No. 07-36039, 07-36040

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STORMANS, INC., doing business as RALPH'S THRIFTWAY, et al,

Plaintiffs-Appellees,

v.

MARY SELECKY, Acting Secretary of the Washington State Department of Health, et al.

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NO. CV-07-5374-RBL
HONORABLE RONALD B. LEIGHTON

AMICI CURIAE BRIEF OF CHRISTIAN LEGAL SOCIETY, CHRISTIAN PHARMACISTS FELLOWSHIP INTERNATIONAL, CHRISTIAN MEDICAL ASSOCIATION, AMERICAN ASSOCIATION OF PRO LIFE OBSTETRICIANS AND GYNECOLOGISTS, AND FELLOWSHIP OF CHRISTIAN PHYSICIAN ASSISTANTS SUPPORTING APPELLEES AND URGING AFFIRMANCE

M. CASEY MATTOX
GREGORY S. BAYLOR
CENTER FOR LAW AND RELIGIOUS FREEDOM
8001 Braddock Road, Suite 300
Springfield, VA 22151
Tel: (703) 642-1070
Fax: (703) 642-1075

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici* certify that (1) none of *amici* have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in any *amici*.

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STATEMENTS OF INTEREST OF AMICI CURIAE[1]

The **Christian Legal Society** ("CLS") is a nonprofit, interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and members at over 140 accredited law schools. CLS' legal advocacy and information division, the Center for Law & Religious Freedom (the "Center"), works for the protection of religious belief and practice, as well as for the autonomy of religion and religious organizations from the government. The Center strives to preserve religious freedom in order that men and women might be free to follow their conscience, and because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Among such inalienable rights is the right of religious liberty.

Christian Pharmacists Fellowship International ("CPFI") is a non-profit interdenominational fellowship of Christian pharmacists whose members include Washington pharmacists. CPFI is greatly concerned about its members' rights of conscience and their ability to exercise those rights in their professional practice. CPFI believes that pharmacists have a moral and legal responsibility to refuse to dispense a prescription that in the pharmacist's judgment might be harmful to the patient, either directly or indirectly. CPFI therefore opposes regulatory efforts to

[1] The parties have consented to the filing of this brief.

force pharmacists to dispense prescriptions against their best judgment and moral conscience. CPFI believes strongly in the sanctity of human life and supports the rights of Christian pharmacists, based upon Biblical principles and their moral convictions, to exercise their conscience within the realm of professional practice.

Christian Medical Association ("CMA") is a national organization of Christian physicians, with over 16,000 members. The CMA also has associate members who are members of allied healthcare professions, including nurses and physician assistants. The Christian Medical Association opposes practices that threaten the sanctity of human life contrary to scripture and traditional, historical, and Judeo-Christian medical ethics. CMA has advocated strongly for conscience protections for healthcare professionals.

American Association of Pro Life Obstetricians and Gynecologists ("AAPLOG") is a national organization of over 2,000 obstetricians and gynecologists who reaffirm the unique value and dignity of individual human life in all stages of growth and development from conception (*i.e.*, fertilization) onward. AAPLOG is opposed to practices that threaten the sanctity of human life and has advocated for conscience protections for physicians who do not engage in such practices.

Fellowship of Christian Physician Assistants ("FCPA") is a national fellowship of Christian physician assistants with over 600 members, and is a

recognized caucus of the American Academy of Physician Assistants. FCPA is opposed to practices that threaten the sanctity of human life and advocates for conscience protections for healthcare workers who do not participate in such practices.

CMA, AAPLOG, and FCPA are each Defendant-Intervenors in *California ex. rel. Brown v. United States, Docket No.* C 05-00328 JSW. The case involves a challenge by California to the Weldon Amendment, a federal statute that prohibits state and local governments receiving certain federal funds from discriminating against pro-life healthcare workers and institutions. The District Court entered judgment in favor of the Defendants and Defendant-Intervenors on March 19, 2008. Should the Plaintiffs appeal that decision to this Court, this Court's decision in the instant case may impact one or more of the legal issues in *California ex. rel. Brown* on appeal to this Court.

