Nos. 12-35221, 12-35223

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, Secretary of the Washington State Department of Health, et al.,
Defendants-Appellants,

and **JUDITH BILLINGS**, et al.,
Intervenors-Appellants.

Appeal from the United States District Court
for the Western District of Washington, No. CV-07-05374-RBL

Brief of Amicus Curiae Americans United for Separation of Church and State, in Support of Defendants-Appellants, Seeking Reversal

---

Ayesha N. Khan
Alex J. Luchenitser
Benjamin N. Hazelwood*
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1301 K Street NW, Suite 850E
Washington, DC 20005
Phone: (202) 466-3234
Fax: (202) 898-0955
khan@au.org/luchenitser@au.org
** Admitted in New York only. Supervised by Ayesha N. Khan, a member of the D.C. Bar.*

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Americans United for Separation of Church and State is a 501(c)(3) nonprofit corporation. Americans United has no corporate parent, and no publicly held corporation owns any part of it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

AUTHORSHIP AND FUNDING OF BRIEF

No party's counsel authored any part of this brief, and no person other than amicus curiae contributed money intended to fund the preparation or submission of this brief.

AUTHORITY TO FILE

All parties have consented to the filing of this brief.

IDENTITY AND INTERESTS OF AMICUS CURIAE

Americans United for Separation of Church and State is a national, nonsectarian, public-interest organization dedicated to defending the constitutional principles of religious liberty and separation of church and state. We represent more than 120,000 members, supporters, and activists across the country, including thousands who reside in this Circuit. Since our founding in 1947, we have regularly served as a party, as counsel, or as an amicus curiae in scores of church-state cases before the U.S. Supreme Court, this Court, and other federal and state courts nationwide.

One of Americans United's principal goals is to protect the rights of individuals to hold and practice the religious beliefs of their choice without interference by the government. We have advocated for such rights as counsel and amicus in many cases, including suits by prison inmates to protect their rights to worship (*see Sossamon v. Texas*, 131 S. Ct. 1651 (2011); *Cutter v. Wilkinson*, 544 U.S. 709 (2005)), by a public-school student to be permitted to wear his hair in accordance with the tenets of his religion (*see A.A. ex rel. Betenbaugh v. Needville Independent School District*, 611 F.3d 248 (5th Cir. 2010)), by a church

to be allowed to engage in its religious rituals without being prosecuted under the nation's drug laws (*see Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006)), and by survivors of fallen war veterans of minority faiths to be given the same level of recognition on government-issued burial markers as provided to adherents of more established faiths (*Circle Sanctuary v. Nicholson*, No. 06-C-0660-S (E.D. Wis. Nov. 13, 2006)).

But Americans United does not believe that the Free-Exercise Clause of the First Amendment should be used as a sword to impose the beliefs of one faith upon those who do not share the faith. That curtails religious freedom instead of advancing it — and is exactly what the district court's ruling would do here. For this reason, we file as amicus in support of reversal.

SUMMARY OF ARGUMENT

The Washington State regulatory scheme at issue strikes a careful, appropriate balance between the religious freedom of pharmacists and that of their patients. Individual *pharmacists* are given the right to decline to fill prescriptions if doing so would be contrary to their personal religious or moral beliefs. But *pharmacies*

receive no such right to opt out. The regulatory scheme thus prevents an individual pharmacist's religious beliefs from being foisted onto a patient who may hold quite different beliefs.

In ruling Washington's regulations unconstitutional, the district court either misapplied or misunderstood Free-Exercise case-law in a manner that would allow the religious beliefs of some to invade the rights of others, not just here but in many other contexts. The legal principles suggested by the district court could allow religious groups to flout laws which protect children from being exploited as laborers, which enable government bodies to raise sufficient revenue to function, and which ensure that employers hire persons who are in the country legally.

In particular, the district court made three critical errors. First, the court incorrectly ruled that exemptions in Washington's regulations trigger heightened scrutiny. But such scrutiny generally results only from exemptions which reflect individualized, discretionary decision-making by public officials that can easily be abused to discriminate against religious actors. The exemptions here are not individualized — they are narrow, categorical exemptions for objectively defined

situations. And though some courts have held that even categorical secular exemptions can trigger heightened scrutiny if they undermine the governmental interests underlying a law in the same manner that a religious objection would, the exemptions here ultimately advance Washington's interest in enhancing patients' ability to access medications, while a religious exemption for pharmacies would only undermine such access.

