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 *AMICI CURIAE* INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS AND CHURCH OF THE LUKUMI BABALU AYE, INC., IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici address the need for the Court's review of the following question, which is contained within the question presented by Petitioners:

In cases arising under the Free Exercise Clause, is the historical background of a challenged law, including legislative history and events contemporaneous with its enactment, relevant to whether the law is "neutral" regarding religion?

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INTEREST OF THE *AMICI CURIAE*[1]

Amici—the Church of the Lukumi Babalu Aye, Inc., and the International Society for Krishna Consciousness—are religious organizations that have been subjected to governmental discrimination in the United States. In response to such discrimination, *amici* have sought relief under the Free Exercise Clause. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949 (D.C. Cir. 1995). As religious minorities, *amici* have strong interests in ensuring that courts examine all available, relevant evidence to determine whether a state actor has unconstitutionally discriminated based on religion.

SUMMARY OF ARGUMENT

A government may not restrict a practice because of its religious motivation. The issue here is whether a state agency did just that when it adopted regulations that compel pharmacists to dispense what they believe are abortifacient drugs, in violation of the pharmacists' sincerely held religious beliefs.

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[1] In accordance with Supreme Court Rule 37.2(a), counsel of record received timely notice of the intention to file this brief, and all parties have submitted to the Court blanket consent to the filing of *amicus curiae* briefs. As required by Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund this brief.

When Petitioners challenged the regulations as violating the Free Exercise Clause, the district court, after a 12-day trial, made exhaustive findings of fact establishing that, though the regulations are neutral on their face, their "object" is to "restrict [a] practice[] because of [its] religious motivation." *Lukumi*, 508 U.S. at 533. The district court found that "*literally all of the evidence* demonstrate[d] that the . . . rulemaking was undertaken primarily (if not solely) to ensure that religious objectors would be required to stock and dispense [emergency contraceptives]." Pet. App. 91a (emphasis added). After finding that the regulations are not neutral, the district court applied strict scrutiny and enjoined enforcement of the regulations against Petitioners. *Id.* at 110a.

The Ninth Circuit reversed, but not because any of the district court's findings of fact about the law's object were clearly (or at all) erroneous. Rather, the Ninth Circuit *refused to examine* those facts. *Id.* at 26a–27a. It adopted Justice Scalia's view that the "collective will" of a lawmaking body cannot be known; thus, it did not examine the voluminous historical-background evidence that the regulations targeted religious pharmacists. *Id.* at 27a (internal quotation marks and citation omitted); *see Lukumi*, 508 U.S. at 558 (Scalia, J., concurring) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body."). In doing so, the Ninth Circuit deepened a circuit split on the question, left open in *Lukumi*, whether the "historical background" of a law, including its legislative and administrative history, is relevant evidence of that law's neutrality in the Free Exercise context. *See id.* at 540.

This Court should grant review to clarify whether historical-background evidence is relevant to determining the "object" or "purpose" of a law under the Free Exercise Clause. As the Court has explained in the similar context of the Equal Protection Clause, the background of a law can be "highly relevant" to the "purpose of . . . official action." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977). But, although certain Justices have relied on a full range of historical-background evidence, no majority has done so in a Free Exercise case. *See Lukumi*, 508 U.S. at 540–41 (opinion of Kennedy, J.) (relying on such evidence); *id.* at 558 (Scalia, J., concurring) (declining to do so). Amidst this uncertainty, at least four federal courts of appeals and one state court of last resort look to historical-background evidence in the Free Exercise context, but the Supreme Court of Utah and now the Ninth Circuit do not. Among the federal circuit courts, the Ninth Circuit stands alone, and in a decided minority.

This question is particularly important for practitioners of minority religions across the nation. For religious groups threatened by insidious legislative drafting, it is essential for smoking out a law's true object that courts examine its full context, including its historical background. Indeed, the historical-background evidence in this very case—which the Ninth Circuit ignored—confirms not only that state actors seek to target religious minorities, but also that they can cloak their animus in facially neutral laws. For example, before the regulations were enacted, the Executive Director of the state Commission explained in an email that "'[t]he moral

issue IS the basis of the concern'" and that there was some "difficulty i[n] trying to draft language to allow facilitating a referral for *only . . . non-moral or non-religious reasons*." Pet. App. 130a–31a. The Governor similarly wanted to ensure that the regulations were "clean enough" for her favored interest groups regarding the "conscious/moral [*sic*] issues." *Id.* at 130a. And Commission "witnesses testified that the object of the Regulations was to specifically address conscientious objections." *Id.* at 140a. This Court should decide whether the Ninth Circuit was wrong in ignoring such overwhelming historical-background evidence and thus reversing the district court's finding of a clear constitutional violation.

