No. 15-862

In The Supreme Court of the United States

STORMANS, INC., doing business as Ralph's Thriftway, Rhonda Mesler, and Margo Thelen,

Petitioners,

v.

JOHN WIESMAN, Secretary of the Washington State Department of Health, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* CHRISTIAN LEGAL SOCIETY, DEMOCRATS FOR LIFE OF AMERICA, WORLD VISION, INC., NATIONAL HISPANIC CHRISTIAN LEADERSHIP CONFERENCE-CONEL, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, AND AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a law prohibiting religiously motivated conduct violates the Free Exercise Clause when it exempts the same conduct when done for a host of secular reasons, has been enforced only against religious conduct, and has a history showing an intent to target religion.

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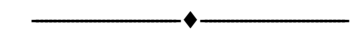
INTEREST OF *AMICI CURIAE*[1]

Amici are organizations committed to the protection of religious liberty, the protection of unborn life, or both. *Amici* join together on this brief because this case involves both matters. The state's regulation in this case effectively singles out religiously motivated action for prohibition, and it places a severe burden on the conscience of those who believe that the emergency contraceptives in question may cause the destruction of an embryonic human life.

The specific statements of interest of each *amici* are included in the Appendix to this brief.



SUMMARY OF ARGUMENT

The court of appeals' decision in this case conflicts with basic principles under the Free Exercise Clause and cries out for this Court's review. Washington State has prohibited pharmacies and pharmacists from declining to stock and dispense prescriptions, but only when the reason for declining is moral or religious conscience. As the petition for certiorari explains, this prohibition effectively singles out religious

[1] No counsel for a party, a party, or anyone other than the *amici curiae* or their counsel authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. Ten-day notice was provided, and letters granting blanket consent from all parties are on file with the Clerk.

reasons for declining to fill a prescription; it thus violates even the narrowest reading of the Free Exercise Clause under *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

I. In this brief, *amici* focus on another specific conflict with *Lukumi*. The state justified the regulation based on an asserted need to ensure "timely access to medicines," but the extensive trial record shows – and the district court found – no problem of access to the emergency contraceptives involved in this case (*ella* and Plan B) or to any drug. Under *Lukumi*, the fact that laws "proscribe more religious conduct than is necessary to achieve their stated ends" is "significant evidence" (1) that the laws actually target the religious conduct and (2) that they are invalid under strict constitutional scrutiny. Yet the court of appeals disregarded or evaded the extensive evidence that showed no problem of access – including the state's own stipulation that facilitated referrals "help ensure timely access" to medicines "including Plan B." The court of appeals thus flew in the face of *Lukumi*, and of this Court's admonition that "factual stipulations are binding and conclusive" (*Christian Legal Society v. Martinez*, 561 U.S. 661 (2010)).

This case reflects far more than a refusal to give weight to a factual record. *Lukumi*'s "neutrality and general applicability" test for claims under the Free Exercise Clause will be rendered meaningless if evidence of targeting of religious conduct can be disregarded to the extent that it was here. *Amici* have

focused on the evidence that the regulation is unnecessary to ensure access to medications: but as the petition shows, the court of appeals, departing from other circuits, disregarded extensive other evidence of discriminatory targeting.

II. The court of appeals also decided an important question of federal law in a way dramatically out of step with the well-established conscience protections our nation offers those who object, for religious or moral reasons, to participating in the taking of human life, including abortion. Petitioners believe that because human life begins when a sperm fertilizes an egg, it is immoral for them to stock or dispense any drug that would cause the death of a human embryo, including by preventing its implantation in the uterus. Petitioners' objection fits within our national tradition of broadly protecting those who cannot conscientiously facilitate an act that they believe may take a life. Courts may not, of course, question petitioners' belief that a distinct life begins at fertilization. And petitioners' judgment that *ella* and Plan B create unacceptable risks of destroying an embryo must also be deferred to: first because they make this judgment in the light of their belief about the seriousness of the potential harm, and second because they have a reasonable fear that these emergency contraceptives may prevent embryos from implanting.

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ARGUMENT

I. BY DISREGARDING EVIDENCE THAT THE STATE'S REGULATION IS ENTIRELY UNNECESSARY TO ENSURE TIMELY ACCESS TO MEDICATIONS, THE COURT OF APPEALS' DECISION CONFLICTS WITH *LUKUMI*.

As the petition for certiorari explains, by upholding new regulations that were clearly targeted at religion, the decision below refused to follow *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), and created conflicts with six other circuits and a state supreme court over the meaning of the key phrase "neutral and generally applicable." Pet. 19-38.

