No. 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.

JOHN WIESMAN, *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
No. 3:07-cv-05374-RBL – Hon. Ronald B. Leighton

APPELLEES' PETITION FOR REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Stormans, Inc., is a privately-held corporation with no parent corporation. No publicly-held corporation owns 10% or more of its stock.

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STATEMENT

Washington is the only state in the country with pharmacy regulations prohibiting referrals for reasons of conscience. Every major pharmacy organization opposes the regulations, and they have never been applied to anything but religious conduct.

After a twelve-day bench trial, including almost 800 exhibits and twenty-two witnesses with over 200 years of combined pharmacy experience, the district court found that "the purpose of the Regulations was to target conscientious objections to Plan B." (ER144.) It found that "the burden [of the Regulations] falls squarely and almost exclusively on religious objectors," while exempting referrals for "an almost unlimited variety of secular reasons." (ER39, 35.) And it found that the Regulations have been selectively enforced. (ER45-54, 132-37.)

A panel of this Court reversed. Remarkably, the panel simply ignored the district court's factual findings, relying instead on its own account of the evidence. It then adopted a narrower interpretation of the Free Exercise Clause than any other circuit. The result is a decision that upends decades of settled pharmacy practice and creates multiple conflicts with the Supreme Court and other circuits.

FACTUAL BACKGROUND

I. The Plaintiffs

The Plaintiffs are two pharmacists and a family-owned pharmacy who believe that life is sacred from conception. (ER59-61, 107-08.) Because of their beliefs, Plaintiffs cannot dispense the morning-after or week-after pills (collectively, "Plan B"), both of which can destroy a fertilized human egg. (*Id.*)[1] For Plaintiffs, dispensing these drugs would make them complicit in an abortion. (ER107-08.)

When a customer requests Plan B, Plaintiffs provide a "facilitated referral"—that is, they provide a list of nearby pharmacies that carry the drug and call ahead to ensure it is in stock. (ER61.) Over thirty pharmacies carry Plan B within five miles of Plaintiff's store. (ER82.) It is also available from nearby doctors' offices, government health centers, emergency rooms, Planned Parenthood, a toll-free hotline, and the Internet. (*Id.*) As of 2013, it is available on grocery-store shelves without a prescription, just like Tylenol. Supp.8. It is undisputed that

[1] The panel said that "Plaintiffs declined to introduce evidence" on "[w]hether the drugs at issue prevent implantation of a fertilized ovum." Op.41 n.14. But Plaintiffs offered extensive evidence, including FDA-approved labeling, medical literature, and expert opinion. SER1245, 1508-1595.

none of Plaintiffs' customers has ever been denied timely access to any drug. (ER82-83.)

The State admitted and stipulated below that Plaintiffs' referrals are "a time-honored pharmacy practice" that "do not pose a threat to timely access to lawfully prescribed medications," "including Plan B." (SER1619-20.) Plaintiffs' referrals are approved by the American Pharmacists Association and legal in every other state. APhA.28-31.

II. The Regulations

In 2007, Washington became the only state to pass Regulations making Plaintiffs' conduct illegal. Planned Parenthood drafted the Regulations at the request of Governor Gregoire, who personally joined a boycott of Plaintiff's store. (ER70-71, 108.) When the Pharmacy Commission initially rejected the Governor's proposal, she replaced several members with new ones recommended by Planned Parenthood. (ER68, 70, 76.) After the Regulations were adopted, the Commission's spokesperson and primary drafter of the official documents explaining the Regulations admitted that "the object of the rule was ending refusals for conscientious objection." (SER295, 300, 349, 356.) The Commission Chairman also vowed that "I for one am never going to vote

to allow religion as a valid reason for a facilitated referral." (ER80-81; SER1204.)

The new Regulations include a "Delivery Rule," which provides that "[p]harmacies have a duty to deliver lawfully prescribed drugs or devices." (ER90-91.) The Delivery Rule incorporates an older "Stocking Rule," which requires pharmacies to "maintain at all times a representative assortment of drugs." (ER92.) Both rules include exemptions that allow pharmacies to refer patients for a host of secular reasons, but not for reasons of conscience. (ER34.)[2]

Due to the Regulations, one Plaintiff pharmacist was constructively discharged. The other must transfer out-of-state, and the pharmacy owners will lose their pharmacy license absent an injunction. (ER108-111.)