ARGUMENT

I. THIS COURT HAS LEFT OPEN WHETHER A LAW'S HISTORICAL BACKGROUND IS RELEVANT TO ITS NEUTRALITY UNDER THE FREE EXERCISE CLAUSE.

Under the Free Exercise Clause, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 533. Both the purpose and effect of the law are relevant: "If the purpose *or* effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid . . . ." *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (emphasis added); *see also Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) ("Each value judgment under the Religion Clauses must . . . turn on whether particular acts in question are intended

to establish or interfere with religious beliefs and practices or have the effect of doing so.").

Even where a law maintains "[f]acial[] neutral[ity]," courts apply strict scrutiny if the law's "object" is not neutral. *Lukumi*, 508 U.S. at 533–34. That is, the Free Exercise Clause "forbids subtle departures from neutrality and covert suppression of particular religious beliefs." *Id.* at 534 (internal quotation marks and citations omitted). The Clause "protects against governmental hostility which is masked, as well as overt," and this Court "must survey meticulously" to "eliminate . . . religious gerrymanders." *Id.* (internal quotation marks and citation omitted).

Where the "object" or "purpose" of a law is at issue, there is good reason for courts to examine its context, as well as its text. Courts generally lack the ability to determine a law's "object" or "purpose" *without* relying on contextual factors, including "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* at 540. Canny state actors can almost always "mask[]" their discriminatory intentions beneath facially neutral text. *Id.* at 534. Consequently, this Court has recognized that historical-background evidence can be "highly relevant" to the "purpose of . . . official action." *Arlington Heights*, 429 U.S. at 268.

In multiple constitutional contexts, this Court thus looks to the historical background of a law when it needs to determine the law's object or purpose. For

instance, this Court analyzes the historical background of laws that are challenged under the Establishment Clause. "There is . . . nothing hinting at an unpredictable or disingenuous exercise when a court enquires into purpose after a claim is raised under the Establishment Clause." *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). And to undertake that inquiry, the Court looks to the "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history and the historical context of the statute, and the specific sequence of events leading to its passage." *Id.* (quoting *Edwards v. Aguillard*, 482 U.S. 578, 594–95 (1987)).

This Court also examines historical-background evidence in cases arising under the Equal Protection Clause. In *Hunter v. Underwood*, 471 U.S. 222 (1985), for example, this Court invalidated a facially neutral law that "was motivated by a desire to discriminate against blacks," where the relevant state actors "were not secretive about their purpose." *Id.* at 229, 233. Even if historical-background evidence may prove less conclusive than, say, the text of a facially discriminatory statute, it remains *relevant* to a determination of purpose—particularly where the evidence is strong.

But *Lukumi* highlights that this Court has not directly decided whether courts must examine a law's historical background in the Free Exercise context. The principal opinion in *Lukumi* relied on historical-background evidence such as statements made at city council sessions, but this aspect of the opinion did not command a majority of the Court.

Cf. Lukumi, 508 U.S. at 540–41 (opinion of Kennedy, J.) (relying on evidence of "significant hostility . . . toward the Santeria religion" expressed in the "minutes and taped excerpts" of a city council session), *with id.* at 558 (Scalia, J. concurring) (refusing to examine historical-background evidence). As delineated below, without direction from this Court, federal courts of appeals and state courts of last resort have split on whether to consider historical-background evidence in cases involving the Free Exercise Clause, and the Ninth Circuit here deepened the split by echoing Justice Scalia's concurring opinion in *Lukumi*.

II. THE NINTH CIRCUIT HAS DEEPENED A POST-*LUKUMI* SPLIT OVER WHETHER A LAW'S HISTORICAL BACKGROUND IS RELEVANT TO ITS NEUTRALITY.

The Ninth Circuit's decision exacerbates a post-*Lukumi* split of authority among federal courts of appeals and state courts of last resort. At least five such courts examine the historical background of a law in the Free Exercise context. The Ninth Circuit and the Supreme Court of Utah do not.

A. At Least Four Federal Courts of Appeals, and the California Supreme Court, Consider a Law's Historical Background When Deciding Whether It Is Neutral.

