

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*

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

With neither the facts nor the law on their side, Respondents simply pound the table.

On the facts, Respondents seek to avoid review by manufacturing factual disputes, fighting their own stipulations, and using eleventh-hour gamesmanship to contrive vehicle problems. But it is too late to dispute the record, which encompasses a twelve day trial with abundant testimony, bargained-for stipulations, and extensive findings of fact—*none* of which Respondents challenged on appeal as clearly erroneous.

More telling is what Respondents do not dispute. Respondents do not defend how the Regulations were gerrymandered to target Petitioners. Nor do they dispute the district court’s finding that the Regulations, in practice, permit an “almost unlimited variety” of business and convenience referrals while banning religiously-motivated ones. Nor do Respondents mention that the American Pharmacists Association (“APha”) and thirty-seven other pharmacy trade associations condemn the Regulations as unnecessary, unprecedented, and affirmatively harmful to patients.

Respondents fare no better on the law. The Ninth Circuit claimed to apply *Lukumi* while studiously avoiding *Lukumi*’s command to look to the law’s “real operation.” Respondents never explain why the Ninth Circuit could possibly be justified in looking to the theoretical operation of the law instead. That Panglossian approach is the

opposite of *Lukumi*'s and is reason enough for summary reversal.

Even without summary reversal, the Ninth Circuit's strained effort to avoid *Lukumi* and the record resulted in a decision that conflicts with other circuits in three different respects. Respondents fail to address those splits in any meaningful way—or the decrease in healthcare access that will result if its decision remains undisturbed. U.S. Conference of Catholic Bishops (“USCCB”) Br. 14-20; APhA Br. 21-25.

Respondents would erase our country's long-standing protection for religious conscience in this area not because of any harm—indeed, they have stipulated that Petitioners' conduct is harmless—but because religiously-motivated referrals are politically controversial, while secular referrals are not. The Free Exercise Clause protects religious observers against this kind of “unequal treatment.” *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542 (1993). The Ninth Circuit's decision to the contrary warrants this Court's review.

I. The Ninth Circuit's decision refused to follow *Lukumi*.

Summary reversal is warranted because the Ninth Circuit upheld Regulations just as problematic as the ordinances unanimously struck

down in *Lukumi*.¹ Respondents’ main response, like the Ninth Circuit’s holding (and the city’s defense in *Lukumi*), is to insist that the case be resolved based on what “the text” of the Regulations might mean in theory, rather than “the effect of [the Regulations] in [their] real operation.” 508 U.S. at 535. But that contradicts *Lukumi*.

Lukumi requires courts to evaluate a law “[a]part from the text” to determine its “real operation.” *Id.* *Lukumi* itself struck down a facially neutral ban on the “unnecessary” killing of animals, not because of the text—which was “broad on its face” with no exemptions—but because the government deemed religious killing unnecessary while ignoring “most other killings” in practice. *Id.* at 537. The Ninth Circuit, by contrast, refused to consider the “practices [that] had occurred” under the Regulations. App.32a.

Respondents try to manufacture a factual dispute about actual practice under the Regulations by claiming that the district court’s findings were based on “speculation.” State 23.² But more than a

¹ *Cf. Lopez v. Smith*, 135 S. Ct. 1 (2014) (summary reversal of unanimous Ninth Circuit decision after no en banc vote); *Marshall v. Rodgers*, 133 S. Ct. 1446 (2013) (same); *Stanton v. Sims*, 134 S. Ct. 3 (2013) (same); *Swarthout v. Cooke*, 562 U.S. 216 (2011) (same); *Felkner v. Jackson*, 562 U.S. 594 (2011) (same).

² Respondents attack the impartiality of the district judge, claiming that the court “[a]dopted Petitioners’ proposed findings almost verbatim.” Intervenor 12. But the district court added new findings, deleted or modified others, and rejected

dozen pharmacy experts—including eight senior Commission officials (Supplemental Appendix (“SA”) 1-3)—testified that since the Regulations were enacted, referrals motivated by considerations of business and convenience have remained widespread, well-known, and unpunished. App.81a, 162-68a. The Commission *stipulated* that these referrals “continue[] to occur for many reasons.” App.335a; SA19-20. And the Ninth Circuit admitted the district court’s findings on this point were “not clearly erroneous.” App.32a; *see also* APhA Br. 10-15.

