Nos. 12-35221, 12-35223

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STORMANS, INC., et al.,

Plaintiffs-Appellees,

v.

MARY SELECKY, et al.,

Defendants-Appellants,

and

JUDITH BILLINGS, et al.,

Intervenors-Appellants.

On Appeal from the Western District of Washington, No. 07-05374
(Hon. Ronald B. Leighton)

AMICUS CURIAE BRIEF OF **MEMBERS OF THE UNITED STATES CONGRESS** IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE OF THE WESTERN DISTRICT OF WASHINGTON

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CORPORATE DISCLOSURE STATEMENT

Amici **Senators Roy Blunt** (R-MO), **Mike Johanns** (R-NE)**, Mike Lee** (R-UT), and **Marco Rubio** (R-FL), and **Representatives Robert Aderholt** (R-AL), **Dan Benishek, M.D.** (R-MI), **Charles Boustany, M.D.** (R-LA), **Paul Broun, M.D.** (R-GA), **Chip Cravaack** (R-MN), **Renee Ellmers, R.N.** (R-NC), **John Fleming, M.D.** (R-LA), **Andy Harris, M.D.** (R-MD), **Vicky Hartzler** (R-MO), **Randy Hultgren** (R-IL), **Jim Jordan** (R-OH), **Mike Kelly** (R-PA), **Jeff Landry** (R-LA), **Dan Lipinski** (D-IL), **Jeff Miller** (R-FL), **Steve Pearce** (R-NM), **Joe Pitts** (R-PA), **Chris Smith** (R-NJ), and **Joe Wilson** (R-SC) are Members of the United States Congress and, therefore, are not nongovernmental corporate parties subject to filing a corporate disclosure statement.

s/ Denise M. Burke
Counsel for Amici

Dated November 21, 2012

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

This *Amicus Curiae* brief is filed on behalf of Members of the United States Senate and House of Representatives. *Amici* include **Senators Roy Blunt** (R-MO), **Mike Johanns** (R-NE), **Mike Lee** (R-UT), and **Marco Rubio** (R-FL), and **Representatives Robert Aderholt** (R-AL), **Dan Benishek, M.D.** (R-MI), **Charles Boustany, M.D.** (R-LA), **Paul Broun, M.D.** (R-GA), **Chip Cravaack** (R-MN), **Renee Ellmers, R.N.** (R-NC), **John Fleming, M.D.** (R-LA), **Andy Harris, M.D.** (R-MD), **Vicky Hartzler** (R-MO), **Randy Hultgren** (R-IL), **Jim Jordan** (R-OH), **Mike Kelly** (R-PA), **Jeff Landry** (R-LA), **Dan Lipinski** (D-IL), **Jeff Miller** (R-FL), **Steve Pearce** (R-NM), **Joe Pitts** (R-PA), **Chris Smith** (R-NJ), and **Joe Wilson** (R-SC).

Amici believe that the freedom of conscience is a fundamental right affirmed by the history and tradition of this Nation, and as legislators *Amici* have an interest in ensuring that this freedom is not diminished. *Amici* believe that the actions of the Defendants run contrary to this Nation's history and tradition, including the precedents set by our federal and state legislatures, the United States Supreme Court, our Founders, and national and international medical organizations. As

[1] In accordance with Fed. R. App. P. 29, the parties have consented to the filing of this *amicus* brief. No party's counsel has authored the brief in whole or in part. No party or party's counsel has contributed money intended to fund preparing or submitting this brief. No person other than *Amici*, their members, or their counsel has contributed money that was intended to fund preparing or submitting the brief.

legislators seeking to uphold constitutional and statutory freedom of conscience, *Amici* request that this Court affirm the decision of the Western District of Washington.

ARGUMENT

Freedom of conscience is a fundamental right that has been revered since the founding of our Nation. The paramount importance of this historic right has been affirmed by both federal and state legislatures, including the Washington State legislature, by the United States Supreme Court, by our Founders, and even by national and international medical organizations. In short, our history and tradition affirm that a person cannot be forced to commit an act that is against his or her moral, religious, or conscientious beliefs—and this history and tradition unequivocally support the Plaintiffs in this case.