Because the Free Exercise Clause prohibits "subtle departures from neutrality" and "masked" "governmental hostility," the First, Second, Sixth, and Seventh Circuits, as well as the California Supreme Court, since *Lukumi* have clearly examined

historical-background evidence in the Free Exercise context. *Lukumi*, 508 U.S. at 534.

In *Commack Self-Service Kosher Meats, Inc. v. Hooker*, the Second Circuit relied on such evidence, including legislative history, when it analyzed whether a Kosher labeling statute was neutral regarding religion. 680 F.3d 194, 211 (2d Cir. 2012). The plaintiffs "alleg[ed] that the law discriminated against non-Orthodox Jews and impermissibly gave the state a supervisory role over what is 'kosher.'" *Id*. at 203. "Specifically, the plaintiffs contend[ed] that whether a law is neutral or discriminatory can be gleaned, not only from the statutory language, but also from direct or circumstantial evidence of intent, including the legislative history and the historical background of the statute." *Id.* at 211. Such evidence could establish whether a law "subtl[y] depart[ed] from neutrality" or was a "covert suppression of particular religious beliefs." *Id.* Only after examining the historical background of the law did the Second Circuit conclude that "the Legislature [was] not attempting to challenge the plaintiffs' religious beliefs." *Id.*

Several other federal courts of appeals since *Lukumi* also have followed its principal opinion in relying on historical-background evidence in Free Exercise cases. In *St. John's United Church of Christ v. City of Chicago*, the Seventh Circuit held that it "must look at available evidence that sheds light on the law's object, including the effect of the law as it is designed to operate, the 'historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the act's legislative or

administrative history.'" 502 F.3d 616, 633 (7th Cir. 2007) (quoting *Lukumi*, 508 U.S. at 540). Agreeing with the principal opinion in *Lukumi*, the Seventh Circuit views such evidence as critical to whether a facially neutral law "embodie[s] a more subtle or masked hostility to religion." *Id.* at 633. Similarly, in *Prater v. City of Burnside, Kentucky*, the Sixth Circuit "consider[ed] whether the City," in making a particular land use decision, "intentionally sought to burden [a] Church's religious activities." 289 F.3d 417, 428 (6th Cir. 2002). The court reiterated that "the Free Exercise Clause protects against governmental hostility which is masked, as well as overt"; thus, when determining whether anti-religious animus had motivated the City's decision, the Sixth Circuit analyzed evidence of the City's past land use decisions and the town's violation of its own procedural rules. *Id.* at 428–430. Additionally, in *Wirzburger v. Galvin*, the First Circuit examined historical-background evidence of anti-religious motivation relating to a facially neutral amendment of the state constitution. 412 F.3d 271, 281 (1st Cir. 2005). *See also CHILD, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (8th Cir. 2000) (citing *Lukumi*, 508 U.S. at 535 & 540, in analyzing legislative history to determine whether law had impermissible intent to discriminate among religions).

The California Supreme Court also takes account of historical-background evidence when it analyzes neutrality under *Lukumi*. In *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 78 (Cal. 2004), Catholic Charities of Sacramento challenged a state law that required certain health plans to cover contraceptives. After determining

that the law was facially neutral, the court also examined Catholic Charities' argument, based on the "legislative history and practical effect" of the statute, that the state legislature "gerrymandered" the law to reach only Catholic employers. *Id.* at 82. The court explained that the Free Exercise Clause prohibits "'subtle departures from neutrality' and 'governmental hostility which is masked as well as overt.'" *Id.* at 84 (quoting *Lukumi*, 508 U.S. at 534). The court also noted Catholic Charities' "analogy to *Lukumi*, in which the high court considered specific statements by members of the Hialeah City Council as evidence that the ordinance prohibiting animal sacrifice was intended to suppress the Santeria religion." *Id.* at 86. Although the court concluded that "Catholic Charities' assertions about the legislative history of the [statute in its case] d[id] not justify a similar conclusion," the court reached that conclusion only after, and in light of, an extensive review of the historical background. *Id.* at 84–87.

B. The Ninth Circuit and the Supreme Court of Utah Refuse to Consider the Historical Background of a Law When Deciding Whether It Is Neutral.