ARGUMENT

I. The Appellees' Title VII and Supremacy Clause Claim Provides An Additional and Sufficient Basis for Affirming the Decision of the District Court.

As the trial court held and the appellees compellingly argue in their brief, the First Amendment prohibits appellants from singling out persons with sincere religious objections to dispensing controversial agents like Plan B and discriminating against them for those beliefs. The appellees prevailed on this ground in the court below and this Court should affirm that decision. However, even were this Court to determine that the trial court should not have granted a preliminary injunction on First Amendment grounds, it may and should affirm the preliminary injunction because the appellees are likely to succeed on the merits of their claim under Title VII of the Civil Rights Act of 1964 and the Supremacy Clause. *Big Country Foods v. Bd. of Educ. of Anchorage Sch. Dist.*, 868 F.2d 1085, 1088 (9th Cir. 1989) (in reviewing a decision on a preliminary injunction court may affirm on any ground supported by the record).

A. Title VII of the Civil Rights Act Prohibits Employers From Discriminating Against Employers Because of Their Religious Beliefs.

Congress enacted Title VII of the Civil Rights Act of 1964 in order to eliminate discrimination in employment on the basis of race, color, religion, sex, or national origin – "whether the discrimination is directed against majorities or

minorities." *Trans World Airlines v. Hardison,* 432 U.S. 63, 71 (1977). Through Title VII Congress gave "highest priority" to the elimination of "practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." *Franks v. Bowman Transp.,* 424 U.S. 747, 763 (1976).

Soon after passage of Title VII, the Equal Employment Opportunity Commission explained that the prohibition on discrimination on the basis of religion also required employers "to make reasonable accommodations for the religious needs of employees and prospective employees." *Id., quoting* 29 CFR § 1605.1 (1968). In 1972 Congress codified the EEOC's regulatory accommodation requirement for religious employees by defining "religion" as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j). The proponent of this 1972 amendment declared that its purpose was "to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law." 118 Cong. Rec. 705 (1972) (Floor statement of Senator Jennings Randolph), quoted in *Hardison,* 432 U.S. at 74. Thus, Title VII requires that an employer must "accommodate the religious beliefs of an employee in a manner which will reasonably preserve the

employee's employment status...." *Am. Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 776 (9th Cir. 1986). While employers are relieved of this obligation where accommodation would impose on them an undue hardship, Title VII requires employers to work with employees to find a reasonable accommodation of the employees' religious beliefs. *Id.*

B. By Virtue of the Supremacy Clause of the Constitution, Title VII Pre-empts State Laws That Undermine Congress's Goal of Preventing Religious Discrimination in Employment.

A fundamental predicate of our federal system of government is that state laws may not nullify or conflict with federal law. U.S. Const. art. VI, § 2. Where such a conflict arises, federal law is "the supreme law of the land" and the conflicting state law is void. A state law conflicts with federal law and is thus invalid under the Supremacy Clause where compliance with the state and federal laws would be a "physical impossibility" or where "the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Cal. Fed. Sav. & Loan Assn. v. Guerra,* 479 U.S. 272, 281 (1987) (addressing preemptive effect of Title VII on conflicting state law).

Congress plainly intended that Title VII should supplement any state laws that served its same goals of eradicating employment discrimination while supplanting state laws that ran counter to Title VII's goals. Thus, Congress declared that any "law which purports to require or permit the doing of any act

which would be an unlawful employment practice under this title" is preempted. 42 U.S.C. § 2000e-7. Further, § 1104 of Title XI, applicable to all parts of the Civil Rights Act of 1964, specifies that the Act does not invalidate any state law "unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." 42 U.S.C. § 2000h-4. Congress thereby negated any existing or future state law that presents an obstacle to the accomplishment of the goals of any provision of Title VII – including its requirement that employers reasonably accommodate the religious beliefs and practices of their employees.

