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 THE STATES OF ARIZONA, ALABAMA, ARKANSAS, GEORGIA, MICHIGAN, MONTANA, NEBRASKA, NEVADA, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MARK BRNOVICH
Attorney General
JOHN R. LOPEZ, IV
Solicitor General
Counsel of Record
DOMINIC E. DRAYE
KEITH MILLER
OFFICE OF THE ARIZONA ATTORNEY GENERAL
1275 W. Washington Street
Phoenix, AZ 85007
(602) 542-8255
john.lopez@azag.gov

MICHAEL LEE FRANCISCO
MRDLAW
3301 West Clyde Place
Denver, CO 80211
(303) 325-7843
michael.francisco@mrd.law

Counsel for Amici Curiae
(*additional counsel listed on inside cover*)

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

LUTHER STRANGE
Attorney General of Alabama
501 Washington Ave.
Montgomery AL 36130

LESLIE RUTLEDGE
Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, Arkansas 72201

SAMUEL S. OLENS
Attorney General of Georgia
40 Capitol Sq., S.W.
Atlanta, GA 30334

BILL SCHUETTE
Attorney General of Michigan
P.O. Box 30212
Lansing, Michigan 48909

TIMOTHY C. FOX
Attorney General of Montana
P.O. Box 201401
Helena, MT 59620

DOUGLAS J. PETERSON
Attorney General of Nebraska
2115 State Capitol
Lincoln, NE 68509

ADAM PAUL LAXALT
Attorney General of Nevada
100 N. Carson Street
Carson City, NV 89701

E. SCOTT PRUITT
Attorney General of Oklahoma
313 NE 21st St.
Oklahoma City, OK 73105

ALAN WILSON
Attorney General of
South Carolina
P.O. Box 11549
Columbia, SC 29211

KEN PAXTON
Attorney General of Texas
P.O. Box 12548 (MC 059)
Austin, TX 78711

SEAN REYES
Attorney General of Utah
350 N. Slate St., Ste 230
Salt Lake City, UT 84114

PATRICK MORRISEY
Attorney General of
West Virginia
State Capitol Building 1
Room E-26
Charleston, WV 25305

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. The Court Should Grant Certiorari to Clarify Free Exercise Doctrine Following *Lukumi* 2

II. Nearly Every State Protects Pharmacists' Religious Liberty 7

III. Rather than Presenting a Barrier, the Principles of Federalism Support Granting Certiorari 12

A. Appeals to Federalism Do Not Limit This Court's Protection of Individual Rights 12

B. Amici States Support Granting Certiorari in Part to Prevent the Principles of Federalism Being Misused 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Arizona State Legislature v. Arizona Indep. Redistricting Comm'n,
135 S. Ct. 2652 (2015) 13

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014) 3

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) . . . . . *passim*

City of Boerne v. Flores,
521 U.S. 507 (1997) 3

Cutter v. Wilkinson,
544 U.S. 709 (2005) 4

Employment Division v. Smith,
494 U.S. 872 (1990) 2, 3, 4, 5, 15

Grutter v. Bollinger,
539 U.S. 306 (2003) 10

Harris v. Quinn,
134 S. Ct. 2618 (2014) 5

Holt v. Hobbs,
135 S. Ct. 853 (2015) 10, 11

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694 (2012) 5

Johnson v. California,
543 U.S. 499 (2005) 10

Little Sisters of the Poor v. Burwell,
136 S. Ct. 446 (2015) 4

Locke v. Davey,
540 U.S. 712 (2004) 3, 5

McCullen v. Coakley,
134 S. Ct. 2518 (2014) 5

McCutcheon v. Fed. Election Comm'n,
134 S. Ct. 1434 (2014) 5

McDonald v. City of Chicago,
561 U.S. 742 (2010) 13

Morr-Fitz, Inc. v. Blagojevich, 2011 WL 1338081,
No. 2005-CH-000495
(Ill. Cir. Ct. Apr. 5, 2011) 9, 10, 11