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[2] Citing an early preliminary-injunction ruling, the panel states that Plaintiffs "do not challenge the Stocking Rule." Op.14, 16 n.2, 31. But on remand, Plaintiffs expressly challenged the Stocking Rule, litigating it at summary judgment, pretrial, trial, and appeal. *See, e.g.*, SJResp.22 (Stocking Rule is "[a]t the center of this case"); ER315-421 (pretrial); ER44-49, 93-94 (trial); Br.19-21, 42-43, 73-76, 86-100, 135.

III. The Proceedings

Plaintiffs filed suit on July 25, 2007, challenging the Regulations under the Free Exercise, Equal Protection, and Due Process Clauses. After reversal of a preliminary injunction, *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009) ("*Stormans I*"), the district court held a twelve-day bench trial, considering almost 800 exhibits and twenty-two witnesses, and culminating in 145 pages of factual findings and legal analysis.

The trial court thoroughly analyzed how the Regulations operate in practice. Reviewing four years of experience, the court found that "the effect of the law in its real operation" was to "exempt pharmacies and pharmacists from stocking and delivering lawfully prescribed drugs for an almost unlimited variety of secular reasons, but fail to provide exemptions for reasons of conscience." (ER34-35.) It found that pharmacies can refuse to stock drugs that might attract an undesirable clientele, require additional paperwork, or fall outside their chosen business niche. (ER92-94, 124-25.) They can refuse to deliver drugs to patients who request simple compounding, unit dosing, or offer to pay with Medicaid. (ER95-96.) And they can fail to deliver drugs due to

careless inventory management. (ER125; SER693-99.) None of this has ever been prohibited; rather, "the only change these rules have [e]ffected" was to "eliminat[e] referral…for religious reasons." (SER356.)

The court also made detailed findings on the Regulations' history and purpose. The court found that "the evidence at trial revealed no problem of access to Plan B or any other drug before, during, or after the rulemaking process." (ER81-82.) Instead, the evidence "demonstrat[ed] that the predominant purpose of the [Regulations] was to stamp out the right to refuse" for reasons of conscience. (ER17.) The Commission confirmed its purpose in public pronouncements (Br.26-27) and voluminous internal correspondence—all of which revealed that "the goal of the [Commission], the Governor, and the advocacy groups" was to "bar pharmacists and pharmacies from conscientiously objecting," while "allowing pharmacies and pharmacists to refuse to dispense for practically any other reason." (ER18.)

Based on its extensive findings, the district court held that the Regulations were not "neutral" under the Free Exercise Clause because they were gerrymandered to burden religious conduct and motivated by discriminatory intent. (ER34-44, 137-46.) It also held that the

Regulations were not "generally applicable" because they exempted a vast amount of secular conduct and had been selectively enforced. (ER44-54, 118-37.)

A panel of this Court reversed, concluding that "the rules are neutral and generally applicable" and "rationally further the State's interest in patient safety." Op.9.

REASONS FOR GRANTING THE PETITON

I. The panel resolved multiple, far-reaching questions of free exercise doctrine in conflict with the Supreme Court and other circuits.

The panel's decision conflicts with the Supreme Court and other circuits on several core questions of free exercise doctrine. To reach its novel legal conclusions, the panel utterly disregarded the district court's factual findings and engaged in fact-finding as if on a blank slate. The result is a decision that bears little relationship to the record or the district court's factual findings. More importantly, the decision dramatically curtails the Free Exercise Clause in conflict with the Supreme Court and other circuits.

A. The decision conflicts with Supreme Court precedent on religious gerrymanders.

Under the Free Exercise Clause, a law is not "neutral" if "the effect of a law in its real operation" is to accomplish a "religious gerrymander." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993). In *Lukumi*, the Court held that an ordinance banning animal sacrifice was a religious gerrymander because it burdened "Santeria adherents but almost no others," had been interpreted to favor secular conduct, and "proscribe[d] more religious conduct than [wa]s necessary to achieve [its] stated ends." 508 U.S. at 536-38. Here, the district court found that the Regulations do the same: They burden conscientious objectors but no others; they favor secular referrals; and they prohibit conscience-based referrals even when the State has stipulated that they are harmless. (ER137-41.)