Second, the district court went astray in determining that the regulations have been selectively enforced against religious pharmacies. In fact, the record shows that the Washington Board of Pharmacy has only taken disciplinary actions under the regulations as a result of objections that had nothing to do with religion. Moreover, while the Board has opened an investigation that might result in future discipline against a religious objector, most of the Board's investigations under the regulations have concerned non-religious objections. The district court appeared to take issue with the Board's practice of initiating investigations only in response to complaints, rather than affirmatively scouring the state for violations of the regulations. Case-law makes

clear, however, that a complaint-based enforcement process is not unconstitutional "selective enforcement."

Third, even if this Court were to conclude for some reason that the circumstances at bar warrant scrutiny higher than rational-basis, the Court should not apply strict scrutiny, but should instead apply a balancing analysis similar to that used by the Supreme Court in *Locke v. Davey*, 540 U.S. 712 (2004). In that case, the Supreme Court upheld a Washington State law that prohibited the use of state scholarships for study toward a theology degree, because the law did not impose a significant burden on religious practice, accommodated religion by funding many other kinds of religious study, and was motivated not by hostility toward religion but by an important state interest in separating church and state. Likewise, the regulations here are constitutional because they impose little burden on religious practice, accommodate the religious objections of individual pharmacists, and are not motivated by hostility toward religion but by an important — indeed, compelling — governmental interest in ensuring that patients can obtain medications in a timely manner.

ARGUMENT

I. The exemptions to the Board's rules do not trigger heightened scrutiny.

A. The exemptions are categorical, not individualized.

A law that applies equally to religious and nonreligious conduct ordinarily does not trigger heightened scrutiny under the Free-Exercise Clause. *See, e.g.*, *Employment Division v. Smith*, 494 U.S. 872, 878–79 (1990). But if an otherwise generally applicable law has exemptions that require "individualized governmental assessment of the reasons for the relevant conduct," such exemptions can lead to heightened scrutiny. *See id.* at 884. For individualized exemptions can allow government officials to "devalue[ ] religious reasons . . . by judging them to be of lesser import than nonreligious reasons," and to thereby "single[ ] out" "religious practice" "for discriminatory treatment." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537–38 (1993).

In *Lukumi*, for example, a Santeria church that used animal sacrifice in its worship challenged a city ordinance that banned most killings of animals, but exempted killings that were deemed "necessary." *Id.* at 537. The Supreme Court struck down the statute, in

part because it "require[d] an evaluation of the particular justification for the killing [and thus] represent[ed] a system" of individualized exemptions. *Id.* In *Blackhawk v. Pennsylvania*, 381 F.3d 202, 205, 209–12 (3d Cir. 2004) (Alito, J.), the Third Circuit held that a state could not constitutionally deny a religious exemption from a law requiring citizens to obtain a permit to own an exotic animal, because the law granted discretionary exemptions for "hardship" and "extraordinary circumstances." And in *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298–99 (10th Cir. 2004), the Tenth Circuit held that if a university granted students discretionary, individualized exemptions from curricular requirements, it also had to grant a Latter Day Saint student a religious exemption from an acting-class exercise that required her to curse.

On the other hand, when a law contains exemptions that are categorical, not individualized, the law generally does not trigger heightened scrutiny under the Free-Exercise Clause. For instance, in *American Friends Service Committee v. Thornburgh*, 961 F.2d 1405, 1408 (9th Cir. 1992), this Court rejected a religious group's challenge to an immigration law that exempted "independent contractors, household

employees, and employees hired prior to November 1986" from a requirement that employers check the immigration status of their employees. The Court explained that the exemptions were "objectively-defined" and did not call for individualized governmental assessments. *See id.* at 1408–09. Similarly, in *Swanson ex rel. Swanson v. Guthrie Independent School District No. I-L*, 135 F.3d 694, 697, 701 (10th Cir. 1998), the Tenth Circuit found no constitutional flaw in a school-district policy that exempted only special-education students and fifth-year seniors from a general prohibition on students attending school part-time. The school district was not required to grant an exemption to an individual who was home-schooled for religious reasons, because the existing exemptions were for "strict categories of students" and did not "give rise to the application of a subjective test." *Id.*

