No. 15-862

IN THE
Supreme Court of the United States

STORMANS, INC., *ET AL.*, *Petitioners*,

v.

JOHN WIESMAN, *ET AL.*, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief *Amicus Curiae* of Public Advocate of the United States, United States Justice Foundation, Conservative Legal Defense and Education Fund, Institute on the Constitution, Southwest Prophecy Ministries, and Daniel Chapter One In Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Public Advocate of the United States is a nonprofit social welfare organization, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). U.S. Justice Foundation and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3). Institute on the Constitution is an educational organization. Southwest Prophecy Ministries and Daniel Chapter One are religious and educational organizations.

These legal, policy, and religious organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on the proper construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

In recent cases that involved some of the same issues, some of these *amici* filed an *amicus curiae* brief in the Supreme Court of Colorado in Masterpiece Cakeshop v. Craig & Mullins, a case involving state effort to compel a private business to participate in a

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

wedding celebration for a same-sex marriage despite the business owner's religious belief in God-ordained marriage between one man and one woman.[2] Brief *of Amici Curiae* U.S. Justice Foundation, *et al.* (Oct. 23, 2015). Additionally, some of these *amici* filed an *amicus* brief in Zubik v. Burwell & Little Sisters of the Poor v. Burwell, Nos. 14-1418, 14-1453, 14-505, 15-35, 15-119 & 15-191. Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.* (filed Jan. 11, 2016), involving the contraceptive/abortifacient mandate in the Affordable Care Act.[3]

STATEMENT OF THE CASE

Petitioners are a pharmacy in Olympia, Washington and two individual pharmacists who worked for other pharmacies. Petitioners refuse to dispense Plan B and *ella* because they are abortifacients, *i.e.*, they are drugs which act to cause a woman's body to abort a baby. Respondents include the Washington State Pharmacy Quality Assurance Commission (the "Commission").

The Petitioners ably set forth many of the relevant facts as to how the Board's order came to be issued. *See* Petition for Certiorari at 5-19. Yet, there is even more to the story. The district court set forth detailed findings of fact describing an amazing series of events

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[2] http://www.lawandfreedom.com/site/constitutional/Brief%20in%20Support%20of%20Cert.%20--%20final.pdf

[3] http://lawandfreedom.com/wordpress/wp-content/uploads/2016/01/Zubik-Little-Sisters-Amicus-Brief.pdf

in which a private organization, Planned Parenthood of the Great Northwest ("Planned Parenthood"), maneuvered, with its allies inside state government, to capture a state regulatory agency in order to drive out of business those pharmacies which disagree with the group's abortion rights ideology. As the district court records, at every stage of the proceedings below, the driving force behind the government action was a private political organization — Planned Parenthood.

- In 2005, Planned Parenthood contacted Governor Christine Gregoire and began meeting with the Governor's Senior Health Policy Advisor, seeking to ban conscience-based objection to Plan B. App.123-27a.

- The Governor's Advisor and Planned Parenthood contacted the Executive Director of the Commission. Planned Parenthood subsequently wrote the Commission urging it to impose a ban on conscience-based referrals. App.124a. The Commission met several times in the latter half of 2005 and each time continued to support conscience-based referrals. App.124-25a.

- In January 2006, Planned Parenthood met with the Governor, and at its urging, she sent a letter to the Commission opposing conscience-based referrals. App.125a.

- The Governor then appointed to the Commission a former Planned Parenthood board member, whom Planned Parenthood had recommended. *Id.*

- The Commission, under pressure from the Governor and Planned Parenthood, initiated a rulemaking to consider conscience-based referrals, despite opposition among Commission members to such referrals. App.126a.

- Planned Parenthood made a presentation to the Commission in March 2006, but the Commission was not persuaded. *Id*.

- Based on further pressure from Planned Parenthood, the Governor "considered terminating existing Board members or issuing an emergency rule or executive order." App.126a.

- At the suggestion of the Governor, Planned Parenthood worked with the Washington State Human Rights Commission ("HRC") "to intimidate" the Pharmacy Commission. The HRC, with the assistance of Planned Parenthood, wrote the Commission, threatening the individual members with personal liability if the Commission passed a regulation permitting conscience-based referrals. App.127a.

- In June 2006, the Commission unanimously adopted a rule permitting referrals for a variety of reasons. App.128a. Within hours of the adoption of the new rule, the Governor wrote the Commission expressing her strong opposition. She also met with Planned Parenthood to discuss rewriting the rule. The Governor announced that she had the authority to remove the Commission members and asked Planned Parenthood to

determine whether she could issue an emergency rule or an executive order to override the Commission. App.128-29a.