Although the panel admitted that religious objectors "may be burdened disproportionately," it held that the Regulations are still neutral because they apply "to *all* objections to delivery that do not fall within an exemption." Op.21. But that is a truism: All laws apply to conduct that isn't exempt. In *Lukumi*, for example, the ordinances applied to *all* animal killing that wasn't exempt. The problem was the

breadth of the exemptions, which protected almost all forms of secular animal killing. The same problem is present here: The exemptions, in practice, protect all forms of secular referral. Indeed, it is undisputed that *no* secular referral has *ever* been found to violate the Regulations—despite the fact that, at the time of trial, the Delivery Rule had been in force for four years, the Stocking Rule for over forty, and the Commission conceded that such referrals are commonplace.

Next, the panel reasoned that the Regulations are neutral because they *might* apply to secular referrals in the future—such as refusals to deliver "diabetic syringes, insulin, HIV-related medications, and Valium." Op.21-22. But *Lukumi* requires the court to consider "the effect of a law in its real operation"—not hypothetical future operation. 508 U.S. at 535; Br.82-83. In any event, the district court found that these hypothetical referrals are *exempt* under the Regulations. (ER86-90, 97-102.)

The panel also suggested that the Regulations are neutral because they "specifically *protect* religiously motivated conduct" by "allowing pharmacies to 'accommodate' individual pharmacists" who have religious objections. Op.20. But the district court found that the

Regulations do *not*, in practice, work that way: The vast majority of pharmacies have only one pharmacist on duty, making it impossible to accommodate individual pharmacists—as happened with the two individual Plaintiffs. (Br.27-29; ER105-111, 15.) And the Commission's own witnesses admitted that the Regulations do not accommodate objectors. (ER106-07; Br.27-29.)

Finally, the panel found it irrelevant that the Regulations prohibit conscience-based referrals even when there are "other means that might achieve the Commission's purpose." Op.24. But *Lukumi* says just the opposite. When laws "proscribe more religious conduct than is necessary to achieve their stated ends," that is "significant evidence" of "improper targeting." 508 U.S. at 538. Here, the State has *stipulated* that conscience-based referrals "do not pose a threat to timely access to lawfully prescribed medications." (SER1619-20.) The panel simply disregarded this stipulation in conflict with *Lukumi*. Op.23-34; *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 677 (2010) ("[Factual stipulations are] binding and conclusive.").

B. The decision conflicts with the Supreme Court and other circuits on discriminatory intent.

The panel's decision also conflicts with the Supreme Court and other circuits on the question of discriminatory intent. Discriminatory intent can be shown by, among other things, "the historical background of the [law]," "the specific series of events leading to [its] enactment," and "contemporaneous statements made by members of the decisionmaking body." *Lukumi*, 508 U.S. at 540 (Kennedy, J.). Although Justice Kennedy's opinion on this point was not joined by a majority, this Court has cited it favorably, and every circuit to consider the question has followed it. (ER142-43 (collecting cases); Br.112.) It is also consistent with longstanding precedent under the Establishment and Equal Protection Clauses, both of which invite consideration of a law's historical background. *See, e.g.*, *Cammack v. Waihee*, 932 F.2d 765, 774 (9th Cir. 1991) (Establishment); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 489 (1997) (Equal Protection).

Here, the record includes extensive evidence on the Regulations' historical background, including "reams of emails, memoranda, and letters between the Governor's representatives, Pharmacy [Commission] members, and advocacy groups." (ER18.) The district

court found that "the focus of the regulatory process, from beginning to end, was on conscientious objections to Plan B," and that "literally all of the evidence," except self-serving testimony by State witnesses, "demonstrates that the 2007 rulemaking was undertaken primarily (if not solely) to ensure that religious objectors would be required to stock and dispense Plan B." (ER43, 77-78, 144-46.)