Even though exemptions such as these require some individual evaluation of a person's eligibility for them, they remain permissible because the decision-maker is given a clear standard and there is little risk of discrimination against religious applicants. "While of course it takes some degree of individualized inquiry to determine whether a person is eligible for even a strictly defined exemption, that kind of

limited yes-or-no inquiry is qualitatively different from the kind of case-by-case system [questioned] by the *Smith* Court." *Axson-Flynn*, 356 F.3d at 1298. Heightened scrutiny under the Free-Exercise Clause is not triggered, for example, by the need for a city to hold a hearing to determine whether a religious applicant is eligible for an objectively defined non-religious exemption to a zoning law. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 654–55 (10th Cir. 2006).

The exemptions to the Washington regulations are similar to the categorical exemptions upheld, not to the individualized exemptions struck down, in the cases cited above. The delivery rule requires that all pharmacies fill valid prescriptions "except for the following or substantially similar circumstances: (a) [p]rescriptions containing an obvious or known error . . . (b) [n]ational or state emergencies . . . (c) [l]ack of specialized equipment or expertise . . . (d) [p]otentially fraudulent prescriptions; or (e) [u]navailability of drug despite good faith compliance with [the stocking rule]." Wash. Admin. Code § 246-869-010(1). The delivery rule also does not "require[ ] pharmacies to deliver a drug or device without payment." *Id.* § 246-869-010(2).

When it overturned the district court's preliminary injunction, this Court reviewed all these exemptions and held that they did not trigger heightened scrutiny. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1134–35 (9th Cir. 2009). Even if the law-of-the-case and law-of-the-circuit doctrines leave room for re-examination of this conclusion, it was plainly correct, for the exemptions are clearly, objectively defined, and do not call for any kind of individualized assessment that can lead to discrimination against religious objectors.

The district court made much hay of the delivery rule's exemption for "substantially similar circumstances" as the five enumerated exemptions. *See* ER 40. The five exemptions are so narrowly defined, however, that extending them to "substantially similar circumstances" does not give significant discretion to government decision-makers, and certainly not the kind of discretion that can be abused to discriminate against religious objectors in favor of secular ones. Indeed, there is no evidence in the record that the "substantially similar circumstances" language has ever been relied upon to broaden any of the five enumerated exemptions to which it relates.

The district court claimed that the provision in Subsection (2) of the delivery rule that "[n]othing in this section requires pharmacies to deliver a drug or device without payment" had been extended — based on the "substantially similar circumstances" language — to "allow pharmacies to refuse to deliver a drug because [they] do[ ] not accept a patient's particular insurance or because [they] do[ ] not accept Medicare or Medicaid." ER 16. But the "substantially similar circumstances" language could not have been so used, because it appears in Subsection (1) of the rule and does not even apply to Subsection (2). In any event, refusals to deliver based on a lack of proper insurance are authorized by the text of Subsection (2) itself, for if a pharmacy does not accept a patient's insurance, and the patient cannot otherwise pay for the drug, the pharmacy has no means of obtaining payment.

The district court further erred by concluding that the exemptions to the stocking rule are "largely individualized." *See* ER 39. The district court relied on purported unwritten exemptions that allow "a pharmacy [to] decline to stock a drug . . . [1] because the drug falls outside the pharmac[y's] chosen business niche . . . [2] the drug has a short shelf

life; [3] the drug is expensive; [4] the drug requires specialized training or equipment; [5] the drug requires compounding; [6] the drug is difficult to store; [7] the drug requires the pharmacy to monitor the patient or register with the manufacturer; [8] the drug has an additional paperwork burden; or [9] . . . the pharmacy has a contract with a supplier of a competing drug." ER 37. The court also noted that "[p]harmacies regularly decline to stock oxycodone, cough medicine, and Sudafed due to concerns that such drugs would make the pharmacy a target for crime." *Id.*

To begin with, the record does not even support the existence of some of the alleged exemptions pointed to by the district court, such as the alleged exemptions for drugs that are too expensive and drugs that could attract criminals. *See* Intervenor-Appellants' Brief at 20–22, 54. The district court's conclusion that the exemptions exist was apparently based primarily on hypothetical questions posed at trial to persons who did not, as individuals, have authority to take action on behalf of the Board. *See id.*; State-Appellants' Brief at 14–15, 28–29. Moreover, this Court has already held that exemptions such as the ones listed by the district court do not trigger heightened scrutiny, noting, "[n]or can

every single pharmacy be required to stock every single medication that might possibly be prescribed, or to maintain specialized equipment that might be necessary to prepare and dispense every one of the most recently developed drugs." *See Stormans*, 586 F.3d at 1135.

