No. 15-862

In the Supreme Court of the United States

STORMANS, INC., DOING BUSINESS AS RALPH'S THRIFTWAY; RHONDA MESLER; AND MARGO THELEN,
Petitioners,

v.

JOHN WIESMAN, SECRETARY OF THE WASHINGTON STATE DEPARTMENT OF HEALTH, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RELIGIOUS LIBERTY SCHOLARS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief addresses the meaning of "neutral" and "generally applicable" law—the threshold standards that determine the level of scrutiny under the constitutional test set forth in *Employment Division v. Smith* and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.

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INTEREST OF AMICI

Amici are law professors who have closely studied the Religion Clauses, in most cases for many years. We hold broadly diverse views on religion, politics, and public policy, but we agree on the meaning of "neutral" and "generally applicable" law. This brief will place this case in the broader context of free-exercise doctrine. Because there are many amici, individuals are identified in the appendix.[1]

SUMMARY OF ARGUMENT

This Court's free-exercise jurisprudence is defined by two cases with facts at opposite ends of a continuum. The Court decided them a quarter century ago, and it has provided no further guidance despite a growing circuit split. Lower courts that carefully examined this Court's opinions found a clear rule that governments must treat religious conduct as well as they treat analogous secular conduct—or face strict scrutiny. But that rule has not been unambiguously stated, and the Ninth Circuit entirely missed it.

Employment Division v. Smith held that religiously motivated conduct is not exempt from a "valid and neutral law of general applicability," exemplified there by an "across-the-board criminal prohibition" on possession of peyote. 494 U.S. 872, 879, 884 (1990) (internal quotations omitted). The only other case to apply this rule struck down a gerrymandered set of ordinances that applied to

[1] This brief was prepared entirely by amici and their counsel. No other person made any financial contribution to its preparation or submission. Counsel of record received timely notice of the intent to file this brief, and blanket consents are on file with the Clerk.

Santeria adherents and almost no others, noting that these ordinances fell "well below the minimum standard necessary to protect First Amendment rights." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993).

Many laws that burden religion fall between the extremes of *Smith*'s no-exception prohibition and *Lukumi*'s religious gerrymander: they exempt some, but not all, secular conduct that is analogous to the burdened religious conduct. Lower courts have disagreed about these in-between cases, and now the Ninth Circuit has upheld regulations as extreme as the ordinances in *Lukumi*.

I. Neutrality and general applicability are distinct requirements; if either is unsatisfied, strict scrutiny applies. Laws that "target" or "gerrymander" religion with the "object" of imposing a burden are not neutral. *Id.* at 533-34. The "minimum" requirement of neutrality is that a law not "discriminate[]" against religion or prohibit conduct "because" it is religious. *Id.* at 532. But none of these words—target, gerrymander, object, discriminate, because—appears in the discussion of general applicability.

Discriminatory government motive is one way to show that a law is not neutral. Anti-religious motive is *sufficient* to trigger strict scrutiny, but never *necessary*. Nine Justices found the ordinances in *Lukumi* invalid, but only two found bad motive.

II. Whether or not a law is neutral, it is subject to strict scrutiny if it is not generally applicable.

A. A generally applicable law applies to all secular conduct analogous to the burdened religious conduct. The regulations at issue here apply only to religious

reasons for failing to stock or deliver a drug, exempting all or nearly all secular reasons.

B. The Ninth Circuit nevertheless held the rules to be generally applicable, because it found good policy reasons for the secular exemptions. But the reasons for exempting analogous secular conduct do not make that conduct any less analogous.

Whether secular conduct is analogous to regulated religious conduct is determined by its effect on the state's asserted interests. If the state fails to regulate secular conduct that undermines its asserted interests to a similar degree as the burdened religious conduct, the law is not generally applicable and requires strict scrutiny. General applicability requires that religious conduct be treated equally with more-favored secular conduct that causes harms similar to those allegedly caused by the religious conduct.

Unequal treatment need not be reflected in the text of the law; it is equally invalid if it emerges informally or in the course of enforcement. The Ninth Circuit ignored this principle, refusing to consider the drafting history, and explaining away the enforcement history. By disregarding the operation of the regulations in practice, the Ninth Circuit disregarded many of the district court's key findings: that Washington prohibits conscience-based refusals to stock and deliver drugs—and almost nothing else.

