No. 07-36039, 07-36040
(Consolidated)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STORMANS INC., doing business as Ralph's Thriftway; *et al.,*
Plaintiffs/Appellees,

vs.

MARK SELEKY, Secretary, Washington State Dep't of Health; *et al.,*
Defendants/Appellants,

and

JUDITH BILLINGS, *et al.,*
Defendants-Intervenors/Appellants.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
TACOMA DIVISION
NO. CV-07-05374-RBL
HON. RONALD B. LEIGHTON, U.S. DISTRICT JUDGE

AMICUS CURIAE BRIEF OF APA WATCH IN SUPPORT OF PLAINTIFFS-APPELLEES IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *Amicus Curiae* APA Watch makes the following corporate disclosure statement: No publicly held company owns 10% or more of APA Watch's stock, and APA Watch has no parent company.

Dated: April 30, 2008

Respectfully submitted,

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae APA Watch, a nonprofit nonstock Virginia corporation located in McLean, Virginia, files this brief with the consent of all parties. APA Watch seeks to expand the public's opportunities to participate meaningfully in rulemakings by federal, state, and local administrative agencies and to ensure the availability of review by courts and legislatures of the rules that such agencies adopt. Toward those ends, APA Watch has participated as *amicus curiae* and commenter in court and agency proceedings, including matters before the U.S. Supreme Court and state and federal administrative agencies.

INTRODUCTION

In this appeal, officers of Washington State's Board of Pharmacy and Human Rights Commission (respectively, the "Board" and the "Commission" and collectively, the "State") and several individuals who intervened ("Intervenors") as defendants (collectively with the State, the "Defendants") ask this Court to vacate a preliminary injunction that the district court entered to enjoin the State's coercing pharmacies and pharmacists to dispense levonorgestrel tablets, 0.75 mg (hereinafter "Plan B"), notwithstanding their religious objections to abortifacients.

STATEMENT OF FACTS

Amicus curiae APA Watch adopts appellees' Counter Statement of Facts. *See* Appellees' Br. at 4-17. In summary, a pharmacy (Stormans, Inc.) and two pharmacists (Margo Thelen and Rhonda Mesler) allege injury from that a Board regulation on pharmacies' and pharmacists' obligation to dispense Plan B, notwithstanding religious objections, and a Commission position that refusal to dispense Plan B constitutes gender discrimination under the Washington Law against Discrimination, WASH. REV. CODE §49.60 ("WLAD"). Where relevant, APA Watch cites pertinent record evidence.

In addition, APA Watch notes that the federal Food & Drug Administration plainly found Plan B's modes of action to include making the uterus inhospitable to the implantation of a fertilized egg, Appellees' Br. at 2 n.1, which is an abortion in certain religious faiths:

> In this context, it is not possible to anaesthetize consciences, for example, concerning the effects of particles whose purpose is to prevent an embryo's implantation or to shorten a person's life…. In the moral domain, your Federation is invited to address the issue of conscientious objection, which is a right your profession must recognize, permitting you not to collaborate either directly or indirectly by supplying products for the

> purpose of decisions that are clearly immoral such as, for example, abortion or euthanasia.

Pope Benedict XVI, *Address of His Holiness Benedict XVI to Members of the International Congress of Catholic Pharmacists* (Oct. 29, 2007);[1] *see also* Pontifical Academy for Life, *Statement on the So-Called 'Morning-After Pill'* (Oct. 31, 2000) ("the proven 'anti-implantation' action of the *morning-after pill* is really nothing other than a chemically induced abortion [and] from the ethical standpoint the same absolute unlawfulness of abortifacient procedures also applies to distributing, prescribing and taking the *morning-after pill*") (emphasis in original).[2]

While honest people undoubtedly differ on the meaning of life, the timing of life, and the permissibility of ending life at certain times, there can be no question that appellees' religious views fall squarely within the mainstream of religious thought and, thus, religious

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[1] The Papal address to Catholic Pharmacists is located at: http://www.vatican.va/holy_father/benedict_xvi/speeches/2007/october/documents/hf_ben-xvi_spe_20071029_catholic-pharmacists_en.html (last visited April 30, 2008).

[2] The Pontifical Academy for Life's Statement is located at: http://www.vatican.va/roman_curia/pontifical_academies/acdlife/documents/rc_pa_acdlife_doc_20001031_pillola-giorno-dopo_en.html (last visited April 30, 2008).

freedom: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 851 (1992).

SUMMARY OF ARGUMENT

Stormans has standing to raise the free-exercise rights of shareholders and employees, as well as its own free-exercise rights (Sections I.A.2, I.A.3). In any event, because the standing inquiry lacks a "nexus" requirement outside taxpayer-standing cases, Stormans' economic injuries suffice for it to challenge the State action on free-exercise grounds (Section I.A.1). The two pharmacists – Ms. Thelen and Ms. Mesler – have standing because they have suffered past injuries and face imminent injury if this Court vacates the preliminary injunction (Section I.B.1). For standing purposes, the alleged indirectness of the pharmacists' injuries cannot bar review, and (in any event) they suffer *direct* injury (Section I.B.2). Contrary to the Intervenors' suggestion, the standing inquiry is not limited to fundamental rights (Section I.B.3). Defendants do not and cannot challenge the ripeness of the Board regulation (Section II.B.1), and the

conflict between honoring the WLAD-granted rights of pharmacists and consumers provides precisely the sort of Hobson's choice that declaratory relief was designed to address (Section II.B.2). Moreover, for federal civil-rights claim under 42 U.S.C. §1983, 42 U.S.C. §1988(a) authorizes this Court to find this matter prudentially ripe under Washington State's common law (II.B.3). Finally, pharmacists have ripe claims even if pharmacies do not (II.B.4).