In any event, to the extent the exemptions do exist and consideration thereof is not foreclosed by the law of the case or the circuit, there is no basis to conclude that the exemptions are individualized, not categorical. The exemptions simply lay out objectively verifiable situations in which a pharmacy could choose not to stock a drug. They do not require subjective inquiries into "the reasons for the relevant conduct." *Cf. Lukumi*, 508 U.S. at 537. There is no opportunity to devalue religious motives when an exemption is conditioned on whether a pharmacy is devoted to providing a particular class of specialized medicines, whether a pharmacy has sufficient equipment to store a particular drug, or whether a pharmacy is contractually obligated to stock only a particular brand of medication, for example.

The district court also concluded that the stocking rule has individualized exemptions because the Board must "make an

individualized determination of who is a 'patient' before it can determine whether a pharmacy has violated the rule." ER 39. But "that kind of limited yes-or-no inquiry is qualitatively different from the kind of case-by-case system" that triggers heightened scrutiny under the Free-Exercise Clause. *See Axson-Flynn*, 356 F.3d at 1298. Indeed, the term "patient" is clearly defined in the Board's pharmacy regulations as "an individual who receives health care from a health care provider." Wash. Admin. Code § 246-16-020(5); *see also, e.g.*, *id.* § 246-860-020(5).

B. Third Circuit case-law holding that even categorical exemptions sometimes trigger heightened scrutiny does not support such a result here.

The district court not only mistakenly concluded that the exemptions here are individualized, but it also misapplied *Fraternal Order of Police Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.) — which holds that even categorical exemptions can trigger heightened scrutiny in some instances — to decide that the exemptions to the Board's rules lead to strict scrutiny even if it is acknowledged that the exemptions are categorical. ER 40. In *Fraternal Order*, based on an interest in "fostering a uniform appearance," a police department prohibited police officers from wearing beards. 170

F.3d at 366. The policy exempted officers with medical conditions that necessitated growing a beard, as well as undercover officers. *See id.* at 360, 366. A group of Muslim officers sued for an exemption to allow them to wear beards in accordance with the requirements of their religion. *See id.* at 360–61.

The Third Circuit concluded that the medical exemption triggered heightened scrutiny because it "undermine[d] the Department's interest in fostering a uniform appearance" to the same extent that a religious exemption would. *Id.* at 366. The decision to exempt beards worn for medical reasons but not ones worn for religious causes evinced a "value judgment that secular . . . motivations for wearing a beard are important . . . but that religious motivations are not." *Id.* On the other hand, the exemption for undercover officers did not support heightened scrutiny; it did not undermine the department's interest in maintaining uniformity because "undercover officers obviously are not held out to the public as law enforcement personnel." *Id.* (quotation marks omitted).

In other words, "the relevant comparison for purposes of a Free Exercise challenge . . . is between its treatment of certain religious

conduct and the analogous secular conduct that *has a similar impact on the regulation's aims*." *Lighthouse Institute for Evangelism v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007). For example, in *Smith*, 494 U.S. at 874, 890, the Supreme Court upheld a state drug law against a challenge by religious objectors even though the law had an exemption for lawful prescriptions. That exemption "did not undermine the purpose of the state's drug laws" — protection of "public health and welfare" — because lawfully prescribed substances are not expected to harm a state's citizens. *See Blackhawk*, 381 F.3d at 211. By contrast, in *Blackhawk*, the Third Circuit mandated a religious exemption from a law requiring a permit to own exotic animals, partly because the law contained categorical exemptions for zoos and circuses. *See id.* The court concluded that those exemptions undermined the state interests at issue — raising money and "discourag[ing] the keeping of wild animals in captivity" — in the same way that a religious exemption would. *Id.*