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 shows that a law is not generally applicable. *Smith* and *Lukumi*

clearly imply this rule, and a well-reasoned opinion by then-Judge Alito adopts it explicitly.

C. There are at least two reasons for rigorously interpreting and enforcing the requirement of general applicability. First, exempting some secular conduct from a prohibition that applies to religious conduct implies an improper value judgment—that the secular conduct is more valuable, more deserving of protection, than the religious conduct. The Ninth Circuit squarely violated this principle, deciding that business reasons for not stocking a drug are good, but religious reasons are not so good. App.30a-31a. It made the very "value judgment" that the Free Exercise Clause prohibits.

Second, requiring laws to be generally applicable 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 and still regulate religious minorities.

III. In this case, all business reasons for not stocking or delivering drugs are exempt; only religious reasons are prohibited. If these regulations are generally applicable, the Free Exercise Clause protects only against governments that make no effort to disguise their suppression of disapproved religions. A quarter century after *Smith* and *Lukumi*, it is time for more specific guidance from this Court.

ARGUMENT

The current understanding of the Free Exercise Clause derives from two cases with facts at opposite ends of a continuum—*Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *Smith* upheld the epitome of a generally applicable law—an "across-the-board criminal prohibition" on possession of peyote. 494 U.S. at 884. *Lukumi* unanimously struck down a system of city ordinances gerrymandered to such an extreme degree that they applied to "Santeria adherents but almost no others." 508 U.S. at 536.

Smith and *Lukumi* are both special cases, at opposite ends of a broad range. Many cases fall in the middle, involving laws that regulate religious conduct and some but not all analogous secular conduct. In the quarter century since *Smith* and *Lukumi*, this Court has provided no further guidance. The result is the circuit split detailed in the petition, Pet.22-38, and the Ninth Circuit's confused failure to apply *Lukumi* to this case, which falls at the *Lukumi* end of the continuum.

This brief will place this case in the broader context of the free-exercise doctrine that emerges from *Smith*, *Lukumi*, and the earlier precedents they reinterpreted: if a law is not neutral, or not generally applicable, it triggers strict scrutiny.

I. Neutrality and General Applicability Are Independent Requirements with Distinct Content.

A. *Smith* 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.'" 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). But if a law is not neutral, or not generally applicable, it must be justified under strict scrutiny and the compelling-interest test as before. *Id.* at 884 (reaffirming *Sherbert v. Verner*, 374 U.S. 398 (1963)). *Lukumi* is the only other Supreme Court case to apply this test, and in the decades since, lower courts have inconsistently construed it. The Ninth Circuit departed from it altogether.

Lukumi addressed neutrality and general applicability as distinct requirements, in separate sections of the opinion. The ordinances were not neutral, because they "target[ed]" Santeria, their "object" was to suppress Santeria sacrifice, and they were "gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings." 508 U.S. at 542. These words—target, targeting, object, and gerrymander—are pervasive in the neutrality section of the opinion. *Id.* at 532-42. But they do not even appear in the section on general applicability. *Id.* at 542-46.

The neutrality section of the opinion also used the language of equal protection and nondiscrimination law. "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." *Id.* at 532 (emphases added). These words—discriminate, discrimination, because—are also entirely absent from the general-applicability section of the opinion. General applicability is a distinct requirement,

elaborated in Section II of this brief. In this section, we briefly examine neutrality.

B. "There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion," *i.e.*, of showing that a law is not neutral. *Id.* at 533. One way, highly relevant to the Ninth Circuit's analysis, is to show that a law was motivated by a desire to burden religion.

The trial court found that Washington acted with anti-religious motive; the Ninth Circuit held that finding clearly erroneous. The petition explains why the trial court was right and the Ninth Circuit wrong. Pet.35-38. But even if the Ninth Circuit were right, that would not save its decision. Anti-religious motive is *sufficient* to trigger strict scrutiny, but it is not *necessary*. *Shrum v. City of Coweta*, 449 F.3d 1132, 1144-45 (10th Cir. 2006) (collecting cases).

