  
11 the pre-rule refuse and refer policy, used daily by most pharmacies for a wide variety of other  
12 drugs, fails to ensure that patients will have the access they need. To the contrary, in the pre-trial  
13 stipulation to stay, the State admitted that "facilitated referrals do not pose a threat to timely  
14 access to lawfully prescribed medications"; rather, facilitated referrals "help assure timely  
15 access," including to Plan B specifically. Pl.'s & State Def.'s Stip. & Agreed Or. ¶ 1.5 [Dkt.  
16 #441].

17 In sum, the evidence demonstrates that the burden of the rules falls almost exclusively on  
18 religious objectors to Plan B, the Board of Pharmacy has interpreted the rules in favor of secular  
19 conduct over similar religiously-motivated conduct, and the rules themselves proscribe more  
20 religious conduct than necessary to achieve patient access. The rules are not neutral and are  
21 therefore subject to strict scrutiny.

22 This conclusion is buttressed by the history of the rules' development, which  
23 demonstrates that they were intended to target religious objectors.  
24

1 *c. Legislative History.*

2 From the start, the drafters sought to create rules that would permit refusal for almost any  
3 secular reason while prohibiting refusal for religious reasons. Except for post-lawsuit testimony  
4 by State witnesses, literally all of the evidence demonstrates that the 2007 rulemaking was  
5 undertaken primarily (if not solely) to ensure that religious objectors would be required to stock  
6 and dispense Plan B. The Governor's office worked actively with the Board and interest groups  
7 to ensure that religious or moral objections to Plan B would not allow a pharmacy to refuse and  
8 refer a patient. The Governor herself threatened to replace Board members who supported a  
9 draft rule that included a conscience exception.

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

16 While Defendants argued that the Board's rules intended to prohibit personal objections  
17 generally, it is telling that the Board's “Notice to Pharmacists,” instructing pharmacists on the  
18 Board's new rules' operation, was internally titled “<<pharmacyplnB103\_001.pdf>>.” The title  
19 highlights the document's unstated focus.

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21  
22 <sup>19</sup> Tr. Trans. vol. 1 at 72:24–73:4, Nov. 28, 2011 (Q. You understood the goal of the final  
23 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.”).

24 <sup>20</sup> See Pl.'s Exs. 155 &157.

1           These rules were drafted for the primary—perhaps *sole*—purpose of forcing pharmacies  
2 (and, in turn, pharmacists) to dispense Plan B over their sincerely held religious beliefs. The  
3 rules were adopted “because of” religious objections to dispensing Plan B, not “in spite” of their  
4 incidental suppression of those beliefs. *Lukumi*, 508 U.S. at 540. Accordingly, the rules are not  
5 neutral in their operation, and they are not valid unless they were narrowly tailored to achieve a  
6 compelling state interest. Whether they meet this strict scrutiny is discussed below.

#### 7           **4. General Applicability.**

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

11           The Free Exercise Clause “protect[s] religious observers against unequal treatment, and  
12 inequality results when a legislature decides that the governmental interests it seeks to advance  
13 are worthy of being pursued only against conduct with a religious motivation.” *Lukumi* at 543-  
14 43. A facially neutral and generally applicable regulation violates the Free Exercise Clause  
15 when it has been enforced in a discriminatory manner. A law is not generally applicable if it  
16 burdens a category of religiously motivated conduct but exempts or does not reach a substantial  
17 category of conduct that is not religiously motivated, and which undermines the purposes of the  
18 law to at least the same degree as the covered conduct that is religiously motivated. *Blackhawk*,  
19 381 F.3d at 209 (*citing Lukumi* and *Fraternal Order*).

20           A regulation is not constitutional when the government applies it in a selective,  
21 discriminatory manner, thus singling out the plaintiffs’ religiously motivated conduct. When the  
22 government enforces a law against religious conduct but not similar secular conduct, it devalues  
23 religious reasons by judging them to be of lesser import than nonreligious reasons. *See Tenafly*,  
24 309 F.3d at 167–168. This is exactly what has occurred here.

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

5 First, neither the State nor the Defendant-Intervenors produced any evidence that the  
6 delivery rule had been enforced against any pharmacy except those refusing to dispense Plan B.  
7 To the contrary, the delivery rule has been enforced only against the Plaintiff pharmacy, which  
8 holds a religious objection to dispensing Plan B. And it has only been enforced<sup>21</sup> with respect to  
9 the failure to deliver that one drug—Plan B. Furthermore, for 40 years, the stocking rule has  
10 never been enforced against any pharmacy, even though it too is intended to ensure access to all  
11 medications by requiring all pharmacies to stock a representative supply of medications to serve  
12 its patients.