The exemptions from the delivery and stocking rules here further the Board's interests in ensuring timely and safe access to lawfully prescribed medications. For this reason, the exemptions listed by the

district court (without record support in some instances, *see supra* at 12) have already been found not to trigger heightened scrutiny by this Court, or are substantially similar to those that this Court so analyzed. *See Stormans*, 586 F.3d at 1134–35. The Court explained that "the absence of these exemptions would likely drive pharmacies out of business or, even more absurdly, mandate unsafe practices." *Id.*

For instance, filling prescriptions that contain an obvious error or appear fraudulent could easily harm patient safety. Requiring specialty pharmacies that focus on medications that are not commonly available — such as pharmacies that specialize in cancer medicines or fertility medicines — to also stock medications outside their fields could make it economically infeasible for them to stay in business and thereby hinder patient access to needed medicines. And requiring pharmacies to stock oxycodone in high-crime areas could undermine both patient safety and access by making the pharmacies vulnerable to robbery (and, possibly as a result, closure).

To support its conclusion that the exemptions undermine patient access and safety, the district court pointed to only two specific exemptions. ER 41. First, the court asserted that "[p]atient access is not

increased when a pharmacy is exempted from the stocking rule because it made an advantageous contract with a competing drug manufacturer." *Id.* But a pharmacy that contracts to sell a particular brand of medicine is still meeting its patients' needs for that medicine. The district court also stated that "[p]atient access is not increased when a pharmacy is exempted from the delivery rule because it chooses not to accept certain insurance." *Id.* But "[n]obody could seriously question a refusal to fill a prescription because the customer did not pay for it," and forcing pharmacies to accept insurance that would make them unprofitable could cause numerous pharmacies to go out of business. *See Stormans*, 586 F.3d at 1135.

On the other hand, as the district court acknowledged (ER 38), allowing religious and other personal exemptions to the delivery and stocking rules would unquestionably undermine patient access to medicines. At best, a patient could be forced to find another pharmacy. At worst, a patient could fail to obtain a needed medication in time.

These are not mere hypotheticals. Some Washington pharmacists have already imposed their religious beliefs upon their patients, inflicting great personal harm upon them as a result. One woman

became pregnant after she was raped and several pharmacies refused to provide her with emergency contraception. ER 899. Another woman was forced to undergo surgery for a miscarriage after a pharmacy refused to fill a prescription that would have allowed the miscarriage to be passed through non-surgical means. ER 1214–21.

C. Under the district court's approach, the existence of any secular exemption would create a right to a religious exemption.

The district court's interpretation of the case-law would seem to mandate religious exemptions from all laws that contain secular exemptions. It appears that the district court wrongly read *Fraternal Order*, 170 F.3d 359, as holding that secular categorical exemptions generally create a right to religious exemptions. *See* ER 40. The district court even concluded that the mere need for the Board to apply the definition of "patient" when enforcing the stocking rule creates an individualized exemption to that rule. ER 39.

The district court's broad interpretation of the law would lead to absurd results that conflict with decisions of the Supreme Court and this Court. For example, contrary to the Supreme Court's holding in *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905), the district court's reasoning would seem to require religious exemptions from compulsory

immunization laws that have an exemption for children who are medically unfit to be vaccinated. The district court's views would also mandate religious exemptions from compulsory minimum-wage and child-labor laws, because such laws exclude employees who make the bulk of their income from tips or family farms. *But see Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 792 (9th Cir. 2005) ("[t]he First Amendment does not exempt religious institutions from laws that regulate the minimum wage or the use of child labor"). Ultimately, the district court's position would eviscerate the principle, pronounced by the Supreme Court in *United States v. Lee*, 455 U.S. 252, 261 (1982), that when "followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."

II. The Board's enforcement of its rules does not trigger heightened scrutiny.

The district court also concluded that strict scrutiny was warranted on the grounds that the Board failed to enforce its rules in a uniform manner. ER 44–54. But differential enforcement of a law triggers heightened scrutiny under the Free-Exercise Clause only when

the government's enforcement decisions are aimed at suppressing a particular religious practice. The record here does not support any such finding, for the Board has neutrally exercised its investigatory and enforcement powers based on receipt of complaints, without regard to whether an alleged violation of the rules was motivated by religion. The district court's analysis of this issue seems to be based on the assumption that any failure by a government body to enforce a law against all violators of whom it is aware creates a right to a religious exemption from that law — a view that would lead to further outlandish results, as few laws can be enforced so comprehensively.