ARGUMENT

Although they did not raise standing below, the Defendants argued in their opening appellate briefs that they can challenge subject-matter jurisdiction at any stage, even on appeal. The Defendants were correct on both fronts. First, in choosing not to contest standing below, the Defendants properly avoided raising a meritless argument. FED. R. CIV. P. 11(b)(2). Second, the Defendants are nonetheless correct that neither they nor the plaintiffs can waive subject-matter jurisdiction, even on appeal. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94-95 (1998) ("requirement that jurisdiction be established as a threshold matter spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception")

(citations and interior quotations omitted, alteration in original). APA Watch offers this *amicus curiae* brief to aid the Court in quickly dispensing with the Defendants' standing and ripeness arguments so that the Court and the parties can focus on the weightier substantive issues raised by this matter.

I. PHARMACIES AND PHARMACISTS HAVE STANDING

Standing involves a tripartite test of a cognizable injury to the plaintiff, caused by the defendant, and redressable by the court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). Although causation and redressability pose "little question" when the government *directly* regulates a plaintiff, the standing inquiry requires a heightened showing when the government regulates third parties, who then cause injury. *Id.* Here, the Defendants suggest that no pharmacist has suffered an actual injury *attributable to the State,* State Br. at 44-45; Intervenors' Br. at 19-21, and that corporate pharmacies cannot suffer free-exercise injuries at all. Intervenors' Br. at 18. The Defendants' arguments are wrong or inapposite on both counts.

A. Pharmacy Standing

Because the State directly regulates them, pharmacies do not have a heightened showing of causation and redressability. *Defenders of*

Wildlife, 504 U.S. at 561-62. The Board's regulation directly caused pharmacies' injuries, and the requested injunctive relief directly will redress those injuries.

1. No Nexus Requirement

While "standing is not dispensed in gross" so that standing to challenge one government action would automatically provide standing to challenge other, discrete government actions, *Lewis v. Casey,* 518 U.S. 343, 358 n.6 (1996), standing doctrine has no nexus requirement outside taxpayer standing. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 78-81 (1978). Thus, "once a litigant has standing to request invalidation of a particular agency action, it may do so by identifying all grounds on which the agency may have failed to comply with its statutory mandate." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 353 & n.5 (2006) (interior quotations omitted). If Stormans can establish standing against a State action *on any one basis,* it can challenge the lawfulness of that State action *on all bases:*

> [T]he fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate.

Sierra Club v. Morton, 405 U.S. 727, 737 (1972). The *Duke Power* case is instructive. There, the environmental plaintiffs based their standing on the aesthetic environmental injuries from power plants, but challenged the Price-Anderson Act's caps on damages from some future nuclear accident as an unconstitutional taking. *Duke Power,* 438 U.S. at 73-74, 79-81. By analogy here, Stormans can challenge the State's regulation on free-exercise grounds, once Stormans establishes its standing on any grounds.

2. Free-Exercise Standing

Citing *Harris v. McRae,* 448 U.S. 297, 321 (1980), and *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 778 n.14 (1978), Intervenors argue that Stormans lacks standing to assert free-exercise rights because it is for-profit corporation, not a religious corporation or an individual. Intervenors' Br. at 18. Neither *Harris* nor *Bellotti* bear the weight that Intervenors would place on them. Moreover, under the circumstances, Stormans can assert the free-exercise rights of its owners and its employees, even if Stormans itself lacks free-exercise rights. In any event, Intervenors' free-exercise argument is immaterial because Stormans has standing for economic and regulatory injuries,

see Section I.A.3, *infra*, and *any party* with standing can challenge the State's action on free-exercise grounds. *See* Section I.A.1, *supra*.

In pertinent part, *Harris* denied standing to the "Women's Division of the Board of Global Ministries of the United Methodist Church" because its membership admittedly divided on the abortion question, which made the organization an improper one to represent its individual members' religious views. *See Harris,* 448 U.S. at 321 (claim "requires the participation of individual members" because "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion") (citations and interior quotations omitted). Here, although only one of the four family owners provided an affidavit, it is clear that "*our* store had decided not to stock Plan B for moral and religious reasons" and that "*we* [*i.e.,* the *owners*] prohibited [the pharmacy] from stocking it." E.R. 686 (Stormans Decl., ¶17) (emphasis added). Moreover, Stormans is a fourth-generation family business owned entirely by the Stormans family. E.R. 682. To suggest that only Kevin Stormans supports the religious rights raised here is to suggest that the other owners have

simply neither noticed nor questioned the picketing and this lawsuit. Intervenors suggest the improbable.

Intervenors apparently cite *Bellotti* for the general proposition that "'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals." *Bellotti,* 435 U.S. at 778 n.14. Other than that general principle, the *Bellotti* footnote that Intervenors cite works *against* Intervenors' theory.