In this brief, *amici* focus on another specific conflict with *Lukumi*: the regulation was a solution in search of a problem. The state justified it based on an asserted need "to increase timely access to medicines." App. 146a (district court finding of fact) (noting that "[s]everal Board witnesses testified that [this was] the purpose of the Regulations"). However, as the district court further found, there was no problem of timely access to address: "[T]he evidence at trial revealed no problem of access to Plan B or any other drug before, during, or after the rulemaking process." *Id.* The district court reached this conclusion based on a 12-day trial and extensive findings of fact.

Under *Lukumi*, as we will show, the fact that laws "proscribe more religious conduct than is necessary to

achieve their stated ends" is significant evidence that the laws discriminate against religious exercise and are invalid under strict constitutional scrutiny. Yet the court of appeals disregarded or evaded the extensive evidence that showed "no problem of access" to Plan B or other drugs. As such, the court of appeals flew in the face of *Lukumi*.

In *Lukumi*, this Court gave several reasons for holding that the city's ordinances discriminated against the animal sacrifices of the Santeria faith. Among other things, the Court said: "We find significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends." 508 U.S. at 538. The city could have prevented animal cruelty and protected public health by laws "stopping far short of a flat prohibition on all Santeria sacrificial practice" – for example, by regulating the method of killing and the disposal of carcasses. *Id.* Instead, the fact that the city imposed "'gratuitous restrictions' on religious conduct" showed that it sought "not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Id.* (quotation omitted).

The same is true here. In this case, extensive evidence showed that requiring objecting pharmacies and pharmacists to dispense medications was not necessary to ensure timely access; "facilitated referrals" would be sufficient. Plainly, under *Lukumi* this was "significant evidence of the [regulation's] improper targeting of" religious objections to dispensing

medications (508 U.S. at 538). Yet the court of appeals ignored or dismissed this evidence.

A. The Court of Appeals Failed to Give Effect to the State's Stipulation that Facilitated Referrals "Pose No Threat to Timely Access" to Medications.

First, and most obviously, the state stipulated in the district court that facilitated referrals "do not pose a threat to timely access to lawfully prescribed medications, . . . includ[ing] Plan B"; and that facilitated referrals "help assure timely access to lawfully prescribed medications, . . . includ[ing] Plan B." App. 142a-143a (district court findings of fact; brackets and ellipses in original, docket citation omitted). See also *id.* (stipulating that facilitated referrals are "a time-honored practice" that is "often in the best interest of patients").

The Stipulation surely shows that the regulation "proscribe[s] more religious conduct than is necessary to achieve [its] stated ends" (*Lukumi*, 508 U.S. at 538). If facilitated referrals "help assure timely access to" medications (App. 143a), then to prohibit such referrals is "gratuitous," and this is "significant evidence" that the regulation actually aims at "suppressing [a pharmacist's refusal to dispense certain drugs] because of its religious motivation." 508 U.S. at 538.

The court of appeals, however, dismissed the Stipulation as evidence of targeting and discrimination. It

claimed that "as a matter of logic, . . . *Defendants' 2010* [s]tipulation" was not "evidence of discriminatory intent by *the Commission* when it adopted the rules in *2007*." App. 26a (emphases in original). But this fundamentally misreads *Lukumi*'s discriminatory-intent analysis by limiting it solely to the subjective intent of the particular decision makers at one time.[2] When this Court assessed evidence of targeting and discrimination in *Lukumi*, it did not ask only what was known to the Hialeah City Council at the time the ordinances in question were enacted. Instead, the Court simply said that when a law "visits 'gratuitous restrictions' on religious conduct," it is reasonable to infer that its object is "not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Lukumi*, 508 U.S. at 538.

As *Lukumi* emphasized, the discriminatory nature of a law is shown not just by its text – or by the subjective motivation of its enactors – but also by its "effect . . . in its real operation." *Id.* at 535. By holding that the Stipulation could only be relevant to the commissioners' historical motivations, the court of appeals ignored *Lukumi*'s direction that a discriminatory object or "targeting" can be shown in multiple ways.

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[2] We agree with Petitioners that the background and process of the 2007 events are relevant evidence to show "targeting." Pet. 17. Our point is only that, contrary to the court of appeals' holding, the evidence of motivation in 2007 is not the *only* relevant evidence.