We know that anti-religious motive is not necessary, because nine Justices held the *Lukumi* ordinances unconstitutional while only two found bad motive. 508 U.S. at 540-42 (Kennedy and Stevens, JJ.). Two said motive is irrelevant. *Id.* at 558-59 (Scalia, J. and Rehnquist, C.J., concurring). Three said that strict scrutiny should apply even to neutral and generally applicable laws. *Id.* at 565-77 (Souter, J., concurring); *id.* at 577-80 (Blackmun and O'Connor, JJ., concurring). Two more (White and Thomas, JJ.) did not write separately and did not join the motive section of the opinion. *See id.* at 522. Motive added little in *Lukumi*, where there were so many other grounds for holding the ordinances not neutral and not generally applicable.

C. The answer to whether anti-religious motive is sufficient to show lack of neutrality comes earlier in the opinion. "*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." *Id.* at 532 (emphasis added). This is the language of equal protection and nondiscrimination law.

In that body of law, it is settled that a plaintiff may prove either a facial classification or that a facially neutral law is "a purposeful device to discriminate." *Washington v. Davis*, 426 U.S. 229, 246 (1976). When a challenged rule is facially neutral, those claiming discrimination may show that the rule was adopted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979). *Hunter v. Underwood* unanimously held that a facially neutral provision of the Alabama Constitution was invalid because it had been "enacted with the intent of disenfranchising blacks." 471 U.S. 222, 228-29 (1985).

This body of equal-protection law is the "minimum" requirement of neutrality. *Lukumi*, 508 U.S. at 532. Laws that burden religion must at least be free of anti-religious motive. Plaintiffs *may* prove, as a path to strict scrutiny, that a law was enacted with anti-religious motive and thus is not neutral. But they *need not* do so if a law is not generally applicable.

II. General Applicability Requires Objectively Equal Treatment of Religious and Secular Conduct, Without Regard to Motives, Targeting, or the Statute's Object.

A. To Be Generally Applicable, a Law Must Treat Religious Conduct as Well as It Treats Analogous Secular Conduct.

1. *Smith*'s second requirement is that a law that burdens religion be generally applicable. Because the "across-the-board criminal prohibition" in *Smith* so clearly was generally applicable, 494 U.S. at 884, the Court did not explicitly define the boundaries of general applicability. But *Smith*'s understanding of that requirement appears 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 claimants who refused work that conflicted with their religious practices.

Smith reaffirmed these precedents, explaining that strict scrutiny applied because the unemployment-compensation law allowed individuals to receive benefits if they refused work for "good cause," thus creating "individualized exemptions" from the requirement of accepting available work. 494 U.S. at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality opinion)). Where the state allows individual exemptions, "it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.*

Individualized exemptions are one way in which a law can fail to be generally applicable. The statute at issue in *Sherbert* was not generally applicable, because it allowed "at least some" exceptions. *Smith*, 494 U.S. at 884. There cannot be many acceptable reasons for refusing work and claiming a government check instead, but there were "at least some," and therefore, the state also had to recognize religious exceptions.

2. The Court elaborated on the new standard in *Lukumi*, striking down Hialeah's ordinances that prohibited the killing of animals only when the killing was unnecessary, took place in a ritual or ceremony, and was not for the primary purpose of food consumption. 508 U.S at 535-37.

As already explained, the Court clearly separated neutrality from general applicability. *Supra*, Section I.A. General applicability requires laws to apply to all the secular conduct that undermines the same state interests as the regulated religious conduct. General applicability concerns objectively unequal treatment of religious and secular practices, regardless of targeting, motive, or an improper object. The lack of general applicability in *Lukumi* was shown in multiple ways: narrow prohibitions of selected conduct and categorical and individualized exemptions for analogous secular conduct, 508 U.S. at 543-44, resulting in failure "to prohibit nonreligious conduct" that endangered the city's interests "in a similar or greater degree than Santeria sacrifice," *id*. at 543.