- Planned Parenthood then drafted a new rule and presented it to the Governor. The primary purpose of the new draft was to remove the option of referrals for moral or religious objections. App.130-31a.

- The Governor subsequently convened a "task force" in support of her rule. It included representatives from the Commission and Planned Parenthood, among others, but did not include any other advocacy organizations, conscientious objectors, or faith-based health care providers. App.131a. The task force reached a "compromise" whereby the draft rule would provide referrals for business, economic, or convenience reasons, but would not provide a conscience-based referral — except for objections to lethal drugs under Washington's Death With Dignity Act. App.133-34a.

- Days before the Commission was set to vote preliminarily on the new revised rule, the Governor contacted the Commission Chair to tell him "'to do [his] job' and to 'do the right thing' and that she [the Governor] was going to 'roll up her sleeves and put on her boxing gloves.'" She contacted the Chair personally, despite having warned her Advisor that contacting individual Commission members was illegal. App.136-37a. In August 2006, the Commission preliminarily

approved the Governor's task force rule by a vote of 4-2. App.137a.

- The Governor asked Planned Parenthood and other pro-abortion advocacy groups to interview candidates to replace Commission members in order to guarantee final approval of the new rule. The Governor then nominated two individuals as members of the Commission, both of whom were recommended by Planned Parenthood. One was a board member of NARAL Pro-Choice Washington. App.137-38a. On April 12, 2007, the newly-constituted Commission approved the new regulation, and the next day the Washington Senate confirmed three new Commission members. App.138a.

- The Commission is primarily complaint driven, so it did not inspect pharmacies for compliance with the new rule. Hence, in July 2006, several Planned Parenthood activists test shopped Plan B from Stormans pharmacy, and then they filed a complaint with the Commission when they were unable to purchase the drug. Stormans advised the Commission that it had a conscientious objection to dispensing Plan B. App.184a.

- Planned Parenthood test shoppers also targeted two pharmacists, Petitioners Thelen and Mesler, who were permitted and accommodated by their employers to refer Plan B customers to other pharmacies. App.188a.

- Planned Parenthood organized a boycott of Stormans and its affiliated grocery stores. The Governor joined in the boycott, and the Governor's Mansion informed Stormans that it would terminate 16 years of doing business with Stormans. App.185a.

- As a result of the new rule and the complaints from Planned Parenthood activists, Stormans now faces revocation of its pharmacy license. Likewise, petitioners Thelen and Mesler were advised by their employers that their referrals of Plan B could no longer be accommodated under the new rule. App.187-88a.

Based on these and other detailed factual findings, the district court held that the Commission and the Commission's rules targeted those with religious-based objections to the dispensing of Plan B and *ella* and thus violated the Free Exercise Clause of the First Amendment. However, the Ninth Circuit reversed, holding that "the rules are neutral and generally applicable and that the rules rationally further the State's interest in patient safety." App.10a.

SUMMARY OF ARGUMENT

Based upon their religious beliefs and convictions, Petitioners do not — and indeed cannot — in good conscience dispense FDA Plan B drugs to their customers. However, in conformity to time-honored pharmacy practice, Petitioners can and do refer their customers to other pharmacies — even facilitating the referral by calling ahead of time to ensure for the

customer that the desired Plan B drug is available. But the Washington State Pharmacy Commission has outlawed such referrals because they are based upon a religious conscientious objection to the dispensing of Plan B abortifacients.

In the courts below, the Commission agreed that the Petitioners' referral practice does not pose a threat to timely access to lawfully prescribed Plan B drugs. Rather, the Commission conceded that such conscience-based, facilitated referrals are often in the best interests of the Petitioners' customers. Nevertheless, the Commission insisted on enforcing its rule that, if conscience-based, such referrals are illegal.

Lacking any legitimate police power basis upon which to rest the enforcement of its rule, the Commission justified its position on moral grounds, adopting Planned Parenthood's position that it was immoral for Petitioners to refuse to stock and dispense Plan B drugs and, therefore, it was illegal for Petitioners even to refer their customers to a pharmacy that does.

By taking sides in the moral debate over Plan B abortion-inducing drugs, the Washington Pharmacy Commission has exceeded its jurisdiction in a matter of faith and morals that, according to the principles of the free exercise of religion, can only be rightfully governed by reason and conviction. As James Madison and Thomas Jefferson, the two men most responsible for the religion guarantees of the First Amendment, argued, resort to the power of civil government is

illegitimate and impermissible in matters of opinion. Such matters, they asserted, are duties owed exclusively to the Creator. By crossing that jurisdictional line, the Washington Pharmacy Commission has unconstitutionally prohibited the Petitioners' free exercise of religion.

