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, *ET AL.*,
Defendants-Appellants,
and
JUDITH BILLINGS, *ET AL.*,
Intervenors-Appellants.

On Appeal from the United States District Court
for the Western District of Washington,
Tacoma Division, Case No. 07-CV-05374-RBL
Hon. Ronald B. Leighton, Judge Presiding

BRIEF OF CONSTITUTIONAL LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF APPELLEES

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY

The amici who submit this brief are law professors who have closely studied the Religion Clauses of the First Amendment, in most cases for many years. The issues here presented are of critical importance not only to individual religious believers, to opposing interest groups, and to the State, but also to a coherent Free Exercise Clause interpretation. Amici bring to this case a deep theoretical understanding of the Supreme Court's free exercise jurisprudence that may help the Court resolve the parties' competing claims about that body of law.

Employment Division v. Smith, 494 U.S. 872 (1990), held that the free exercise of religion may permissibly be burdened by laws that are neutral and generally applicable. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), unanimously applied strict scrutiny to gerrymandered ordinances that fell "well below the minimum standard necessary to protect First Amendment rights." *Id.* at 543. A deeper understanding of the Free Exercise Clause is necessary to identify when state action falls not "*well* below," but simply "below" the bar of general applicability. This brief attempts to offer that deeper understanding. These amici hold broadly diverse views on religious,

political, and public policy matters, but they are agreed on the meaning of "neutral and generally applicable law." Because there are many amici, individual amici are identified in the appendix.[1]

AUTHORSHIP AND FUNDING OF BRIEF

No party's counsel has authored any portion of this brief, and no party or party's counsel has made any financial contribution to the preparation or filing of this brief. *See* FED. R. APP. P. 29(c).

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

SUMMARY OF ARGUMENT

The Supreme Court's free-exercise jurisprudence is defined by two cases at opposite ends on the continuum of religious exercise cases.

Employment Division v. Smith established the rule that religiously motivated conduct is not exempt from regulation by means of a "valid and neutral law of general applicability," exemplified there by an "across-the-board criminal prohibition" on possession of the drug peyote. 494 U.S. 872, 879, 884 (1990). *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, a unanimous opinion issued just three years after *Smith*, struck down a gerrymandered system of ordinances applying to Santeria practitioners and almost no others as falling "well below the minimum standard necessary to protect First Amendment rights." 508 U.S. 520, 543 (1993). Most laws fall between the extremes of *Smith*'s no-exception prohibition and *Lukumi*'s religious gerrymander.

Though declining to define its limits, the Supreme Court in *Lukumi* identified the general-applicability requirement as a bulwark against underinclusive regulation that burdens religious exercise but fails "to prohibit nonreligious conduct that endangers [state] interests in a similar or greater degree." *Id.* Read together, *Smith* and *Lukumi*

create a special kind of equality rule that goes well beyond the traditional bounds of equal protection and nondiscrimination law. *Smith* and *Lukumi* require that laws and regulations be generally applicable, which means that they must apply to everyone, or at least to nearly everyone, and to all conduct that significantly undermines the state's alleged interest. Analogous religious and secular conduct must be treated equally, and whether conduct is analogous is determined by the conduct's effect on the state's asserted interest.

Smith, *Lukumi*, and the cases interpreting them identify "many ways" in which a law can fail the test of neutrality and general applicability. 508 U.S. at 533. Religion need not be singled out, and the state need not act with bad motive. Laws that burden religion and apply to some but not all analogous secular conduct are not generally applicable.

Even a single secular exception that undermines the state's asserted interest makes the law less than generally applicable. *Smith* and *Lukumi* clearly imply that rule, and there are multiple reasons for it. First, exempting some secular conduct from a prohibition that applies to religious conduct implies a value judgment—that the secular

conduct is more valuable, or more deserving of protection, than the religious conduct.

Second, the requirement of general applicability provides vicarious political protection to religious minorities. Other groups with more political power may successfully resist enactment of a law that would burden them too. But that vicarious political protection quickly disappears if the state can exempt influential secular interests.

Unequal treatment of religion need not be reflected in the text of the law; it is equally invalid if it emerges informally or in the course of enforcement.

A discriminatory legislative motive is yet another alternative that defeats claims of neutrality and general applicability, as is clear from the equal-protection jurisprudence referenced in both *Smith* and *Lukumi*. Bad motive is sufficient, although not necessary. Appellants, by contrast, have no coherent interpretation of *Smith* and *Lukumi*. They repeatedly argue that the regulators' motives were irrelevant, and that the district court could not inquire into those motives. State Br. 28, 38 & n.11, 41. But they ultimately claim to be entitled to reversal because the regulations were not the product of "animus." *Id.* at 47.