3. The Ninth Circuit appeared to think that a law is generally applicable if it is not as bad as the ordinances in *Lukumi*. App.28a-29a. This Court

explicitly rejected that idea, identifying *Lukumi* as an extreme case. The ordinances were *not* at or near the borders of constitutionality; they fell "well below the minimum standard necessary to protect First Amendment rights." 508 U.S. at 543. It was therefore unnecessary to "define with precision the standard used to evaluate whether a prohibition is of general application." *Id.* Now, as made clear by both the circuit split and the Ninth Circuit's failure to recognize a case as bad as *Lukumi*, the Court needs to provide a more precise definition.

Smith and *Lukumi* already provide the framework. "The Free Exercise Clause 'protect[s] religious observers against unequal treatment.'" *Lukumi*, 508 U.S. at 542 (quoting *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring) (alteration by the Court)). "[F]irst and foremost, *Smith-Lukumi* is about objectively unequal treatment of religious and analogous secular activities." Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 210 (2004).

B. A Law Is Not Generally Applicable if Exceptions or Coverage Gaps Exempt Analogous Secular Conduct.

A law is not generally applicable if, on its face or in practice, it fails to regulate some or all secular conduct that undermines the government interests allegedly served by regulating religion. It does not matter whether there are good reasons for secular exceptions, whether secular exceptions are explicitly stated in the text of the challenged law, whether there are few such exceptions, or whether there is only one.

What matters is whether a secular exception or gap in coverage undermines the state's asserted interests to the same or similar degree as the burdened religious conduct.

1. It Does Not Matter How Reasonable the Secular Exceptions May Be.

a. The stocking and delivery rules at issue here are interpreted to prohibit failure to stock or deliver a drug for religious reasons, while explicitly exempting several secular reasons for not stocking or delivering a drug, and implicitly exempting all or nearly all remaining secular reasons. The Ninth Circuit recognized that Washington's rules "carve out several enumerated exemptions," App.30a, yet it held these rules to be generally applicable. App.32a, 41a.

The Ninth Circuit decided that business reasons for not stocking or delivering drugs make sense, and therefore, do not detract from the general applicability of the rules. According to the Ninth Circuit, "the enumerated exemptions are necessary reasons … that … allow pharmacies to operate in the normal course of business." App.30a. In other words, business reasons for not stocking a drug are better, more deserving of the state's respect, than religious reasons.

This is precisely the preference for secular reasons over religious reasons that *Smith* and *Lukumi* prohibit. In *Smith*, the 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." 494 U.S. at 884. That proposition does not

turn on whether secular reasons are "better" than religious ones, a judgment that government is generally not permitted to make.

In *Sherbert*, the narrow exemption for "good cause," 374 U.S. at 400-01, was a perfectly sensible exemption to the general requirement of accepting available work. But this narrow and justified secular exemption still required a corresponding religious exemption—or a compelling reason why not. It was not the bad policy of the secular exemption that mandated a religious exemption; it was the secular exemption's mere existence.

Similarly in *Lukumi*, the city argued that its permitted secular reasons for killing animals were "important," "obviously justified," and "ma[de] sense." 508 U.S. at 544. But that did not make the ordinances generally applicable. Secular exceptions defeat general applicability no matter how important, justified, or sensible.[2]

b. The Ninth Circuit also said that the state's exemptions for business reasons were "necessary." App.30a. This reasoning assumes that religious reasons are unnecessary—even if the religious practice is absolutely necessary to the believer.

This argument from necessity flouts a specific holding in *Lukumi*. One of the ordinances prohibited only unnecessary killings. The city argued that most

[2] We are not here discussing application of strict scrutiny to claims that government has a compelling interest in treating secular acts more favorably than analogous religious acts. The Ninth Circuit erroneously moved that potential issue from the back of the case to the front—from compelling interest to general applicability—and applied an unspecified but much lower standard of review.

secular killings were necessary but that religious killings were not. 508 U.S. at 537. The Court rejected this necessity standard: "[T]he ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons." *Id.* Yet the Ninth Circuit applied the same necessity test that this Court invalidated in *Lukumi*.

The regulations at issue here are subject to strict scrutiny under *Sherbert*, *Thomas*, *Smith*, and *Lukumi*, regardless of how the secular exceptions compare in judicially perceived value to religious exceptions. The Ninth Circuit failed to understand that it could not dismiss religion as unnecessary.