Indeed, *Bellotti* described Intervenor's theory as an "artificial mode of analysis, untenable under decisions of this Court." *Bellotti,* 435 U.S. at 779. "That [plaintiff] is a corporation has no bearing on its standing to assert violations of the first and fourteenth amendments under 42 U.S.C. §1983." *RK Ventures, Inc. v. City of Seattle,* 307 F.3d 1045, 1057 (9th Cir. 2002) (quoting *Advocates for the Arts v. Thomson,* 532 F.2d 792, 794 (1st Cir. 1976), alteration in *RK Ventures*); *cf. Bellotti,* 435 U.S. at 780 n.15 ("settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment"); *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940) ("The fundamental concept of

liberty embodied in th[e Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment[, which] declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"). Thus, nothing precludes a for-profit corporation from having a religious viewpoint and suffering free-exercise injuries.

Here, the evidence plainly establishes that Stormans has staked out a Christian position against Plan B, and that both the State and Intervenors have discriminated against Stormans for its position. E.R. 684-86 (Stormans Decl., ¶¶10-20).[3] "[I]f a corporation can suffer harm from discrimination, it has standing to litigate that harm." *Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc.,* 368 F.3d 1053, 1059-60 (9th Cir. 2004) (quoting *Gersman v. Group Health Ass'n,* 931

[3] Although the Defendants undoubtedly view their actions as non-discriminatory and commendable, courts analyze subject-matter jurisdiction from the plaintiffs' merits views. *Southern Cal. Edison Co. v. F.E.R.C.,* 502 F.3d 176, 180 (D.C. Cir. 2007) ("in reviewing the standing question, the court… must therefore assume that on the merits the [plaintiffs] would be successful in [their] claims"); *Tyler v. Cuomo,* 236 F.3d 1124, 1133 (9th Cir. 2000) ("[w]hether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits").

F.2d 1565, 1568 (D.C. Cir. 1991), *vacated on other grounds,* 502 U.S. 1068 (1992)). But even if this Court found that for-profit corporations lack religious beliefs, Stormans nonetheless could assert the free-exercise rights of its s*hareholders* and its *employees.*

With regard to *shareholders,* a close corporation or family corporation like Stormans plainly has standing to assert the free-exercise rights of its family shareholders under the circumstances. *E.E.O.C. v. Townley Engineering & Mfg. Co.,* 859 F.2d 610, 619-20 (9th Cir. 1988) (citing *Tony & Susan Alamo Found. v. Sec'y of Labor,* 471 U.S. 290, 303 n.26 (1985)). With regard to *employees* – and Stormans has employees with religious objections to Plan B, E.R. 683 (Stormans Decl., ¶5) – employers can assert their employees' rights to be free from unlawful discrimination to avoid being *complicit* in that discrimination:

> When the law makes a litigant an involuntary participant in a discriminatory scheme, the litigant may attack that scheme by raising a third party's constitutional rights.

Lutheran Church-Missouri Synod v. F.C.C., 141 F.3d 344, 350 (D.C. Cir. 1998) (citing *Craig v. Boren,* 429 U.S. 190 (1976), and *Barrows v. Jackson,* 346 U.S. 249, 259 (1953)); *accord Thinket Ink,* 368 F.3d at 1059-60 (quoted *supra*). Because it would suffer injury from its own

discriminatory religious intolerance of its employees under the State's coercion, Stormans has standing to challenge that coercion.

3. Economic and Regulatory Standing

From their competing perspectives, the parties focus on metaphysical principles of equal-protection (on behalf of pharmacists, pharmacies, and consumers who wish to purchase Plan B) and religious freedom (on behalf of pharmacists and pharmacies). While important to the merits, these grand, foundational principles are not critical to this Court's standing inquiry. An "identifiable trifle" is sufficient injury to satisfy constitutional standing. *U.S. v. Students Challenging Regulatory Agency (SCRAP),* 412 U.S. 669, 689 n.14 (1973); *Council of Insurance Agents & Brokers v. Molasky-Arman,* __ F.3d __, 2008 WL 962103, *4 (9th Cir. 2008); *Nat'l Wildlife Fed'n v. Burford,* 871 F.2d 849, 854 (9th Cir. 1989). Here, the State has conceded (as a factual matter) that putting additional pharmacists on duty increases the cost of operating a pharmacy. E.R. 654, 676, 679. Professor Whitcomb Henry confirmed the application to pharmacies of that self-evident economic principle, E.R. 234-35 (Whitcomb Henry Decl., ¶¶10-12), which plainly applies to Stormans. *See* E.R. 683 (Stormans Decl., ¶5) (Stormans has pharmacist-

employees with religious objections to Plan B). As indicated in Section I.A.1, *supra,* that quantum of economic harm suffices for the Pharmacy to challenge the State's action as unconstitutional:

> We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax… The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.

SCRAP, 412 U.S. at 690 (citations and interior quotations omitted). Thus, Stormans plainly has standing.

B. Pharmacist Standing

The Defendants argue that, unlike pharmacies, pharmacists are not directly regulated here. For their part, Ms. Thelen and Ms. Mesler vigorously dispute that claim, citing several ways in which the State directly regulates pharmacists. *See* Appellees' Br. at 36-42. Moreover, because it *directly* alters the terms on which pharmacists interact with pharmacies, the State's action *directly* injures pharmacists. Henry P. Monaghan, *Third Party Standing,* 84 COLUM. L. REV. 277, 299 (1984) ("a litigant asserts his own rights (not those of a third person) when he seeks to void restrictions that directly impair his freedom to interact

with a third person who himself could not be legally prevented from engaging in the interaction"); *FAIC Securities, Inc. v. U.S.,* 768 F.2d 352, 360 n.5 (D.C. Cir. 1985) (*citing* Monaghan) (Scalia, J.); *Law Offices of Seymour M. Chase, P.C. v. F.C.C.,* 843 F.2d 517, 524 (D.C. Cir. 1988) (R. B. Ginsburg, J.). Thus, the pharmacists credibly assert direct injury.