Appellees would prevail even under appellants' incoherent interpretation of the Free Exercise Clause, because the facts here at issue are every bit as egregious as those in *Lukumi*. All business reasons for not stocking or delivering drugs are exempt; only religious reasons are regulated. If this Court treats these regulations as neutral and generally applicable, the door will be open to "prohibition[s] that society is prepared to impose upon [religious practitioners], but not upon itself." *Lukumi*, 508 U.S. at 545 (citations and internal quotation marks omitted). "This precise evil is what the requirement of general applicability is designed to prevent." *Id*. at 545-46.

ARGUMENT

I. *SMITH* AND *LUKUMI* ARE OPPOSITE POINTS ON THE SPECTRUM OF FREE EXERCISE CLAIMS, AND MANY CLAIMS TRIGGERING STRICT SCRUTINY FALL IN BETWEEN.

The Supreme Court's modern conception of the Free Exercise Clause derives from two cases at opposite ends on the continuum of religious liberties cases—*Employment Division v. Smith*, 494 U.S. 872, and *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520. *Smith* concerned the epitome of a generally applicable law—an "across-the-board," exception-free prohibition on the possession of peyote. 494 U.S. at 884. *Lukumi*, by contrast, unanimously struck down a system of

city ordinances gerrymandered to such an extreme degree that they fell on "Santeria adherents but almost no others." 508 U.S. at 536. *Lukumi* is not "a special case" (State Br. 36) because it is an exception to the broad rule of *Smith*. Rather, *Smith* and *Lukumi* are both special cases, at opposite ends of a broad continuum.

"The key to understanding the Constitution's protection of religious liberty" in this case is to "locate the boundary line between neutral laws of general applicability and those that fall short of this standard." Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 851 (2001). The Supreme Court's free-exercise jurisprudence confirms that this boundary is one of objectively equal treatment: a generally applicable law must apply to almost everyone, and the state must treat religious exercise no less favorably than secular conduct similar in nature or effect.

A. The "General Applicability" Requirement Articulated In *Smith* And *Lukumi* Mandates Equal Treatment For Religious Conduct And Secular Conduct.

In *Smith*, the Supreme Court held for the first time that "[g]enerally applicable, religion-neutral laws that have the effect of

burdening a particular religious practice need not be justified by a compelling governmental interest." 494 U.S. at 866 n.3.

Smith articulated the requirements of neutrality and general applicability in a context far different from the present facts. *Smith* presented the question whether Oregon could enforce a blanket criminal ban on the possession of peyote against two individuals who had engaged in sacramental peyote consumption as part of a Native American worship service.[2] 494 U.S. at 874. Oregon's "across-the-board criminal prohibition" on peyote possession applied equally to all Oregonians, without exceptions or carve-outs. *Id.* at 884.

In that context, the Court held that the Free Exercise Clause did not "relieve" those who used peyote religiously of the obligation to comply with Oregon's "'valid and neutral law of general applicability.'" *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). Oregon's political majority had not disfavored religious exercise, but simply had imposed on the

[2] Because the peyote ban was constitutional, the Supreme Court held that the State of Oregon likewise could deny unemployment compensation to the practitioners after they were fired from their jobs as a consequence of their peyote consumption. *Smith*, 494 U.S. at 890.

sacramental users the same peyote prohibition that applied to everyone else.

Since the "across-the-board criminal prohibition" was the quintessential generally applicable law, the Court found no occasion to delineate the boundaries of the general-applicability requirement. Even so, *Smith*'s understanding of that requirement is apparent from the Court's analysis of its earlier cases on unemployment compensation: *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Board*, 450 U.S. 707 (1981). *Sherbert* and *Thomas* applied compelling-interest review to unemployment-compensation statutes that denied benefits to religious claimants who refused work that conflicted with their religious practice.

Smith reaffirmed these precedents, explaining that strict scrutiny was warranted in both cases because

> a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment: "The statutory conditions [in *Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions."

Smith, 494 U.S. at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality opinion)). These cases established a requirement of equal treatment without exceptions: "[O]ur decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.*

The Supreme Court expounded upon that proposition in *Lukumi*, striking down the City of Hialeah's gerrymandered scheme of ordinances that prohibited the killing of animals only when the killing was "unnecessar[y]," took place as part of a ritual or ceremony, and was not for the primary purpose of food consumption. *See Lukumi*, 508 U.S at 536-37. The Hialeah ordinances fell far short of the First Amendment's requirements, because they were gerrymandered to burden the Santeria and "almost no others." *Id.* at 536. Neutrality and general applicability were defeated in multiple ways: narrow prohibitions of selected conduct and categorical and individualized exemptions for analogous secular conduct, *id.* at 543-44, resulting in failure "to prohibit nonreligious conduct" that endangered the state interests in public health and preventing animal cruelty "in a similar or

greater degree than Santeria sacrifice," *id.* at 543; and prohibiting "more religious conduct than is necessary to achieve" those interests, *id.* at 538. Two justices also found neutrality defeated by the city's anti-religious motive in enacting the ordinances. *Id.* at 540-42 (Kennedy, J.). In each of these ways, the Hialeah authorities had denied religiously motivated conduct equal treatment with analogous secular conduct, and each was a path to compelling-interest review.