In the decision below, by contrast, the Ninth Circuit joined the Supreme Court of Utah in refusing to examine the historical background of a law in the Free Exercise context. Pet. App. 26a–27a; *State v. Green*, 99 P.3d 820, 828 (Utah 2004).

The Ninth Circuit explained 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." Pet. App. 27a (internal quotation marks and citation omitted). This

statement echoed Justice Scalia's concurrence in *Lukumi*, in which he refused to consider certain evidence of the historical context of the ordinances at issue. *See Lukumi*, 508 U.S. at 558 (Scalia, J., concurring) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body.").

As a result, the Ninth Circuit ignored voluminous, uncontroverted evidence that the regulations were adopted precisely and only to end conscience-based referrals. After a 12-day trial, the district court had concluded that "reams of emails, memoranda, and letters between the Governor's representatives, [Commission] members, and advocacy groups demonstrat[ed] that the predominant purpose of the rule was to stamp out the right to refuse." Pet. App. 57a.

A small sample of the district court's factual findings illustrates the broad foundation of its conclusion and thus the extent of the facts with which the Ninth Circuit refused to contend: In 2005, Planned Parenthood "sought to enlist the Governor's help to prohibit conscientious referrals for [emergency contraceptives]." *Id.* at 124a. The Governor in response sought a rule that was "clean enough" for "Planned Parenthood" and her other preferred advocates regarding "conscious/moral [*sic*] issues." *Id.* at 130a. Members of the Commission, after supporting the right of conscientious refusal, were—at the behest of the Governor and Planned Parenthood—threatened by the Washington Human Rights Commission with *personal liability* for "sex discrimination." *Id*. at 126a–127a. The Governor also took the unprecedented step of publicly threatening to remove recalcitrant Commissioners.

Id. at 129a. The Commission's Executive Director explained in an email that "'[t]he moral issue IS the basis of the concern.'" *Id.* at 130a. And he candidly admitted that the "difficulty is trying to draft language to allow facilitating a referral for *only* . . . *non-moral or non-religious reasons*." *Id.* at 131a (internal quotation marks omitted). Yet the Commission "never identified a *single* incident in which a patient was unable to gain timely access" to emergency contraceptives, and its own "post hoc survey of access . . . showed that there was *no problem*." *Id.* at 244a–45a (emphases added).

Although the Ninth Circuit in one paragraph acknowledged some background evidence, it did so only as dressing for its conclusion that "[t]he collective will of the Commission cannot be known . . . ." Pet. App. 27a (internal quotation marks and citation omitted). The Ninth Circuit pointed to some limited evidence that the Commission did not act "solely" to vitiate religious objections but "also" considered the safe and timely delivery of drugs that "may or may not engender religious objections": For instance, it noted in passing that "public testimony" addressed topics outside of religious objections. *Id.* The appellate court, however, ignored the district court's finding that the public testimony focused "almost exclusively" on "conscientious objections to [emergency contraceptives]," *id.* at 127a; and, more generally, did not address any of the district court's factual findings or the evidence underlying them. In the Ninth Circuit's view, its glancing references to snippets of the factual record somehow demonstrated that the "administrative history hardly reveals a

single design" and thus that "the district court clearly erred" in its overall "finding [of] discriminatory intent." *Id.* at 27a, 28a. But had the Ninth Circuit addressed the trial court's actual, specific factual findings from the regulations' historical context—as at least four other circuits and a state court of last resort would have done—it would have had to either *rely* on these findings or *reject* them (and could only reject them after giving them "great deference," *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (internal quotation marks omitted)). It did neither.

In thus blinding itself, the Ninth Circuit has set itself apart from all other circuit courts to consider the question here, and finds company only in the Supreme Court of Utah. *See Green*, 99 P.3d at 828. In *Green*, Utah's highest court upheld an anti-bigamy statute against a Free Exercise challenge. *Id.* at 822. The defendant argued that the court must consider the legislative history of the statute to determine its neutrality. *Id.* at 828. The Supreme Court of Utah refused to undertake that inquiry because a majority of this Court had not expressly done so in *Lukumi*. *Id.* This Court should grant review to resolve this split of authority, given the importance of the issue to religious minorities across the nation.

III. WHETHER A LAW'S HISTORICAL BACKGROUND IS RELEVANT TO ITS NEUTRALITY IS EXCEPTIONALLY IMPORTANT.

A. Examining a Law's Historical Background Is Particularly Important for Protecting Practitioners of Minority Religions from Insidious Legislative Drafting.