In response, the panel suggested that it is an "open question" whether it can consider historical background at all, and that "the collective will of the [Commission] cannot be known, except as it is expressed in the text and associated notes and comments of the final rules." Op.24 (quoting *Stormans I* at 1133). But this conflicts with every other circuit to address the question, as well as a long line of establishment and equal protection cases. (ER142-43; Br.112.)

Next, the panel rejected the district court's finding of discriminatory intent, asserting that the Commission "did not act solely in response to religious objections," but "was also concerned with the safe and timely delivery of many other drugs." Op.24-25. But the district court's finding "on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal." *Hernandez v.*

New York, 500 U.S. 352, 353 (1991). It cannot be overturned unless it is "illogical, implausible, or without support in inferences that may be drawn from the record." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). The panel never even mentioned this standard.

That is because the district court's finding was based on overwhelming evidence. (ER144.) There were "reams" of evidence demonstrating that the Regulations were "aimed at Plan B and conscientious objectors from their inception." (ER17.) The Governor asked her advisors to ensure that the Regulations were "clean enough for the advocates re: conscious/moral issues." (SER1085.) She replaced Commission members with those recommended by Planned Parenthood. (ER68, 76.) The Executive Director admitted that he was trying to "draft language to allow facilitating a referral for only…non-moral or non-religious reasons." (SER1099.) The Commission's own publication described "the issue" addressed by the Regulations as "emergency contraception" and referrals based on "conscientious, moral, or religious grounds." (SER952-56, 643; ER77; Br.26-27.) The Commission Chairman made overtly hostile statements related to religious

objectors, including a vow "never" "to vote to allow religion as a valid reason for a facilitated referral." (SER1204, 1334, 800-01, 787-88, 1139; ER144-45.) The Commission's own witnesses admitted that "the object of the rule was ending refusals for conscientious objection." (SER349; ER144-45.)

It is as if, in *Lukumi*, the mayor privately asked his advisors to make sure that the ordinance was "clean enough" on "Santeria sacrifice issues"; the city attorney admitted that he was trying to "draft language to allow animal killing for only non-religious reasons"; the council chairman vowed "never vote to allow Santeria sacrifice as a valid reason for animal killing"; and city officials admitted that "the object of the rule was ending Santeria sacrifice." The panel's conclusion that "[n]othing in the record" supports a finding of discriminatory intent is absurd—especially in light of the deference owed to the district court on such a fact-intensive question.[3]

[3] The panel's one-paragraph rejection of the trial court's findings was copied nearly verbatim from Intervenors' opening brief. *Compare* Op.25 *with* Interv.46.

C. The decision conflicts with the Supreme Court and other circuits on categorical exemptions.

The panel's opinion also conflicts with the Supreme Court and other circuits on the doctrine of categorical exemptions. Those cases teach that a law is not "generally applicable" if it is substantially underinclusive—that is, if it "fail[s] to prohibit nonreligious conduct that endangers [the government's] interests in a similar or greater degree than [religious conduct] does." *Lukumi*, 508 U.S. at 543.

Here, the Regulations "exempt pharmacies and pharmacists from stocking and delivering lawfully prescribed drugs for an almost unlimited variety of secular reasons." (ER35, 118-27.) For example, pharmacies can choose not to stock pain medications because they dislike the clientele they attract; they can choose not to stock anti-depressants because they find it inconvenient to monitor blood work; and they can choose not to stock Plan B because they prefer to serve a geriatric or pediatric niche. Br.73-74. Even when a time-sensitive drug is sitting on the shelf, they can refuse to deliver it because they don't want to mix a simple compound, perform unit dosing, or accept Medicaid. Br.105. They can even fail to deliver time-sensitive drugs due to careless inventory management. (ER125.) Commission witnesses

conceded that all of these refusals are permitted even when they pose a "much more serious access issue" than conscience-based referrals. (ER123-24, Br.71-76.)