This Court and lower courts in this Circuit have held that state laws are preempted and unenforceable where they conflict with or undermine any part of Title VII. *See, e.g., Rosenfeld v. S. Pac.,* 444 F.2d 1219, 1225-26 (9th Cir. 1971) (California labor laws – although intended to "protect" female workers were "contrary to the general objectives of Title VII of the Civil Rights Act of 1964, ... and are therefore by virtue of the Supremacy Clause, supplanted by Title VII"); *Homemakers of Los Angeles v. Div. of Indus. Welfare,* 356 F. Supp. 1111, 1112 (N.D. Cal. 1973) (California laws providing for overtime pay for certain female employees conflicted with and were preempted by Title VII); *Burns v. Rohr Corp.,* 346 F. Supp. 994, 998 (S.D. Cal. 1972) (California regulation requiring rest breaks for female employees conflicted with and was preempted by Title VII). *See also Gen. Electric v. Hughes,* 454 F.2d 730, 731 (6th Cir. 1972) (Preliminary injunction

affirmed preventing state from enforcing state law on the ground that it was preempted by Title VII). As these cases demonstrate, even where the stated purpose of state legislation is to protect some segment of the population and not to explicitly mandate discrimination, where these laws conflict with Title VII they are nevertheless preempted and of no force and effect.

II. The Regulations Prohibit Pharmacies From Reasonably Accommodating the Religious Beliefs of Pharmacists in Violation of Title VII of the Civil Rights Act.

A. The Regulations Require Pharmacies and Pharmacy Owners to Either Close Their Washington Pharmacies or Sacrifice Their Sincerely Held Religious Convictions.

The Washington regulations mandate that every pharmacy stock and dispense Plan B unless it is excused for one of the specified reasons. WAC 246-869-010. Although the Pharmacy Board exempted pharmacies from the mandate on certain secular grounds, it has explicitly determined that religious or conscientious objections to Plan B do not excuse a pharmacy from filling a prescription for Plan B. ER 284 ("The rule does not allow a pharmacy to refer a patient to another pharmacy to avoid filling the prescription due to moral or ethical obligations."). A pharmacy must keep Plan B in stock and must ensure that the prescription is immediately filled onsite. Referral of the prescription to another pharmacy is prohibited. ER 290. (Pharmacy Board explaining pharmacies would

not be in compliance with the regulations if they referred to another pharmacy because of a "personal objection.")

Most of Washington's pharmacies are small businesses, often owned by pharmacists themselves. ER 584. Ralph's Thriftway, a Plaintiff, is a family-owned grocery store and pharmacy whose owners object to dispensing Plan B on religious grounds. ER 684-85. Ralph's Thriftway, and the few other Washington pharmacies that are owned and/or operated by persons with religious objections to dispensing Plan B[2] are simply left with the choice of closing up their businesses, thereby causing their patrons to look elsewhere for the thousands of other drugs they provide or engage in an action that they deem deeply violative of their religious convictions. The Plaintiffs hold a sincere religious conviction that dispensing and counseling a patient to use Plan B is tantamount to assisting in the taking of an innocent human life.[3] It is undisputed that the Washington regulations

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[2] A survey by the Pharmacy Board of nearly 40% of the state's pharmacies found only two pharmacies in the state that objected to dispensing Plan B because of personal or religious objections. ER 292.

[3] Because of the gravity of this decision for the pharmacy owners who object to stocking and selling this medication, it is not at all clear that mandating that every pharmacy provide Plan B will have the intended effect of increasing availability of Plan B. It is at least as likely - if not far more so - that some pharmacy owners would prefer to close their pharmacies or move them to another state more hospitable to religious freedom instead of allowing themselves to be complicit in an act that they believe to be the taking of a human life. This would not only fail to make Plan B more available, it would make thousands of other drugs less available.

simply prohibit them from maintaining both their Washington pharmacies and their religious convictions against selling Plan B.