I. FREEDOM OF CONSCIENCE IS A FUNDAMENTAL RIGHT AFFIRMED BY THE U.S. CONGRESS

The U.S. Congress has considered and passed a number of measures expressing the federal government's commitment to protecting the freedom of conscience. Congress first addressed the issue of conscience protections just weeks after the U.S. Supreme Court handed down its decision in *Roe v. Wade*. In 1973, Congress passed the first of the Church Amendments (named for its sponsor, Senator Frank Church).[2] Taken together, the original and subsequent Church Amendments protect healthcare providers from discrimination by recipients of U.S. Department of Health and Human Services (HHS) funds on the basis of their

[2] 42 U.S.C. 3001-7.

objection, because of religious belief or moral conviction, to performing or participating in *any* lawful health service or research activity.

In 1996, Section 245 of the Public Health Service Act, known as the Coats Amendment (named for its sponsor, Senator Daniel Coats), was enacted to prohibit the federal government and state or local governments that receive federal financial assistance from discriminating against individual and institutional healthcare providers, including participants in medical training programs, who refused to, among other things, receive training in abortions; require or provide such training; perform abortions; or provide referrals or make arrangements for such training or abortions.[3] The measure was prompted by a 1995 proposal from the Accreditation Council for Graduate Medical Education to mandate abortion training in all obstetrics and gynecology residency programs.

The most recent federal conscience protection, the Hyde-Weldon Amendment, was first enacted in 2005 and provides that no federal, state, or local government agency or program that receives funds in the Labor, Health and Human Services (LHHS) appropriations bill may discriminate against a healthcare provider because the provider refuses to provide, pay for, provide coverage of, or

[3] 42 U.S.C. 238n.

refer for abortion.[4] The Amendment is subject to annual renewal and has survived multiple legal challenges brought by pro-abortion groups.[5]

Congress has also acted to provide specific conscience protections in the provision of contraceptives. For example, in 2000, Congress passed a law requiring the District of Columbia to include a conscience clause in any contraceptive mandate, protecting religious beliefs and moral convictions.[6] Similarly, in 1999, Congress prohibited health plans participating in the federal employees' benefits program from discriminating against individuals who refuse to prescribe contraceptives.[7]

These laws highlight the deeply held desire of the American people to protect healthcare providers from mandates or other requirements forcing them to choose between their consciences and/or religious and moral beliefs and their

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[4] Consolidated Appropriations Act 2008, Pub. L. No. 110-161, §508(d), 121 Stat. 1844, 2209 (2007).

[5] Many similar conscience provisions related to federal funding have been passed over the last 45 years. *See*, *e.g.*, 42 U.S.C. § 300a-7(b), (c)(1) (1973); 42 U.S.C. § 300a-7(c)(2), (d) (1974); 42 U.S.C. § 300a-7(e) (1979); 42 U.S.C. § 1395w-22(j)(3)(B) (1997); 48 C.F.R. § 1609.7001(c)(7) (1998); Pub. L. No. 108-25, 117 Stat. 711, at 733 (2003).

[6] *See* Title III, § 127 of Division C (D.C. Appropriations) of the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 126-27 (2000).

[7] *See* Title VI, § 635(c) of Division J (Treasury and General Government Appropriations) of the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 472 (1999).

livelihoods, and aptly demonstrate that the actions of Defendants stray from the national commitment to protect the freedom of conscience.

II. FREEDOM OF CONSCIENCE IS A FUNDAMENTAL RIGHT AFFIRMED BY STATE LEGISLATURES

Forty-seven states provide some degree of statutory protection to healthcare providers who conscientiously object to certain procedures.[8] Thus, the

