No. 15-862

IN THE

Supreme Court of the United States

STORMANS, INC., d/b/a RALPH'S THRIFTWAY, *et al.*,
Petitioners,

v.

JOHN WIESMAN, SECRETARY, 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 FOR AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

TODD ZUBLER
Counsel of Record
CARL NICHOLS
DANIEL P. KEARNEY, JR.
DANIEL HARTMAN
KEVIN GALLAGHER
RYAN MCCARL
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
todd.zubler@wilmerhale.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE DECISION BELOW IS WHOLLY INCONSISTENT WITH THIS COURT'S FREE EXERCISE PRECEDENTS 3

A. The Free Exercise Clause Requires More Than Superficial Neutrality 3

B. Washington's Rules Cannot Satisfy *Lukumi* 5

II. THE DECISION BELOW THREATENS RELIGIOUS MINORITIES BY ENDORSING WASHINGTON'S SELECTIVE ENFORCEMENT OF THE RULES 8

III. AT A MINIMUM, THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE CONFLICT BETWEEN THE LOWER COURTS REGARDING SELECTIVE ENFORCEMENT 13

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Page(s)

Bloch v. *Frischholz*, 587 F.3d 771 (7th Cir. 2009) 12

Church of the Lukumi Babalu Aye, Inc. v. *Hialeah*, 508 U.S. 520 (1993) 2, 4, 5, 13

Employment Division, Department of Human Resources of Oregon v. *Smith*, 494 U.S. 872 (1990) 2, 3, 4, 5

Grosjean v. *American Press Co.*, 297 U.S. 233 (1969) 5

Minneapolis Star & Tribune Co. v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) 5

Tenafly Eruv Ass'n, Inc. v. *Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002) 11, 12, 13, 14

STATUTORY PROVISIONS

Wash. Admin. Code § 246-869-010 7

OTHER AUTHORITIES

Hamilton, Marci A., *God vs. the Gavel* (2014) 12

Watanabe, Teresa, *Change drives tension in staid Hancock Park*, L.A. Times, Oct. 1, 2007, http://articles.latimes.com/2007/oct/01/local/me-orthodox1 12

IN THE

Supreme Court of the United States

No. 15-862

STORMANS, INC., d/b/a RALPH'S THRIFTWAY, *et al.*,
Petitioners,

v.

JOHN WIESMAN, SECRETARY, 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 FOR AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Agudath Israel of America (Agudath Israel) is a national grassroots Orthodox Jewish movement with many thousands of members across the United States. It regularly intervenes at all levels of government to advocate and protect the interests of the Orthodox Jewish community in the United States. Agudath Israel is particularly assiduous in seeking to prevent any government action that might restrict the ability of

[1] Letters consenting to the filing of this brief are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made any monetary contribution to the preparation or submission of this brief.

Orthodox Jews to practice their religion freely or to participate fully and equally in public life.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's opinion reflects an insidious animosity toward religion and conscientious objectors. In *Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520 (1993), this Court made clear that the Free Exercise Clause prohibits governments from punishing religiously motivated conduct while exempting the same conduct when undertaken for nonreligious reasons. The Ninth Circuit, however, approved just such a regime. Far removed from the "across-the-board criminal prohibition" upheld in *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990), Washington's pharmaceutical Rules exempt referrals for "an almost unlimited variety of secular reasons," Pet. App. 81a; were overtly "aimed at [abortifacient drugs] and conscientious objectors from their inception," *id.* 57a; and have been enforced only against religious objectors, *id.* 94a. The Ninth Circuit's decision was willfully blind to these realities. If permitted to stand, the decision threatens to consign religion and religious objectors to second-class status by prohibiting adherents from upholding their religious commitments while participating fully and equally in economic life. Indeed, under the Ninth Circuit's analysis, only a statute that expressly targets religious conduct would be unconstitutional.

Particularly troubling is the Ninth Circuit's treatment of selective enforcement. Even though Washington has enforced its Rules against only religious objectors, the Ninth Circuit held that such discriminatory enforcement was not problematic "because the Commission responds only to the complaints that it

receives" and "no evidence support[ed] the district court's finding that the Commission's enforcement of the rules is other than complaint-driven." Pet. App. 39a, 40a. But this Court has never upheld an enforcement regime that targets only religious conduct, and for good reason: The Ninth Circuit's decision would permit states to selectively enforce their rules against religious groups so long as such enforcement merely responds to complaints. But passive enforcement regimes like Washington's can easily be co-opted by vocal groups that disfavor certain religious groups, particularly religious minorities. That is what happened here: "the evidence at trial demonstrated that … Planned Parenthood and other pro-choice groups have conducted an active campaign to seek out pharmacies and pharmacists with religious objections to Plan B and file complaints." *Id.* 179a.