The court of appeals also simply refused to accept the Stipulation as a binding admission of fact. Even though the state stipulated that facilitated referrals "help assure timely access" to medications "including Plan B," the court of appeals objected that "the time-sensitive nature of emergency contraception" and other drugs might make it important to receive medication immediately. App. 26a.

By refusing to accept the state's admission that access to Plan B would be timely, the court of appeals disregarded this Court's admonition that "'[f]actual stipulations are binding and conclusive.'" *Christian Legal Society v. Martinez*, 561 U.S. 661, 677 (2010) (brackets and quotation omitted). In *Martinez*, this Court found that CLS had stipulated in the trial court that the defendant law school had a policy requiring all student groups to open leadership positions to "all comers": this Court then held that the stipulation limited CLS to challenging only that particular policy. *Id.* at 675-78.

In the present case, the state stipulated that "facilitated referrals help assure timely access" to medications, "including Plan B." It chose to enter into this "binding" joint stipulation, the district court found, "[i]n order to secure Plaintiffs' consent – and [the] Court's approval" – to stay the trial date that was then upcoming. App. 141a. If *Martinez*'s injunction to adhere to factual stipulations is to be applied consistently, and taken seriously, the state cannot avoid the effect of its stipulation concerning access.

B. The Court of Appeals also Disregarded Other Extensive Evidence of Access.

The court of appeals effectively disregarded not just the Stipulation, but also extensive additional evidence of access, reflected in the district court's findings of fact. App. 146a-157a; see App. 146a ("the evidence at trial revealed no problem of access to Plan B or any other drug before, during, or after the rulemaking process"). These findings likewise constitute "significant evidence" that (1) the regulation is not aimed at ensuring access, but rather targets objections because of their religious nature, and that (2) under strict scrutiny, it fails to serve a compelling governmental interest.

1. Plan B is widely available in Washington as a general matter, and "widely available in [the] communities" petitioners serve. App. 147a. The district court found that Washington "has long had some of the highest sales of Plan B in the nation." App. 146a. Anyone over age 16 can purchase Plan B without a prescription "at pharmacies, doctors' offices, government health centers, emergency rooms, [or] Planned Parenthood"; "through a toll-free hotline"; or for overnight delivery through the Internet. *Id.* Since 2013 it has been available on grocery and drugstore shelves without a prescription, making it even more available. It is also widely available near each of petitioners' pharmacies. App. 147a. For example, as the district court found, it is available at four pharmacies within one mile of petitioner Rhonda Mesler's pharmacy,

at thirteen pharmacies within five miles, and at eighteen pharmacies within twenty-five miles. *Id.*

2. Survey data concerning pharmacies' practices confirmed widespread access. For example, a 2006 survey by the Board revealed that 77 percent of pharmacies stock Plan B; a 2008 online survey by the state pharmacy association showed that 86 percent stock emergency contraceptives and 98.3 percent either stock it or "have an established system to facilitate the immediate needs of their patients." App. 148a-149a.

The survey data showed in particular that "religious objections do not pose a barrier to access." *Id.* 148a. For example, in the 2006 survey, of the 23 percent of pharmacies that did not stock Plan B, only 2 percent refused to stock it for religious reasons. *Id.* Thus "pharmacies were more than ten times more likely to not stock Plan B for business reasons than for reasons of conscience." *Id.* 153a-154a; see also *id.* 357a, 211a-212a (witness testimony that business and convenience refusals pose "a much more serious access issue" than religious refusals would). Of course, the very fact that the regulations allow pharmacies to refuse to stock certain drugs for business, economic, or convenience reasons also provides evidence that there are other means of access to the drugs.

3. The testimony of the Board's members and spokesperson confirmed that there was no problem of access. For example, as the district court found, the Board's former chair, who had presided over the

rulemakings, "explained that the Board has never identified a single drug that patients are unable to access in Washington." App. 149a. After summarizing other testimony, the district court concluded that "no Board witness, or any other witness, was able to identify any particular community in Washington – rural or otherwise – that lacked timely access to emergency contraceptives or any other time-sensitive medication." *Id.* 152a.

As the last finding indicates, the evidence of widespread access extended to rural as well as urban communities, and to time-sensitive medication as well as others. See, e.g., App. 150a (consultant and spokesperson confirmed he was "not aware of any area in Washington, rural or nonrural for which there is an access problem for time-sensitive drugs"); *id.* 148a (2006 Washington State Pharmacy Association survey showed no problems of access even though it "focus[ed] on time-sensitive medications and rural areas").