B. The Law Prevents Washington Pharmacies From Reasonably Accommodating Their Employees' Religious or Conscientious Objection to Dispensing Plan B.

1. The Washington Human Rights Commission Has Declared Pharmacists' Referral of Patients to Other Pharmacies for Plan B to be Sex Discrimination Under Washington Law.

The Pharmacy Board has directly prohibited both pharmacists and pharmacies from "discriminat[ing] against patients or their agent in a manner prohibited by state or federal laws." WAC 246-863-095(4)(d) (prohibition on discrimination by pharmacists); WAC 246-869-010(4)(d) (prohibition on discrimination by pharmacies). While the plain language of the regulations do not compel pharmacists to stock, dispense, or counsel patients concerning treatments contrary to the pharmacist's conscience, Washington has nevertheless interpreted them to require this result. The Washington Human Rights Commission has clearly stated that any pharmacist who does not fill a Plan B prescription because of his or her religious convictions commits sex discrimination under the Washington Law Against Discrimination – even if another pharmacist at the same pharmacy fills the prescription. ER 632, 636. The Pharmacy Board has stated that it will rely upon the Commission in determining whether the action of a pharmacy or pharmacist constitutes "discrimination." ER 489. Pharmacists, like pharmacies,

are thus subject to sanction for sex discrimination in violation of the WLAD when they decline to dispense Plan B because of their religious or conscientious objections.

2. The Obligations Placed on Pharmacies to Dispense Plan B Fall Directly on Pharmacists.

Although WAC 246-869-010 imposes affirmative obligations only on "pharmacies" to stock and dispense medications, the direct and immediate effect of the rule is felt by pharmacists. A "pharmacy" cannot fill a prescription for Plan B or any other medication. Only a licensed pharmacist may engage in the practice of pharmacy, RCW 18.64.020, including "[i]nterpreting prescription orders; the compounding, dispensing, labeling, administering, and distributing of drugs and devices...." RCW 18.64.011(11). *See also* WAC 246-863-095(2)(g) (one of the very regulations at issue in this case prohibiting pharmacists from delegating the responsibility of dispensing prescriptions) and WAC 246-863-095(2)(b),(c); ER 219 (Board warning that another pharmacist must be available to consult). The burden of any mandate that a pharmacy dispense Plan B necessarily falls to the licensed pharmacist or pharmacists engaged in the practice of pharmacy at that location.

The appellants' hypotheses that a pharmacy could accommodate objecting pharmacists by allowing pharmacy technicians or other employees to fill prescriptions for Plan B is therefore inconsistent with Washington law, including

the very regulations giving rise to this case. Moreover, the suggestion that another pharmacist could be on-call to dispense Plan B would predictably result in much greater delays in dispensing Plan B than simply referring a patient to another nearby pharmacy. It is odd that the Defendant-Intervenors, women allegedly aggrieved by delays or inconveniences in their procurement of Plan B, suggest an accommodation that would have a pharmacy call an off-site pharmacist to come to the pharmacy for the purpose of dispensing and counseling them concerning Plan B. In most cases the customer would likely experience a much shorter delay in having their Plan B prescription filled if they were simply directed by the pharmacy to any of the 33 other pharmacies within five miles of Ralph's Thriftway or the numerous pharmacies near the individual Plaintiffs' pharmacies rather than waiting for the pharmacy to contact an on-call pharmacist and wait for that person to arrive to fill their prescription. ER 672, 675.

Finally, despite Defendants' newfound efforts to imagine other theoretical accommodations that would be permissible under the Washington regulations, the fact remains that the Pharmacy Board has made clear – speaking directly to Plaintiff Thelen – that the only permissible accommodation is for the pharmacy to hire additional pharmacists to work the same shifts as the pharmacist with a religious objection. ER 679. Nothing in the briefs of the appellees or the intervenors counters the District Court's factual finding that the only permissible

accommodation under the regulations would be for a pharmacy to hire a second pharmacist -- at an estimated annual cost of $80,000 -- to work the same shift as the objecting pharmacist. ER 12-13 (Order). As the District Court correctly recognized, the regulations "appear designed to impose a Hobson's choice for the majority of pharmacists who object to Plan B: dispense a drug that ends a life as defined by their religious teachings or leave their present position in the State of Washington." ER 16 (Order).