But *assuming* Defendants' view, pharmacists would have a heightened showing of causation and redressability for the indirect injuries that pharmacists claim they will suffer as the result of the State's regulating pharmacies. *Defenders of Wildlife,* 504 U.S. at 561-62. Assuming that it applies at all, that heightened showing is easily met where the State action authorizes conduct that otherwise would be illegal. *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 45 n.25 (1976) (privately inflicted injury is traceable to government action if the injurious conduct "would have been illegal without that action"); *City of Los Angeles v. Lyons,* 461 U.S. 95, 105-06 (1983) (government authorization sufficient to confer standing). Similarly, "[w]hile… it does not suffice if the injury complained of is th[e] result [of] the *independent* action of some third party not before the court, that does not exclude injury produced by determinative or coercive effect upon the action of

someone else." *Bennett v Spear,* 520 U.S. 154, 169 (1997) (citations and quotations omitted, emphasis in original). Thus, pharmacists easily can establish standing if the State *either* authorizes pharmacies to take actions that would be unlawful absent the State action *or* coerces pharmacies to take adverse (but lawful) action.

1. Imminence of Injury

Sworn testimony from the two individual plaintiffs establishes that one lost her job and had to undertake less-advantageous employment because of the State actions, E.R. 676-77 (Thelen Decl., ¶¶11-13), and the other would lose her employment but for the preliminary injunction. E.R. 672-73 (Mesler Decl., ¶15). As to the former, prior injuries can evidence the imminence of future injuries, *O'Shea v. Littleton,* 414 U.S. 488, 496 (1974) ("past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury"); *Fortyune v. American Multi-Cinema, Inc.,* 364 F.3d 1075, 1081 (9th Cir. 2004) (same), and the State action stands as an ongoing obstacle to her obtaining more-advantageous employment. As to the latter, "'but for' caus[ation] suffices for standing purposes," *Idaho Conservation League v. Mumma,* 956 F.2d 1508, 1518 (9th Cir. 1992)

(citations and interior quotations omitted), even though it is not required. *Scott v. Rosenberg,* 702 F.2d 1263, 1268 (9th Cir. 1983); *Khodara Env'tl., Inc. v. Blakey,* 376 F.3d 187, 195 (3rd Cir. 2004) ("neither the Supreme Court nor our Court has ever held that but-for causation is always needed"). Because they assert ongoing and imminent injuries to their employment, Ms. Thelen and Ms. Mesler plainly have standing as individual pharmacists.

2. Indirectness of Injury

Both the State and the Intervenors suggest that the State's regulating *pharmacies* means that individual *pharmacists* lack standing. State Br. at 44-45; Intervenors' Br. at 19-21. In one of its earliest indirect-injury cases, however, the Supreme Court flatly rejected that evasion. *Truax v. Raich,* 239 U.S. 33, 36-38 (1915). In *Truax,* an alien employee had standing to challenge a state law under which his employer would dismiss him to meet the law's quota on the percentage of aliens in his *employer's* workforce. Just as Mr. Raich could sue the government directly for an unconstitutional government directive imposed *on his employer,* pharmacists have standing to challenge government actions that authorize or incentivize pharmacies

to dismiss them. *See also Columbia Broadcasting System, Inc. v. U.S.,* 316 U.S. 407, 422-23 (1942) (broadcasters had standing to challenge regulations applicable to station owners, which altered the terms on which station owners could interact with broadcasters). Contrary to Defendants' unstated suggestion, indirect injury is simply not fatal to standing.

Pharmacies' new, State-inducted unwillingness to hire conscientious-objector pharmacists constitutes an "invasion of a legally protected interest... in a manner that is 'particularized'" to plaintiffs, which is an injury *per se,* whether or not the plaintiff would secure the benefit (*i.e.,* employment) with the State action removed. *Adarand Constr., Inc., v. Pena,* 515 U.S. 200, 211 (1995); *Gratz v. Bollinger,* 539 U.S. 244, 262 (2003) ("'*injury in fact*'... is the denial of equal treatment [from] imposition of the barrier, not the ultimate inability to obtain the benefit") (emphasis added). The record plainly establishes that, prior to the challenged State action, pharmacists and pharmacies enjoyed the conscientious right to refuse and refer. E.R. 517-18. The challenged State action altered the legal footing of conscientious-objector pharmacists and the pharmacies that employed them, which provides

standing to enjoin that State action. *Clinton v. New York,* 524 U.S. 417, 433 & n.22 (1998) (applying unequal-footing rationale outside equal-protection framework); *Bras v. Cal. Pub. Util. Comm'n,* 59 F.3d 869, 873 (9th Cir. 1995). While such challenges generally arise in the equal-protection context, *Clinton,* 524 U.S. at 456-57 (Scalia, J., dissenting), nothing in Article III so limits them. *Clinton,* 524 U.S. at 433 & n.22 (majority). In summary, it is disingenuous, evasive, and unavailing for the Defendants to hide behind indirectness when the State itself coerces the indirect injuries.