Nonetheless, in the face of this evidence, the court of appeals still posited that the regulation might serve the need for speed "considering the time-sensitive nature of emergency contraception," "especially in rural areas." App. 26a. The court simply refused to take account of the record, which included "intentionally over-sampl[ing]" rural pharmacies to ensure access was widespread. App. 148a-149a.

4. Likewise, the court of appeals wrongly relied on the state's proffered examples of anecdotal "refusal stories" (see App. 23a-24a), when the district court

had, correctly, rejected them. During the rulemaking process, the governor urged Planned Parenthood to gather refusal stories to further support the formulation of its regulation. App. 152a. Planned Parenthood sent test-shoppers to document any pharmacies that refused to stock or dispense Plan B in an attempt to prove there was a problem with access to Plan B. *Id.* 156a-157a. It then repeated four primary anecdotal stories at each hearing and trial. *Id.* 152a-155a.

However, after a close examination, the district court concluded that not one customer had been denied timely access to Plan B or any other drug due to a conscience objection, and that the refusal stories "do not demonstrate a problem of access." App. 89a, 152a-153a, 244a. The court found that several of the stories "were investigated by the Board and were found to be inaccurately reported, unsubstantiated, or not a violation of the rules." *Id.* 154a. Others were "uncorroborated or involved mere hypotheticals" – for example, the hypothetical story of the denial of a syringe to a man with gelled hair and a tattoo. *Id.* 155a.

Planned Parenthood introduced several new stories at trial. Many involved simple complaints that a drug was not in stock for business reasons or in cases where no reason was given. *Id.* 153a-154a. Others "did not involve refusals at all," but rather a patient having to wait for a short time or receive the medicine from another pharmacist, which the state has said the regulations permit. Finally, many stories were "not the result of natural encounters with access

problems, but were instead manufactured by an active campaign of test shopping." *Id.* 156a.

In particular, the court of appeals – and the state – made several references to alleged refusals by pharmacists to dispense HIV medicine. See App. 23a, 24a, 27a. But the district court found that "[d]espite frequent mentions of HIV during the rulemaking process, there is no evidence that any patient has ever been denied HIV drugs due to a conscientious or 'personal' objection." App. 151a. Board members confirmed in their testimony that they had no example of a person who had been denied HIV drugs or a location in which they were unavailable. *Id.* 150a-152a. If there is a pharmacist who would ever refuse to dispense a life-preserving drug because she objects to the patient's personal characteristics, it is certainly not any of the petitioners: their facilitated referrals are not motivated by any objection to any person or group, but by the belief that taking a life is religiously and morally objectionable.

5. The court of appeals' decision reflects far more than a refusal to give weight to the factual record in a case. *Lukumi*'s "neutrality and general applicability" test for claims under the Free Exercise Clause will be rendered meaningless if evidence can be disregarded to the extent that it was here. *Amici* have focused on the record showing there is no need to impose on the religious conscience of pharmacists. But in upholding the state's regulation, the court of appeals likewise refused to give effect to other forms of evidence showing that the regulation discriminates

against religion in its structure, enforcement, and intent. See Pet. 23-38 (evidence of other exemptions, of selective enforcement against religious conduct, and of historical background showing lack of neutrality).

For all these reasons, this Court should grant review to ensure that the test of neutrality and general applicability remains a meaningful vehicle for protecting the fundamental right of religious freedom.

II. THE COURT OF APPEALS' RULING DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY INCONSISTENT WITH OUR NATION'S TRADITION OF PROTECTING CONSCIENTIOUS OBJECTIONS TO THE TAKING OF HUMAN LIFE.

The court of appeals' decision stands at odds not only with free exercise principles, but with the nation's commitment to conscience protections. Washington is the only state that currently prohibits conscience-based referrals by pharmacists. App. 121a-122a. As the district court recognized, both the national and state pharmacy associations endorse the right to refer based on considerations of conscience. App. 120a.

The regulations are also dramatically out of step with the well-established conscience protections our nation provides those who object, for religious or moral reasons, to participating in the taking of human life, including abortion. Pet. 38. Petitioners believe that a

distinct human life begins when a sperm fertilizes an egg. Pet. 6; App. 51a. Accordingly, they believe it is immoral to facilitate any act that causes the death of a human embryo, and they object to stocking or dispensing any drug, such as *ella* and Plan B, that would prevent implantation of an embryo. These very beliefs, of course, were at issue in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). There this Court emphasized that for such religious believers to facilitate action that "may result in the destruction of an embryo" is to "engage in conduct that seriously violates their religious beliefs." *Id.* at 2775.