Morr-Fitz, Inc. v. Quinn,
976 N.E.2d 1160
(Ill. App. Ct. Sept. 20, 2012) 10, 11

Planned Parenthood of Se. Penn. v. Casey,
505 U.S. 833 (1992) 7

Reed v. Town of Gilbert, Ariz.,
135 S. Ct. 2218 (2015) 5

Roe v. Wade,
410 U.S. 113 (1973) 7

Sherbert v. Verner,
374 U.S. 398 (1963) 3

Trinity Lutheran Church v. Pauley,
No. 15-577 (certiorari granted Jan. 15, 2016) . . 5

Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015) 5

Williams-Yulee v. Florida Bar,
135 S. Ct. 1656 (2015) 5

Wisconsin v. Yoder,
406 U.S. 205 (1972) 3

Zelman v. Simmons-Harris,
536 U.S. 639 (2002) 13

STATUTES

42 U.S.C. § 300a-7 7

42 U.S.C. § 2000bb *et seq* . . . . *passim*

42 U.S.C. § 2000bb-(b)(1) 3

42 U.S.C. § 2000bb-bb-4 3

42 U.S.C. § 2000cc *et seq* . . . . *passim*

Alaska Stat. § 18.16.010(b) 7

Ariz. Rev. Stat. § 36-2151 7

Ariz. Rev. Stat. § 36-2154(B) (2009) 8

Ark. Code Ann. § 20-16-304 7

Ark. Code Ann. § 20-16-304(4) 8

Cal. Bus. & Prof. Code § 733(b)(3) 9

Cal. Health & Safety Code § 123420 7

Conn. Agencies Regs. 19-13-D54 7

Del. Code Ann. tit. 24, § 1791 7

Del. Code Regs. 24.2500 § 3.1.2.4 8

Fla. Stat. Ann. § 390.0111(8) 7

Ga. Code Ann. § 16-12-142 7
Ga. Comp. R. & Regs. § 480-5-.03(n) 8
Haw. Rev. Stat. § 453-16(d) 7
Idaho Code Ann. § 18-611 8
Idaho Code Ann. § 18-612 7
68 Ill. Adm. Code § 1330.500(e) 10
745 Ill. Comp. Stat. 70/3-4 7
Ind. Code §§ 16-34-1-3 to -7 7
Iowa Code § 146.1 7
Kan. Stat. Ann. § 65-443 7
Ky. Rev. Stat. Ann. § 311.800 7
La. Rev. Stat. Ann. §§ 40:1061.2-3 7
02-392 Me. Code R. ch. 19 § 11 9
Me. Rev. Stat. Ann. tit. 22, §§ 1591-1592 7
Md. Code Ann., Health-Gen. § 20-214 . . . . 7, 8
Mass. Gen. Laws ch. 112, § 121 8
Mich. Comp. Laws §§ 333.20181- 333.20184 8
Minn. Stat. Ann. §§ 145.414, 145.42 8
Miss. Code Ann. §§ 41-107-1 to -13 8
Mo. Rev. Stat. § 197.032 8
Mont. Code Ann. § 50-20-111 8
Neb. Rev. Stat. §§ 28-337 to -341 8

Nev. Admin. Code § 639.753 9

Nev. Rev. Stat. Ann. § 632.475 8

N.J. Stat. Ann. §§ 2A:65A-1 to -3 8

N.J. Stat. Ann. § 45:14-67.1(c) 9

N.M. Stat. Ann. § 30-5-2 8

N.Y. Civ. Rights Law § 79-i 8

N.C. Gen. Stat. § 14-45.1(e)-(f) 8

N.D. Cent. Code § 23-16-14 8

Ohio Rev. Code Ann. § 4731.91 8

Okla. Stat. Ann. tit. 63, § 1-741 8

Or. Rev. Stat. §§ 435.475, 435.485 8

18 Pa. Cons. Stat. Ann. § 3213(d) 8

49 Pa. Code § 27.103 (2010) 8

R.I. Gen. Laws § 23-17-11 8

S.C. Code Ann. §§ 44-41-40, 50 8

S.D. Codified Laws § 36-11-70 8

Tenn. Code Ann. § 39-15-204 8

Tex. Occ. Code Ann. §§ 103.001-103.004 8

Utah Code Ann. § 76-7-306 8

Va. Code Ann. § 18.2-75 8

Wash. Rev. Code Ann. § 48.43.065 8

W. Va. Code Ann. § 16-2F-7 8

Wis. Stat. § 253.09 8

Wyo. Stat. Ann. §§ 35-6-105, 106 8

OTHER AUTHORITY

The Federalist No. 51 (J. Madison) reprinted in The Essential Federalist and Anti-Federalist Papers (D. Wooton ed. 2003) 14