3. The Intended and Immediate Impact of the Regulations is to Prohibit Pharmacies From Accommodating Pharmacists' Religious Beliefs by Permitting Them to Refer Plan B Prescriptions to Nearby Pharmacies.

The American Pharmacists Association (APhA) has long held that pharmacists should "act with conviction of conscience" and that it is therefore ethical for pharmacists with religious or conscientious objections to Plan B to decline to fill the prescriptions and seek accommodations for their convictions. APhA, *Code of Ethics for Pharmacists*, (adopted 194); APhA "Pharmacist Conscience Clause," in *2004 Action of the APhA House of Delegates* 6 (2004). Among the APhA's suggested means of accommodating the religious convictions of pharmacists with respect to Plan B is "proactively directing prescribers and patients to pharmacies that carry [Plan B]." ER 235-36, 241-43. In 2006, the Washington State Pharmacy Association presented a report to the Board affirming

pharmacists' right to "refuse and refer" patients seeking Plan B to nearby pharmacies. ER 396.

Consistent with these ethical positions of both the national and state pharmacy associations, the Pharmacy Board also determined that pharmacists with religious or conscientious objections to Plan B should continue to refer patients to other colleagues or pharmacies, ER 571, and voted unanimously to recognize a pharmacist's right to "refuse and refer" patients seeking Plan B to nearby pharmacies. ER 500. Only after Governor Gregoire threatened removal of the Board members for supporting pharmacists' conscience rights did the Board depart from the ethical positions of the national and state pharmacy associations and adopt the challenged rules. ER 617, 619.

In compliance with their obligation under Title VII of the Civil Rights Act to reasonably accommodate their employees' religious beliefs, and consistent with APhA guidelines, some Washington pharmacies permitted their pharmacists to refer the few customers seeking Plan B to another nearby pharmacy. Plaintiffs Mesler and Thelen were each accommodated in this manner. ER 672, 675. The challenged rules eliminated these accommodations. Thelen has already lost her job because of the Board's adoption of the challenged rules. ER 676. Mesler is likely to lose her job if the preliminary injunction is reversed. ER 672-673.

The Washington Human Rights Commission deems any refusal of Plan B on religious or conscience grounds to be sex discrimination under the WLAD. Thus, Washington employers have no possible means of accommodating a pharmacist's religious convictions regarding Plan B. Even allowing another pharmacist colleague at the same store to dispense Plan B would be impermissible. ER 636 (Letter from Washington Human Rights Commission Director to Pharmacy Board rejecting a compromise position by which a pharmacist could "pass it along to another pharmacist to fill or refer to another pharmacy altogether" because "discrimination cannot be mitigated, but can only be remedied, prevented and eliminated."). This absolute and categorical prohibition on a pharmacy's accommodation of its pharmacists' religious convictions is a direct affront to Title VII's purpose of preventing religious discrimination in employment and requiring employers to reasonably accommodate their employees' religious beliefs. As such, the Washington rules are preempted by Title VII.

Even if the challenged rules are interpreted – contrary to the opinion of the Washington Human Rights Commission – to permit pharmacies to accommodate pharmacists by hiring additional pharmacists to work alongside them, they would still have the same effect as an outright ban on accommodation. Title VII requires only that an employer reasonably accommodate employees' religious beliefs and practices where the employer can do so without undue hardship. 42 U.S.C. §

2000e(j). An employer demonstrates "undue hardship," relieving it of the obligation of accommodating an employee's religion where the accommodation would cause it to bear more than a *de minimis* cost. *Hardison,* 432 U.S. at 84 (payment of additional wages to other employees filling in for employee would be more than a *de minimis* cost).