Petitioners' objections fit within the tradition of broadly protecting those who object to participating in abortion or other forms of taking human life. This tradition confirms that Washington's requirement – by forcing pharmacies and pharmacists to be involved in acts that may destroy a human embryo – imposes a severe burden on their conscience. See *Hobby Lobby*. And the tradition reflects a national judgment that there is not a sufficiently compelling interest to override the severe burden on conscience.

Finally, federal and state laws show that conscientious objections to facilitating abortions are protected especially broadly. Such accommodations reach commercial actors and actions beyond direct performance of abortion.

A. Our Laws Treat the Right Not to Participate in Taking a Human Life as a Fundamental Matter of Conscience.

Our nation – as any nation committed to civil liberty would – protects those who believe that their action would immorally contribute to the taking of a human life. And Washington itself specifically protects pharmacists' right to refuse to dispense drugs for abortions or assisted suicide.

The "right to refuse to take a human life over a sincere religious or moral objection" has "been consistently protected for health care practitioners in the context of abortion, abortifacient drugs, assisted suicide, and capital punishment," as well as for conscientious objectors to military service. App. 253a; see Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121, 147-48 (2012) ("government efforts to ensure that unwilling individuals are not forced to engage in what they believe to be killings" have been "systematic and all encompassing").[3]

Pharmacists share fully in these rights of conscience. Every other state would permit the conscience-based referrals involved here, and national and state pharmacy associations endorse them. See

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[3] Protections for conscientious objectors to military service, see 50 U.S.C. § 456(j), go back to the nation's founding. The federal government and eleven states protect individuals against being forced to participate in capital punishment. Rienzi, *supra*, at 139.

supra p. 14. Washington itself, in its Death with Dignity Act, specifically protects unwilling pharmacies and pharmacists from having to dispense medicine for an assisted suicide. RCW 70.245.190. Washington also protects pharmacists under its protection for those who refuse to participate in abortions. RCW 9.02.150 ("No person may be discriminated against in employment or professional privileges because of the person's participation or refusal to participate in the termination of a pregnancy."). This protection confirms that it is entirely reasonable for pharmacists to believe themselves morally responsible for the medications they dispense.[4] Yet, as the district court found, Board witnesses who affirmed pharmacists' conscience right concerning assisted suicide (App. 121a) refused to extend the right to the case of early-abortifacient drugs.

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[4] Indeed, the American Pharmacists Association recently adopted a policy discouraging its members from providing medications for executions because such acts are "fundamentally contrary to the role of pharmacists as providers of health care." Eyder Peralta, *Pharmacists Group Votes To Discourage Members From Providing Execution Drugs*, National Public Radio (Mar. 30, 2015), http://www.npr.org/sections/thetwo-way/2015/03/30/396419514/pharmacists-group-votes-to-discourage-members-from-providing-execution-drugs (accessed Jan. 24, 2016).

See also *Ward v. Polite*, 667 F.3d 727, 735, 739 (6th Cir. 2012) (noting the American Counseling Association's code of ethics allows conscience-based referrals when a counselor chooses not to work with terminally ill clients who are considering end-of-life options, because this involves "weighty 'personal' and 'moral' issues").

Protections for those conscientiously opposed to participating in abortions are particularly widespread and strong. Such protections pre-date *Roe v. Wade*, 410 U.S. 113 (1973): states that liberalized their abortion laws before *Roe* "included explicit conscience protections for individuals and institutions in the [liberalization] statutes" or in separate laws. Mark L. Rienzi, *The Constitutional Right Not to Participate in Abortions:* Roe, Casey*, and the Fourteenth Amendment Rights of Healthcare Providers*, 87 Notre Dame L. Rev. 1, 30-31 & n.142 (2011). In announcing constitutional abortion rights in *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973), this Court simultaneously endorsed conscience protections. *Doe*, 410 U.S. at 197-98 (noting that Georgia statute in question had provisions "to afford appropriate protection to the individual and to the denominational hospital" and "the hospital is free not to admit a patient for an abortion").

Soon after *Roe*, Congress passed the Church Amendment of 1973, which protects federally funded entities and their personnel from having to perform or provide facilities for abortions or sterilization against their "religious beliefs or moral convictions." 42 U.S.C. § 300a-7. The Amendment also protects health-care personnel against discrimination by their employers for such refusals. *Id*. Similar conscience clauses have been enacted in other federal laws and, as of 2007, in 47 states. James T. Sonne, *Firing Thoreau: Conscience and At-Will Employment*, 9 U. Pa. J. Lab. & Emp. L. 235, 269-71 (2007). Every one of the 47 states protects provider conscience

concerning abortion, and the abortion provisions "are remarkable" in, among other things, "the range of persons covered." *Id*.