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[8] *See, e.g.*, **Alaska** (Alaska Stat. § 18.16.010); **Arizona** (Ariz. Rev. Stat. Ann. § 36-2154); **Arkansas** (Ark. Code Ann. § 20-16-304; Ark. Code Ann. § 20-16-601; Ark. Code Ann. § 20-13-1403); **California** (Cal. Health & Safety Code § 123420; Cal. Prob. Code §§ 4619, 4621, 4734, 4736; Cal. Bus. & Prof. Code §§ 733, 4211, 4314, 4315); **Colorado** (Colo. Rev. Stat. Ann. § 18-6-104; Colo. Rev. Stat. Ann. § 25-6-102; Colo. Rev. Stat. Ann. § 25-6-207; Colo. Rev. Stat. § 25-3-110); **Connecticut** (Conn. Agencies Regs. § 19-13-D54); **Delaware** (Del. Code Ann. tit. 24, § 1791); **Florida** (Fla. Stat. Ann. § 390.0111(8); Fla. Stat. Ann. § 381.0051); **Georgia** (Ga. Code Ann. § 16-12-142; Ga. Code Ann. §§ 49-7-2, -6; Ga. Admin. Code § 480-5-.03; Ga. Code Ann. § 31-20-6); **Hawaii** (Haw. Rev. Stat. Ann. § 453-16; Haw. Rev. Stat. Ann. § 227E-7); **Idaho** (Idaho Code § 18-611; Idaho Code § 18-612); **Illinois** (745 Ill. Comp. Stat. Ann. 70/1 to 12); **Indiana** (Ind. Code Ann. §§ 16-34-1-3 to -7); **Iowa** (Iowa Code Ann. §§ 146.1, .2); **Kansas** (Kan. Stat. Ann. § 65-443, -444); **Kentucky** (Ky. Rev. Stat. Ann. § 311.800); **Louisiana** (La. Rev. Stat. Ann. §§ 40.1299.31 to .33); **Maine** (Me. Rev. Stat. Ann. tit. 22, §§ 1591, 1592; Me. Rev. Stat. Ann. tit 22, § 1903); **Maryland** (Md. Code Ann., Health-Gen. § 20-214); **Massachusetts** (Mass. Gen. Laws Ann. Ch. 112, § 12I; Mass. Gen. Laws Ann. Ch. 272, § 21B); **Michigan** (Mich. Comp. Laws Ann. §§ 333.20181 to .20184); **Minnesota** (Minn. Stat. Ann. § 145.414; Minn. Stat. Ann. § 145.925); **Mississippi** (Miss. Code Ann. §§ 41-41-215, 41-107-1 to -13); **Missouri** (Mo. Ann. Stat. §§ 188.100 to .120); **Montana** (Mont. Code Ann. § 50-20-111); **Nebraska** (Neb. Rev. Stat. §§ 28-337 to -341); **Nevada** (Nev. Rev. Stat. Ann. § 632.475); **New Jersey** (N.J. Stat. Ann. §§ 2A:65A-1 to -4); **New Mexico** (N.M. Stat. Ann. § 30-5-2; N.M. Stat. Ann. § 24-7A-7); **New York** (N.Y. Civ. Rights Law § 79-I; N.Y. Comp. Codes R. & regs. tit. 10, § 405.9; N.Y. Comp. Codes R. & Regs. tit. 18, § 463.6); **North Carolina** (N.C. Gen. Stat. Ann. §§ 14-45.1(e), (f)); **North Dakota** (N.D. Cent. Code § 23-16-14); **Ohio** (Ohio Rev. Code Ann. § 4731.91); **Oklahoma** (Okla. Stat. Ann. tit. 63, § 1-741); **Oregon** (Or. Rev. Stat. §§

overwhelming legal position of the states is to protect healthcare providers—not to require healthcare providers to provide or perform services that are contrary to their consciences.

The common denominator in these states is the protection of physicians or hospitals from being forced to participate in an abortion procedure, but most state laws are more comprehensive and protect a variety of healthcare providers. For example, states such as Idaho, Illinois, Mississippi, and Louisiana protect *all healthcare providers*—including pharmacists—who conscientiously object to participating in *any* healthcare procedure or service. At least 14 states protect healthcare providers who specifically object to the provision of contraception: Arkansas, Colorado, Florida, Georgia, Maine, Massachusetts, Minnesota, New York, Oregon, Tennessee, Virginia, West Virginia, Wisconsin, and Wyoming. And then there are at least 8 states that provide specific protection for the civil

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435.475, .485; Or. Rev. Stat. § 435.225); **Pennsylvania** (43 Pa. Cons. Stat. Ann. § 955.2); **Rhode Island** (R.I. Gen. Laws Ann. § 23-17-11; RI. Code R. § 14-000-009); **South Carolina** (S.C. Code Ann. §§ 44-41-40, -50); **South Dakota** (S.D. Codified Laws §§ 34-23A-11 to -14; S.D. Codified Laws § 36-11-70); **Tennessee** (Tenn. Code Ann. §§ 39-15-204, -205; Tenn. Code Ann. § 68-34-104(5)); **Texas** (Tex. Occ. Code Ann. §§ 103.001 to .004); **Utah** (Utah Code Ann. § 76-7-306); **Virginia** (Va. Code Ann. § 18.2-75; Va. Code Ann. § 32.1-134); **Washington** (Wash. Rev. Code Ann. § 9.02.150; Wash. Rev. Code Ann. § 48.43.065; **West Virginia** (W. Va. Code § 16-2B-4; W. Va. Code § 16-30-12); **Wisconsin** (Wis. Stat. Ann. §§ 253.09, 441.06(6), 448.03(5); Wis. Stat. Ann. § 253.07(3)(b)); **Wyoming** (Wyo. Stat. Ann. §§ 35-6-105, -106, -114; Wyo. Stat. Ann. §§ 42-5-101(d), -102(a)(ii)).