The panel dismissed these exemptions on the ground that they actually "further the rules' stated goal of ensuring timely and safe patient access to medications," because "the absence of these exemptions would likely drive pharmacies out of business." Op.27-28 (quoting *Stormans I* at 1135). But no evidence supports this speculation. Rather, the district court found that "[i]t is quite possible that narrowing or eliminating some of the exemptions would be fully compatible with keeping pharmacies in business *and* expanding access to medication." (ER126.) For example, "requiring all pharmacies to accept Medicaid[,] as many do, could significantly increase access to medication for the poor without driving pharmacies out of business." (*Id.*) And it is hard to believe that requiring niche pharmacies to stock Plan B would drive them out of business.

More importantly, it is undisputed that the *absence* of religious accommodations will drive religious pharmacies out of business—as Plaintiffs testified and the Commission admitted. (ER108-110, 126.)

The panel's opinion assumes that it is fine for the State to accommodate secular referrals to "keep pharmacies in business," while refusing to accommodate religious referrals "that are just as necessary to keep pharmacies in business." (*Id.*) But that is precisely the sort of "value judgment in favor of secular motivations" that the Constitution forbids. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.); *Lukumi*, 508 U.S. at 537-38 (government cannot "devalue[] religious reasons" by "judging them to be of lesser import than nonreligious reasons").

Other circuits have repeatedly invalidated laws with far narrower exemptions. In *Fraternal Order*, the Third Circuit invalidated a law that prohibited police officers from growing beards for religious reasons, because the law had one exemption for medical reasons. 170 F.3d at 366. The Eleventh Circuit invalidated a zoning restriction that applied to synagogues while exempting private clubs. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234-35 (11th Cir. 2004). And the Sixth Circuit invalidated a rule that prohibited counselors from referring patients for reasons of conscience while exempting "multiple types of [secular] referrals." *Ward v. Polite*, 667 F.3d 727, 738-40 (6th

Cir. 2012). The panel's decision squarely conflicts with these cases. *See also* Br.77 (collecting cases).

D. The decision conflicts with the Supreme Court and other circuits on individualized exemptions.

The panel's decision also creates conflicts on the issue of "individualized exemptions." When a law gives the government discretion to make "individualized exemptions" based on "an individualized governmental assessment of the reasons for the relevant conduct," the law is subject to strict scrutiny. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.).

Here, the district court found that three provisions give the government virtually unlimited discretion to make individualized exemptions: (1) the government can exempt any conduct that is "substantially similar" to other exempted conduct; (2) the government can exempt a pharmacy if it is in "good faith" compliance with the Stocking Rule; and (3) the government can exempt a pharmacy based on an "extraordinarily vague and open-ended" interpretation of what constitutes a "representative assortment" of drugs. (ER129-30; Br.85-89.)

The panel held that these exemptions do not trigger strict scrutiny because they "are tied to particularized, objective criteria." Op.31. But the criteria are anything but objective. (ER129-30; Br.85-89.) More importantly, the panel's ruling misses the point. Any exemption can arguably be tied to objective criteria; the question is whether the criteria give the government discretion to make "case-by-case inquiries" based on "the reasons for the relevant conduct." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004). That is undisputed here. (ER101, 130; Br.85-89.)

In *Blackhawk*, for example, a Native American religious leader sought to keep wild animals in captivity without paying a fee. 381 F.3d at 211. The state could exempt individuals from the fee if it was consistent with "sound game or wildlife management activities"; but it chose not to grant an exemption for religious reasons. Although the text of the exemption was obviously tied to "particularized, objective criteria" (Op.31)—namely, consistency with "sound game or wildlife management activities"—the Third Circuit held that it still fell within the individualized exemptions rule. 381 F.3d at 209. *Blackhawk* and the panel's decision here cannot be reconciled. *See also* ER130-31

(addressing individualized exemptions in *Axson-Flynn*, 356 F.3d 1277; *Sherbert v. Verner*, 374 U.S. 398 (1963); and *Lukumi*, 508 U.S. at 537).