"These [abortion-conscience] protections exten[d] not only to direct personal performance of an abortion, but more broadly to providers who have an objection to being forced to 'participate,' 'refer,' 'assist,'" or facilitate in other ways concerning abortion. Rienzi, 87 Notre Dame L. Rev. at 34. The Hyde-Weldon Amendment, included in yearly appropriations acts, prohibits federal funds for the HHS and Labor departments from being "made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Consolidated Appropriations Act, 2012, § 507(d)(1), Pub. L. No. 112-74, 125 Stat. 786 (2011). The protected entities include many engaged in commerce, including hospitals, health insurance plans, and health maintenance organizations. *Id.* § 507(d)(2). The Affordable Care Act contains parallel protections. 42 U.S.C. § 18023(b)(4) ("[n]o individual health care provider or health care facility," including commercial entities, may be discriminated against because of a religiously or morally based refusal "to provide, pay for, provide coverage of, or refer for abortions").

Federal law also protects federally funded entities from sex-discrimination challenges for refusing

"to provide or pay for any service, including the use of facilities, related to an abortion." 20 U.S.C. § 1688. It protects "any health care entity," including an individual, from discrimination by federal or state governments for refusing to provide training, undergo training, or refer someone for training, in performing abortions. 42 U.S.C. §§ 238n(a), 238n(c)(2). It prohibits the use of legal aid funds to assist any proceeding or litigation that seeks "to compel any individual or institution" to perform, assist with, or provide facilities for an abortion in violation of religious or moral convictions. 42 U.S.C. § 2996f(b)(8). And it protects various health plans and providers from having to provide or cover counseling or referral concerning a service if they object to the provision of such service on moral, ethical, or religious grounds. 42 U.S.C. § 1396u-2(b)(3)(B); 42 U.S.C. § 1395w-22(j)(3)(B); 48 C.F.R. § 1609.7001(c)(7).

These provisions extend to a broad range of entities, including commercial actors, and a broad range of actions beyond direct participation in an abortion. They reflect the nation's judgment that the burden on conscience for one forced to participate in an abortion is severe, and that the government seldom if ever has an interest in access to abortion strong enough to justify imposing this burden.

B. Petitioners Fit Within the Tradition of Protecting Conscientious Objections to the Taking of Human Life.

Petitioners fit within this strong tradition of protecting conscientious objections – including pharmacists' objections – to the taking of human life. They have concluded that dispensing the drugs in question may terminate the life of a distinct, even if very new, human person. Their claim of conscience merits the same sympathy and protection as others involving the taking of human life.

As the court of appeals noted – in discussing a different legal issue – here "the parties do not agree that a life is at stake." App. 45a. But this dispute is irrelevant to petitioners' free exercise claim and does not weaken its force.[5]

1. Petitioners' belief that a distinct, protected human life begins at fertilization requires judicial deference.

Like millions of Americans, petitioners believe that a distinct human life begins at fertilization. Thus they believe it is deeply immoral to knowingly facilitate an

[5] The court of appeals made its comments in the course of holding that petitioners had no *substantive due process right* of non-participation in taking a life. App. 45a-48a. The reasons for rejecting that claim have no application to petitioners' free exercise claim.

act that destroys a human embryo by preventing its implantation in the uterus.

Plainly, under the Free Exercise Clause the courts may not question the validity of that religiously grounded moral view.[6] As this Court held in *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981), whether a law conflicts with a claimant's religious belief "is not to turn upon a judicial perception of the particular belief or practice in question"). See also *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2778 (2014) ("federal courts have no business answering" the question "whether the religious belief asserted in a RFRA case is reasonable," and "[f]or good reason, we have repeatedly refused to take such a step"). Clearly, for free exercise purposes, petitioners' belief must be taken as given.

2. Petitioners' reasonable judgment that the drugs pose an unacceptable risk of destroying an embryo after fertilization also deserves deference.

Petitioners' belief also includes the judgment that the drugs pose a risk of terminating a new embryo – a risk sufficiently great that it is immoral to facilitate

[6] Petitioners' understanding of the commencement of a distinct life is well supported by embryology. See Brief *Amicus Curiae* of American Association of Pro-Life Obstetricians & Gynecologists, *et al.*, at 8-15 ("AAPLOG Brief"). Our point is simply that courts may not constitutionally second-guess their claim on this issue.

their use. This judgment has a factual component concerning how the drugs actually operate, but it also contains a moral component – a judgment concerning the level of risk that makes petitioners complicit in the destruction of human life. When there is a risk that the medications can operate by destroying an embryo – as is undisputed here – the religious objector must receive deference on the moral judgment of how much risk triggers unacceptable complicity.