rights of pharmacists and pharmacies: Arizona, Arkansas, California, Georgia, Kansas, Maine, North Carolina, and South Dakota.[9]

Included in this list of 47 conscience-protecting states[10] is the State of Washington. In fact, Wash. Rev. Code § 9.02.150 is one of the more comprehensive freedom of conscience statutes in the nation. This provision states:

> No *person or private medical facility* may be required by law or contract in any circumstances to participate in the performance of an abortion if such person or private medical facility objects to so doing. No person may be discriminated against in employment or professional privileges because of the person's participation or refusal to participate in the termination of a pregnancy.

Id. (emphasis added).

Important here is the legislature's use of the word "person." It is not limited to physicians or nurses. Instead, it applies to any person within the State of Washington. Thus, it also applies to pharmacists.

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[9] For statutory citations, *see* n.8, *supra*.

[10] The only states that do not *statutorily* protect the freedom of conscience of healthcare providers are Alabama, New Hampshire, and Vermont. However, even these states provide a degree of protection. For example, Article 4 of the New Hampshire Constitution states, "Among the natural rights, some are, in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the Rights of the Conscience." In Alabama, the state has filed a motion to intervene in the case *Eternal World Television Network, Inc. v. Sebelius*, claiming that the HHS mandate requiring insurance coverage of "all FDA-approved" contraceptives contravenes Article I, Section 3 of the Alabama Constitution, as well as the Alabama Religious Freedom Amendment. *See Alabama AG Files Motion to Intervene In EWTN Lawsuit Challenging Mandate for Contraceptive Coverage* (Mar. 22, 2012), *available at* http://www.ago.state.al.us/Update-193 (last visited Nov. 7, 2012).

Also significant is the use of the phrase "or private medical facility"—meaning it applies not only to individuals, but also to private corporations. As such, § 9.02.150 can be read as stating, "No pharmacist or pharmacy… may be required by law or contract… to participate in the performance of an abortion… [nor] be discriminated against in … professional privileges…."

Under the Code, "abortion" is defined as "any medical treatment intended to induce the termination of a pregnancy except for the purpose of producing a live birth." Wash. Rev. Code § 9.02.170(2). While the Plaintiffs and Defendants may disagree on what constitutes a "pregnancy,"[11] what is undisputed is that both the Food and Drug Administration (FDA) and the manufacturer of "Plan B" acknowledge that "emergency contraception" can prevent a fertilized egg (*i.e.*, a

[11] For an overview of how the definition of pregnancy has "changed," *see* C. Gacek, *Conceiving Pregnancy: U.S. Medical Dictionaries and Their Definitions of Conception and Pregnancy,* FRC INSIGHT PAPER (April 2009), *available at* http://downloads.frc.org/EF/EF09D12.pdf (last visited Oct. 2, 2012).

distinct human organism) from attaching to the wall of the uterus.[12] Moreover, the "emergency contraceptive" *ella* works even after implantation.[13]

As stated throughout this litigation, Plaintiffs believe that this mechanism of action constitutes the taking of a human life. Thus, the protection afforded in § 9.02.150 should apply to the prescription or dispensing of "emergency contraception." All persons and private entities in the State of Washington are protected from participating in abortion; and "emergency contraceptives" have an abortifacient mechanism—placing the conscientious objection to such provision under the ambit of § 9.02.150.[14]

The comprehensive protection of Wash. Rev. Code § 9.02.150 will be drastically compromised if Defendants succeed in forcing pharmacists—just one

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[12] *See* FDA, *FDA's Decision Regarding Plan B: Questions and Answers* (updated Apr. 30, 2009), *available at* http://www.fda.gov/cder/drug/infopage/planB/planBQandA.htm (last visited Sept. 30, 2012); Duramed Pharmaceuticals, *How Plan B One-Step Works* (2010), *available at* http://www.planbonestep.com/plan-b-prescribers/how-plan-b-works.aspx (last visited Sept. 30, 2012).

[13] For more information on these life-ending mechanisms of action, *see* Part I.B. of the Brief of *Amici Curiae* Christian Medical Association et al., Docket No. 67 (submitted Nov. 20, 2012).