This Court should grant certiorari and reverse.

ARGUMENT

I. THE DECISION BELOW IS WHOLLY INCONSISTENT WITH THIS COURT'S FREE EXERCISE PRECEDENTS

A. The Free Exercise Clause Requires More Than Superficial Neutrality

In *Smith*, this Court recognized that an "across-the-board criminal prohibition on particular conduct," which applies to the entire society without exception, does not violate the Free Exercise Clause even though it might burden an individual's religious practices. 494 U.S. at 884. The Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879.

Smith held that a neutral and generally applicable law does not violate the First Amendment because those characteristics suggest that such a law does not target religious conduct and that any burden on religious conduct is merely an "incidental effect." 494 U.S. at 878. When a law threatens criminal liability for conduct that anyone could engage in and prohibits it in all circumstances, the democratic process provides at least some protection against religious persecution and some assurance that the law broadly reflects an important public interest. But *Smith*'s rationale crumbles when a statute applies only to certain people or is riddled with exceptions that allow the prohibited conduct in some circumstances but not others. In such situations, the democratic process offers insufficient refuge: favored groups with favored motivations can win exemptions and religious minorities can be disproportionately burdened.

Lukumi therefore set a high bar for application of *Smith*'s neutrality and general applicability rule. The Court held that official action "cannot be shielded [from rigorous First Amendment scrutiny] by mere compliance with the requirement of facial neutrality." 508 U.S. at 534. Courts instead must look beyond a law's superficial neutrality and assess the actual operation of the law. *See id.* at 535 ("The effect of a law in its real operation is strong evidence of its object."). And the *Lukumi* Court itself struck down three ordinances that were not neutral or generally applicable because they burdened "Santeria adherents but almost no others" and they exempted "[m]any types of animal deaths or kills" that undermined the government's interests "in a similar or greater degree than Santeria sacrifice does." *Id.* at 536-538, 543.

B. Washington's Rules Cannot Satisfy Lukumi

Like the ordinances struck down in *Lukumi*, the Rules at issue here are far removed from the "across-the-board criminal prohibition" upheld in *Smith*, and the Ninth Circuit's analysis of those Rules is plainly inconsistent with *Lukumi*. Indeed, the Ninth Circuit misapplied this Court's precedents and validated a regime even more hostile to religion than the ordinances in *Lukumi*. Although Washington's Rules purport to be neutral and generally applicable, they apply only to pharmacies, exempt a host of secular conduct and, as the district court found, were aimed from their inception at religious objectors. Just as the law in *Lukumi* "exclude[d] almost all killings of animals except for religious sacrifice," 508 U.S. at 535-536, Washington's regime permits virtually any failure to fill a prescription—except a referral that is based on religious or conscientious objection.

As an initial matter, the Rules are not "generally applicable" like the criminal drug prohibition in *Smith*. Washington's Rules threaten punishment for only a tiny portion of the population—pharmacists and pharmacies—and the democratic process therefore offers much less assurance that the Rules are not being used to target religious practice. *Smith* expressly contrasted "generally applicable" laws such as antitrust prohibitions and "the collection of a general tax," *Smith*, 494 U.S. at 878, with narrower laws—such as a "license tax applied only to newspapers with weekly circulation above a specified level," *see id.* (citing *Grosjean* v. *Am. Press Co.*, 297 U.S. 233, 250–251 (1969), and *Minneapolis Star & Tribune Co.* v. *Minn. Comm'r of Rev.*, 460 U.S. 575, 581 (1983)). The Ninth Circuit reasoned that the Rules "prescribe and proscribe the same conduct for *all*, regardless of motivation." Pet. App. 25a (emphasis

added). "All" to the Ninth Circuit, however, meant all pharmacists and pharmacies. The Ninth Circuit thus stretched the definition of "all" in an attempt to avoid heightened scrutiny.