If this Court allows the Ninth Circuit's decision to stand, the consequences will be felt far beyond the State of Washington. Because religious minorities usually pursue practices or beliefs that are unique to them, it is not difficult to cast a law as "neutral" even where it targets only a certain religious practice. Unless courts consider historical-background evidence, such superficially neutral laws will often evade meaningful Free Exercise review.

For instance, in *Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona*, a Jewish community alleged that it was thwarted in its efforts to build a rabbinical college for the training of rabbinical judges, who are essential to the faith of Orthodox and Hasidic Jews. 915 F. Supp. 2d 574, 581–82 (S.D.N.Y. 2013). One of the plaintiffs purchased a site for the college on land in the Village of Pomona. *Id.* at 583. The Village then amended a number of its zoning ordinances—for instance, limiting the size of "dormitory" buildings within the Village—in ways that effectively prohibited the construction of a rabbinical college. *Id.* at 585–86. Nevertheless, the ordinances were facially neutral. *Id.* at 621.

The district court—located in a circuit where courts examine historical-background evidence in Free Exercise cases, *see Commack Self-Service*, 680 F.3d at 211—refused to dismiss the plaintiffs' Free Exercise claim, largely due to the historical background of the ordinances. 915 F. Supp. 2d at 620. And the historical-background evidence was striking: The Mayor of the Village, prior to his election, opposed the construction project and "appeared in a campaign video in which he said that the rabbinical college could not only 'change the village,' but could change 'the makeup of the village.'" *Id*. at 586. Village Trustees "warned a civic association to be careful not to allow discriminatory statements to slip out." *Id*. (internal quotation marks omitted). Plaintiffs cited "various slurs and other offensive statements about Hasidic Jews made by members of the Village's community." *Id*. A former Mayor, in response to community opposition to the rabbinical college, implied that discriminatory motives fueled the opposition to the project, even though he was not allowed to voice them:

> Ladies and gentleman, let me say something. We sitting at this table have limitations that are placed on us as to what we can say, and what we can't say, because our attorney tells us what we can say and what we can't say. I can't say what I feel—I can't—if I agree with you, I don't agree with you, I don't have that luxury of being able to say that here. All that I can say is that every member of this board works very, very hard to do what is best for this community. You have your issues. Don't assume because no one has gotten up and said,

> wow, I agree with you, oh boy; don't assume that because we didn't do that we don't agree.

Id. The former Mayor's comments are telling, as they underscore that lawmakers understand the potential benefits of obfuscating when they pass laws aimed at discriminating.

The en banc Seventh Circuit's decision in *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009), also demonstrates how easy it is to craft a facially neutral rule that targets a specific religion and how valuable historical-background evidence can be in identifying such targeting. Plaintiffs owned a condominium and were subject to the association's rules. *Id.* at 773. As their Jewish faith required, they affixed to the doorpost of their condominium a "mezuzah," a small religious artifact. *Id.* at 772. The association thereafter reinterpreted its "Hallway Rules" to prohibit any items on doors and doorposts. *Id.* at 773–74. The panel rejected plaintiffs' Fair Housing Act claim, but Judge Wood in dissent showed that the "Hallway Rule[s]" were "not neutral once [they were] examined beyond [their] face." *Bloch v. Frischholz*, 533 F.3d 562, 573 (7th Cir. 2008) (Wood, J, dissenting). She further emphasized that the uniqueness of a religion allows others to hide their discriminatory intent; for example, "the placing of an object on the doorpost is (as far as anything in this record shows) irrelevant to practitioners of Christianity, Islam, Buddhism, Hinduism, or any other religion, but it is a duty (a mitzvah) for Jews." *Id.* at 572. Reconsidering the matter *en banc*, the Seventh Circuit agreed with Judge Wood, finding evidence that tended to prove that "religious bias" had motivated the reinterpretation of the rule.

Bloch, 587 F.3d at 783–87; *see also id.* at 786–87 (reversing the grant of summary judgment in favor of defendants because the evidence suggested that the new rule targeted mezuzahs).