[14] Washington also maintains other conscience protections, such as Wash. Rev. Code § 48.43.065, which "recognizes that in developing public policy, conflicting religious and moral beliefs must be respected," and seeks to balance conscientious objection with other rights.

subgroup of healthcare providers—to provide abortion-inducing drugs contrary their conscientious objections. Once the protection of pharmacists has been breached, the freedom of conscience of all healthcare providers will be at risk.[15] Further, not only do the Defendants' actions in this case undermine the clear protections afforded to the Plaintiffs under Washington law, but their actions run contradictory to the laws and the clear intent of the vast majority of states.

III. FREEDOM OF CONSCIENCE IS A FUNDAMENTAL RIGHT AFFIRMED BY THE U.S. SUPREME COURT

For decades, the United States Supreme Court has worked to guarantee the freedom of conscience to this nation's citizens. In fact, the Court's decisions affirming this freedom are too numerable to discuss here, and thus a few examples must suffice .

For example, the Supreme Court has stated that "***[f]reedom of conscience*** and freedom to adhere to such religious organization or form of worship as the individual may choose ***cannot be restricted by law***." *Cantwell v. Conn*., 310 U.S. 296, 303 (1940) (emphasis added). While the "freedom to believe" is absolute, the "freedom to act" is not; however, "in every case," regulations on the freedom to act cannot "unduly infringe the protected freedom." *Id*. at 303-04.

[15] Moreover, this breach is not related solely to abortion. Because Washington allows physician-assisted suicide, pharmacists could also be forced to provide life-ending drugs to terminally ill persons.

In the 1940s, the Court considered regulations requiring public school students to recite the pledge to the American flag. In 1940, the Court ruled against a group of Jehovah's Witnesses who sought to have their children exempted from reciting the pledge. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).[16] However, in just three short years, the Court entirely shifted course and reversed itself. In *West Virginia State Board of Education v. Barnette*, the Court considered another public school policy requiring students to recite the pledge against their religious convictions. 319 U.S. 624 (1943). The majority opinion stated:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein…. We think the action of the local authorities in compelling the flag statute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the *First Amendment to our Constitution* to reserve from all official control."

[16] Even though *Gobitis* was ultimately decided incorrectly, Justice Frankfurter, writing the majority opinion, did expound upon the balance between the interest of the schools and the interest of the students. He saw that the claims of the parties must be reconciled so as to "prevent either from destroying the other." *Gobitis*, 310 U.S. at 594. Because the liberty of conscience is so fundamental, "every possible leeway" must be given to the claims of religious faith. *Id*. On the other hand, Justice Frankfurter stated, similarly to what the Defendants have argued here, that "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." *Id*. at 594-95. However, such conclusions were ultimately overthrown in *Barnette*, and as such this Court should reject any similar arguments that "religious convictions which contradict the relevant concerns of a political society" must submit to an overreaching authority.

Id. at 642 (emphasis in original). In other words, the Court ruled it unconstitutional to force public school children to perform an act that was against their religious beliefs. The Court also stated, "[F]reedom to differ is not limited to things that do not matter much…. The test of its substance is the right to differ as to things that touch the heart of the existing order." *Id*.[17]

Barnette has been affirmed on numerous occasions, including in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), where the Court stated:

> It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. *That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty*. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, *we have ruled that a State may not compel or enforce one view or the other*.

Id. at 851 (citing *Barnette*, 319 U.S. 624) (other citations omitted) (emphasis added).

To force parents and children to choose between their religious beliefs and their public education was a clear violation of the plaintiffs' First Amendment rights. Likewise, forcing pharmacists and pharmacies to choose between their

[17] "The very purpose of a *Bill of Rights* was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's … freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Barnette*, 319 U.S. at 638 (emphasis in original).

religious, moral, or conscientious convictions and their livelihoods is an unconstitutional exercise of state power.

In the 1960s and 1970s, the Court continued to protect the freedom of conscience of the American people—but this time in the form of protecting men who were conscientiously opposed war. Section 6(j) of the Universal Military Training and Service Act contained a conscience clause exempting men from the draft who were conscientiously opposed to military service because of "religious training and belief."[18] In *United States v. Seeger* and *Welsh v. United States*, the Court extended draft exemptions to "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become part of an instrument of war." *Welsh*, 398 U.S. 333, 344 (1970) (affirming *Seeger*, 380 U.S. 163 (1965)).