Intervenors also point the Court to one of a series of inapposite tax and zoning cases. Intervenors' Br. at 19-20 (citing *Allen v. Wright,* 468 U.S. 737, 757 (1984)). The plaintiffs in these cases lacked a right to free medical care, had no equal-protection interest in eliminating tax exemptions for exclusionary schools that they did not want to attend, and could not afford to live in the tony suburb of Penfield. *Simon,* 426 U.S. at 40-41; *Allen,* 468 U.S. at 757-58 & n.22; *Warth v. Seldin,* 422 U.S. 490, 504-05 (1975).[4] By contrast, the pharmacists here assert

[4] In *Allen,* the African-American plaintiffs wanted to eliminate tax breaks for segregated private schools so that Caucasian students would

(Footnote cont'd on next page)

constitutional, statutory, and regulatory rights. U.S. CONST. amend. I, cl. 1; 42 U.S.C. §2000e-2(a)(1); WASH. REV. CODE §49.60.030(1); E.R. 517-18 (State's prior refuse-and-refer policy). Thus, neither *Allen* (cited by Intervenors) nor any other similar case has any bearing on pharmacists' ability to vindicate their rights by suing the regulator of their employers as the true source of their injury.

3. Cognizable Injury

The Intervenors argue that the Free Exercise Clause does not provide a "legally cognizable right," both because the government may burden religious freedom as "the inevitable cost of an ordered society" and because pharmacists lack "any constitutional right to their particular job." Intervenors' Br. at 20-21. Neither the law generally nor their cited authorities specifically are as the Intervenors would have them:

(Footnote cont'd from previous page.)

cease attending such schools, matriculate into the public-school system, and thus redress the denial of an integrated education, which the Court found too attenuated. *Allen,* 468 U.S. at 757-58 & n.22. While the *Allen* plaintiffs had a right to be free from racial discrimination, they did not have a right to make other students attend the *Allen* plaintiffs' school.

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.

Truax, 239 U.S. at 41 (citations omitted). Moreover, because the First Amendment expressly enumerates religious rights, U.S. CONST. amend. I, the Intervenors cannot seriously question that religious freedom is constitutionally *cognizable*. Indeed, religious freedom is a *fundamental* right. *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349-50 (1987); *Wisconsin v. Yoder,* 406 U.S. 205, 214 (1972). Instead, Intervenors' two-pronged argument is more nuanced, but equally wrong.

First, citing *Employment Div., Dep't of Human Resources of Oregon v. Smith,* 494 U.S. 872, 879, 888-89 (1990), the Intervenors argue that – because the State's other interests in an "ordered society" may trump the pharmacists' religious interests, the pharmacists lack standing. Intervenors' Br. at 20. Put simply, that "confuses standing with the merits." *Initiative & Referendum Institute v. Walker,* 450 F.3d 1082, 1092 (10th Cir. 2006); *Lac du Flambeau Band of Lake Superior*

Chippewa Indians v. Norton, 422 F.3d 490, 501 (7th Cir. 2005); *In re Columbia Gas Systems Inc.,* 33 F.3d 294, 298 (3rd Cir. 1994); *cf. Cantrell v. City of Long Beach,* 241 F.3d 674, 682 (9th Cir. 2001). But "'standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *McConnell v. FEC,* 540 U.S. 93, 227 (2003) (quoting *Warth,* 422 U.S. at 500); *Southern Cal. Edison Co.,* 502 F.3d at 180 (quoted in note 3, *supra*); *Tyler,* 236 F.3d at 1133 (quoted in note 3, *supra*). Otherwise, every losing plaintiff would lose for lack of standing.

Second, citing *Dittman v. Cal.,* 191 F.3d 1020, 1031 n.5 (9th Cir. 1999), and *Amunrud v. Bd. of Appeals,* 158 [Wash.]2d 208, 220, 143 P.3d 571, 577 (2006), the Intervenors argue that the plaintiffs lack "any constitutional right to their particular job," Intervenors' Br. at 20, but candidly admit that their cited authorities relate to the question of the "*fundamental* right" to a "particular profession." Intervenors' Br. at 20-21 (emphasis added).[5] Put another way, Intervenors candidly admit that their cited authorities are inapposite.

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[5] As signaled by the discussion of *Truax* in Section I.B.2, *supra,* Intervenors are simply mistaken or misleading when they argue that the "constitutional right to their particular job… is simply not a right the Constitution has ever recognized." Intervenors Br. at 20. While Mr.

(Footnote cont'd on next page)

As required for standing, a "cognizable constitutional right" is not the same as a "fundamental right." *Bates v. Jones,* 131 F.3d 843, 853 n.4 (9th Cir. 1997) (O'Scannlain, J., concurring in the result) (*en banc*). If all cognizable rights were fundamental rights, all judicial review would be strict scrutiny. *Clark v. Jeter,* 486 U.S. 456, 461 (1988) (strict scrutiny reserved for state "classifications based on race or national origin and classifications affecting fundamental rights") (citations omitted); *Berger v. City of Seattle,* 512 F.3d 582, 607 (9th Cir. 2008) ("restriction faces strict scrutiny only if it targets a suspect class or a fundamental right"). Whether fundamental or not, an "identifiable trifle" is sufficient injury to satisfy constitutional standing, and, as explained in Sections I.A.3, I.B.1, *supra,* Ms. Thelen and Ms. Mesler unquestionably meet that test.