2. Whether Exempted Secular Conduct Is Analogous Depends on the State's Asserted Interests, 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. Because the whole point is to treat religious reasons for acting equally with secular reasons, analogous conduct cannot be identified by assessing the comparative merits of religious and secular reasons.

This Court was quite clear on what makes religious and secular conduct analogous: that the "nonreligious conduct … endangers these [state] interests in a similar or greater degree" than the burdened religious conduct. *Lukumi*, 508 U.S. at 543.

With few exceptions, the many business decisions not to stock or deliver a drug affect the state's asserted interests in the same way as a religious decision to the same effect. Whatever the

pharmacy's reasons, the drug is not stocked or delivered. And cumulatively, business reasons endanger the state's interests to a vastly greater degree, because the state accepts such a wide range of business reasons (including reasons the district court viewed as mere matters of convenience, App. 162a, 166a), and because so many more pharmacies act on those reasons. Even with respect to the drugs at issue here, the vast majority of pharmacies that choose not to stock emergency contraception do so for secular reasons, not religious reasons. App.148a-49a.

3. Secular Exceptions Make a Law Not Generally Applicable, Even if They Are Not Stated in the Law's Text.

a. Unequal treatment of religious and secular conduct requires strict scrutiny, 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. In addition to evaluating the text of the ordinances, the Court reviewed an array of other sources to identify analogous secular conduct left unregulated. *See id.* at 526, 537, 539, 544-45 (considering numerous sections of Florida statutes); *id.* at 543 (fishing); *id.* at 544-45 (garbage from restaurants).

b. The Ninth Circuit made selective and inconsistent use of the drafting, interpretive, and enforcement history of the regulations here. When considering whether the regulations would prohibit conscience-based refusals to stock and deliver emergency contraception, the court rightly went beyond the bare text of the regulations and relied on the history of the regulations and the law's "effect …

in its real operation." App.21a (quoting *Lukumi*, 508 U.S. at 535 (ellipsis by Ninth Circuit)).

But when considering whether the regulations allowed secular exemptions, the court myopically focused on the bare text of the regulations, attempting to explain away the interpretation revealed by the enforcement history, App.37a-40a, and refusing to consider the overwhelming evidence of the drafting history. App.27a, 32a, 35a. Had the Ninth Circuit followed this Court's example and gone beyond the bare text, it would have concluded—as did the district court in careful and detailed findings of fact and conclusions of law—that the regulations prohibit conscience-based refusals to stock and deliver drugs, and almost nothing else. Pet.16; App.81a, 86a, 134a-36a, 141a-43a, 144a-45a, 160a-68a, 171a-75a, 200a-16a.

c. The Ninth Circuit said it was irrelevant that the rules had never been enforced against anyone but plaintiff, because the Pharmacy Commission followed a policy of "complaint-driven enforcement." App.37a-40a. There had been "many complaints" against plaintiff, and no complaints against anyone else. App.39a. The court thus validated a multi-year campaign by ideologically motivated activists to drive one small pharmacy out of business because of its religious practices.

This reasoning provides a formula for discriminatory enforcement. If governments can write vague rules that leave accepted understandings unstated, or that leave much to the discretion of enforcement authorities or activists among the public, and courts then ignore the extra-textual understandings and the actual or intended exercise of

discretion, government would be completely free to treat religious and secular practices unequally. The Free Exercise Clause would protect only against unsophisticated governments that explicitly state what they are doing.

4. Rules That Apply to Most but Not All Analogous Secular Conduct Are Not Generally Applicable.

Many laws apply to some but not all analogous secular conduct. If the exempted secular conduct undermines the state's interest to the same degree as the burdened religious conduct, such a law is not generally applicable.

An illuminating example is *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996). *Rader* was a challenge to the University of Nebraska-Kearney's rule that freshmen were required to live in the dormitory. *Id.* at 1543. Rader sought permission to live in a Christian group house instead, because alcohol, drugs, and pre-marital sex were prevalent in the dormitories. *Id.* at 1544-46. He was denied an exemption from the rule. *Id.* at 1548.

The rule contained categorical exemptions for students older than nineteen, married students, and students living with their parents. *Id.* at 1546. These categorical exemptions had a sound basis, 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 not in Rader's case. Discovery revealed that

there were additional individualized exceptions in unwritten administrative practice. *Id*. at 1547.