Moreover, in direct conflict with *Lukumi*, the Ninth Circuit's decision treats business-related objections to the Rules as more important than religious and conscientious objections, which turns the Free Exercise Clause on its head. As the district court found, the Rules are "riddled with secular exemptions that undermine their stated goal of increasing patient access to all medications. The rules operate primarily to force (some) religious objectors to dispense [P]lan B, while permitting other pharmacies to refrain from dispensing other medications for virtually any reason." Pet. App. 106a. Thus, for example, niche pharmacies are *categorically* permitted to decline to stock drugs that fall outside their chosen business niche. *Id.* 203a. Pharmacies also are *categorically* permitted to decline to stock a drug if the drug would require specialized training or equipment that the pharmacy does not wish to purchase. *Id.* And in practice, pharmacies have been permitted not to stock a drug merely because the pharmacy lacks adequate shelf space to carry all drugs needed by patients or because it does not wish to take the time to register with a manufacturer or mix two creams together. *Id.* 163a. "In all of these situations, pharmacies are permitted to refer patients elsewhere, regardless of the effect on access to medication." *Id.* 213a. But if a pharmacy refers a patient to another pharmacy because of a religious belief, the pharmacy faces significant penalties, including the revocation of its license.

Washington's Rules thus distinguish identical conduct—referring patients to other pharmacies—based

solely on the motivation behind that conduct. If the conduct is economically motivated or done for reasons of convenience, it is exempted and allowed. If it is motivated by religion, it is punishable. The Rules (and the Ninth Circuit's analysis upholding the Rules) thus privilege secular, economically motivated conduct *over* religious conduct. In doing so, the Ninth Circuit turned the Free Exercise Clause upside down. If the First Amendment means anything, it means that religiously motivated conduct must be treated at least equally with economically or secularly motivated conduct.

To be sure, the Ninth Circuit attempted to justify its holding by characterizing the Rules' exemptions as narrow, noting that there are only five enumerated exemptions. But those exemptions extend to situations that are "substantially similar" to the enumerated exemptions. Wash. Admin. Code § 246-869-010(1). Further, officials may excuse a failure to deliver a prescription in a timely matter if they conclude that the pharmacy complied in "good faith" with the Stocking Rule. *Id.* § 246-869-010(1)(e). It is difficult to conceive of *any* secular business reason for a referral that could not be justified based on an exemption in the Rules.

The Rules thus operate to penalize religious referrals, not to ensure the broad availability of prescription drugs: it is business as usual under the Rules for most pharmacies, but it is open season for religious objectors. Under the Ninth Circuit's decision, a state that wishes to target religious beliefs or practices can do so simply by drafting language that is superficially neutral toward religion but that exempts effectively all conduct that is not religiously motivated. Indeed, only a statute that expressly targeted religious conduct would be unconstitutional. That approach conflicts with this Court's holding in *Lukumi*.

II. THE DECISION BELOW THREATENS RELIGIOUS MINORITIES BY ENDORSING WASHINGTON'S SELECTIVE ENFORCEMENT OF THE RULES

The Rules' lack of neutrality and general applicability is only exacerbated by Washington's selective enforcement of them, which poses a special danger to religious minorities. The Free Exercise Clause protects religious minorities from persecution in all forms, including selective enforcement of ostensibly neutral laws. The Ninth Circuit, however, was essentially indifferent to the law's selective enforcement, upholding the Rules on the ground that Washington uses a "complaint-driven" enforcement process and consumers had not filed complaints about referrals motivated by secular reasons. Pet. App. 40a. But far from insulating the Rules from First Amendment scrutiny, Washington's "passive," complaint-driven enforcement regime only heightens the danger for religious minorities—who risk being singled out for their religious views by vocal groups who use the complaint process to enlist the government against them.

The district court correctly found that State officials had selectively enforced the Rules. It found that since the passage of the Delivery Rule in 2007, the State has opened active investigations only with respect to conscientious objections to Plan B, and not for objections for business reasons. Pet. App. 225a. Similarly, in the forty-plus years that the Stocking Rule has been in effect, the State has never investigated any pharmacy, except Ralph's (the Stormans' family pharmacy) and three others—all of which were investigated following complaints filed by Plan B test-shoppers. *Id.*[2]

---

[2] *See* Pet. App. 86a ("[W]hile the [Commission] allows pharmacies to refuse to stock drugs for countless secular reasons, the

The State rationalizes its selective enforcement of the Rules by contending that it follows a "complaint-driven enforcement" process. Pet. App. 38a.[3] Ralph's and similar pharmacies happened to be implicated "in a disproportionate percentage of investigations," according to the State, simply "because the Commission responds only to the complaints that it receives." *Id.* 39a. The Ninth Circuit not only accepted this rationale but also troublingly implied that a passive or complaint-driven enforcement regime could never lead to selective enforcement: the Ninth Circuit rejected the selective-enforcement allegation simply because "no evidence supports the district court's finding that the Commission's enforcement of the rules is other than complaint-driven." *Id.* 40a.