Welsh acknowledged that § 6(j) protected persons with "intensely personal" convictions—even when other persons found those convictions "incomprehensible" or "incorrect." *Welsh*, 398 U.S. at 339. Like Seeger, Welsh "held deep conscientious scruples against taking part in wars where people were killed. Both strongly believed that killing in war was wrong, unethical, and

[18] Section 6(j) was not a "new" idea or exemption. Early colonial charters and state constitutions spoke of freedom of conscience as a right, and during the Revolutionary War, many states granted exemptions from conscription to Quakers, Mennonites, and others with religious beliefs against war.

immoral, and their consciences forbade them to take part in such an evil practice." *Id*. at 337. Important here is Welsh's statement:

> I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being…. I cannot, therefore conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant.

Id. at 343 (quoting Welsh).

While the draft cases were related to a statutory exemption not at issue here, the holdings of these cases demonstrate the strong commitment to freedom of conscience in this nation. Like Welsh, Plaintiffs believe that human life is valuable—at all stages and in all situations. They cannot injure or kill another human being, but, as discussed *supra*, "emergency contraception" has the potential to terminate the lives of unborn children.

Just one year after *Welsh*, the Court stated the following in a case requiring bar applicants to make certain statements about their personal beliefs:

> And we have made it clear that: "This conjunction of liberties is not peculiar to religious activity and institutions alone. The *First Amendment* gives freedom of mind the same security as freedom of conscience."

Baird v. State Bar of Ariz., 401 U.S. 1, 6 (1971) (emphasis in the original). Indeed, "freedom of conscience" is referenced explicitly throughout Supreme Court jurisprudence. *See*, *e.g*., *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S.

503, 506 n.2 (1969) (specifically referencing "constitutionally protected freedom of conscience").

IV. FREEDOM OF CONSCIENCE IS A FUNDAMENTAL RIGHT AFFIRMED BY OUR FOUNDERS

The First Amendment promises that Congress shall make no law prohibiting the free exercise of religion. U.S. Const. amend. I. At the very root of that promise is the guarantee that the government cannot force a person to commit an act in violation of his or her religion.[19]

The signers to the religion provisions of the First Amendment were united in a desire to protect the "liberty of conscience." Having recently shed blood to throw off a government which dictated and controlled their religion and practices, a government which guaranteed freedom of conscience was foremost in their hearts and minds.[20]

The most often quoted Founder and author of the Declaration of Independence, Thomas Jefferson, made it clear that freedom of conscience is not to be submitted to the government:

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[19] *See generally* M.W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

[20] The Founders often used the terms "conscience" and "religion" synonymously. T. Berg, *Free Exercise of Religion*, in THE HERITAGE GUIDE TO THE CONSTITUTION 310 (2005). Thus, adoption of the "religion" clauses does not mean that the Founders were ignoring freedom of conscience. The two were inextricably intertwined.

> [O]ur rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God.[21]

Jefferson also stated that no provision in the Constitution "ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority."[22]

Jefferson also maintained that forcing a person to contribute to a cause to which he or she abhorred was "tyrannical."[23] This belief formed the basis of Jefferson's bill in Virginia, which prohibited the compelling of a man to furnish money for the propagation of opinions to which he was opposed.[24] Jefferson—who considered it "tyrannical" to force a person to contribute monetarily to a position he disagreed with—would likely be aghast at a law requiring a person to provide an actual service that is conscientiously objectionable to that person.

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[21] Thomas Jefferson, *Notes on Virginia* (1782).

[22] Thomas Jefferson, Letter to New London Methodists (1809).

[23] J.P. Boyd, THE PAPERS OF THOMAS JEFFERSON 545 (1950) (quoting Jefferson, *A Bill for Establishing Religious Freedom*).

[24] Thus, not only is Jefferson the author of the Declaration of Independence, but he is also the author of one of this Nation's first statutes granting the right to refuse to participate or to act based upon conscientious convictions. Jefferson was so proud of this accomplishment that he had "Author of the … Statute of Virginia Religious Freedom…" etched on his gravestone.

James Madison, considered the Father of the Bill of Rights—the same bill of rights protecting pharmacists today—was also deeply concerned that the freedom of conscience of Americans be protected. In his infamous *Memorial and Remonstrance against Religious Assessments*, Madison stated:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature *an unalienable right*.[25]

In fact, Madison described the conscience as "the most sacred of all property."[26] Madison also amended the Virginia Declaration of Rights to state that all men are entitled to full and free exercise of religion, "according to the dictates of conscience."