INTEREST OF AMICI CURIAE[1]

The Amici States take seriously their obligation to defend the rights of their citizens, chief among them the religious liberty enshrined in the Establishment, Free Exercise, Free Speech, and Equal Protection Clauses. Consistent with the Free Exercise Clause, the overwhelming majority of States protect the right of pharmacists and other health care professionals to act consistent with the dictates of their conscience and would thus permit the Petitioners to act on a religious motivation—in addition to the host of other reasons Washington State recognizes—in referring customers to a different source for certain medications. In the interest of protecting individuals' rights to exercise their religion, and to avoid a misapplication of the important doctrine of federalism, the Amici States urge this Court to grant the petition for writ of certiorari.

SUMMARY OF ARGUMENT

In the two decades since this Court decided *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), States and local governments have struggled to apply this Court's Free Exercise Clause jurisprudence. The present case is a prime example. The decision of the Court of Appeals for the Ninth Circuit undermines the religious liberty protections established by this Court's holdings and demonstrates the urgent need for clearer guidance in this area of law. Because courts are in disarray on the application of *Lukumi*, many States have enacted policies to address

---

[1] Counsel for Amici Curiae provided timely notice of the intent to file this brief to all parties' counsel of record.

the specific issue of pharmacists' rights of conscience. Such context-specific measures, however, are no substitute for judicial clarity. Moreover, the record in this case, including evidence of discriminatory purposes behind Washington's statute, make this an ideal vehicle for applying *Lukumi*. Finally, granting the petition for writ of certiorari would vindicate the Constitution's structural protections for individual rights.

ARGUMENT

I. The Court Should Grant Certiorari to Clarify Free Exercise Doctrine Following *Lukumi*.

The Free Exercise Clause enshrines a fundamental right that was at the core of this Nation's founding and remains at the core of many citizens' identities. But for all its importance, the Free Exercise Clause has lately suffered from judicial inattention. The present case is a welcome vehicle for providing guidance to the state and local governments that look to the Free Exercise Clause for the definition of their people's rights.

Since this Court decided *Employment Division v. Smith*, 494 U.S. 872 (1990), resulting in multiple changes and clarifications to longstanding free exercise doctrine, the Court has only decided one substantive case applying the *Smith* framework. Lower courts have often cited that case, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), as this Court's last word on the Free Exercise Clause, but

confusion and conflicts have come to dominate the application of the *Smith-Lukumi* framework.[2]

The Petition raises important questions regarding when courts apply the compelling government interest test to claims under the Free Exercise Clause. These concerns have not been addressed in any of the statutory religious liberty cases decided during the past two decades. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760-62 (2014) (describing history of statutory claims following *Smith*). Indeed, the dearth of Free Exercise Clause decisions since *Lukumi* is partially explained by Congress's two-part statutory response to *Smith*. Congress first passed the Religious Freedom Restoration Act (RFRA) in 1993, 42 U.S.C. § 2000bb-bb-4, "to restore the compelling government interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened," 42 U.S.C. § 2000bb-(b)(1). As originally conceived, RFRA applied both to state and local governments and to the federal government. Because only the latter application survived this Court's decision in *City of Boerne v. Flores,* 521 U.S. 507 (1997), States do not benefit from the steady stream of cases defining the religious liberty enshrined in RFRA. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)

---

[2] The Free Exercise Clause also made an appearance in *Locke v. Davey*, 540 U.S. 712 (2004), but Amici take the Court at its word that "the only interest at issue" in *Locke* was "funding the religious training of clergy," *id.* at 722 n.5. That decision therefore provides no guidance in more general free exercise cases like the present one.

(applying RFRA to federal law); *Little Sisters of the Poor v. Burwell*, 136 S. Ct. 446 (2015) (granting certiorari on RFRA questions but denying certiorari on free exercise claim).