[Commission] will investigate if a religious objector refuses to stock Plan B for a religious reason."); *id.* 169a ("The [Commission] has actively investigated those complaints, and has also initiated a complaint of its own, while dropping analogous complaints against other pharmacies that were temporarily out of stock for business reasons."); *id.* 231a ("[T]he evidence shows that the government has enforced the [Rules] against Plaintiffs' pharmacy—and only against Plaintiffs' pharmacy—while making no effort to enforce the [Rules] against widespread, widely known, nonreligious conduct that threatens access to medication just as much as, or more than, Plaintiffs' conduct."); *id.* 178a ("[D]espite widely known refusals to stock drugs for business reasons, the [Commission] has never initiated a complaint under the Stocking Rule against any other pharmacy in over forty years.").

[3] We note, however, that the Ninth Circuit characterization of Washington's regime as complaint-driven completely disregards the district court's findings of fact on the issue. *See* Pet. App. 176a (noting that the State's enforcement mechanisms include biannual examinations, test-shoppers, newsletters, and cooperation "with the State Pharmacy Association to raise compliance issues with individual pharmacists"—none of which is complaint-driven).

A passive and reactive enforcement regime, however, cannot insulate a law from review for selective enforcement; rather, such a regime exacerbates the danger of selective enforcement. Passive, complaint-driven enforcement schemes run the risk of being co-opted by vocal and active groups who are especially hostile to a particular religion (or religion generally) and who will use the complaint-driven enforcement process to harass religious minorities—which is what happened here. As the district court noted, "the evidence at trial demonstrated that Planned Parenthood and other pro-choice groups have conducted an active campaign to seek out pharmacies and pharmacists with religious objections to Plan B and file complaints." Pet. App. 179a.

Indeed, the district court found that Ralph's had been singled out even among religious objectors to providing Plan B. The district court noted that even while the State was pursuing enforcement action against Ralph's, no Catholic-affiliated pharmacy in the state has ever been investigated for substantially the same conduct.[4] The Ninth Circuit blithely dismissed this concern, stating that the "Commission did not investigate alleged non-compliance among Catholic pharmacies for the simple reason that the Commission received no complaints against those pharmacies." Pet. App. 38a.

---

[4] *See* Pet. App. 99a ("[T]he Board of Pharmacy has been aware since before its 2007 rulemaking that Catholic pharmacies do not and will not stock or deliver Plan B (or, for that matter, contraceptives)."); *id.* 103a ("It is therefore clear that the Board could enforce its stocking and delivery rules against the state's many non-compliant Catholic pharmacies, and that it has consciously chosen not to do so. Its refusal is not excused by its attorneys' current claim that the Fourth Amendment prohibits such investigations, or by the claim that investigations are 'complaint-driven' and there have been no patient complaints about Catholic pharmacies." (footnote omitted)).

But this example only highlights the problem of the State's complaint-driven enforcement regime. Such a regime can be selectively enforced against the politically weak—a small family-owned business—while turning a blind eye to the exact same religious objection by groups with more political power—the Catholic hospitals that serve a huge percentage of Washington's population. This sort of selective enforcement is thus a particularly acute threat to unpopular, minority faith perspectives.

The Ninth Circuit's approach provides little protection for religious minorities against selective enforcement. Indeed, if the Washington Rules today can be selectively enforced against a majority religion such as Christianity, there will be little protection in the future against selective enforcement against religious minorities. It is not difficult to imagine situations in which the Ninth Circuit's ruling could negatively affect the Orthodox Jewish community.

Consider, for example, *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002). There, the Third Circuit considered whether a longstanding local ordinance—which prohibited the placement of "signs, advertisements, or any other matter" on utility poles or elsewhere along public streets without the government's permission—violated the Free Exercise Clause because it was selectively enforced against Orthodox Jews. 309 F.3d at 151-152. The ordinance was facially neutral, but in practice it was selectively enforced: The local government allowed everything from "drab house numbers and lost animals signs to the more obtrusive holiday displays, church directional signs, and orange ribbons," but barred the Orthodox community from attaching *lechis*, discrete objects with religious significance, to utility poles. *Id.* at 167.