When all exceptions were accounted for, only sixty-four percent of 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.

There are other decisions to similar effect, showing that the Ninth Circuit's ruling exacerbated a split both within the Circuit[3] and elsewhere.[4]

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[3] *See Alpha Delta Chi 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 were exceptions for newspapers, magazines, and broadcasters).

[4] *See* Pet. 23-33 (analyzing seven cases from four federal circuits and Supreme Court of Iowa); *see also Horen v. Commonwealth*, 479 S.E.2d 553, 556-57 (Va. Ct. App. 1997) (holding that ban on possession of certain bird feathers was not neutral, where 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 landmarking ordinance subject to strict scrutiny where it had exceptions for substantial benefit to city, financial hardship to owner, and best interests of community).

5. A Law Is Not Generally Applicable if It Contains a Single Secular Exception That Undermines the State's Regulatory Interests.

a. A single secular exception triggers strict scrutiny if it undermines the state interest allegedly served by regulating religious conduct. This is the holding of a well-reasoned opinion by then-Judge Alito, writing for the Third Circuit in *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999). *See* Pet.23.

In *Newark*, two Muslim police officers whose religious beliefs required them to grow beards challenged a city policy requiring officers to be clean shaven. Though touted as a "zero tolerance" policy, it had two exemptions—one for officers with medical conditions, and one for officers working undercover. The undercover exemption did not trigger strict scrutiny, because the department's interest in a uniform appearance did not apply to undercover officers. *Newark*, 170 F.3d at 366. Indeed, uniform appearance would have wholly defeated the purpose of having undercover officers.

But the medical exemption made the rule not generally applicable, because it undermined the city's interest in the uniform public appearance of its police officers in the same way as would a religious exemption. *Id.* at 364-66.

The Eleventh Circuit reached a similar result in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1235 (11th Cir. 2004), which applied compelling-interest review to the exclusion of religious assemblies from the business district. The

stated goal of the zoning ordinance was protecting "retail synergy" in the business district. *Id*. at 1234-35. A single exemption for lodges and private clubs "violates the principles of neutrality and general applicability because private clubs and lodges endanger Surfside's interest in retail synergy as much or more than churches and synagogues." *Id*. at 1235. *See* Pet.24.

b. 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.[5]

The question is not whether one or a few secular analogs are regulated. The question is whether a single secular analog is *not* regulated. The constitutional right to free exercise of religion is to be

[5] *Smith* is consistent as well. At first glance, it appears that Oregon permitted a secular exception by allowing possession of a "controlled substance" pursuant to a doctor's prescription. 494 U.S. at 874. But "controlled substance" covers a wide range of drugs. Oregon confirmed that the exception did not apply to Schedule I drugs, including peyote, Brief for Petitioner 14, 14 n.6, which is presumably why this Court described the prohibition as "across-the-board," 494 U.S. at 884. The case concerned the prohibition of peyote, and there were no secular exceptions. It is therefore unnecessary to consider whether medical use under a physician's supervision would have undermined the state's interests to the same extent as religious use.

treated like the most favored analogous secular conduct. It is not enough to treat a constitutional right like the least favored, most heavily regulated secular conduct.

C. There Are Important Reasons for Strictly Interpreting and Enforcing the General-Applicability Requirement.

These rules about the general-applicability requirement, including the rule that a single secular exception defeats general applicability, are not arbitrary. They are deeply rooted in the underlying rationale of the general-applicability requirement.

1. Secular Exceptions Without Religious Exceptions Imply a Value Judgment About Religion.

The *Newark* opinion reasoned that the medical exception "indicates 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. The Eleventh Circuit adopted this reasoning in *Midrash Sephardi*. 366 F.3d at 1235.

This point about value judgments also appears in *Lukumi*, which said that the ordinances' necessity test "devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons." 508 U.S. at 537.

The point deserves further elaboration. It does not require that the state make an explicit value judgment, or that state officials consciously compare religious and secular conduct and deem the secular conduct more worthy—although both

Washington and the Ninth Circuit did that here. *Supra,* Section II.B.1.

More commonly, the 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. Whether explicit or implicit, that is the value judgment that the Free Exercise Clause prohibits.