According to the Pharmacy Board, the cost of accommodating a pharmacist's religious beliefs concerning Plan B by hiring an additional pharmacist to work alongside him would be $80,000 annually. ER 655 (Pharmacy Board's "Final Significant Analysis" concerning the regulations). As the District Court observed, "No employer can be expected to accommodate in this manner." ER 12-13 (Order). However, this is the only possible accommodation that is both consistent with Washington pharmacy statutes and which the Pharmacy Board has suggested may suffice. ER 679. And given the WHRC's opinion that this accommodation would constitute sex discrimination under Washington law for which the pharmacy would be responsible,[4] it is even less likely that a pharmacy would be willing to offer such an accommodation.

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[4] In its letter to the Pharmacy Board stating that permitting pharmacists to "pass [a Plan B prescription] along to another pharmacist to fill" would be impermissible discrimination, the Commission also stated that liability for a pharmacist's decision not to fill a prescription would also apply to "the employer, manager, or corporation who condones the practice." ER 636.

Prior to the adoption of the challenged rules, Washington pharmacies, including those employing Plaintiffs Thelen and Mesler, had accommodated employees' religious beliefs by permitting them to refer patients seeking Plan B to another nearby pharmacy. ER 672, 675. The fact that these employers had previously accommodated Plaintiffs in this manner and would have continued to do so but for the adoption of the challenged regulations demonstrates that the "refuse and refer" accommodation did not impose an undue hardship on the pharmacies. *Menges v. Blagojevich*, 451 F. Supp.2d 992, 1003 (C.D. Ill. 2006) (Walgreens' past accommodation of its pharmacists by permitting them to refer prescriptions for Plan B to another pharmacist on staff or a nearby pharmacy demonstrated that Walgreens could accommodate pharmacists' religious beliefs without significant costs). The conclusion that this accommodation imposed no undue hardship on the pharmacies is bolstered by the fact that demand for Plan B remains so low that the average Washington pharmacy sees two or fewer prescriptions for Plan B per month. ER 587.

The Pharmacy Board's actions terminated this existing, APhA recommended, and reasonable accommodation of pharmacists' Title VII rights. The only theoretically available alternative accommodation, hiring additional pharmacists, would be more than Title VII requires. See *Hardison*, 432 U.S. at 84. By ruling out the one workable accommodation available to an employer seeking

to satisfy its Title VII obligations to pharmacists with religious objections to Plan B, the regulations present a clear obstacle to the accomplishment of Title VII's goal of requiring employers to reasonably accommodate the religious beliefs of employees and are therefore preempted. *Guerra,* 479 U.S. at 281.

As common sense would suggest, and the employment statuses of Plaintiffs Thelen and Mesler confirm, the regulations all but mandate that a pharmacy terminate its pharmacists because of their religious objections to dispensing Plan B. ER 13 (Order) ("termination is the outcome that any Board member could reasonably have expected when promulgating these regulations"). As the District Court recognized, the impact of these regulations on the livelihoods of pro-life pharmacists is no unintended consequence. The very purpose of the challenged regulations was to stop pharmacies from accommodating the religious beliefs of pharmacists who object to Plan B by simply referring the customer to a nearby pharmacy. They are the product of a coordinated campaign to drive from the pharmaceutical profession anyone who does not agree with the state's compelled orthodoxy on Plan B. The regulations entirely prohibit a class of employers from accommodating their employees' religious beliefs in a manner that imposed no any undue hardship on the employers nor any burdens on the public or other employees. Because the regulations permit or require employers to forego their

obligations to religious employees under Title VII, they conflict with and are preempted by Title VII by virtue of the Supremacy Clause.

CONCLUSION

Title VII of the Civil Rights Act of 1964 requires employers to reasonably accommodate the religious beliefs of their employees. The challenged state regulations prohibit Washington pharmacies from accommodating the religious beliefs of their employees concerning dispensing Plan B. The state regulations therefore directly conflict with Title VII and, by virtue of the Supremacy Clause of the Constitution, are preempted. The appellees' claim under Title VII and the Supremacy Clause therefore provides an alternative and sufficient basis for affirming the District Court's decision to enjoin the enforcement of the challenged regulations.