Madison understood that if man cannot be loyal to himself, to his conscience, then a government cannot expect him to be loyal to less compelling obligations or rules, statutes, judicial orders, and professional duties. If the government demands that he betray his conscience, the government has eliminated the only moral basis for obeying any law. Madison considered it "the particular

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[25] James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 15 (emphasis added).

[26] B.F. Milton, THE QUOTABLE FOUNDING FATHERS: A TREASURY OF 2,500 WISE AND WITTY QUOTATIONS 36-37 (2005).

glory of this country, to have secured the rights of conscience which in other nations are least understood or most strangely violated."[27]

Our first President, George Washington, maintained that "the establishment of Civil and Religious Liberty was the Motive that induced me to the field of battle," and he advised Americans to "labor to keep alive in your breast that little spark of celestial fire called conscience."[28] President Washington also maintained that the government should accommodate religious persons:

> The conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit.[29]

An enumeration of the Founders' commitment to freedom of conscience could go on and on. John Adams stated that "no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner most agreeable to the dictates of his own conscience."[30] Samuel Adams wrote that the liberty of conscience is an original right.[31]

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[27] James Madison, Speech Delivered in Congress (Dec. 22, 1790).

[28] M. Novak & J. Novak, WASHINGTON'S GOD 111(2006); Milton, *supra*.

[29] George Washington, Letter to the Religious Society Called Quakers.

[30] John Adams, *A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts,* in REPORT FROM COMMITTEE BEFORE THE CONVENTION OF DELEGATES (1779).

Moreover, the freedom of conscience is not limited to "religious" mindsets. Indeed, it was conscience that inspired transcendentalists such as Ralph Waldo Emerson and Henry David Thoreau. For example, Thoreau wrote:

> Must the citizen ever for a moment, or in the least degree, resign his conscience to the legislator? Why has every man a conscience then? I think that we should be men first, and subjects afterward…. The only obligation which I have a right to assume is to do at anytime what I think right.[32]

Thoreau taught that each citizen has an obligation to disobey any law that requires him to violate his own conscience.

Forcing pharmacists to fill prescriptions to which they are conscientiously opposed guts the very purpose for which this Nation was founded and formed. As Thomas Jefferson charged us:

> [W]e are bound, you, I, every one, to make common cause, even with error itself, to maintain the common right of freedom of conscience. *We ought with one heart and one hand hew down the daring and dangerous efforts of those who would seduce the public opinion to substitute itself into … tyranny over religious faith*…."[33]

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[31] H.A. Cushing, THE WRITINGS OF SAMUEL ADAMS 350-59 (vol. II, 1906).

[32] Henry David Thoreau, *Civil Disobedience*.

[33] Thomas Jefferson, Letter to Edward Dowse, Esq. (Apr. 19, 1803) (emphasis added).

V. FREEDOM OF CONSCIENCE IS A FUNDAMENTAL RIGHT AFFIRMED BY NATIONAL AND INTERNATIONAL MEDICAL ORGANIZATIONS

National and international medical organizations also affirm healthcare providers' freedom to abide by their consciences, including their religious and moral beliefs. Most relevant here, the American Pharmacists Association (APhA) states in its *Code of Ethics* that pharmacists should avoid any behavior that compromises their "dedication to the best interests of the patients," but also holds that pharmacists have a duty to "act with conviction of conscience." APhA, *Code of Ethics for Pharmacists* (adopted 1994).[34] In its *Pharmacist Conscience Clause*, APhA states:

> 1. APhA recognizes the individual pharmacist's right to exercise conscientious refusal and supports the establishment of systems to ensure patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal.
>
> 2. APhA shall appoint a council on an as needed basis to serve as a resource for the profession in addressing and understanding ethical issues.

APhA, *Pharmacist Conscience Clause*, in *2004 Action of the APhA House of Delegates* 6 (2004) (also reported in JAPhA 38(4):417 (July/Aug. 1998)).

Likewise, the policy of the American Society of Health-System Pharmacists (ASHP) recognizes "the right of pharmacists … to decline to participate in

[34] *Available at* http://www.pharmacist.com/code-ethics (last visited Nov. 6, 2012).

therapies they consider to be morally, religiously, or ethically troubling." ASHP, *Pharmacist's Right of Conscience and Patient's Right of Access to Therapy* (2011).[35]

Analogously, leading professional physicians' organizations have consistently held that physicians should be free to determine which procedures they will perform, in what type of practice they will engage, and what patients they will serve. In its *Principles of Medical Ethics*, the American Medical Association (AMA) provides that, with the exception of medical emergencies, a physician shall "be free to choose whom to serve, with whom to associate, and the environment in which to provide medical care." AMA, *Principles of Medical Ethics* (adopted 2001, updated 2006), at VI.[36]