The effort by the Pharmacy Commission to penalize the moral and religious views of Stormans is not an isolated case. This case should be understood as part of a much larger trend, by which secular forces have gained political power in some areas of the country and are using that power to force others to yield to their moral and religious views. The effort here to compel a Christian pharmacy to become complicit in abortion by the sale of abortifacients, in violation of their moral and religious views, is not unlike other efforts to penalize Christian belief and practice being manifested elsewhere.

Although those fashioning these new coercive laws and regulations rarely admit that they themselves are motivated by religious and moral views, they operate on presuppositions which can best be understood as Secular Humanism. Rejecting Biblical Christianity, these laws and regulations reflect a moral inversion of the Christian principles which undergirded the American law since well before the Declaration recognized that our rights come from the Creator God.

The Obama Administration has demonstrated no reluctance to force the Little Sisters of the Poor to become complicit in abortion. The EEOC has no reluctance in re-writing the law of sex discrimination

to center on "sexual orientation." California is compelling pro-life counselors to distribute pro-abortion literature. And, as illustrated by Stormans, the effort includes ensuring that those practicing licensed professions or engaging in business subordinate their personal morality on matters such as abortion and same sex marriage to that dictated by the State. The logical extension of such efforts will be that Bible-believing Christians who do not yield to every aspect of the unfolding dictates of Secular Humanism will be unable to make a living except, perhaps, as common laborers.

The effort by the State of Washington to compel Stormans to embrace abortion constitutes an egregious violation of Stormans' exercise of free exercise of religion. *Certiorari* should be granted so that this Court may confirm the constitutional constraint against the "impious presumption of ... rulers [to set] up their own opinions [and] impose them on others," in violation of the first principles of the First Amendment, as set out by Thomas Jefferson in the Virginia Act for Establishing Religious Freedom.

ARGUMENT

I. THE WASHINGTON STATE PHARMACY RULE UNCONSTITUTIONALLY PROHIBITS PETITIONERS' FREE EXERCISE OF RELIGION.

A. Washington State Has Taken Sides in a Moral Debate outside Its Jurisdiction.

This petition concerns the constitutional right of the Christian Petitioners to the free exercise of religion. It is uncontested that "[b]ecause of their religious beliefs, Petitioners cannot stock or dispense the morning-after or week-after pills (collectively, 'Plan B'), which the FDA has recognized can prevent implantation of an embryo." Petition for a Writ of Certiorari ("Pet. Writ") at 6. It is also uncontested that Petitioners' moral conviction has not prevented any of its customers from "timely access to any drug," including Plan B. *Id.* at 7. Indeed, it is uncontested that Petitioners practice what is known as "facilitated referral," by "provid[ing] [its] customer[s] with a list of nearby pharmacies that stock Plan B and, upon the [customer's] request, call to confirm it is in stock." *Id.*

By stipulation below, the State agreed:

> that facilitated referral is "a time-honored pharmacy practice" that "continues to occur for many reasons" and "do[es] not pose a threat to timely access to lawfully prescribed medications," "including Plan B." [*Id.*]

Additionally, the State stipulated below:

> that facilitated referrals "help assure timely access to lawfully prescribed medications ... includ[ing] Plan B" and "are often in the best interest of patients." [*Id.*]

Throughout, the State's Governor worked in tandem with Planned Parenthood, "threatening Pharmacy Commission members with personal liability ... if they voted for a regulation that permitted conscience-based referrals." *See* Pet. Writ at 8-10. At first, this public-private coalition failed: the "Pharmacy Commission voted unanimously to protect conscience-based referrals." *Id.* at 10. Relentlessly, the Governor and Planned Parenthood pressed forward, (i) threatening to remove Commission members, and (ii) redrafting the proposed rule to Planned Parenthood's liking, thereby prompting the Executive Director of the Commission to explain its purpose for outlawing religious conscience-based referrals:

> "the moral issue IS the basis of the concern.... [T]he public, legislators and governor are telling us loud and clear that they expect the rule to protect the public from unwarranted intervention based on the moral beliefs of a pharmacist." [*Id.* at 10.]

Finally, in order to guarantee passage of the rule, the Governor was forced to alter the composition of the Commission, appointing two new members recommended by Planned Parenthood, one of whom

became the new Chairman of the Commission and announced that he would "never ... vote to allow religion as a valid reason for a facilitated referral," on the ground that such action would be "'immoral' and engaging in 'sex discrimination.'" *Id.* at 11.