Similarly, the Ninth Circuit held that Washington could decide that business and convenience needs are more important than its interest in emergency contraception in every pharmacy. And it could decide that emergency contraception in every pharmacy is more important than the religious needs of conscientiously objecting pharmacists. With or without a conscious or direct comparison, both Washington and the Ninth Circuit deemed business and convenience needs more important than religious needs. App.30a-31a. This is precisely the value judgment condemned by *Lukumi*, *Newark*, and *Midrash Sephardi*.

2. Requiring General Applicability Provides Vicarious Political Protection for Religious Minorities.

The requirement of generally applicable law is an application of Justice Jackson's much quoted

observation that "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency v. City of New York*, 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 *Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring)).

Small religious minorities will rarely have the political clout to defeat a burdensome law or 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.

"Even narrow secular exceptions rapidly undermine" this vicarious political protection. Laycock, 118 Harv. L. Rev. at 210. If secular interest groups burdened by the regulation get themselves exempted, they have no reason to oppose the regulation, and religious minorities are left standing alone. That is plainly what happened in Washington: the groups seeking to suppress conscientiously objecting pharmacies were careful at every stage not to threaten any other pharmacy's secular reasons for failing to stock and deliver drugs. With its secular interests protected, and with the Pharmacy Commission threatened into submission by the governor's office, the industry abandoned its defense of the few pharmacies with objections based on

conscience. *See* Pet.9-11; App.125a-26a (industry's initial position); App.133a-34a (industry's "compromise" position).

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 not generally applicable.

III. The Ninth Circuit's Reasoning Confirms That Lower Courts Need Further Guidance.

The petition and the district court's opinion show that the regulations in this case are just as bad as those in *Lukumi*. *See, e.g.*, Pet.16; App.86a. But the Ninth Circuit treated the case as unremarkable, deeming it a case with just some secular exemptions, and then holding that if there were good reasons for the secular exemptions, they did not undermine the regulations' general applicability. This result confirms that this Court must provide more guidance to lower courts.

The Ninth Circuit's opinion referenced one fact that by itself should have put this case far down the path to strict scrutiny: "The rules require pharmacies to deliver prescription medications, but they also carve out several enumerated exemptions." App.30a. Yet instead of asking whether any of these exemptions undermined the state's interest in delivery of drugs, the Ninth Circuit engaged in a lengthy effort to explain away those secular exemptions, concluding at one point that "the rules' delivery requirement applies to *all* objections to delivery that do not fall within an exemption." App.23a. Every law applies to everything

it applies to; the court's italicized "all" is entirely circular. And because the court intended to refer only to explicit exemptions, the statement is also inaccurate. The district court found many exemptions not stated in the regulations' text. Pet.16-18.

Courts need not and should not engage in such mental gymnastics. An unambiguous ruling from this Court, stating more explicitly what it indicated in *Smith* and *Lukumi*, will help ensure that they do not. A quarter century after *Smith* and *Lukumi*, it is time.

CONCLUSION

This Court should grant the petition for writ of certiorari and reverse the judgment below.

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February 3, 2016

APPENDIX

Identifying the Individual Amici

All amici join this brief in their personal capacity. Their respective institutions take no position on the issues in this case.

Lawrence A. Alexander is Warren Distinguished Professor of Law and Co-Executive Director of the Institute for Law and Religion and of the Institute for Law and Philosophy at the University of San Diego.

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Teresa Stanton Collett is Professor of Law at the University of St. Thomas in Minnesota.

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Carl H. Esbeck is the Isabelle Wade and Paul C. Lyda Professor of Law and the R.B. Price Distinguished Professor of Law at the University of Missouri.

Richard W. Garnett is the Paul J. Schierl / Fort Howard Corporation Professor of Law at the University of Notre Dame.

Robert P. George is the McCormick Professor of Jurisprudence at Princeton University, and Visiting Professor of Law at Harvard University.

Mary Ann Glendon is the Learned Hand Professor of Law at Harvard University.

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Douglas Laycock is the Robert E. Scott Distinguished Professor of Law and Professor of Religious Studies at the University of Virginia, and the Alice McKean Young Regents Chair in Law Emeritus at the University of Texas at Austin.

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