A. Complaint-driven enforcement is not "selective enforcement."

The Supreme Court has emphasized that "the decision to prosecute is particularly ill-suited to judicial review." *Wayte v. United States*, 470 U.S. 598, 607 (1985). Investigators take into account a variety of considerations when determining whether to bring an enforcement action, including whether the prosecution will deter future violators, the strength of the case, and how the individual case fits the government's overall enforcement scheme. *See id.* Thus, courts defer to enforcement decisions unless they are "'deliberately based upon an

unjustifiable standard such as . . . religion.'" *Id.* at 608 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

For instance, in *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 153–54, 167 (3d Cir. 2002), the court held that a municipality violated the Free-Exercise Clause by enforcing an ordinance banning the placement of items on utility poles against Orthodox Jews who wished to affix strips to the poles to demarcate a religious zone. The court explained that the municipality had intentionally declined to enforce the ordinance against numerous other violators, and that its enforcement decision had been motivated by a desire to keep Orthodox Jews from moving to the town. *See id.* at 153, 167–68.

In contrast, in *Branch Ministries v. Rossotti*, 211 F.3d 137, 144–45 (D.C. Cir. 2000), the court held that the Internal Revenue Service did not violate the rights of a church by revoking its tax-exempt status for engaging in a national advocacy campaign on behalf of a political candidate, even though the IRS chose not to take similar enforcement actions against churches that engaged in smaller-scale political advocacy. The court explained that the punished church was not "similarly situated" to the other churches because of the broader scope

of its campaign, and so the government's enforcement decision was based on "'legitimate prosecutorial factors.'" *Id.* (quoting *United States v. Hastings*, 126 F.3d 310, 315 (4th Cir. 1997)).

One constitutionally legitimate way for the government to make enforcement decisions is to rely on reports of violations. In *Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142, 1155 (9th Cir. 2007), this Court rejected a claim that a city's complaint-based enforcement of a noise ordinance discriminated against a religious organization, explaining that "the police may legitimately respond to citizen complaints and stop excessive amplified sound." In *Wayte*, 470 U.S. at 612, the Supreme Court spurned a contention that the government acted unconstitutionally by enforcing a draft-registration requirement only against those who reported their failure to comply, noting that this "passive enforcement program . . . promoted prosecutorial efficiency," while "search[ing] actively" for violators "would have been difficult and costly."

Here, too, the Board's enforcement process is constitutional because it is based on complaints from members of the public. ER 1114–17, 1165–68, 1193–94. Relying on such complaints can help the Board

allocate its scarce enforcement resources to the most important violations — ones where patients have actively sought medication and been denied.

B. The Board has not enforced the stocking and delivery rules in a discriminatory manner.

The record shows that the Board's application of its complaint-based enforcement system has been neutral with respect to religion. The Board has issued disciplinary action under the stocking rule five times. ER 1461. None of those cases involved religious objections. *Id.*

The Board has never taken disciplinary action under the delivery rule. *Id.* It did open some investigations under that rule, but only one of those investigations related to a religious objector — plaintiff-appellee Stormans. ER 744–47, 1209–12. The other pharmacies that the Board investigated explained that they simply had temporarily run out of the relevant drug and would order more. ER 1209–12. Therefore, under Subsection 1(e) of the delivery rule — which excuses compliance in cases of "[u]navailability of the drug or device despite good-faith compliance with [the stocking rule]" — there was no violation, and the Board closed those investigations. *Id.* The only investigation the Board

kept open was against Stormans, for that pharmacy affirmatively refused to stock the drug at issue. ER 133.

But, due to this litigation, the Board has not even had an opportunity yet to decide whether to take any disciplinary action against Stormans. ER 20. The district court preliminarily enjoined the Board's rules on November 8, 2007, less than four months after they went into effect. ER 650, 667–68. The parties then agreed that if this Court were to vacate the preliminary injunction, the Board would notify the district court of any new complaints about pharmacies failing to comply with the rules, and "no investigation of any such complaint would proceed absent the [district court's] approval." ER 20. As a result, the Board also did not investigate two other complaints it received before the trial of the case. *Id.*

Given that this litigation effectively froze the Board's investigatory and enforcement processes when the delivery rule was still in its infancy, the fact that the only currently open investigation is against Stormans cannot reasonably be treated as evidence of discriminatory enforcement. *Cf. Branch Ministries*, 211 F.3d at 144 (upholding first ever revocation of a church's tax-exempt status for

political advocacy). Unlike in *Tenafly*, 309 F.3d at 153, no showing has been made that the Board's decisions have been based on anti-religious animus. There is no evidence that the Board ignored complaints against non-religious pharmacies while prosecuting religious ones.