The Tenth Circuit's decision in *Axson-Flynn v. Johnson* further illustrates these hazards for practitioners of minority religions. A state university forced a Mormon student out of its acting program because, due to her religious beliefs, she would not utter certain profanities during theatrical productions. 356 F.3d 1277, 1282 (10th Cir. 2004). Instructors told the student: "'You can choose to continue in the program if you modify your values. If you don't, you can leave. That's your choice.'" *Id.* The plaintiff left the program and sued based on violations of her constitutional rights. The Tenth Circuit reversed the district court's grant of summary judgment for the defendants because there was a genuine issue of material fact as to whether the policy requiring students to utter profanities was "generally applicable." *Id.* at 1293–94. But even if it was, the case illustrates how easy it is, under the guise of a facially neutral rule, to target Mormon students who refuse to say certain words.

The prospect of facially neutral, anti-Muslim legislation also looms large. The American Bar Association has noted that "an increasing number" of state laws have been passed to prohibit the use of "Islamic" law, though many of these laws do not mention anything Islamic. Am. Bar Ass'n Resolution 113A, at 2 (Aug. 8–9, 2011), *at* http://tinyurl.com/gmds7yu. Tennessee, for instance, enacted a facially neutral statute that restricted the use of foreign law. Tenn. Code § 20-15-101, *et seq*.

The statute was based on model legislation that a group crafted to "preserv[e] individual liberties and freedoms which become eroded by the encroachment of foreign laws and foreign legal doctrines, such as Shariah." Resolution 113A at 2, n.7 (internal quotation marks and citation omitted); *see also id.* at 2, 3 n.8 (describing a bill that originally "would have provided that 'the knowing adherence to sharia and to foreign sharia authorities is prima facie evidence of an act in support of the overthrow of the United States government,'" that was later amended to be "facially neutral," and that was not ultimately enacted). Whatever one thinks of these specific laws, and however they might fare under a proper constitutional analysis, it would make no sense for a court, in assessing them, to blind itself to and refuse to take into account the full context of such enactments.

Moreover, these real-world examples demonstrate that lawmakers are willing and able to obfuscate anti-religious animus. In *Tartikov*, not only did the Village pass facially neutral laws, but a former Mayor also asked community members to read between the lines because he could not state his actual "feel[ings]," and Village Trustees instructed a civic association not to let discriminatory statements "slip out." 915 F. Supp. 2d at 586. Moreover, rarely do lawmakers tout in committee hearings that they are voting for a bill so as to target Muslims, even if they imply as much to their supporters. *See, e.g.*, Avi Selk, *Irving City Council backs state bill Muslims say targets them*, Dall. Morning News, Mar. 19, 2015 (describing bill that "does not reference Shariah, Islam, or even religion," even though the bill's

sponsor implied that it was targeted at Islam). In the face of clever lawmakers with discriminatory purposes, courts must look to historical-background evidence when analyzing neutrality; otherwise, the protections of the Free Exercise Clause will prove hollow whenever a well-coached lawmaking body constructs a law that cloaks its anti-religious objective.

B. The Historical Background of the Regulations Here Is Important for Confirming That Respondents Targeted Religious Pharmacists.

The use of historical-background evidence is important to Petitioners—and all Washington-based pharmacists whose religious beliefs preclude them from dispensing emergency contraceptives—because such evidence is dispositive here. As the district court explained, "*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 [emergency contraceptives]." Pet. App. 91a (emphasis added). Even though "the evidence at trial revealed no problem of access to [emergency contraceptives] or any other drug before, during, or after the rulemaking process," the Governor, her preferred interest groups, and (eventually) the Commission engaged in a concerted effort to prohibit conscientious objection—and only conscientious objection—as a reason for a facilitated referral. *Id.* at 146a.

Beginning in 2005, Planned Parenthood "sought to enlist the Governor's help to prohibit conscientious referrals for [emergency contraceptives]." *Id.* at

124a. Planned Parenthood also contacted the Commission and its Executive Director, urging them to prohibit referral for reasons of conscience. *Id.* Nevertheless, the Commission continued to publicly support referrals based on conscientious objection throughout 2005. *Id.* at 124a–25a. In early 2006, the Governor sent a letter to the Commission opposing referral for reasons of conscience. *Id.* at 125a. The Governor also appointed a new member to the Commission—a former Planned Parenthood board member whom Planned Parenthood recommended to the Governor. *Id.*

"Seeking to increase pressure on the [Commission], the Governor's Office then urged Planned Parenthood to work together with the [Washington] Human Rights Commission ('HRC')." *Id.* at 126a. The HRC and Planned Parenthood met, and "within days," the HRC Executive Director warned the Commission Executive Director that conscientious objection to emergency contraception was illegal "discrimination" against women. *Id.* at 127a. The HRC Executive Director then threatened Commission members with "personal liability if they passed a regulation permitting referral." The district court found that "Planned Parenthood reviewed drafts and helped shape the message of this intergovernmental warning, which was obviously intended to intimidate the [Commission]." *Id.*