13 Plaintiffs demonstrated that since 1997 there have been at least nine complaints to the  
14 Board regarding a pharmacy's refusal (or failure) to dispense drugs other than Plan B, and that  
15 the Board declined to investigate any of them. On the other hand, Plaintiff Stormans was the  
16 subject of seven complaints in the immediate aftermath of the 2007 rules' implementation, and

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19 <sup>21</sup> 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.

20 The Ninth Circuit's Opinion acknowledged this possibility, when it discussed the rules'  
21 general effect of increasing access in terms of overcoming pre-rule religious or moral objections  
22 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).

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

1 two more in following months. The Board investigated and closed seven of those without  
2 disciplinary action, but two remain open<sup>22</sup>.

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

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

19 \_\_\_\_\_  
20 <sup>22</sup>The State appears to argue that the stipulated Stay prevents it from closing these  
21 investigations. If that is its position, it makes no sense. It did not seek permission to close them,  
22 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.

23 <sup>23</sup> These are: Ascension Health, Franciscan Health System, PeaceHealth, and Providence  
24 Health & Services.

1 Because many primary care physicians do not accept Medicaid, the poor increasingly use  
2 the Emergency Room for their primary care needs. Each Catholic-affiliated hospital in the state  
3 includes an Emergency Room, and each ER utilizes its hospital's in patient pharmacy. RCW  
4 70.41.350 requires every hospital providing emergency care to sexual assault victims to stock  
5 emergency contraception and to dispense it to those victims requesting it. As a result, each  
6 Catholic Emergency Room (or in patient) pharmacy does in fact stock Plan B, and will dispense  
7 it (only) to sexual assault victims. They will not dispense the drug to a patient presenting herself  
8 at the Emergency Room after unprotected, consensual sex, even though it is in stock. These  
9 pharmacies appear to be in violation of the delivery rule (though they may be exempted from it  
10 under Rev. Code of Wash. § 48.43.065).

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

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

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

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22 <sup>24</sup> See Ethical and Religious Directives for Catholic Health Care Services, referenced in  
23 Dkt. # 531. These Directives do permit the dispensation of Plan B to rape victims.

24 <sup>25</sup> 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.

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

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

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

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

18 First, it is clear that the Board of Pharmacy has been aware since before its 2007  
19 rulemaking that Catholic pharmacies do not and will not stock or deliver Plan B (or, for that  
20 matter, contraceptives). Susan Boyer, the Board's current Executive Director and the State's  
21 Rule 30(b)(6) designee in this case, admitted as much at trial. Nevertheless, she testified the  
22 Board "did not discuss or contemplate" the rules' impact on Catholic pharmacies and their  
23 position on Plan B in its lengthy development of the rules. [See Dkt. #531, at Ex. G]. In April  
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1 2008, the Washington State Catholic Conference of Bishops filed an amicus brief in the Ninth  
2 Circuit, explaining its position on Plan B and the rules' impact on Catholic health care providers.  
3 Dkt. # 531, Ex. H. Yet at trial, Boyer testified that she still does not know what impact the rules  
4 will have on Catholic pharmacies.

5 Boyer's (and the State's) primary claim is that patients know that a Catholic pharmacy  
6 will not dispense Plan B, and that there is therefore no demand for Plan B at Catholic  
7 pharmacies. This position is not persuasive. It might explain why there have not yet been any  
8 patient complaints about the Catholic pharmacies' failure to stock or deliver, but it is not  
9 evidence that there is no demand for the drug. Demand in the economic context means a  
10 "willingness and ability to purchase a commodity or service" or "the quantity of a commodity or  
11 service wanted at a specified price and time." The fact that no patient has formally complained  
12 to the Board about a Catholic pharmacy's refusal to stock or deliver Plan B is not even  
13 circumstantial evidence that there is no demand for the drug at that pharmacy. Many Catholic  
14 hospitals (such as St. Joseph's in Tacoma) are located in areas of modest incomes, with large  
15 populations of women of child bearing age. These potential patients are more likely than  
16 average to use the Emergency Room for their primary health care needs, and are less likely to  
17 have access to transportation to travel to a distant pharmacy to obtain Plan B. There is demand  
18 for Plan B, and the fact that a Catholic pharmacy does not meet it does not support the  
19 conclusion that there is not.

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

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

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

15 The State’s position is based on its reading of *Client A v. Yoshinaka*, 128 Wn. App. 833  
16 (2005), and *Seymour, DDS. v. Washington State Department of Health, Dental Quality*  
17 *Assurance Commission*, 152 Wn. App. 156 (2009). [See Dkt. #522]. These cases suggest that  
18 evidence obtained outside a formal investigation may be excluded, in some circumstances, under  
19 the Fourth Amendment. Neither case addresses the fact that the Board of Pharmacy is authorized  
20 to inspect every pharmacy every two years, and neither defeats the conclusion that the Board is

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23 <sup>26</sup> The Board’s analysis did not otherwise address the cost to pharmacies driven out of  
24 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.