Ignoring this evidence, Respondents claim the Regulations are *supposed* to make these common secular referrals illegal—or at least *might* make them illegal “if [the Commission is] ever presented with a complaint about such conduct.” State 26. But the district court found that the Commission “has interpreted the rules to ensure that the burden falls squarely and almost exclusively on religious objectors,” App.86a, while finding contrary testimony “implausible and not credible.” App.171-76a. The Ninth Circuit disputed this finding as “clearly err[oneous]” (App.28a)—despite the fact that Commission members approved secular referrals at meetings and in correspondence. *E.g.*, App.135-36a; SA6-16; 351-58a. But this factual issue is legally immaterial. The question under *Lukumi* is not whether the Regulations are *supposed* to permit secular referrals, but whether they *actually* do so in

two of the Petitioners’ three legal theories. It also issued a separate 48-page opinion with independent factual findings. App.49a.

their “real operation.” 508 U.S. at 535. That point is undisputed. App.32a.

Finally, Respondents claim that the Regulations do not violate *Lukumi* because they supposedly “protect religiously motivated conduct” by pharmacists—an assertion repeated over 20 times. State 1. But the district court found—and the Ninth Circuit did not dispute—that the Regulations do not, *in practice*, accommodate pharmacists. App.54-55a, 180-83a; APha Br. 23-24. Pharmacists—like Petitioners Thelen and Mesler—have been constructively discharged and threatened with termination because the Regulations make accommodations too expensive. App.187-88a. Commission witnesses confirmed “that [the] new rule would likely end in the termination of conscientious objectors.” SA5; App.180-83a. But again, the Ninth Circuit relied on the possibility of an accommodation in theory rather than its unavailability in practice—in direct conflict with *Lukumi*.³

II. The Ninth Circuit’s decision conflicts with decisions of other circuits.

Respondents claim that the Ninth Circuit “applied exactly the same test” as other circuits. State 25. But that is simply wrong.

³ Intervenor-Respondents claim (at 6) the Regulations mirror provisions in five other states. But in each state, pharmacies can be accommodated by not stocking objectionable drugs—as the district court found, App.121-23a, the Ninth Circuit did not dispute, and pharmacy associations confirm. APhA Br. 13-14.

1. On the question of exemptions, no other Circuit has adopted the Ninth Circuit’s coulda-shoulda-woulda rule. Unlike the Ninth Circuit, other circuits do not defer to what the government says its regulations *might* do in theory but examine what the regulations *actually* do in practice. In *Ward v. Polite*, the university said it had “a policy of disallowing *any* referrals,” but the Sixth Circuit examined the referrals allowed in practice. 667 F.3d 727, 739 (6th Cir. 2012). In *Axson-Flynn v. Johnson*, the university said all students must “perform the[ir] acting exercises as written,” but the Tenth Circuit examined exceptions made in practice. 356 F.3d 1277, 1291 (10th Cir. 2004). And in *Tenafly Eruv Association, Inc. v. Borough of Tenafly*, the government said its ordinance “d[id] not allow [government] officials to make exceptions,” but the Third Circuit looked “beyond the text of the ordinance” to what the government “tacitly” permitted “in practice.” 309 F.3d 144, 151, 167 (3d Cir. 2002). The Ninth Circuit’s decision conflicts with these cases.

Other circuits also forbid the government from making a “value judgment in favor of secular motivations” by treating secular conduct as more important than religious practice. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.); Pet. 28. But the Ninth Circuit did just that, concluding that secular reasons—including mere convenience—are “necessary reasons for failing to fill a prescription,” while religious reasons are not. App.30a (quoting *Stormans I* at App.315a). It did so even though Commission witnesses admitted—and the district court found—that secular referrals cause

a “much more serious access issue” than religiously-motivated ones. App.356-57a, 211-12a, 215a.

2. On the question of individualized exemptions, Respondents concede that the Third, Sixth, and Tenth Circuits apply strict scrutiny when (1) “the law allows government to exercise discretion in favor of secular conduct” and (2) “the government does so in practice.” State 28. That is just what happened here. As the district court found, the catch-all exemptions in the Regulations contain no objective criteria; rather, the Stocking Rule, along with the exceptions for “good faith” and “substantially similar circumstances,” give the Commission broad discretion to permit common secular referrals. App.88a, 90a, 220-22a. And in practice, this is precisely how the Regulations have been enforced. App.184a, 222a.