The Supreme Court explicitly identified *Lukumi* as an extreme case—*not* the minimum threshold necessary to trigger a First Amendment violation. *Lukumi* declined to "define with precision the standard used to evaluate whether a prohibition is of general application" because the ordinances "fall well below the minimum standard necessary to protect First Amendment rights." *Lukumi*, 508 U.S. at 543. And tellingly, despite their divergent theories of the Free Exercise Clause on display in *Smith*, all nine justices found Hialeah's ordinances to be neither neutral nor generally applicable.

As extreme as *Lukumi*'s facts were, *Lukumi* provided guidance for less extreme cases. It pointed out many ways in which governments can depart from neutrality and general applicability. *Id.* at 533. It

confirmed that free-exercise claimants need not prove facts nearly so extreme as those in *Lukumi*; the ordinances there fell "well below" minimum constitutional standards. *Id.* at 543. It confirmed that free-exercise claimants need not prove the government's motive; seven justices found the ordinances unconstitutional without considering the city's motive. Read together, *Smith* and *Lukumi* create an equality rule under which the "unequal treatment of religious and secular [conduct] require[s] compelling justification." Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 28 (2001). "The Free Exercise Clause 'protect[s] religious observers against unequal treatment.'" *Lukumi*, 508 U.S. at 542 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in the judgment)).

B. The General Applicability Requirement Is Not A Mere Prohibition Against Singling Out Religious Conduct For Unique Burdens.

Appellants would make *Lukumi*'s facts the minimum threshold for triggering strict scrutiny. According to appellants, compelling-interest review is justified only when, as in *Lukumi,* the state's regulations "unambiguously target[] a particular religious practice . . . of a single

religious group." State Br. 36. Appellants' reading is irreconcilable not only with *Lukumi*'s finding of an extreme violation, but also with *Sherbert* and *Thomas,* as interpreted and reaffirmed in *Smith*.

In *Smith*, the Supreme Court said that *Sherbert* and *Thomas* stand for the "proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884. The Court's treatment of *Sherbert* and *Thomas* shows that that proposition does not turn on whether the state has targeted a particular religious group or practice for a unique burden, or even on the quantity of similar secular conduct that is exempted.

In *Sherbert,* the "good cause" and "suitability" exemptions from South Carolina's Unemployment Compensation Act did not excuse all or even many secular motivations for refusing work. A few secular reasons, such as a risk to the worker's health or pay below the applicant's prior earnings, were permissible reasons to refuse work, but other secular reasons were not acceptable. *Sherbert*, 374 U.S. at 402 n.3. Because the purpose of the inquiry was to determine whether the worker could collect a government check rather than accept

employment, "good cause" for refusing work was necessarily interpreted narrowly.[3] The Court was well aware of this in *Smith*; it said only that the unemployment laws allowed workers to refuse work for "*at least some* 'personal reasons.'" 494 U.S. at 884 (emphasis added). But these narrow secular exemptions required a religious exemption—or a compelling reason why not. Moreover, neither the requirement to accept available work in these cases, nor the "good cause" exemption for refusing work, could reasonably be interpreted as a regulatory scheme targeting religious claimants whose Sabbath observance or religious objections to producing armaments for war might cause them to leave employment. But appellants must read these cases in this implausible way to support their apparent interpretation of *Smith* and *Lukumi*.

The problem in *Sherbert* and *Thomas* was not that the unemployment compensation laws singled out religious minorities. Rather, the "good cause" exception "lent itself to individualized governmental assessment of the reasons for the relevant conduct," to "consideration of the particular circumstances," and to "individual

[3] *See generally* Mark A. Rothstein *et al.*, *Employment Law* §10.12-10.13 (West 3d ed. 2004).

exemptions" for personal hardships of a secular kind, *Smith*, 494 U.S. at 884.