Even still, at its June 1, 2006, meeting, the Commission unanimously rejected the Governor's preferred rule, voting in favor of a draft regulation that permitted referrals for "business, economic, convenience and conscientious reasons." *Id.* at 128a. The Governor sent a letter to the Commission

opposing the draft rule, and she later publicly threatened to remove Commission members, if necessary to achieve her goal. *Id.* at 128a–29a. "[S]taff who had worked for [the Washington Department of Health] for decades testified that this was the first instance in which a Governor had ever threatened the [Commission] . . . with removal." *Id.* at 129a.

Within a week of the June vote, Planned Parenthood presented a new draft rule to the Governor. The Governor asked her staff whether the new draft was "clean enough" regarding the "conscious/moral issues." *Id.* at 130a. The Executive Director explained in an email that "'[t]he moral issue IS the basis of the concern'" and that "'[t]he public, legislators and governor are telling us loud and clear that they expect the rule to protect the public from unwanted intervention based on the moral beliefs . . . of a pharmacist.'" *Id.* He also explained that the "difficulty is trying to draft language to allow facilitating a referral for *only* . . . *non-moral or non-religious reasons*." *Id.* at 131a (internal quotation marks omitted).

The Governor convened a "taskforce" to "forge a consensus in support of her rule." *Id.* She invited no "conscientious objectors, faith-based health care providers, or any other outside organizations besides her 'advocates,' which were the women's reproductive rights groups." *Id.* The Governor insisted that "referrals for reasons of conscience were off the table." *Id.* at 132a. The taskforce ultimately agreed to maintain facilitated referrals for "business reasons" while prohibiting facilitated referral for reasons of conscience. *Id.* at 133a–34a.

"To guarantee final approval of the Regulations in 2007, the Governor took another unprecedented step." *Id.* at 137a. The Governor "involved her 'advocates' . . . in the process of interviewing candidates for the [Commission]." "Chair Awan, who applied for a second term, testified that his interview focused almost exclusively on the pharmacy refusal issue. His reappointment was opposed by the 'advocates,' and the Governor declined to reappoint him." *Id.* The Governor then "selected two new candidates recommended by Planned Parenthood," including "a NARAL Washington board member." *Id.* at 137a–38a. Unsurprisingly, "the [Commission] voted to approve the final Regulations" in April 2007. *Id.* at 138a.

There is no mystery about the Commission's purpose for promulgating the regulations. Commission "meetings and public testimony . . . focused almost entirely on emergency contraception and conscientious objections." *Id.* at 139a. "The formal guidance document on the Regulations, which the [Commission] provided directly to pharmacies and pharmacists, referred to [emergency contraceptives] and no other drug. It also singled out only one reason for referral that was prohibited: conscientious objection." *Id.* "Similarly, [Commission] witnesses testified that the object of the Regulations was to specifically address conscientious objections." *Id.* at 140a. The Vice-Chair of the 2006–07 rulemaking process stated in writing to the Commission that "he would recommend prosecuting all conscientious objectors who refused to fill prescriptions to the 'full extent of the law,'" but he also "confirmed at the August

[Commission] meeting that he would not discipline pharmacists" who refused for business-related reasons. *Id.* at 135a, 140a.

And the Commission enacted these regulations even though "it is undisputed that the Regulations will force at least some pharmacies and pharmacists out of business, further reducing access to medication." *Id.* at 215a. Should the Court allow the Ninth Circuit's decision to stand, pharmacists with conscientious objections to dispensing certain drugs will be all but unemployable in Washington. The district court found that the only way for most pharmacies to comply with the regulations is to fire conscientious objectors. *Id.* at 181a–82a. Unless this Court intervenes, the Ninth Circuit's decision will also force the Stormans family to close their fourth-generation pharmacy. *Id.* at 185a–86a.

The Free Exercise Clause does not allow the State of Washington to drive pharmacists and pharmacies out of business based on their religious beliefs. And this rule holds true even though the relevant policymakers are able to achieve their anti-religious objective with a facially neutral law. This Court should grant the petition for a writ of certiorari to make that rule clear to all.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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