Following the invalidation of RFRA as applied to the States, Congress responded by passing a narrower statute protecting religious liberty in the context of state action in two limited areas: prisons and land use decisions. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, sets forth statutory protections similar to those in RFRA, but its application is far narrower, extending only to its two eponymous topics. *See generally Cutter v. Wilkinson*, 544 U.S. 709, 715-16 (2005) (upholding RLUIPA as valid exercise of congressional authority).

With RFRA and RLUIPA in operation, individual religious liberty claims that would have traditionally proceeded under the Free Exercise Clause have been supplanted by statutory claims. Combined with this Court's fidelity to the doctrine of constitutional avoidance, these statutes have prevented the development of Free Exercise Clause precedent for over two decades—a drought that is not only lengthy but particularly confounding because it began almost the moment *Smith* effected a sea change in First Amendment law. Aside from prisons and certain land use decisions, state and local governments remain accountable to the Free Exercise Clause alone and would benefit from the guidance this Court has continued to provide to federal authorities via RFRA.

The lack of decisions from this Court has left lower courts to debate the application of *Smith* and *Lukumi*

and the two (or more) categorical exceptions to *Smith*'s general rule that free exercise claims should be decided under rational basis review. For at least three reasons, the current case is a welcome vehicle for clarifying current Free Exercise Clause jurisprudence.[3]

First, the post-*Smith* Free Exercise Clause is a nearly empty drum. This paucity contrasts with the Free Speech Clause and even the Establishment Clause, which have been debated and delineated many times since 1993. In the last two Terms alone, this Court decided six substantive cases under the Free Speech Clause,[4] but it has offered no guidance on the Free Exercise Clause in 23 years. The circuit courts, however, have cited *Smith* and *Lukumi* more than 600 times during the same interval. As the Petition demonstrates, lower courts are split on multiple questions of how to apply the exceptions to *Smith*'s general rule. Pet. 22-37. This Court should grant the Petition and provide clarity for lower courts faced with

---

[3] The Court may address the Free Exercise Clause in *Trinity Lutheran Church v. Pauley*, No. 15-577 (certiorari granted Jan. 15, 2016), but if it does, the free exercise analysis is likely to center on the scope of *Locke*, which this Court and the lower courts have treated as not subject to the test in *Smith*, and *Lukumi*. The case may also be decided under the Equal Protection or Establishment Clauses. *E.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012) (finding violation of both Free Exercise Clause and Establishment Clause).

[4] *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015); *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *McCullen v. Coakley*, 134 S. Ct. 2518 (2014); *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014).

Free Exercise challenges to state and local government action outside the specific topics protected by RLUIPA.

Second, the case below includes a fully developed record and sharp presentation of legal arguments ripe for this Court's review. There is no need for further development of the record to frame the legal issues surrounding Petitioners' free exercise claim. In particular, the record amply reflects the Respondents' proffered countervailing interest in promoting the availability of certain medicines, as well as evidence of intent on the part of the state regulatory agency. Working with a record as complete as this one will allow the Court to identify which aspects of the fact pattern in *Lukumi* deserve the attention of courts, litigants, and state authorities endeavoring to enforce the constitutional right to free exercise.

Third, the Ninth Circuit's decision is so far out of step with this Court's *Lukumi* decision that free exercise rights risk substantial erosion absent this Court's review. Individuals' constitutional rights deserve this Court's protection, and the Ninth Circuit's opinion undermines the unanimous holding of *Lukumi* and may hamper future claims under the Free Exercise Clause in circumstances that should fall within the scope of that case.

With no guidance from this Court in 23 years and a lower court decision out of sync with the few existing precedents in this area, the present case is an opportunity to vindicate an often-elusive right.

II. Nearly Every State Protects Pharmacists' Religious Liberty.

The Free Exercise Clause embodies "the Nation's essential commitment to religious freedom." *Lukumi*, 508 U.S. at 524. More specifically, this Court has long recognized the sincere and constitutionally protected objections many individuals have over the termination of pregnancy. These issues have "profound moral and spiritual implications," and thus "[m]en and women of good conscience can disagree, and we suppose some always shall disagree . . . ." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 850 (1992).