3. Respondents seek to explain the pattern of selective enforcement on the ground that the Commission only pursues citizen complaints. State 32-33. But it is undisputed that the Commission uses many tools to enforce its regulations, including inspections, test shopping, and initiating its own complaints. App.102-03a, 176-80a. It did just that against Petitioners, claiming that they violated the Regulations, yet promptly dismissing complaints against pharmacies that failed to stock Plan B for secular reasons. App. 227a, 178a. The Ninth Circuit held that this differential treatment was permissible because other pharmacies failed to stock Plan B “temporarily,” while Petitioners declined to do so “at all times.” App.39a n.11. But the Third Circuit rejected the same argument in *Tenaflly*, holding that

the government could not distinguish between secular and religious conduct on the ground that religious conduct was “permanent.” 309 F.3d at 172.

Regardless, the Commission cannot delegate enforcement power to private interest groups when it knows that those groups are targeting vulnerable religious objectors with a “severely disproportionate number of investigations.” App.228a; *cf. City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985). The Commission also “consciously chose[]” to do nothing about Catholic hospitals—larger and more powerful entities serving millions of patients—even though it knew that those hospitals were not dispensing Plan B. App.97-99a; USCCB Br. 12-13, 19-20. The result is that identical religious objectors are treated differently—and identical secular conduct is ignored—based on activists’ effort to target the most vulnerable.

Rather than addressing this legal conflict, Respondents claim there is no selective enforcement because Petitioners have not yet been punished. State 31-32. But that is because the district court’s injunction and stay have prohibited it. Respondents kept complaints pending against Petitioners for a decade—never dismissing one on the merits, and stating that Petitioners were in “outright defiance” of the Regulations. App.186-87a, 168-69a. They admit that “the Delivery Rule does not allow a pharmacy to refuse to deliver a drug or device to a patient because its owner objects to delivery on religious . . . grounds.” State 10. And they do not even suggest that Petitioners can escape punishment in the future.

Instead, Respondents claim that they recently “dismissed the three remaining complaints” against Petitioners, citing “letters on file with counsel.” State 13 n.2. Respondents never sent those letters to Petitioners until after filing their Brief in Opposition. Although they emailed counsel in September 2015 claiming the complaints had been dismissed, they never sent the formal notice that is legally required when dismissing a complaint. RCW § 18.130.057(4). Respondents say they were awaiting the Ninth Circuit’s decision “because of the district court’s injunction.” State 32. But due to the stay of the Ninth Circuit’s mandate, the district court’s injunction remains in place. Thus, the only plausible explanation for this irregularity is an eleventh-hour “manipulative litigation strategy,” *Lawrence v. Chater*, 516 U.S. 163, 168 (1996), designed to evade judicial review.

4. Finally, on the history of the Regulations, Respondents say that “Petitioners’ real disagreement is with the Ninth Circuit’s analysis of the facts.” State 35. But the Ninth Circuit made two *legal* rulings that conflict with other circuits. First, this Court and other circuits say that a “trial court’s decision on the ultimate question of discriminatory intent represents a finding of fact” entitled to “great deference on appeal.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (internal quotations omitted). The district court found “reams” of evidence proving that “the predominant purpose of the rule was to stamp

out the right to refuse.” App.57a. But the Ninth Circuit rejected that finding without any deference.⁴

Second, the Ninth Circuit held that “[t]he 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.” App.27a (quoting *Stormans I* at App.312a). That follows Justice Scalia’s concurrence in *Lukumi*, 508 U.S. at 558, in conflict with the opinion of Justice Kennedy, *id.* at 540-42, which has been adopted by the Seventh and Eighth Circuits. Pet.35-38.

In those circuits, the egregious history of the Regulations—including the many hostile statements from Commission officials and the Governor—would be dispositive. As the district court found, “[e]xcept for post-lawsuit testimony by State witnesses, literally all of the evidence 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.” App.91a, 37a. This evidence was summed up when the Commission official charged with explaining the Regulations to the public confirmed: “[T]he object of the rule was ending refusals for conscientious objection.” App.359a. Under the law of other circuits, that is a straightforward violation of *Lukumi*.

⁴ Intervenor-Respondents (at 27) say that the facts in free exercise cases require “independent” review under *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). They mischaracterize the *Bose* standard and the Ninth Circuit never invoked it.