In E-9.06 of the AMA's *Code of Medical Ethics* (Code), the AMA provides that every individual has "free choice" of which physician to use. However, "[i]n choosing to subscribe to a health maintenance or service organization or in

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[35] *Available at* http://www.ashp.org/DocLibrary/BestPractices/EthicsPositions.aspx (last visited Nov. 6, 2012). This conscience clause was most recently reviewed and re-approved in 2011. *See* ASHP, *Proceedings of the 63rd annual session of the ASHP House of Delegates* (June 12 and 14, 2011), at 23, *available at* http://www.ashp.org/DocLibrary/Policy/HOD/Proceedings63rdAnnualSession.aspx (last visited Nov. 6, 2012).

[36] *Available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page (last visited Nov. 6, 2012).

choosing or accepting treatment in a particular hospital, the patient is thereby accepting limitations upon free choice of medical services." *See* AMA, *Code of Medical Ethics* (2005).[37] Similarly, a patient has free choice in selecting a pharmacy, but that patient is accepting the limitations that come along with that particular pharmacy.

E-9.06 continues by stating, "[a]lthough the concept of free choice assures that an individual can generally choose a physician, likewise a physician may decline to accept that individual as a patient." *Id*. Thus, the Code is replete with guidelines allowing physicians to refuse to treat certain persons. E.906 even takes into account differences in insurance coverage, stating, "[i]n selecting the physician of choice, the patient may sometimes be obliged to pay for medical services which might otherwise be paid by a third party." *Id*. Thus, the AMA places the responsibility of choosing the appropriate healthcare provider on the patient's shoulders, regardless of the financial obstacles for the patient.

On an international scale, the World Medical Association (WMA) maintains a policy that "[i]f a physician's convictions do not allow him or her to advise or perform an abortion, he or she may withdraw while ensuring the continuity of medical care by a qualified colleague." WMA, *WMA Declaration on Therapeutic*

[37] *Available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion906.page (last visited Nov, 6, 2012).

Abortion (adopted in 1970 and last amended in 2006), at 6.[38] In that same document, the WMA requires that physicians maintain respect for human life and recognizes that the diversity of attitudes toward "the life of the unborn child" is a "matter of individual conviction and conscience that must be respected." *Id*. at 3. The WMA goes on to state that "it is our duty to attempt both to ensure the protection of our patients and to safeguard the rights of the physician within society." *Id*. at 4.

This balance is reflected in other WMA policies as well. For example, in the *WMA International Code of Medical Ethics*, the organization states that "a physician shall respect the rights and preferences of patients," while also stating that "a physician shall always exercise his/her independent professional judgment" and "be dedicated to providing competent medical service in full professional and moral independence, with compassion and respect for human dignity." WMA, *WMA International Code of Medical Ethics* (adopted in 1949 and last amended in 2006).[39] Moreover, this code also states that "a physician shall always bear in mind the obligation to respect human life." *Id*.

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[38] *Available at* http://www.wma.net/en/30publications/10policies/a1/index.html (last visited Nov. 6, 2012).

[39] *Available at* http://www.wma.net/en/30publications/10policies/c8/index.html (last visited Nov. 6, 2012).

In the WMA's *Statement on Professional Responsibility for Standards of Medical Care,* the organization takes an affirming stance on conscience in general (*i.e*., not necessarily related to abortion), recognizing that a "physician should be free to make clinical and ethical judgements [sic] without inappropriate outside interference." WMA, *Statement on Professional Responsibility for Standards of Medical Care* (last updated 2006).[40] Likewise, pharmacists should be free to make ethical decisions for their practice without inappropriate interference from outside the medical profession. WMA's statement goes on to affirm that "[p]rofessional autonomy and the duty to engage in vigilant self-regulation are essential requirements for high quality care" for patients. *Id*.

What these organizational statements demonstrate is that the medical field stands behind the conscience rights of its providers. Plaintiffs' claims are not out of the ordinary; to the contrary, Plaintiffs' claims are supported by the very protections encouraged by national and international medical organizations.

[40] *Available at* http://www.wma.net/en/30publications/10policies/m8/index.html (last updated Nov. 6, 2012).

CONCLUSION

For the reasons set forth above, the decision of the Western District of Washington should be affirmed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it brief contains **5,797** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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s/ Denise M. Burke
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Dated November 21, 2012

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 21, 2012.

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