1 authorized to initiate the complaint and investigation process in the absence of a formal  
2 complaint filed by patient.

3           It is also clear that the Board has not previously adhered to this position. Its witnesses  
4 did not claim that it could not enforce its rules in the absence of a formal, public complaint; to  
5 the contrary, Ms. (Salmi) Hodgson (in the Department of Health’s office of facilities and services  
6 licensing) acknowledged that the Board is authorized to, and does, conduct biannual inspections  
7 of every pharmacy in the state, to monitor compliance with the Board’s regulations. [*See* Tr.  
8 Trans., vol. 8 at 23:10–17, Dec. 20, 2011]. She and other witnesses<sup>27</sup> admitted that the Board  
9 has previously initiated investigations as the result of these biannual inspections.

10           State witnesses also admitted that Board members, employees, and inspectors can and do  
11 file their own complaints to begin the investigation and enforcement process. In fact, one of the  
12 investigations of Plaintiff Stormans’ pharmacy was initiated by the Board itself. Board members  
13 and employees have done so because of media reports or information received from insurance  
14 companies. Ms. Salmi even conceded that the Board is authorized to use “test shoppers” to test  
15 pharmacies’ compliance with Board of Pharmacy regulations, if there is reason to believe a  
16 violation is occurring. [*See* Tr. Trans., vol. 8 at 99:10–15, Dec. 20, 2011; *see* also Dkt. # 551.]

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20           <sup>27</sup> Rod Shafer, the former executive director of the Washington State Pharmacy  
21 Association, similarly testified that the biannual inspections are conducted “to make sure the  
22 pharmacists are following the rules and ensure public safety.” Tr. Trans. December 22, 2011, at  
23 122. He also freely admitted that it was common knowledge that Catholic pharmacies would not  
24 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.

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

6 The next iteration of the State's defense of its differential treatment of Catholic  
7 pharmacies is that selective enforcement is constitutionally permissible under *Wayte v. United*  
8 *States*, 470 U.S. 589 (1985). *Wayte* involved mandatory registration for the Selective Service.  
9 Plaintiff refused, and repeatedly boasted about his decision to the Selective Service. He was  
10 indicted, and sought dismissal by arguing that the law was being enforced against only vocal  
11 opponents to registration. The Supreme Court rejected his claim, holding that prosecutorial  
12 discretion enhanced efficiency and that enforcement against only vocal violators had a valuable  
13 deterrent effect. It recognized the "critical distinction" between the government's *awareness* that  
14 its passive enforcement policy would punish only a subset of non-compliant individuals, and the  
15 choice to use such an enforcement mechanism *because* it would do so. Plaintiff could not prove  
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17 <sup>28</sup> The State suggests that its failure to enforce the rules is the result of the "chilling  
18 effect" of this Court's stay. This position is not compelling, for at least three reasons. First, the  
19 stay was not intended to, and did not purport to, prevent additional investigations under the rules.  
20 Second, during the 2010 rulemaking, the Secretary of Health and interest groups like the  
21 Northwest Women's Law Center advocated against amending the rules to include a right of  
22 conscience. Secretary Selecky wrote to the Board of Pharmacy's Chair, urging him not to do so:  
23 "I agree with what you have heard from Governor Gregoire's office—the current rule strikes the  
24 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.

1 that his indictment was “*because of his protest*,” and his selective enforcement claim failed.

2 *Wayte*, 470 U.S. at 610.

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

11 The State’s final position, that the stocking and delivery rules do not apply to in-patient  
12 Catholic pharmacies, is also unavailing, and perhaps counterproductive. Earlier in the litigation,  
13 the State and the Intervenors had emphasized that the rules applied to all Catholic pharmacies  
14 because, if it were otherwise, the rules would be drastically and inexplicably underinclusive.  
15 The rules facially apply to outpatient, retail Catholic pharmacies, and every witness addressing  
16 the subject so testified. Indeed, the State emphasized this fact in its Supplemental Trial Brief on  
17 selective enforcement: “It is undisputed that the stocking rule and the 2007 rules apply to  
18 [Catholic] pharmacies. There is no evidence to support a finding that the rules are not generally  
19 applicable due to a carve-out having been granted to Catholic out-patient pharmacies.” [*See* Dkt.  
20 #544 at 9]. The Intervenors took the same position in response to the Court’s inquiries about the  
21 rules’ impact on Catholic pharmacies: “The rules at issue in this case do not exempt the  
22 outpatient pharmacies operated by Catholic health systems for the stocking rule or the delivery  
23 rule[.] . . . [I]f a Catholic-owned pharmacy serves a community that needs emergency  
24

1 contraceptives, that pharmacy must stock and deliver emergency contraceptives.” [See Dkt.  
2 #523 at 5].