The point is confirmed more generally by another formulation in *Lukumi*: "*At a minimum*, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." 508 U.S. at 532 (emphasis added). To discriminate "against" or "because" of religion is the conventional language of discrimination statutes and the Equal Protection Clause. This does not exhaust the requirements of the Free Exercise Clause; it is the "minimum," at the beginning of the Court's discussion of "neutrality." The requirement of "general applicability" is not part of the traditional language of discrimination law; it is a new and more protective requirement. A law that results in unequal treatment of religious and secular conduct is not generally applicable, no matter whether the inequality was "because of" religion, or targeted "against" religion, or arose in some other way. *See* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes*

but Missing the Liberty, 118 HARV. L. REV. 155, 204 (2005) (elaborating this and other points about *Smith* and *Lukumi*).

It is clear from *Smith* and *Lukumi*, and from *Smith*'s treatment of *Sherbert* and *Thomas*, that the line between neutral laws of general applicability and those that fall short of this standard does not lie where appellants would draw it. These cases confirm that "selective laws that fail to pursue legislative ends with equal vigor against both religious practice and analogous secular conduct are not governed by *Smith*; such underinclusive laws are subject to surpassingly strict scrutiny under the Free Exercise Clause and *Lukumi*." Duncan, 3 U. PA. J. CONST. L. at 883.

In this case, the State fails to pursue its regulatory ends against much secular conduct that undermines its regulatory purposes to the same degree as appellees' religious exercise. Accordingly, even if this Court disagrees with the district court's holding that the regulations singled out religious exercise, the regulations at issue are subject to strict scrutiny under *Lukumi*. A scheme to single out religion is not the minimum threshold to warrant compelling-interest review. Less egregious action likewise triggers heightened scrutiny whenever the

state gives religious conduct less protection than all or some analogous secular conduct.

C. Whether Secular Conduct Is Analogous Depends On The State's Asserted Interests, And Not On The Reasons For The Conduct.

The requirement that analogous religious and secular conduct be treated equally of course depends on the identification of analogous secular conduct. The Supreme Court is quite clear on what makes religious and secular conduct analogous: that the "nonreligious conduct . . . endangers these [state] interests in a similar or greater degree" as the burdened religious conduct. *Lukumi*, 508 U.S. at 543. Because the whole point is to treat religious reasons for acting equally with secular reasons for acting, the private citizen's reasons for acting cannot be the basis of analogy. When government policy depends on "the reasons for the relevant conduct," government must extend the benefits of that policy to conduct engaged in for religious reasons. *Smith*, 494 U.S. at 884; *Lukumi*, 508 U.S. at 537. It cannot "devalue[] religious reasons." *Lukumi*, 508 U.S. at 537.

The State gets this point fundamentally backwards. It improperly analogizes in terms of private reasons instead of state interests, and

then it denigrates and devalues religious reasons. Despite recognizing a vast array of permissible business reasons for failing to deliver or stock a drug, the State insists that "[n]o situation . . . has been identified in which a religious objection is not allowed, but a similar secular reason is allowed." State Br. 47. The apparent basis of this remarkable claim appears in the next paragraph, where the State analogizes religious reasons to "personal biases, dislikes, or prejudices." *Id.* The State thus deems business reasons different from religious reasons, and religious reasons mere personal prejudices. That denigration of religious reasons precisely encapsulates the discrimination that *Smith* and *Lukumi* forbid.

What makes the many business decisions not to stock or deliver a drug analogous to religious decisions not to stock or deliver a drug is the effect on the State's asserted interests: whatever the pharmacy's reasons, the drug is not stocked or delivered. A business reason for failing to stock or deliver endangers the State's asserted interests to the same extent as a religious reason—and cumulatively, to a vastly greater extent, because the State accepts such a wide range of business reasons and because so many more pharmacies act on those reasons.

II. OTHER COURTS HAVE PROPERLY INTERPRETED *SMITH* AND *LUKUMI* TO REQUIRE STRICT SCRUTINY WHEN A LAW BURDENS RELIGIOUS CONDUCT AND SOME BUT NOT ALL ANALOGOUS SECULAR CONDUCT.

Smith and *Lukumi* create an affirmative mandate that regulations must be both "neutral" and "generally applicable." Generally applicable regulations apply to everyone, or at least to nearly everyone, and to all conduct that significantly undermines the state's alleged interest. The state can depart from these standards in "many ways." *Lukumi*, 508 U.S. at 533. Each of those ways triggers strict scrutiny.

Other courts have interpreted *Smith* and *Lukumi* in cases of what might be termed *partially* applicable laws—laws that burden religion and *some* analogous secular conduct, but *not all* analogous secular conduct. Such laws are subject to strict scrutiny, because they treat religious exercise unfavorably as compared to the analogous secular conduct that is not subject to the burdensome law.