II. PHARMACIES AND PHARMACISTS HAVE RIPE CLAIMS

Ripeness seeks "[t]o prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148

(Footnote cont'd from previous page.)

Raich may not have had a constitutional right to his particular job, he did have a constitutional right not to lose his particular job because of unlawful state discrimination. *Truax,* 239 U.S. at 41.

(1967), *abrogated on other grounds, Califano v. Sanders,* 430 U.S. 99, 105 (1977). The State appears to argue that pharmacies (but not pharmacists) lack a ripe claim against WLAD enforcement (but not against the Board regulations) because Stormans lacks a concrete plan to violate WLAD, the State has not threatened Stormans specifically, and the State has no history of WLAD prosecutions for failing to dispense Plan B. State Br. at 44-49. For their part, the Intervenors argue that pharmacists lack a ripe claim because neither the State nor its regulations threaten state action against individual pharmacists. Intervenors' Br. at 21. As with standing, these arguments are wrong or inapposite on both counts.[6]

A. Constitutional Ripeness

Although neither the State nor the Intervenors specifically focus their ripeness challenges, ripeness involves both a constitutional and a prudential component. *Buono v. Kempthorne,* 502 F.3d 1069, 1077 (9th Cir. 2007). For its constitutional aspect, ripeness arises under the

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[6] Neither the State nor the Intervenors suggest that pharmacies lack a ripe claim against the Board regulations, and the Intervenors' cursory discussion of ripeness does not appear to distinguish between pharmacists' injuries from WLAD versus the Board regulations.

Article III requirement for a "case" or "controversy" and so resembles constitutional standing. *See id.* ("analysis is similar to the injury-in-fact inquiry under the standing doctrine"). For the reasons set forth in Section I, *supra,* the plaintiffs have invoked federal jurisdiction to address a constitutional "case" or "controversy," and their claims there are *constitutionally* ripe.

B. Prudential Ripeness

Although no party challenges the ripeness of Stormans' challenge to the Board regulations, the following two sections establish the prudential ripeness needed to challenge both the Board's regulations and the Commission's WLAD enforcement.

1. Board Regulations

Under federal-court precedent, prudential ripeness poses a "twofold" inquiry that "require[es courts] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs,* 387 U.S. at 148-49; *Buono,* 502 F.3d at 1079 (same). As explained below, the State actions meet both prongs of the twofold federal inquiry. Moreover, contrary to the State's invocation of state-law ripeness, State Br. at 46, Section

II.B.3, *infra,* explains that *state-law ripeness* and 42 U.S.C. §1988(a) provide another route to find the WLAD claims ripe.

Under the federal precedents, "[a] claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *US West Communications v. MFS Intelenet,* 193 F.3d 1112, 1118 (9th Cir. 1999) (quoting *Standard Alaska Production Co. v. Schaible,* 874 F.2d 624, 627 (9th Cir. 1989)) (internal quotation marks omitted); *accord Buono,* 502 F.3d at 1079 (citing *Exxon Corp. v. Heinze,* 32 F.3d 1399, 1404 (9th Cir. 1994)). As to the Board's regulation, all three conditions plainly are met. Indeed, "[i]t is difficult to postulate an issue more proper for judicial decision than that of the statutory authority of an administrative agency." *State of Cal. ex rel. State Water Resources Control Bd. v. F.E.R.C.,* 966 F.2d 1541, 1562 (9th Cir. 1992).

On the hardship of withholding review, "Courts typically read the *Abbott Laboratories* rule to apply where regulations require changes in present conduct on threat of future sanctions." *Ass'n of Am. Medical Colleges v. U.S.,* 217 F.3d 770, 783 (9th Cir. 2000). Because "[t]he loss of First Amendment freedoms, for even minimal periods of time,

unquestionably constitutes irreparable injury," courts relax their ripeness (and standing) analysis to ensure review of state action that chills First Amendment freedoms. *American-Arab Anti-Discrimination Committee v. Reno,* 70 F.3d 1045, 1057-58 (9th Cir. 1995) (citations and interior quotations omitted). Because the regulations require changing conduct and also chill First Amendment rights, the hardship tilts to reviewability now.

2. WLAD Enforcement

With respect to WLAD enforcement, the parties dispute the correct application of this Circuit's three-part test for fear-of-prosecution ripeness. *Compare* State Br. at 45-49 *with* Appellees' Br. at 78-87. Without adding to the parties' briefing of that three-part test, APA Watch respectfully submits that WLAD's application here cuts sharply in favor of ripeness.

Indeed, APA Watch respectfully submits that WLAD's application here is a *train wreck:* pharmacies must choose between violating pharmacists' religious rights under WLAD and female consumers' purported equal-protection rights under WLAD. *Compare* WASH. REV. CODE §49.60.030(1) ("right to be free from discrimination because of…

creed… is recognized as and declared to be a civil right") *with id.* ("right to be free from discrimination because of… sex … is recognized as and declared to be a civil right"). Thus, conscientious objectors and the Intervenors represent competing equal-protection and WLAD rights.[7]