Objectors such as plaintiffs weigh the risk in the light of the seriousness with which they view the intentional termination of embryonic life. Such weighing is common in religious and moral analyses of "cooperation with evil." For example, Catholic moral teaching emphasizes that "'it is important to recognize just how serious abortion is when considering whether there are proportionate (i.e., very serious) reasons'" that warrant calling an action "remote" (i.e., permissible) cooperation with abortion rather than "proximate" (impermissible) cooperation. Paul Loverde and Francis DiLorenzo, *The Voter's Responsibility*, 35 Origins CNS Documentary Service 370, 371 (2005) (statement of Catholic bishops of Virginia) (quoted in Gregory A. Kalscheur, S.J., *Catholics in Public Life: Judges, Legislators, and Voters*, 46 J. Cath. Leg. Stud. 211, 237 (2007)).

It is common sense for an objector to consider the magnitude of harm in determining what risk is acceptable. A pacifist forced to serve in a military unit is substantially burdened even if the likelihood that he or she will kill someone is relatively low. A person

forced to fire a loaded gun at another individual is substantially burdened even if most of the chambers are blanks. Deference to the religious objector's judgment about the gravity of the wrong requires that the court give the objector great deference in determining what risk of the harm's occurrence is morally unacceptable.

Moreover, there is a reasonable basis for concluding that the emergency contraceptives can have embryo-terminating effects. Petitioners draw their conclusion from objective evidence, which was included in the record. SER 1508-55. The Food and Drug Administration's labeling information on both *ella* (ulipristal acetate) and Plan B (levonorgestrel) states that although the primary mechanism for preventing pregnancy is inhibition or delay of ovulation, "[a]lterations to the endometrium that may affect implantation may also contribute to efficacy."[7] Indeed, as this Court in *Hobby Lobby* noted, the federal government there "acknowledge[d]" that these drugs "may result in the destruction of an embryo." 134 S. Ct. at 2775 (quoting Brief for Petitioner, No. 13-354, at 9 n.4)). Likewise, the state has not contested the issue

[7] Ella Full Prescribing Information, 12.1 (updated Mar. 2015), available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2015/022474s007lbl.pdf; see also Plan B One-Step Full Prescribing Information, 12.1 (rev. July 2009), available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021998lbl.pdf (stating that Plan B is believed to act principally by preventing ovulation or fertilization; "[i]n addition, it may inhibit implantation (by altering the endometrium)").

here. Petitioners thus have a reasonable basis for their objection. On a matter as grave as the risk of terminating human life, the objector is entitled to take seriously the government's statements that the risk exists.

With respect to *ella* (ulipristal) in particular, petitioners clearly have ample reason for their judgment. Ulipristal is a selective progesterone receptor modulator (SPRM); as such it is structurally similar and "has similar biological effects to mifepristone, the antiprogestin used in medical abortion."[8] Although *ella* involves lower doses of mifepristone than does RU-486, the so-called abortion pill, the record of the FDA's approval for *ella* contains multiple statements that when administered after ovulation, the drug affects the endometrium in a way that could prevent implantation of a fertilized embryo. For example, the background document for the FDA advisory committee on *ella* states that "[a]dministration of ulipristal in the luteal phase [of the menstrual cycle] also alters the endometrium."[9] As one member of the FDA's advisory committee stated: "I'll even concede that the

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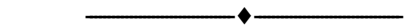
[8] Giuseppe Bernagiano & Helena von Hertzen, *Towards More Effective Emergency Contraception?*, 375 The Lancet 527, 527 (Feb. 13, 2010).

[9] See FDA, Background Document for Meeting of Advisory Committee for Reproductive Health Drugs, FDA Advisory Committee Materials, NDA 22-474 (Ella), at 11-12 (June 17, 2010), available at http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/ReproductiveHealthDrugsAdvisoryCommittee/UCM215425.pdf.

primary mechanism of action might be delayed ovulation, but not in this group that's five days out from unprotected intercourse. . . . I can't imagine how we can put all of these numbers together to say that delayed ovulation explains this continued efficacy [at five days]."[10]

With respect to Plan B, although some scientific studies have concluded that it does no more than prevent conception,[11] other studies, as well as the FDA's labeling and statements, say that it may act after fertilization (see *supra* p. 24; AAPLOG Br., *supra* n.6, at 18-27), and the state has not contested these statements.