A. Rules That Apply To Most But Not All Secular Conduct

An early example in a district court was *Rader v. Johnston*, 924 F.Supp. 1540 (D. Neb. 1996). *Rader* concerned a freshman's free-exercise challenge to the University of Nebraska at Kearney's rule that

freshmen were required to live in the university's dormitory. *Id.* at 1543. Rader, an eighteen-year-old UNK freshman, had sought permission to live in a Christian group house across the street from campus instead of in the dormitory, due to the prevalence of alcohol, drugs, and pre-marital sex in the dormitories. *Id.* at 1544-46. He was denied an exemption to the rule. *Id.* at 1548.

The rule contained categorical exemptions for students older than nineteen, married students, and students living with their parents. *Rader*, 924 F.Supp. at 1546. These categorical exemptions were not without legitimate basis; they did not suggest religious animus. But they treated students' secular needs more favorably than Rader's religious needs. There was an explicit exception for individual hardship, creating entirely reasonable individualized exceptions that were generously interpreted in secular cases, *id.* at 1546-47—but were determined not to apply to Rader's case. Discovery revealed that there were more individualized exceptions in unwritten administrative practice. *Id.* at 1547. When all exemptions were accounted for, only sixty-four percent of UNK freshmen were actually required to live in the dormitory. *Id.* at 1555. Although the rule still burdened a majority

of freshmen, the court held the rule to be not generally applicable because the state had created a "system of 'individualized government assessment' of the students' requests for exemptions," but "refused to extend exceptions" to freshmen desiring to live in the group house "for religious reasons." *Id.* at 1553.

B. A Single Secular Exception That Undermines The State's Regulatory Purpose

A single secular exception triggers strict scrutiny if it undermines the state interest allegedly served by applying the rule to religious conduct. This is the holding of a well-reasoned opinion by Justice Alito, writing then for the Third Circuit, in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999).

In *Newark*, two Muslim police officers whose religious beliefs compelled them to grow beards challenged a city policy requiring police officers to be clean shaven. Though touted as a "zero tolerance" policy, the policy had two exemptions—one for officers with "medical" conditions, and one for officers working undercover. The undercover-officer exemption did not trigger strict scrutiny because the department had no interest in a uniform appearance of undercover officers. *Newark*, 170 F.3d at 366. But the Third Circuit held that the medical exemption

defeated the general applicability of the statute because it undermined the city's interest in the uniform public appearance of the police force to the same degree as would a religious exemption. *Id.* at 364-66.

The Eleventh Circuit applied the same reasoning in holding that a limited secular exemption caused a town's zoning ordinance to fail the general-applicability requirement. *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1235 (11th Cir. 2004). *Midrash Shepardi* applied compelling-interest review to the exclusion of religious assemblies from the business district under a zoning ordinance "provid[ing] for retail shopping and personal service needs of the town's residents and tourists," with the goal of protecting "retail synergy" in the business district. *Id.* at 1233, 1235. A single exemption for lodges and private clubs "violate[d] the principles of neutrality and general applicability," the court held, "because private clubs and lodges endanger[ed]" the town's "interest in retail synergy as much or more than churches and synagogues." *Id.* at 1235.

The unemployment-compensation cases can also be viewed in this light: a single exception for "good cause" required strict scrutiny of the state's failure to provide a religious exception. *Newark* and *Midrash*

Sephardi each involved a single categorical exception; the unemployment cases involved a single provision for individualized exceptions. Either kind of exception—even if there is only one (if that lone secular exception undermines the state's asserted interests)—results in unequal treatment of persons who need a religious exception.

There is another way to state the rule of these cases. When some analogous secular conduct is regulated and some is not, *Smith* and *Lukumi* require that religious conduct be treated like the best-treated secular analog. It is not enough for the state to identify one or a few secular analogs that are burdened equally with religion. It is not enough to treat religion like the secular analog that is treated worst, or that is most heavily regulated. In the unemployment-compensation cases, religious reasons for refusing work must be treated like the small number of acceptable reasons for refusing work, not like the much larger number of unacceptable reasons. In *Newark*, religious reasons for growing a beard must be treated like favored medical reasons, not like disfavored reasons of fashion, style, or personal preference. And so on.

It therefore would not show equal treatment of religious and secular reasons for not stocking a drug to hypothesize that the

regulations might be applied to a secular conscientious objector. Even if such a secular conscientious objector exists, even if the regulations were applied to him, and even if he has no free-exercise claim of his own, that would still leave unregulated a vast domain of secular business reasons for not stocking and delivering selected drugs. If the possibility of applying a regulation to secular moral objectors made a law generally applicable, the general applicability requirement would be nullified. It would always be possible to hypothesize a secular moral objector whose objection tracked that of the religious objectors.