RESPECTFULLY SUBMITTED this 1st day of May, 2008.

M. Casey Mattox (VA Bar No. 47148)
Gregory S. Baylor (TX Bar No. 01941500)
CENTER FOR LAW AND RELIGIOUS FREEDOM
8001 Braddock Road, Suite 300
Springfield, VA 22151
Tel: (703) 642-1070
Fax: (703) 642-1075

cmattox@clsnet.org

Counsel for *Amici Curiae* Christian Legal Society, Christian Pharmacists Fellowship International, Christian Medical Association, American Association of Pro-Life Obstetricians and Gynecologists, and Fellowship of Christian Physician Assistants

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1

No. 07-36039, 07-36040

I certify that: (check appropriate options)

(Options 1 through 3 removed as inapplicable)

__X__ **4. Amicus Briefs**

_X_ Pursuant to Fed. R. App. P. 29(d) and Ninth Circuit Rule 32-1, the attached *amici curiae* brief is proportionally spaced, has a typeface of 14 points or more, and contains 7,000 words or less (specifically, this brief contains 4,187 words, including headings and footnotes),

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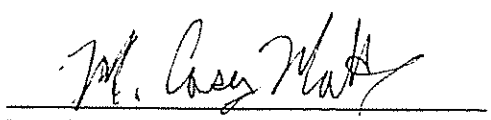
DATED this 1st day of May, 2008, at Springfield, Virginia.



M. Casey Mattox
CENTER FOR LAW AND RELIGIOUS FREEDOM

CERTIFICATE OF FILING AND SERVICE

The undersigned declares that on May 1, 2008, the original and fifteen copies of this *AMICI CURIAE* BRIEF were sent via UPS Overnight Delivery to the Ninth Circuit at the following address:

Clerk, United States Court of Appeals
95 Seventh Street
San Francisco, California 94103-1526

and that two true and accurate copies were sent via United States First Class Mail to the following:

Kristen K. Waggoner
Steven T. O'Ban
Ellis Li & McKinstry, PLLC
Two Union Square
601 Union Street, Suite 4900
Seattle, WA 98101-3906
Counsel for Plaintiffs-Appellees

Byron J. Babione
Benjamin W. Bull
Amy Smith
Alliance Defense Fund
15100 N 90th Street
Scottsdale, AZ 85260-0000
Counsel for Plaintiffs-Appellees

Joyce A. Roper
Alan D. Copsey
Office of the Attorney General
Agriculture & Health Division
7141 Cleanwater Dr. S.W.
PO Box 40109
Olympia WA 98504-0109
Counsel for Defendants-Appellants

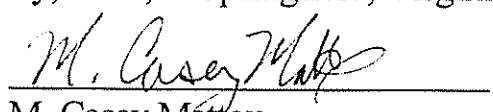
Molly A. Terwilliger
Katie A. Foley
Rima J. Alaily
Heller Ehrman LLP
701 5th Ave., Suite 6100
Seattle WA 98104-7098
Counsel for Defendants-Intervenors-Appellants

Kelly Susan Reese
Planned Parenthood of Western WA
2001 East Madison St.
Seattle, WA 98122
Counsel for Defendants-Intervenors-Appellants

Traci J. Friedl
Office of the Attorney General
P.O. Box 40100
1125 Washington Street, SE
Olympia, WA 98504-0100
Counsel for Defendants-Appellants

Nancy Saprio
Lisa M. Stone
Northwest Women's Law Center
907 Pine Street, Suite 500
Seattle, WA 98101
Counsel for Defendants-Intervenors-
Appellants

DATED this 1st day of May, 2008, at Springfield, Virginia.



M. Casey Mattox
CENTER FOR LAW AND RELIGIOUS FREEDOM