In support of its contrary conclusion, the district court cited the Board's failure to investigate "at least nine complaints to the Board regarding a pharmacy's refusal (or failure) to *dispense* drugs other than Plan B." ER 45 (emphasis added). These complaints were received before the 2007 passage of the delivery rule, however, so the Board did not have any basis to take an enforcement action. *See* ER 739–47, 1161–62, 1173–92.

The district court further made quite a big deal out of the lack of any enforcement action by the Board against Catholic pharmacies. *See* ER 46–54. It is undisputed, however, that the Board has never received any complaints about a violation of the rules by Catholic pharmacies. ER 49. The district court's argument that the Board should have investigated anyway because many Catholic pharmacies "are located in areas of modest incomes, with large populations of women of child bearing age" (*id.*), improperly substituted the court's view for the

Board's, in the face of the Supreme Court's admonition that "the decision to prosecute is particularly ill-suited to judicial review." *Wayte*, 470 U.S. at 607.

C. Under the district court's approach, religiously motivated lawbreakers could be effectively exempt from law.

The district court apparently thought that whenever the government fails to fully enforce a law against all violators of whom it knows, religious objectors receive a right to an exemption from the law. *See* ER 44–46, 52–54. Such a broad view of the law would eviscerate much of the Supreme Court's and this Circuit's Free-Exercise precedent.

The holding of *Smith*, 494 U.S. at 878–79, that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" would be a nullity whenever the government lacks the enforcement resources to prosecute all known or suspected violators. This Court's ruling in *Thornburgh*, 961 F.2d at 1408, that religious groups are not exempt from a law requiring employers to verify the immigration status of their employees would be overturned upon presentation of evidence that the government had not enforced this law each time it had reason to believe

that a secular business had violated it. And, contrary to this Court's holding in *Dronz v. Commissioner*, 48 F.3d 1120, 1123–24 (9th Cir. 1995), individuals with religious objections would be exempted from paying taxes because the IRS is unable to take enforcement action against every instance of tax evasion.

III. Even if Washington's regulations trigger heightened scrutiny, the Court should not apply strict scrutiny, but should instead apply an intermediate balancing test, which the regulations survive.

For the foregoing reasons, the defendants-appellants are correct that Washington's pharmacy rules do not trigger heightened scrutiny. But even if the Court finds that the rules, at least as applied, treat religious objectors differently from non-religious ones in some way, and that heightened scrutiny is therefore warranted, the Court should not apply strict scrutiny. Rather, the Court should apply an intermediate, balancing analysis similar to that used in *Locke*, 540 U.S. 712.

There, the Supreme Court considered a Free-Exercise challenge to a Washington State law that prohibited university students from using state scholarship funds to pursue a degree in devotional theology. *Id.* at 715. On its face, the law discriminated against a particular religious

practice. *Id.* at 720. Yet the Supreme Court declined to apply strict scrutiny, for several reasons. *Id.*

First, the law "place[d] a relatively minor burden" on religious scholarship applicants — it did not impose "criminal [or] civil sanctions on any type of religious service or rite," "deny to ministers the right to participate in the political affairs of the community," or "require students to choose between their religious beliefs and receiving a government benefit." *Id.* at 720–21, 725. Second, the scholarship program went a "long way toward including religion in its benefits," because it permitted scholarship funds to be used for religious classes and at religious schools. *Id.* at 724. Third, the law was not motivated by "animus toward religion," but by a "historic and substantial state interest" in ensuring that religious ministries are supported by private money instead of tax dollars. *Id.* at 721–23, 725. Because the burden on religion was "minor" while the state interest was "substantial," the Supreme Court upheld the law. *Id.* at 725.