The question is not whether one analogous secular reason is regulated. The question is whether one analogous secular reason is *not* regulated. There are other decisions to similar effect, in this circuit[4] and elsewhere.[5]

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[4] *See Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804 (9th Cir. 2011) ("[G]iven the evidence that San Diego State may have granted certain groups exemptions from the policy, there remains a question whether Plaintiffs have been treated differently because of their religious status."); *Canyon Ferry Road Baptist Church v. Unsworth*, 556 F.3d 1021, 1035 (9th Cir. 2009) (Noonan, J., concurring) (concluding that restrictions on church's speech on referendum issue were not neutral and generally applicable where there was an exception for newspapers).

[5] *See Ward v. Polite*, 667 F.3d 727, 738-40 (6th Cir. 2012) (holding that rule preventing counseling student from referring gay counselee to

C. Reasons For The Rule That One Secular Exception Requires A Religious Exception

A law that burdens religious exercise is not generally applicable if it has even one secular exception that undermines the state's alleged interest in regulating religious exercise. This is no arbitrary rule; it is deeply rooted in the underlying rationale of the general applicability requirement.

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another counselor was not neutral and generally applicable where referrals were permitted for other values conflicts and for failure to pay); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 206-12 (3d Cir. 2004) (holding that a permit fee for keeping wild animals, with exceptions for zoos, circuses, hardship, and extraordinary circumstances, was not neutral and generally applicable); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297-99 (10th Cir. 2004) (holding that one exception given to student of another faith, and earlier exceptions given to plaintiff, raised triable issue of whether defendant maintained a system of individualized exceptions); *Mitchell Cnty. v. Zimmerman*, 810 N.W.2d 1, 15-16 (Iowa 2012) (holding that prohibition on buggies with steel protuberances on wheels was not neutral and generally applicable where county failed to prohibit other devices that also damaged roads); *Horen v. Commonwealth*, 479 S.E.2d 553, 556-57 (Va. Ct. App. 1997) (holding that a ban on possession of certain bird feathers was not neutral, when it contained exceptions for taxidermists, academics, researchers, museums, and educational institutions); *Keeler v. Mayor of Cumberland*, 940 F.Supp. 879, 885-86 (D. Md. 1996) (holding a landmarking ordinance not neutral and generally applicable where it had exceptions for substantial benefit to city, financial hardship to owner, and best interests of a majority of the community).

1. Value Judgments About Religion

In *Newark*, Justice Alito reasoned that the medical exception "indicate[d] that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." 170 F.3d at 366. This point about value judgments also appears in *Lukumi*, which said that the ordinances' individualized evaluation of particular justifications for killing animals "*devalues religious reasons* for killing by judging them to be of lesser import than nonreligious reasons." 508 U.S. at 537 (emphasis added). The point deserves further elaboration. It does not require that the state have made an explicit value judgment, or that state officials consciously compare religious and secular conduct and deem the secular conduct more worthy.

Instead, and more commonly, the implicit value judgment emerges from a series of separate comparisons. In *Newark*, the exemption for medical needs showed that the city considered medical needs more important than its interest in uniformity. And the refusal to exempt religious obligations showed that the city considered its interest in uniformity more important than its officers' religious obligations. The

transitive law applies; if medicine is more important than uniformity, and uniformity is more important than religion, then medicine is more important than religion. That is the value judgment that violates the Free Exercise Clause.

Similarly in this case, the State considers many business needs of pharmacies to be more important than its interest in immediate access to Plan B and Ella in every pharmacy. And it considers immediate access to Plan B and Ella more important than the religious needs of conscientiously objecting pharmacies. With or without a conscious or direct comparison, the State has deemed business needs more important than religious needs. This is the implicit value judgment condemned by *Lukumi*, *Newark*, and *Midrash Sephardi*.

2. Vicarious Political Protection For Religious Minorities

The requirement of generally applicable rules is an application of Justice Jackson's observation that "there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Ry. Express Agency v. City of N.Y.*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

Regulation that "society is prepared to impose upon [religious groups] but not upon itself" is the "precise evil the requirement of general applicability is designed to prevent." *Lukumi*, 508 U.S. at 545-46 (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring)). A small religious minority will not have the political clout to defeat a burdensome regulation, but if that regulation also burdens other, more powerful interests, there will be stronger opposition and the regulation is less likely to be enacted. Burdened secular interests provide vicarious political protection for small religious minorities.