Disagreement, however enduring, need not ossify into coercion. In the same year this Court decided *Roe v. Wade*, 410 U.S. 113 (1973), legislatures began protecting rights of conscience for health care providers who hold religious beliefs inconsistent with abortion. *See, e.g.*, 42 U.S.C. § 300a-7 (providing that health care entities receiving certain federal funds may "refuse to provide abortion or sterilization if such services are contrary to their religious or moral beliefs."). Following the federal government's lead, 46 States have enacted their own legislation protecting health care professionals' right to live according to their consciences and abstain from participating in abortion.[5]

---

[5] *See* Alaska Stat. § 18.16.010(b); Ariz. Rev. Stat. § 36-2151; Ark. Code Ann. § 20-16-304; Cal. Health & Safety Code § 123420; Conn. Agencies Regs. 19-13-D54; Del. Code Ann. tit. 24, § 1791; Fla. Stat. Ann. § 390.0111(8); Ga. Code Ann. § 16-12-142; Haw. Rev. Stat. § 453-16(d); Idaho Code Ann. § 18-612; 745 Ill. Comp. Stat. 70/3-4; Ind. Code §§ 16-34-1-3 to -7; Iowa Code § 146.1; Kan. Stat. Ann. § 65-443; Ky. Rev. Stat. Ann. § 311.800; La. Rev. Stat. Ann. §§ 40:1061.2-3; Me. Rev. Stat. Ann. tit. 22, §§ 1591-1592; Md. Code

The principle behind this wave of conscience protections is not confined to clinical abortion procedures. An overwhelming majority of States extend the same protections to pharmacists, who may be asked to dispense drugs they consider to cause an abortion or terminate a pregnancy.

No fewer than 42 States protect a pharmacist or pharmacy from dispensing drugs on the basis of conscience. The most common solution is to permit the objecting practitioner to refer an individual to a different pharmacy in lieu of stocking or dispensing the drug. Of those States allowing conscience referrals, 11 do so by express policy or statute,[6] while the remaining

---

Ann., Health-Gen. § 20-214; Mass. Gen. Laws ch. 112, § 121; Mich. Comp. Laws §§ 333.20181- 333.20184; Minn. Stat. Ann. §§ 145.414, 145.42; Miss. Code Ann. §§ 41-107-1 to -13; Mo. Rev. Stat. § 197.032; Mont. Code Ann. § 50-20-111; Neb. Rev. Stat. §§ 28-337 to -341; Nev. Rev. Stat. Ann. § 632.475 ; N.J. Stat. Ann. §§ 2A:65A-1 to -3; N.M. Stat. Ann. § 30-5-2; N.Y. Civ. Rights Law § 79-i; N.C. Gen. Stat. § 14-45.1(e)-(f); N.D. Cent. Code § 23-16-14; Ohio Rev. Code Ann. § 4731.91; Okla. Stat. Ann. tit. 63, § 1-741; Or. Rev. Stat. §§ 435.475, 435.485; 18 Pa. Cons. Stat. Ann. § 3213(d); R.I. Gen. Laws § 23-17-11; S.C. Code Ann. §§ 44-41-40, 50; S.D. Codified Laws § 36-11-70; Tenn. Code Ann. § 39-15-204; Tex. Occ. Code Ann. §§ 103.001-103.004; Utah Code Ann. § 76-7-306; Va. Code Ann. § 18.2-75; Wash. Rev. Code Ann. § 48.43.065; W. Va. Code Ann. § 16-2F-7; Wis. Stat. § 253.09; Wyo. Stat. Ann. §§ 35-6-105, 106.

[6] *See* Ariz. Rev. Stat. § 36-2154(B) (2009); Ark. Code Ann. § 20-16-304(4); Del. Code Regs. 24.2500 § 3.1.2.4; Ga. Comp. R. & Regs. § 480-5-.03(n); Idaho Code Ann. § 18-611; Miss. Code Ann. § 41-107-1 to -13; 49 Pa. Code § 27.103 (2010); S.D. Codified Laws § 36-11-70; New York Policy available at http://tinyurl.com/zk5ufbz; North Carolina Policy available at http://tinyurl.com/zzeet5j; Oregon Policy available at http://tinyurl.com/h86caam.

31 States allow for conscience protections through the default common law rule that pharmacists may decline to fill a prescription for reasons of conscience, among others.