3 In fact, the Board’s rules apply to Catholic pharmacies, and Catholic pharmacies are not  
4 complying (and will not comply) with them. But there is no evidence whatsoever that the Board  
5 has enforced or will enforce its rules against them. This is exactly the sort of unequal treatment  
6 prohibited by the Free Exercise clause under *Lukumi*. The rules are not generally applicable  
7 because the State does not enforce them against all pharmacies, or even to all pharmacies with  
8 religious objections to dispensing Plan B. Accordingly, they are unconstitutional unless they are  
9 narrowly tailored to achieve a compelling state interest.

#### 10 **5. Application of Strict Scrutiny.**

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

18 As was the case in *Lukumi*, the Court’s analysis of the rules demonstrates why they  
19 cannot survive strict scrutiny. The rules are not at all narrowly tailored; they are instead riddled  
20 with secular exemptions that undermine their stated goal of increasing patient access to all  
21 medications. The rules operate primarily to force (some) religious objectors to dispense plan B,  
22 while permitting other pharmacies to refrain from dispensing other medications for virtually any  
23 reason. They permit Catholic pharmacies to ignore the rules altogether. Nor has the state  
24

1 demonstrated or argued that it has a compelling interest in reaching this result. The rules cannot  
2 survive strict scrutiny, and they are not constitutional.

3 **C. Plaintiffs' Equal Protection Claim.**

4 Plaintiffs assert that the stocking and delivery rules, in operation, violate the Equal  
5 Protection Clause of the Fourteenth Amendment, which provides that no State shall “deny to any  
6 person within its jurisdiction the equal protection of the laws.” *See* Second Am. Compl. ¶ 61;  
7 U.S. Const. amend. XIV. This is “essentially a direction that all persons similarly situated  
8 should be treated alike.” *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439  
9 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). When “social or economic legislation is  
10 at issue,” the Equal Protection Clause allows the States “wide latitude,” and thus, laws “will be  
11 sustained if the classification drawn by the statute is rationally related to a legitimate state  
12 interest.” *Id.* at 440 (citing *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174 (1980);  
13 *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981)). When a statute classifies by race, alienage, or  
14 national origin or impinges a fundamental right, however, the law will be subjected to strict  
15 scrutiny. *Id.*; *see also Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Classifications based on  
16 gender and illegitimacy “also call for a heightened standard of review” and must meet  
17 intermediate scrutiny. *Id.* at 440–41 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718  
18 (1982); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982)). Where a law is facially neutral, like the  
19 stocking and delivery rules, a plaintiff must show both discriminatory intent and impact. *See Lee*  
20 *v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir. 2001). As Justice Kennedy noted in *Lukumi*,  
21 the free-exercise and equal-protection analyses are analogous, *see Lukumi*, 508 U.S. at 540, and  
22 thus, the Court unsurprisingly concludes that the stocking and delivery rules, as applied to the  
23 Plaintiffs, violate the Equal Protection Clause.

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

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

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

#### 22 **D. Plaintiffs' Title VII Claim.**

23 Plaintiffs assert that the delivery and stocking rules "permit (if not require) Washington  
24 employers such as Stormans to take adverse employment action against individual pharmacists

1 such as the plaintiff pharmacists based on their religious beliefs and practices,” thus violating  
2 Title VII, 42 U.S.C. § 2000. Second Am. Compl. ¶ 74. Title VII bars employers from  
3 “discriminat[ing] against any individual with respect to his compensation, terms, conditions, or  
4 privileges of employment, because of such individual’s race, color, religion, sex, or national  
5 origin.” 42 U.S.C. § 2000e-2(a)(1). Further, any state law “which purports to require or permit  
6 the doing of any act which would be an unlawful employment practice under this subchapter” is  
7 preempted by Title VII. *See id.* § 2000e-7. However, Title VII preempts only those state laws  
8 that “*expressly sanction* a practice unlawful under Title VII; the term does not pre-empt state  
9 laws that are silent on the practice.” *Calif. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 297  
10 n. 29 (1987) (emphasis added).

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

#### 19 IV. CONCLUSION

20 The Board of Pharmacy’s 2007 rules are not neutral, and they are not generally  
21 applicable. They were designed instead to force religious objectors to dispense Plan B, and they  
22 sought to do so despite the fact that refusals to deliver for all sorts of secular reasons were  
23  
24

1 permitted. The rules are unconstitutional as applied to Plaintiffs. The Court will therefore  
2 permanently enjoin their enforcement against Plaintiffs.

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4 IT IS SO ORDERED.

5 DATED this 22nd day of February, 2012

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7 Ronald B. Leighton  
8 United States District Judge  
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