"But this vicarious political protection breaks down very rapidly if the legislature is free to exempt any group that might have enough political power to prevent enactment, leaving a law applicable only to small religions with unusual practices and other groups too weak to prevent enactment." Laycock, 40 CATH. LAW. at 36. If secular interests burdened by the regulation can be exempted, they have no reason to oppose the regulation, and religious minorities are left standing alone. That is plainly what happened here: when all pharmacies were assured that their business reasons for failing to stock and deliver drugs would be accommodated, the majority abandoned its defense of the few

pharmacies with objections based on conscience. *See* Appellees' Br. 113 (citing record). This concern with vicarious political protection is the deepest rationale for the rule that even a single secular exception (if it undermines the asserted reasons for the law) makes a law less than generally applicable.

D. Unequal Treatment Not Reflected In The Text

Unequal treatment of religious and secular conduct is presumptively unconstitutional, whether or not that inequality is reflected in the text of the challenged law. *Lukumi* expressly rejected the city's contention that judicial "inquiry must end with the text of the law at issue." 508 U.S. at 534. Far from confining itself to the text of the challenged ordinances, the Court considered the entire body of Florida law on the treatment of animals in assessing general applicability. *See id.* at 526, 537, 539, 544-45 (citing numerous sections of Florida statutes). It consulted a secondary source to identify an exception not mentioned in the text of any law. *Id.* at 543 (fishing). It also emphasized the text of the ordinances, because Hialeah had carefully codified its religious gerrymander in the text of the ordinances.

In this case, the State proceeded differently, putting very little in the text of its regulations—and then attempting to confine the Court to that limited text. The State acknowledges that general applicability depends not only on the text of the regulation but also on "the effect of a law in its real operation." State Br. 27. But then it tries to take that concession back by claiming that the "real operation" must be determined by examining the text. *Id.* at 37. The test of general applicability is not so self-defeating.

Much of the evidence below was directed to determining not just the real operation of the rules, and not just or even primarily the State's motive, but the original understanding of the rules among the relevant public of regulators and regulated. If government could write vague rules that leave accepted understandings unstated, or that leave much to the discretion of enforcement authorities, and then prevent the courts from examining the unstated understandings or the intended exercise of discretion, government could easily treat religious and secular practices unequally. They need only refrain from mentioning the difference in the treatment in the text of the law.

In this case, given that longstanding practice allowed pharmacies broad discretion in deciding what drugs to stock, that the Stocking Rule was not amended, that the new Delivery Rule was written in vague terms that expressly defer to the unamended Stocking Rule, WASH. ADMIN. CODE §246-869-010(1)(e), and that the new rule also provides for exemption in undefined "substantially similar circumstances," WASH. ADMIN. CODE §246-869-010(1), it was entirely reasonable for the parties and the Court to inquire whether these changes were understood to disrupt the long established practice. The findings of fact make clear that, except for objections based on conscience, they were not so intended.

A leading example invalidating unequal treatment not reflected in the text of the challenged law is *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002). The ordinance at issue in *Tenafly* prohibited all persons from posting signs or advertisements on public utility poles; it was entirely neutral and generally applicable "on its face." *Id.* at 167. The borough enforced the ordinance against Orthodox Jews who sought to string thin strips of black plastic from pole to pole—strips with important religious significance. But the court found an

unwritten policy of non-enforcement with respect to house numbers, lost-animal signs, and other uncontroversial items. *Id.* The borough's unequal enforcement of the ordinance triggered strict scrutiny. *Id.* at 168 (holding that the "selective, discriminatory application" of the ordinance "'devalue[d]' Orthodox Jewish reasons for posting items on utility poles by 'judging them to be of lesser import than nonreligious reasons'" (quoting *Lukumi*, 508 U.S. at 537)). *Tenafly*'s reasoning echoes *Rader*, refusing to find general applicability satisfied when the school "grant[ed] exceptions to the policy, at their discretion, in a broad range of circumstances not enumerated in the rule and not well defined or limited." 924 F.Supp. at 1552.

E. Anti-Religious Motive

A law or regulation enacted for anti-religious motives fails the test of neutrality. Anti-religious motive is sufficient, although not necessary.

The State first appears to say that because anti-religious motive is not necessary, it is irrelevant. State Br. 28, 38 & n.11, 41. Then it appears to say that anti-religious "animus" is required. *Id.* at 47. The State's argument is not merely self-contradictory; it manages to be wrong both times. Moreover, the State's animus argument would

require appellees to prove discriminatory intent, while its motive-is-irrelevant argument would deny appellees the benefit of legislative history, which is often a necessary tool for making that showing. The State has no coherent theory of how to prove a free-exercise violation.

We know that anti-religious motive is *not necessary* because nine justices held the *Lukumi* ordinances unconstitutional, but only two justices found or considered bad motive. 508 U.S. at 540-42 (Kennedy, J.). Two said they would not consider motive. *Id.* at 558-59 (Scalia, J., and Rehnquist, C.J., concurring). The remaining five justices did not address Justice Kennedy's reliance on the history of the ordinances. There was little need to consider motive in *Lukumi*, when there were so many other grounds for holding the ordinances not neutral and not generally applicable.