Other decisions further support the use of balancing in certain Free-Exercise contexts. Recently, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 710 (2012), the

Supreme Court held that the Free-Exercise Clause bars suits by ministers against houses of worship under employment-discrimination statutes, concluding that the "interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission" outweighs the "undoubtedly important" "interest of society in enforcement of employment discrimination statutes." But the Court suggested, without deciding, that the Constitution might not bar other kinds of actions against houses of worship, including "actions by employees alleging . . . tortious conduct," "criminal prosecutions for interfering with law enforcement investigations," or "enforcement of general laws [such as child-labor laws] restricting eligibility for employment." *Id.* Presumably, a different result could be reached in those kinds of cases because of the potentially greater governmental interests at stake.

What is more, *Fraternal Order*, one of the principal cases on which the district court relied, applied intermediate scrutiny, not strict scrutiny. *See* 170 F.3d at 366 n.7. Indeed, the result in that case was not surprising, given how weak the governmental interest — "fostering a uniform appearance" — professed there was. *See id.* at 366–67.

Fraternal Order indicated that intermediate scrutiny was appropriate because the case "arose in the public employment context." *Id.* at 366 n.7. Here, if heightened scrutiny is to be applied at all, the fact that this case arises in the context of commercial activity that pharmacies voluntarily choose to enter supports the use of intermediate scrutiny. *Cf. Lee*, 455 U.S. at 261.

The Board's rules easily survive intermediate scrutiny. As in *Locke*, the rules do not place a substantial burden on religion, but instead significantly accommodate religion, by allowing individual pharmacists to decline to dispense drugs. Nor do the rules place a substantial burden on pharmacies who employ pharmacists with religious objections. As this Court previously explained, pharmacies can accommodate such pharmacists by allowing a non-pharmacist technician to physically sell the medication and arranging for another pharmacist to provide any needed consultation by telephone. *Stormans*, 586 F.3d at 1137.

And, as in *Locke*, the rules were not motivated by anti-religious animus. *Stormans*, 586 F.3d at 1131, 1133–34. Instead, they arose out of the Board's interest in "ensur[ing] safe and timely patient access" to

medications. *Id.* at 1131. The appellants correctly point out that this interest is compelling (Intervenor-Appellants' Brief at 61), but even if it were not, it is at the very least substantial and important.

Protecting unimpeded access to medication is especially critical with respect to drugs whose efficacy decreases significantly with the passage of time. For example, immediate access to emergency contraceptives is crucial because such medicine "is most effective within the first 12 to 24 hours after sexual intercourse and becomes less effective with each passing hour." *Stormans*, 586 F.3d at 1114. And in the case of women and girls who "suffer as a result of sexual violence every year in Washington," "refusals to dispense . . . compound the trauma." *Id.* at 1118 n.7.

Similarly, HIV medication can significantly reduce the risk of contracting the virus if administered within seventy-two hours of exposure. ER 1058–59. For those who are already HIV-positive, access to timely drug therapy decreases the risk of serious infection and transmission to others. *See* ER 982, 988, 1058–59, 1124–25, 1144–45.

The Board's interest in ensuring that members of the public do not suffer such harms far outweighs any minor burdens that the Board's

rules impose on religious objectors. Even if heightened scrutiny applies, the rules are constitutional.

CONCLUSION

The freedom of religion protected by the First Amendment gives people the right to make religious decisions for themselves. It does not give people the right to impose their religious beliefs on others. The Board's rules are entirely consistent with these principles. They protect the freedom of conscience of individual pharmacists. And they prevent pharmacies from abridging patients' freedom to make religious choices about matters of an intimate and personal nature. Nothing in the Constitution justifies disturbing this balance. The judgment of the district court should be reversed.

Respectfully submitted,

/s/ Alex J. Luchenitser
Alex J. Luchenitser

Ayesha N. Khan
Alex J. Luchenitser
Benjamin N. Hazelwood*
AMERICANS UNITED FOR
SEPARATION OF CHURCH AND
STATE
1301 K Street NW, Suite 850E
Washington, DC 20005

Phone: (202) 466-3234
Fax: (202) 898-0955
khan@au.org
luchenitser@au.org
hazelwood@au.org

** Admitted in New York only.*
Supervised by Ayesha N. Khan,
a member of the D.C. Bar.

Date: September 4, 2012.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,328 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because its body has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century font.

/s/ Alex J. Luchenitser
Alex J. Luchenitser
Counsel for amicus curiae

Date: September 4, 2012.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 4, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Alex J. Luchenitser
Alex J. Luchenitser
Counsel for amicus curiae

Date: September 4, 2012.