E. The decision conflicts with other circuits on selective enforcement.

The panel's decision also conflicts with other circuits on selective enforcement. In *Tenafly Eruv Association, Inc. v. Borough of Tenafly*, 309 F.3d 144, 168 (3d Cir. 2002), an ordinance banned the placement of materials on public utility poles. In practice, the government did nothing to enforce the ordinance against common directional signs, lost-animal signs, and the like. But in response to citizen complaints, the government enforced the ordinance against ceremonial objects placed by Orthodox Jews. *Id.* at 151-53. The Third Circuit held that the government's "selective, discretionary application of [the ordinance]" against Orthodox Jews was unconstitutional. *Id.* at 168.

Here, it is undisputed that the Commission has done nothing to enforce the Regulations against widespread referrals for secular reasons. But in response to complaints brought by activist groups (ER104-05), it has enforced the Regulations against Plaintiffs. In fact, in the four-year history of the Delivery Rule, and the over forty-year history of the Stocking Rule, the *only* conduct that has *ever* been

considered to be in violation of the Regulations is Plaintiffs' religiously motivated referrals. (ER63, 96, 98, 133.)

The panel rejected the district court's finding of selective enforcement on the ground that "[t]he Commission enforces the [Regulations] through a complaint-driven process," and the Commission has not received any complaints about "similarly situated, secularly motivated [conduct]." Op.34-35. But this holding squarely conflicts with *Tenafly*, where the city *also* enforced its ordinance in response to complaints, and where there was no evidence that the city had received any complaints about similarly situated, secularly motivated conduct. 309 F.3d at 151-53. Indeed, this case is far stronger than *Tenafly*, because there is *direct evidence* of discriminatory intent: The Commission's Chairman vowed that he would "never" "vote to allow religion as a valid reason for facilitated referral," and said that conscientious objectors are engaged in "immoral" "sex discrimination" and should be prosecuted "to the full extent of the law," among other hostile statements. (SER1204, 1334, 800-01, 787-88, 1139; ER144-45.)

Second, the complaint-driven enforcement only makes the selective-enforcement problem worse. As the district court found, the

Commission was well-aware before adopting the Regulations that "pro-choice groups have conducted an active campaign to [file complaints against] pharmacies and pharmacists with religious objections to Plan B," but that "[i]n the vast majority of cases, a referral for business reasons is never going to generate a complaint." (ER104-05.) Thus, from 2006-08, Plaintiff was 700 times more likely to be investigated than any other pharmacy, and was the only pharmacy ever considered to violate the Regulations. (ER34, 739-47; Br.42-43; SER1284-88.)

II. The questions presented are exceptionally important.

This case is also exceptionally important, as evidenced by the seventeen amicus briefs filed on behalf of organizations representing tens of millions of individuals. First, it is crucial for the practice of pharmacy. As the American Pharmacists Association and thirty-four other pharmacy organizations have explained, the Regulations are "truly radical" and "grossly out of step with state regulatory practice." APhA.31. The panel's decision upsets decades of settled pharmacy practice in Washington, threatens the balance in other states, and "might well have the effect of *reducing* access by driving some pharmacies out of business." APhA.28.

Second, the panel's decision undermines the fundamental right to refrain from taking human life. That right has long been protected—for pacifists who object to military service, doctors who object to capital punishment, medical professionals who object to assisted suicide, and doctors and nurses who object to abortion. Br.127-29. It has long been protected for pharmacists in all fifty states. *Id.* So whatever the status of modern due process jurisprudence, the right to refrain from taking human life merits protection. *See also San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004) (strict scrutiny applies to "colorable claim" that free exercise and "a companion right" have been violated).

Finally, the panel has adopted the narrowest interpretation of the Free Exercise Clause in the country. "If this regulation is held to be generally applicable"—when it has never been applied to any secular conduct, when the government has stipulated that it is overbroad, when public officials admit that they were targeting religion, and when reams of internal correspondence reveal discriminatory intent—then the Free Exercise Clause "will be dead in the Ninth Circuit." Profs.34-35.

CONCLUSION

The petition should be granted.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 and 40-1, the attached petition for panel rehearing and rehearing en back is proportionally spaced, has a typeface of 14 points or more and contains 4,189 words.

Dated: August 13, 2015.

s/Kristen K. Waggoner
Kristen K. Waggoner

Attorney for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I electronically 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 on August 13, 2015. 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/Kristen K. Waggoner
Kristen K. Waggoner

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