Petitioners therefore have made a moral judgment, based on objective evidence, that *ella* and Plan B create unacceptable risks of destroying embryos. Forcing petitioners to stock and dispense these drugs would impose a severe burden entirely out of step with this nation's tradition of protecting those who in good conscience believe they would be wrongly taking a human life.



[10] FDA, Transcript of Proceedings, Advisory Committee on Reproductive Health Drugs 160, 164 (June 17, 2010) (statement of Dr. Scott Emerson), available at http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/ReproductiveHealthDrugsAdvisoryCommittee/UCM218560.pdf.

[11] See, e.g., Sandra E. Reznik, '*Plan B': How It Works*, Health Progress, Jan.-Feb. 2010, at 59, available at http://www.chausa.org/docs/default-source/health-progress/hp1001k-pdf.pdf?sfvrsn=0.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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February 4, 2016

APPENDIX

DETAILED STATEMENTS OF INTEREST OF *AMICI CURIAE*

Founded in 1961, the **Christian Legal Society** (CLS) is an association of Christian attorneys, law students, and law professors, with attorney chapters nationwide and law student chapters at nearly 90 law schools. CLS's advocacy arm, the Center for Law and Religious Freedom, works to defend religious liberty and the sanctity of human life in the courts, legislatures, and the public square. CLS believes that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected.

Democrats for Life of America (DFLA) is the preeminent national organization for pro-life Democrats. DFLA believes that the protection of human life is the foundation of human rights, authentic freedom, and good government. These beliefs animate DFLA's opposition to abortion, euthanasia, capital punishment, embryonic stem cell research, poverty, genocide, and all other injustices that directly and indirectly threaten human life. DFLA shares the Democratic Party's historic commitments to supporting women and children, strengthening families and communities, and striving to ensure equality of opportunity, reduction in poverty, and an effective social safety net that guarantees that all people have sufficient access to food, shelter, health care, and life's other basic necessities. DFLA has been distinctively

committed to supporting both strong health care programs and the protection of the conscience of pro-life service providers: DFLA supported the Affordable Care Act and also filed an amicus brief supporting the religious freedom claims in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

World Vision, Inc., is a Christian humanitarian organization that, for over 65 years, has been working with children, families, and their communities in nearly 100 countries to reach their full potential by tackling the causes of poverty and injustice. As a faith-based, pro-life, non-profit corporation incorporated in California and headquartered in Washington (State), World Vision has a direct and substantial interest in the correction of the Court of Appeals' erroneous application of the Free Exercise of Religion clause in this case.

The **National Hispanic Christian Leadership Conference-CONEL** (NHCLC-CONEL) is the National Hispanic Evangelical Association. As the largest Latino Christian organization in America, it leads millions of Hispanic Born Again Christ followers via its 40,118 Evangelical congregations in the United States and 400,000 congregations throughout Latin America. It provides leadership, networking, fellowship, strategic partnerships and public policy advocacy platforms to its seven directives: Life, Family, Great Commission, Stewardship, Education, Youth and Justice.

The **Association of Christian Schools International** (ACSI) is a nonprofit, non-denominational, religious association providing support services to 24,000 Christian schools in over 100 countries. ACSI serves 3,000 Christian preschools, elementary, and secondary schools and 90 post-secondary institutions in the United States. Member-schools educate some 5.5 million children around the world, including 825,000 in the U.S. ACSI accredits Protestant pre-K-12 schools, provides professional development and teacher certification, and offers member-schools high-quality curricula, student testing and a wide range of student activities. ACSI members advance the common good by providing quality education and spiritual formation to their students. Our calling relies upon a vibrant Christian faith that embraces every aspect of life. This gives ACSI an interest in ensuring expansive religious liberty with strong conscience protections.

The **Institutional Religious Freedom Alliance** (IRFA), founded in 2008 and now a division of the Center for Public Justice, a nonpartisan Christian policy research and citizenship education organization, works to protect the religious freedom of faith-based service organizations through a multi-faith network of organizations to educate the public, train organizations and their lawyers, create policy alternatives that better protect religious freedom, and advocate to the federal administration and Congress on behalf of the rights of faith-based services.

The **American Association of Christian Schools** (AACS) serves over 800 Christian schools and their students through a network of thirty-eight state affiliate organizations and two international organizations. The AACS fully supports programs based on the core values of diversity, individual choice, and religious liberty.