Washington's policy is a true outlier. The Ninth Circuit below offers no explanation for why Washington found it necessary to take away conscience rights to facilitate the timely delivery of prescribed medication to patients, while the vast majority of other States, presumably with identical state interests, found less intrusive solutions.

While Washington contends that seven States have similar policies, a review of even those minority jurisdictions reveals how uniquely burdensome to religious conscience rights Washington's policy is. None of the six other States identified by the Ninth Circuit as having a similar policy are as draconian as Washington. California, for example, has a general duty to dispense lawfully prescribed drugs, but it protects referrals in certain circumstances based on "ethical, moral, or religious grounds." Cal. Bus. & Prof. Code § 733(b)(3). California also imposes no duty to stock Plan B, further distinguishing it from Washington. Likewise, New Jersey, Maine, Massachusetts, Nevada, and Wisconsin impose no requirement that a pharmacy stock Plan B, and New Jersey expressly protects referrals when a drug is not stocked. *See* N.J. Stat. Ann. § 45:14-67.1(c); *see also* 02-392 Me. Code R. ch. 19 § 11; Nev. Admin. Code § 639.753. The only other policy similar to Washington's—in Illinois—has been struck down in state court for violating the Free Exercise Clause. *Morr-Fitz, Inc. v. Blagojevich*, 2011 WL 1338081, No.

2005-CH-000495 (Ill. Cir. Ct. Apr. 5, 2011), affirmed on other grounds, *Morr-Fitz, Inc. v. Quinn*, 976 N.E.2d 1160 (Ill. App. Ct. Sept. 20, 2012) (invalidating 68 Ill. Adm. Code § 1330.500(e)).

Given the combined judgment of the overwhelming majority of States that conscience rights of pharmacists and other health care professionals can be protected without limiting access to emergency contraceptives, Washington's contrary conclusion on an issue of such grave importance deserves this Court's review.

It is no response to this damning consensus that this Court should tolerate the Ninth Circuit's decision for lack of a division in the lower courts. Last term in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), this Court reviewed a state prison policy governing beard length and concluded that the policy wrongly burdened inmates' rights to religious exercise.[7] The Court emphasized that the state policy at issue in *Holt* was an outlier. As the Court reasoned, the conflicting policies of the "vast majority of States and the Federal Government" stood in contradistinction to the

---

[7] While decided under RLUIPA, *Holt*'s consideration of sister State policies remains relevant to the Petition's Free Exercise Clause claim because considerations of compelling government interest persist across a variety of underlying claims. *Compare Holt*, 135 S. Ct. at 866 (discussing sister state policies under compelling government interest in context of RLUIPA); *with Johnson v. California*, 543 U.S. 499, 508 (2005) (discussing strict scrutiny under Fourteenth Amendment and noting "[v]irtually all other States and the Federal Government manage their prison systems without reliance on racial segregation."); *see also Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (discussing how strict scrutiny "means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.").

challenged state policy, particularly when the same state interest used to justify the restrictive prison policy—safety and security—applied with equal force in the States with more permissive policies. *Id.* at 866. The uniform voice of the vast majority of States is no reason to deny the current Petition on account of insufficient disagreement in lower courts.

It is an inevitable byproduct of the fact that so many States have codified a policy orthogonal to Washington's policy that there are few divergent judicial decisions concerning the outlier rule. *But see Morr-Fitz, supra*. Under these circumstances, the better question is whether courts have diverged on the principles that resulted in the Ninth Circuit's holding. On that point, the lower courts are in ample disagreement. *See supra* Part I; *see also* Pet. at 22-37 (discussing divisions among circuit courts in the interpretation of *Lukumi*). As in *Holt*, the lack of divergent outcomes interpreting a minority-of-one policy need not preclude certiorari review.

The fact that so many States have affirmatively disagreed with Washington that timely and safe delivery of prescription medication requires every pharmacy or pharmacist in the State to distribute drugs in violation of religious or moral concerns illustrates the importance of this issue. The Court should grant certiorari to resolve the deeper uncertainties surrounding *Lukumi* and the Free Exercise Clause that produced the Ninth Circuit's illiberal decision.