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[7] Both this Court and the Washington Supreme Court have held that courts should interpret WLAD consistent with federal anti-discrimination law. *Stegall v. Citadel Broadcasting Co.,* 350 F.3d 1061, 1065 (9th Cir. 2003); *Xieng v. Peoples Nat'l Bank of Wash.,* 120 Wash.2d 512, 531, 844 P.2d 389 (1993); *McClarty v. Totem Elec.,* 157 Wash.2d 214, 228-29, 137 P.3d 844, 851-52 (2006). Under both federal and Washington law, discrimination because of pregnancy (or the ability to get pregnant) constitutes discrimination because of sex only in the employment context. *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* 462 U.S. 669, 684 (1983) ("Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex"); *Hegwine v. Longview Fibre Co., Inc.,* 162 Wash.2d 340, 349-50, 172 P.3d 688, 693-94 (2007) (same, citing provisions that deal exclusively with employment). Outside the employment context, disparate treatment of a potentially pregnant person because one opposes abortion is not discrimination *because of that person's gender. Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 271-72 (1993) (citing cases). "While it is true… that only women can become pregnant, it does not follow that every… classification concerning pregnancy is a sex-based classification." *Bray,* 506 U.S. at 271 (interior quotations omitted, citing *Geduldig v. Aiello,* 417 U.S. 484, 496, n.20 (1974)); *accord. Harris v. McRae,* 448 U.S. 297, 322 (1980) (restrictions on abortion funding are not discrimination because of sex). Instead, to find the required "[d]iscriminatory purpose" requires that "the decisionmaker... selected or reaffirmed a particular course of action at least in part *because of,* not merely *in spite of,* its adverse effects upon an identifiable group."

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"This Hobson's Choice suggests the ripeness of the issue for review." *City of Auburn v. Qwest Corp.,* 260 F.3d 1160, 1172 (9th Cir. 2001); *cf. West Coast Truck Lines, Inc. v. American Industries, Inc.,* 893 F.2d 229, 233 (9th Cir. 1990) (holding that agency's interpretation of the law is final and ripe for review). Indeed, that is precisely the type of "dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Id.* (quoting *Abbott Labs.,* 387 U.S. at 152). In any event, the ripeness of Stormans' *present* claim against the Board's regulation gives the Court jurisdiction to rule against the Commission's threatened *future* WLAD enforcement. *Duke Power,* 438 U.S. at 81-82. For all of the foregoing reasons, ripeness presents no barrier to review of the competing rights of pharmacists and pharmacies on the one hand and women seeking access to Plan B on the other hand.

In arguing against WLAD ripeness, moreover, the State pretends that the Commission merely exercised its prerogative to comment on another agency's rulemaking. State Br. at 12-13, to create a "letter not

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Bray, 506 U.S. at 271-72 (interior quotations omitted, emphasis added, citing *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279 (1979)).

directed to [plaintiffs], and with no force of law." *Id.* at 44. The letter itself and the public testimony given by Commission representatives extended far beyond a mere "comment" and instead served as an intentional warning to the Board and the pharmacy industry. The record also plainly demonstrates that the Commission posted its letter on its website's Women's Issues section, E.R. 632-44, which is a form of publication entirely outside the Commission's participation in the Board's rulemaking. *CropLife America v. EPA,* 329 F.3d 876, 883 (D.C. Cir. 2003) (agency's press release can constitute a sufficiently binding position to qualify as final agency action). Even if the Commission's publication of the letter to the Board and its public testimony had no force of law,[8] there is nothing unusual about an action immune in one

[8] When an agency adopts a sufficiently inflexible position (*e.g.,* a position that forecloses the future exercise of discretion), courts refer to that position as having the "force of law," even if the agency adopted that position via flawed procedures that render the agency action void *ab initio. CropLife America,* 329 F.3d at 883. Thus, the Commission's position can foreclose recognition of pharmacists' WLAD-based rights of conscientious objection sufficiently for judicial review, even if the Commission letter is not a formal regulation under Washington law. If, for example, the Commission later agrees that pharmacists have conscientious-objector rights, one can easily imagine the Intervenors citing the current letter in their complaint against the reversed policy.

venue losing that immunity when republished in another venue. *Cf. Hutchinson v. Proxmire,* 443 U.S. 111, 123-36 (1979) (Speech and Debate Clause protects senator's floor statements, but not his press release republishing those floor statements). This Court can review the Commission's act of publishing the letter on the Commission's website as an entirely separate agency action.

Moreover, the "cases also make it clear that the agency's characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the 'force of law,' but the record indicates otherwise." *CropLife America,* 329 F.3d at 883 (citing cases). Here, the Commission's letter is hardly a garden-variety public comment. Instead, the Commission claims jurisdiction *over the Board,* E.R. 632 (noting that WLAD provides the Commission "general jurisdiction and power… [that] extends to state agencies"), and *threatens the Board* itself: "granting pharmacists the [refuse and refer] ability… would constitute illegal discrimination on the basis of sex under [WLAD]… and could expose the Board of Pharmacy to liability for writing regulations that are knowingly discriminatory." E.R. 634.

Thus, while the Governor merely threatened to fire the Board, the Commission threatened to lock them up.