Unlike the Ninth Circuit here, however, the Third Circuit correctly held that such selective enforcement triggered strict scrutiny—and was unconstitutional—even though the ordinance was, at least on its face, neutral and generally applicable. *Id.* at 168.

The circumstances of *Tenafly* are not an aberration. For instance, in Los Angeles's Hancock Park, tensions recently flared when land use ordinances were being enforced against the Orthodox Jewish community. *See* Watanabe, *Change drives tension in staid Hancock Park*, L.A. Times, Oct. 1, 2007, http://articles.latimes.com/2007/oct/01/local/me-orthodox1. Although the State contended that it was enforcing the laws neutrally, the Orthodox Jewish community rightfully feared that anti-Semitism spurred the enforcement efforts. *See* Hamilton, *God vs. the Gavel* 129 (2014) (noting the fears of the Orthodox Jewish community in Hancock Park).

The circumstances of *Bloch* v. *Frischholz*, 587 F.3d 771 (7th Cir. 2009) (en banc), a Fair Housing Act case, provide still another example of the risks of selective enforcement. In that case, a homeowners association had a facially neutral and generally applicable rule that prohibited objects outside unit entrance doors. *Id.* at 773. The Blochs placed a mezuzah on their exterior doorposts as required by Jewish law, but the homeowners association insisted that the Blochs remove the objects. The Seventh Circuit noted that the Blochs "are not seeking an exception to a neutral rule." *Id.* at 783. The rule "might have been neutral when adopted," but "the record shows that the defendants selectively enforced [it] only against the mezuzah." *Id.* at 783, 786.

Here, the Ninth Circuit's decision would allow governments to hide behind their "complaint-driven" enforcement processes even while those processes are

causing laws to be selectively enforced against religious minorities. But the Free Exercise Clause was created for the very purpose of protecting religious minorities. *See, e.g.*, *Lukumi*, 508 U.S. at 532 ("'[I]t was historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.'"). Indeed, in *Lukumi*, Justice Souter noted in his concurrence the "government's constitutional obligation 'to accommodate itself to the religious views of minorities.'" *Id.* at 659 (Souter, J., concurring). By validating a regime that endangers religious minorities, the Ninth Circuit fundamentally misapprehends the purpose and scope of the Free Exercise Clause.

III. At A Minimum, This Court Should Grant Certiorari To Resolve Conflict Between The Lower Courts Regarding Selective Enforcement

The Ninth Circuit's decision creates a number of important circuit splits, including with respect to selective enforcement; this Court should, at a minimum, grant review to resolve this split. In particular, the Ninth Circuit's decision conflicts with the Third Circuit's *Tenafly* decision regarding whether passive, reactive enforcement regimes can insulate a law from allegations of selective enforcement under the First Amendment.

The Third Circuit held that a government's invocation of an "often-dormant" ordinance, based on "vehement objections" from local residents, triggered strict scrutiny, even if the ordinance was otherwise neutral and generally applicable. *Tenafly*, 309 F.3d at 168. In contrast, the Ninth Circuit entirely dismissed the petitioners' allegations of selective enforcement merely because "[t]he Commission enforces the … Rule[s] through a complaint-driven process." Pet. App. 37a.

This Court should resolve the circuit split and give lower courts guidance as to whether complaint-driven enforcement regimes are immune from scrutiny for selective enforcement.[5]

CONCLUSION

This Court should grant certiorari and reverse.

Respectfully submitted.

TODD ZUBLER
Counsel of Record
CARL NICHOLS
DANIEL P. KEARNEY, JR.
DANIEL HARTMAN
KEVIN GALLAGHER
RYAN MCCARL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
todd.zubler@wilmerhale.com

FEBRUARY 2016

[5] The Third and Ninth Circuit decisions also differ regarding where, in the *Smith* doctrinal framework, selective enforcement should be analyzed. The Third Circuit treats selective enforcement as relevant to neutrality. *See Tenafly*, 309 F.3d at 168 ("We believe that the Borough's selective, discretionary application of Ordinance 691 against the *lechis* violates the neutrality principle of *Lukumi*."). The Ninth Circuit, on the other hand, viewed selective enforcement as relevant to general applicability. *See* Pet. App. 28a-29a ("A law is not generally applicable if it, in a selective manner, imposes burdens only on conduct motivated by religious belief." (internal quotation marks and alterations omitted)).