The answer to whether anti-religious motive is relevant or *sufficient* comes elsewhere in the *Smith* and *Lukumi* opinions. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue *discriminates against* some or all religious beliefs *or* regulates or prohibits conduct *because* it is undertaken for religious reasons."

Lukumi, 508 U.S. at 532 (emphases added). As already noted, this is the language of equal protection and discrimination law.

Similarly in *Smith*, the majority analogized to the Court's equal-protection jurisprudence, particularly *Washington v. Davis*, 426 U.S. 229 (1976). *Smith*, 494 U.S. at 886 n.3. *Davis* held that, to show a violation of the Equal Protection Clause, a plaintiff must prove either a racial classification *or* that a facially neutral practice is "a purposeful device to discriminate." 426 U.S. at 246. Expounding on *Davis*, the Supreme Court in *Personnel Administrator v. Feeney* said that when a challenged rule is facially neutral, those claiming discrimination must show that the rule was adopted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." 442 U.S. 256, 279 (1979).

Hunter v. Underwood turned these repeated statements of the rule into unambiguous holding, relying on legislative history to unanimously hold that a provision of the Alabama Constitution was invalid because "enacted with the intent of disenfranchising blacks." 471 U.S. 222, 228-29 (1985). This body of equal-protection law, first

referenced in *Smith*'s footnote 3, is the "*minimum* requirement" of neutrality and general applicability under *Smith* and *Lukumi*.

A clear example is *Shrum v. City of Coweta*, 449 F.3d 1132 (10th Cir. 2006). The chief of police allegedly invoked rules derived from the city's collective bargaining agreement, facially neutral and facially generally applicable, for the purpose of driving the plaintiff officer off the force by creating a conflict between his police duties and his religious duties as a part-time minister. On an interlocutory appeal asserting qualified immunity, the court held that the plaintiff's allegations of motive to burden his religious exercise, if proven, "establish a violation of his clearly established constitutional rights under the Free Exercise Clause." *Id.* at 1144. "Proof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus." *Id.* at 1145 (citations omitted).

Under the "minimum requirement" of *Smith* and *Lukumi*, appellees *may* prove, as a path to strict scrutiny, that the regulators' motivation was to burden religion, much as a plaintiff would do in an equal-protection case. But a free-exercise claim is not limited to the

borders of an equal-protection claim. Appellees can also prove lack of neutrality or general applicability in many other ways, regardless of motive. Anti-religious motive is sufficient but not necessary.

III. THE CHALLENGED REGULATIONS ARE JUST AS BAD AS THE ORDINANCES IN *LUKUMI*, ALTHOUGH THAT IS NOT REQUIRED.

The ordinances in *Lukumi* fell "well below" the threshold of general applicability. The regulations at issue in this case need not be nearly that bad to trigger strict scrutiny. But they are.

The district court's findings of fact are overwhelming. *No* pharmacy in Washington has *ever* been penalized for failing to stock or deliver a drug for *any* secular reason. Not for strong secular business reasons, and not for weak business reasons either. And no one understands the new Delivery Rule to have changed that.

The sweep of exemptions and lack of coverage, and the sweep of business discretion to decide what drugs to stock and deliver, is developed in the findings of fact and in the appellees' brief. It appears that Washington has singled out religious reasons as especially offensive, when the governing rule is that religious reasons are constitutionally protected by a stringent requirement of equal treatment. If this regulation is held to be generally applicable, *Smith*

and *Lukumi* will be dead in the Ninth Circuit. The only way to violate the Free Exercise Clause will be to draft a regulation that says: "No person acting for a religious reason may do *X*. This regulation does not apply to any person acting for a secular reason." Short of that, it is hard to think of a rule that fails the test of general applicability if these regulations and their intended application do not.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,733 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it was prepared in Microsoft Office Word in 14-point, proportionally spaced Century Schoolbook font.

3. The electronic version of this brief is an exact copy of the paper version, includes the required privacy redactions under 9th Cir. R. 32(a)(7), and has been scanned and reported free of viruses by the most recent version of a commercial virus-scanning program.

s/ Christian J. Ward
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CERTIFICATE OF SERVICE

I certify that on November 20, 2012, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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.

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Appendix A

Appendix

Each of the individuals listed below has made the Religion Clauses of the Constitution an important part of his or her work as a teacher and scholar. Each joins this brief as an amicus curiae. Institutional affiliations are for identification only; none of amici's law schools takes any position on the issues in this case.

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