When an agency acts under improper coercion with a nexus to the challenged agency action, a reviewing court may evaluate the agency action in light of that coercion. *Pillsbury Co. v. FTC,* 354 F.2d 952, 963-65 (5th Cir. 1966); *District of Columbia Fed'n of Civic Ass'ns v. Volpe,* 459 F.2d 1231, 1246 (D.C. Cir. 1972); *ATX, Inc., v. U.S. Dep't of Transp.,* 41 F.3d 1522, 1527 (D.C. Cir. 1994). The Commission's unquestionable *coercion* begs the question whether that coercion was *improper,* which begs the WLAD merits *against the Board* in reviewing the Board regulation, even if this Court finds the WLAD issues unripe *against the Commission.*

3. State-Law Ripeness

Parallel to the parties' dispute under the federal test for ripeness, the State cites *Wash. Education Ass'n v. Wash. Public Disclosure Comm'n,* 150 Wash.2d 612, 80 P.3d 608 (2003), on agency policies' not creating a ripe threat of enforcement. State Br. at 46. State law is relevant here because, for civil rights cases such as this, 42 U.S.C. §1988(a) authorizes plaintiffs to rely on state law to supplement their

federal cause of action. *Wilson v. Garcia,* 471 U.S. 261, 267 (1985).[9] Under Washington law, courts evaluate justiciability and ripeness under a four-part test:

> (1)... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

First United Methodist Church of Seattle v. Hearing Examiner for Seattle Landmarks Preservation Bd., 129 Wash.2d 238, 245, 916 P.2d 374, 377-78 (1996) ("*First UMC*"). Consistent with this Court's reasoning in *Ass'n of Am. Medical Colleges, supra,* the Washington Supreme Court found this test met when the government action "already has placed constraints" on the church. *Id.*

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[9] The "Title 24" in §1988(a) includes 28 U.S.C. §1343 and 42 U.S.C. §1983. *Lynch v. Household Fin. Corp.,* 405 U.S. 538, 544 n.7 (1972). Under *Moor v. Alameda County,* 411 U.S. 693, 699-700 (1973), plaintiffs without a federal cause of action cannot use §1988(a) to bring a state-law cause of action in federal court, which is inapposite here because plaintiffs have a cause of action under §1343 and §1983.

In *First UMC,* the church challenged a city landmark ordinance on free-exercise grounds, based on the city's *nomination* (not *designation*) of a church building as a landmark. Even though the city had not yet designated the building as a landmark, the challenge met Washington's four-part ripeness test because the "nomination hinders United Methodist from selling its property; a dispute exists between the City and United Methodist regarding this nomination; the dispute is not hypothetical; and the Court can reach a conclusive determination on the constitutionality of the [landmark ordinance]." *Id.* Here, State action hinders pharmacists and pharmacies from exercising their free-exercise rights and free-exercise accommodation, the parties dispute WLAD's resolution of the conflict between conscientious objectors and Plan B consumers, the dispute is concrete, and courts can enter a final resolution. Because this matter is prudentially ripe under Washington law, §1988(a) provides an alternate basis to find ripeness and to relax any merely prudential federal barriers to review.

4. Pharmacist Ripeness

The Defendants do not address the ripeness of the pharmacists' claims, as distinct from those of a pharmacy. It would be inequitable –

even Kafkaesque – to deny review to plaintiffs injured by third parties who acted under government coercion that was unripe for direct review by the third parties. Indeed, while indirect-injury plaintiffs have a *heightened* showing for causation and redressability, *see* Section I.B.2, *supra,* they have a *relaxed* showing for prudential ripeness:

> Our decision that the Union's claims are now nonjusticiable does not mean that employees must wait until after they are to be disciplined under the policy to challenge it in federal court. As *Solomon* and *Eaves* demonstrate, indirect injury, in the absence of enforcement, may be sufficient to establish a justiciable controversy, as long as that indirect injury is specific. For example, if an employee has a concrete and plausible desire to say something in particular and refrains from doing so because the statement arguably violates the policy, he may have the ingredients for a ripe, justiciable dispute.

Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale, 922 F.2d 756, 764 (11th Cir. 1991) (citing *Solomon v. City of Gainesville,* 763 F.2d 1212 (11th Cir. 1985) and *Int'l Society for Krishna Consciousness v. Eaves,* 601 F.2d 809 (5th Cir. 1979)). As noted in *Hallandale,* this Court should not turn away injured individuals who face specific, albeit indirect, injury from State action, even if the pharmacies that injured

those individuals (like the union in *Hallandale*) lack a ripe claim against the State.

CONCLUSION

For the foregoing reasons, APA Watch respectfully submits that Stormans and the individual pharmacists raise justiciable claims and that the district court had subject-matter jurisdiction for the preliminary injunction.

Dated: April 30, 2008

Respectfully submitted,

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BRIEF FORM CERTIFICATE

Pursuant to Rules 29(c)(5) and 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE and Circuit Rule 32-1 of the U.S. Court of Appeals for the Ninth Circuit, I certify that the attached "*Amicus Curiae Brief of* APA Watch in support of Plaintiffs-Appellees in Support of Affirmance" is proportionately spaced, has a typeface of Century Schoolbook, 14 points, and contains 6,998 words, including footnotes, but excluding this Brief Form Certificate, the Table of Authorities, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. I have relied on Microsoft Word 2007's word-count feature for the calculation.

Dated: April 30, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2008, I have caused two copies of the foregoing "*Amicus Curiae Brief of* APA Watch in support of Plaintiffs-Appellees in Support of Affirmance" to be served by first-class U.S. mail, postage prepaid, to the following:

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In addition, I certify that on the same day, I electronically transmitted courtesy copies via electronic mail to the email addresses listed for each of the foregoing. Notwithstanding any electronic courtesy copies, to my knowledge, no counsel has consented pursuant to FED. R. APP. P. 25(c)(1)(D) to electronic service. In addition, I certify that on the same day, I sent an original and fifteen copies to the Clerk of the Court via *Federal Express,* next-day delivery, for filing in this matter.

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