III. Rather than Presenting a Barrier, the Principles of Federalism Support Granting Certiorari.

At an overly simplistic level, vague notions of federalism might appear to shield a State's idiosyncratic regulation of pharmacies. Only a misshapen federalism, however, could legitimize a State denying constitutional protections to its citizens. Indeed, one particular genius of the American structure of dual sovereignties is that the state and federal governments are each tasked with checking tyrannical impulses in the other. Thus, this Court can promote true federalism by checking state overreach in this case.

A. Appeals to Federalism Do Not Limit This Court's Protection of Individual Rights.

The notion that principles of federalism ought to fully shield a State's action from this Court's searching review is erroneous. Indeed, such a misplaced appeal evokes an era when "States' rights" were used as a rallying cry for those who invidiously desired to deny certain citizens their constitutional rights. When individual liberties guaranteed by the Bill of Rights are under siege, a State crying "federalism" should be no more successful than a child playing tag calling "timeout" right before contact with his classmate's hand.

The federalist structure of the American system does not excuse any State's constitutional violations nor legitimize religious discrimination. This Court has refused to indulge the argument that enforcing the

protections of the Bill of Rights "is inconsistent with principles of federalism and will stifle experimentation." *McDonald v. City of Chicago*, 561 U.S. 742, 783 (2010) (plurality opinion). To the contrary, "if a Bill of Rights guarantee is fundamental from an American perspective, then . . . that guarantee is fully binding on the states and thus limits . . . their ability to devise solutions to social problems that suit local needs and values." *Id.* at 784-85. Just so here. Specifically, States may not "impede free exercise rights or any other individual religious liberty interest" in the name of federalism. *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 (2002).

To be sure, as so-called "laboratories of democracy," States are able to take many different approaches within the boundaries of constitutional protections. *See, e.g., Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015). But that creativity has limits: States are not allowed to infringe on individuals' conscience rights guaranteed by the Establishment, Free Exercise, Free Speech, and Equal Protection Clauses. This Court should ignore any invocation of a free-range federalism that escapes its constitutional fences.

B. Amici States Support Granting Certiorari in Part to Prevent the Principles of Federalism Being Misused.

In many other cases before this Court, the Amici States have urged the Court to respect federalism interests. Their same commitment to the proper balance between federal and state power motivates the filing of this brief. Indeed, it is precisely because Amici are some of the fiercest defenders of federalism,

properly conceived, that it is so crucial for these States to police the borders of the doctrine and prevent it from being misused for attacking their citizens' constitutional protections.

True federalism does not invoke the sovereign role of the States as justification for limiting rights enshrined in the Constitution. In the American system, competing sovereigns limit each other and thereby preserve liberty. In Federalist, No. 51, James Madison describes the principle of "double security" built in to the United States Constitution:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the right of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The Federalist No. 51 (J. Madison) reprinted in The Essential Federalist and Anti-Federalist Papers, p. 248 (D. Wooton ed. 2003).

Amici States carry their half of the burden in securing liberty by, for example, challenging federal legislative and regulatory overreach through appropriate channels of litigation.

In cases like the current one, however, the duty falls on federal courts to shoulder their half of the burden. When a State's exercise of power exceeds constitutional bounds, individuals like the Petitioners bring lawsuits to resist state encroachment on individual liberty. This

Court should grant the Petition and demonstrate the best of the principles of federalism in action.

CONCLUSION

The instant conflict over the reach of the Free Exercise Clause affords a needed opportunity to isolate this important provision of the Constitution and provide guidance on the *Smith-Lukumi* framework, which has so far developed without supervision by this Court for 23 years. The importance of the issues at stake and the clarity of the record further militate in favor of review. This Court should grant the Petition for writ of certiorari.

Respectfully submitted,

MICHAEL LEE FRANCISCO
MRDLAW
3301 West Clyde Place
Denver, CO 80211
(303) 325-7843
michael.francisco@mrd.law

MARK BRNOVICH
Attorney General
JOHN R. LOPEZ, IV
Solicitor General
Counsel of Record
DOMINIC E. DRAYE
KEITH MILLER
OFFICE OF THE ARIZONA ATTORNEY GENERAL
1275 W. Washington Street
Phoenix, AZ 85007
(602) 542-8255
john.lopez@azag.gov

Counsel for Amici Curiae

February 5, 2016