III. This case is a clean vehicle to resolve extraordinarily important issues.

Unable to address these conflicts, Respondents strain to manufacture a vehicle problem. First, they say Petitioners “never properly challenged” the Stocking Rule. State 37. But the Delivery Rule expressly incorporates the Stocking Rule, and both rules were pressed and passed upon in the district court and Ninth Circuit. Pet.13 n.5. That preserves the issue for review. *Verizon Commc’ns Inc. v. Fed. Commc’ns Comm’n*, 535 U.S. 467, 530 (2002).

Next, Respondents claim that the over-the-counter availability of one form of Plan B may moot this litigation, even though *ella* and other forms of Plan B are still available only through pharmacies. State 37. But that is *the opposite* of what Respondents argued below. As their brief explained: “the challenged rules continue to apply to these time-sensitive medicines, . . . maintaining a live controversy here.” Defs.-Appellants’ Supp. Br. 1-2, (Dkt.#152). Respondents were right the first time. Although over-the-counter availability of Plan B renders the ban on conscience-based referrals even more gratuitous, Respondents’ about-face on mootness is a transparent attempt to avoid review.

Finally, Respondents claim this Court should deny review because of a dormant, “possible rulemaking” notice. State 37-38. While this notice has been pending for sixteen months, others have been pending for up to seventeen years. *See e.g.*, Wash. St. Reg. 98-13-105; Wash. Dep’t of Health, Rule-Making Activity, <http://www.doh.wa.gov/>

AboutUs/RuleMaking/RuleMakingActivity. Vague claims that the law might someday change cannot prevent this Court's review. The Commission has aggressively defended the Regulations against Petitioners for nearly a decade and has never, since refusing to amend them in 2010, suggested any intent to change them.

Faux vehicle issues aside, this case is an ideal vehicle for the Court to address post-*Lukumi* free exercise law, which is rife with circuit splits and indifference to constitutional violations. The parties agree that pharmacies continue to refer patients for all kinds of secular reasons and that the Regulations ban conscience-based referrals. The Commission has *stipulated* that conscience-based referrals are “a time-honored pharmacy practice” that “do not pose a threat to timely access to lawfully prescribed medications”—a fact the Commission simply ignores. App.335a. Intervenor-Respondents likewise present no evidence that Petitioners' customers were ever denied timely access to any drug, presumably because over thirty pharmacies are located nearby. App.147a. It is thus undisputed that Petitioners' referrals are fully consistent with timely access to medication.⁵

⁵ Intervenor-Respondents (at 10-11) recycle a handful of refusal stories they offered the Commission in 2006 and 2010. But each story was examined and the district court found—without contradiction—that they involved conduct expressly permitted under the Regulations or were inaccurately reported; none suggested any problem of access to medication. App.152-57a;

By contrast, the Ninth Circuit's decision poses a major threat to the provision of health care throughout the circuit. USCCB Br. 14-24; APhA Br. 5, 23-24. Catholic hospitals currently provide half of all Washington hospital beds and serve millions of patients. And Respondents do not dispute that, absent this Court's review, they will soon be forced to choose between continuing their mission or violating the directives of their faith. USCCB Br. 19-24. Respondents' allies have also promised to push similar laws in other states. *Id.* at 22-23.

Ultimately, the Ninth Circuit twisted itself into legal knots to avoid applying anything more than rational basis review. It analyzed the Regulations without regard to their real operation, allowed value judgments in favor of secular conduct, and dismissed the relevance of selective enforcement and legislative history, all of which deepen circuit splits and depart from both the spirit and the letter of *Lukumi*. It is no accident that in the quarter century since *Employment Division v. Smith*, 494 U.S. 872 (1990), with only one exception that was later reversed, the nation's largest circuit has never held a law subject to strict scrutiny under the Free Exercise Clause. *See Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002) *rev'd*, 540 U.S. 712 (2004). Absent this Court's review, the Free Exercise Clause will remain a dead letter in the Ninth Circuit.

SA17-18. Commission witnesses admitted they were unable to identify any access problem. App.149-52a, 409a.

CONCLUSION

The Court should summarily reverse the Ninth Circuit decision or, alternatively, grant plenary review. Absent immediate review, the Court should hold the petition in light of *Trinity Lutheran Church of Columbia v. Pauley*, No. 15-577, which also arises under the Free Exercise Clause.

Respectfully submitted.

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