Remarkably, in the present case, the Commission asserted no legitimate, health-related, governmental interest whatsoever which justified, much less compelled, its regulatory stance that Stormans must capitulate to the Planned Parenthood agenda.[4] Rather, the State of Washington gratuitously has adopted Planned Parenthood's position in a moral debate: that facilitating abortion is a moral imperative deserving of Petitioners' approbation, instead of Petitioners' condemnation that an abortifacient drug is a moral wrong, "destroying human life." Under the free exercise guarantee of the First Amendment, however, the State has absolutely no jurisdiction to use its power to promote one side of that debate at the expense of the other.

B. By Taking Sides in a Moral Debate, Washington State Has Prohibited Petitioners' Free Exercise of Religion.

Since Reynolds v. United States, 98 U.S. 145 (1878), this Court has drawn on the Virginia legacy of

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[4] These *amici* note, however, that, even if the Commission had asserted some governmental interest in increasing access to these abortifacients, it was without legitimate authority to use state occupational licensure laws to compel any Washington pharmacy to carry these drugs.

James Madison and Thomas Jefferson to understand the principles and reach of both religion guarantees of the First Amendment. In Reynolds, the Court endorsed Madison's proposition that religion was a jurisdictional term, defining those duties that "'we owe the Creator'" that are outside the "cognizance of civil government." *Id.* at 162-63.

Thus, at the beginning of his famous Memorial and Remonstrance Against Religious Assessments, Madison quoted the definition of religion as it appeared in the 1776 Virginia Constitution: "that Religion [is] the duty which we owe to our Creator [when] the manner of discharging it, can be directed **only** by reason and conviction, not by force or violence."[5] Continuing, Madison explained that "[t]he 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." *Id.* Religion, Madison further explained, is an "unalienable right," and thus one's "opinions ... depend[] only on the evidence contemplated by their own minds [and] cannot follow the dictates of other men." *Id.*

Applying this general principle, Jefferson stated in the preamble of the Virginia Act Establishing Religious Freedom that "Almighty God hath created the mind free; [and] that all attempts to influence it by

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[5] *See* J. Madison, "Memorial and Remonstrance Against Religious Assessments," reprinted as item # 43 in 5 The Founders Constitution at 82 (P. Kurland & R. Lerner, eds.: Univ. of Chi.: 1987) (emphasis added).

temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness...."[6] Continuing, Jefferson asserted that "our civil rights have no dependence on our religious opinions [and] that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow-citizens he has a natural right." *Id.* "[I]t is time enough," Jefferson concluded, "for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order." *Id.*

Applying Madison's and Jefferson's principles of free exercise here, there is no question that the Washington State Governor and its agency, the Pharmacy Commission, undertook a mission to impose upon the Petitioners Planned Parenthood's political views on abortion. Additionally, it is unmistakable that the State has misused its power to regulate the sale and distribution of pharmaceutical drugs by denying Petitioners the privilege to engage in the pharmacy business unless Petitioners abandon their religious scruples. Indeed, the State has taken sides in the ongoing abortion debate by making it "illegal" for Petitioners to hold to the conviction "that life is sacred from the moment of conception" (Pet. Writ at 6)

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[6] *See* Virginia, Act for Establishing Religious Freedom (Oct. 31, 1785), reprinted as item # 44 in 5 <u>The Founders Constitution</u> at 84-85.

for no reason other than to squelch the debate. There is absolutely no evidence of Petitioners' convictions having caused, or even having threatened to cause, any physical or financial harm to anyone in the State, or otherwise engage in any act that justifies the State's exercise of its police power to promote the public health and safety.[7] Instead, the State has coercively demanded that Petitioners conform their religious and moral beliefs to those of a nongovernmental body dedicated to their demise.

At common law, Sir William Blackstone reminds us, the state has jurisdiction only to make the rules governing "civil conduct," not the rules governing "moral conduct," much less "the rule[s] of faith." 1 W. Blackstone, Commentaries on the Laws of England 45 (Facs. Ed., Univ. of Chi: 1765). As to the latter two kinds of rules, "[t]hese regard man as a creature, and point out his duty to God, to himself and, to his neighbour, considered in the light of an individual." *Id.* Even at common law, then, there is no room for the Washington State Governor or the Pharmacy Commission to seize any power over Petitioners to force them to renounce their convictions before God in obeisance to a totalitarian State.

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[7] The district court below assessed and rejected all the contrived "refusal stories" which were presented to the Commission in the rulemaking process. App.153-57a.

II. SHOULD THE NINTH CIRCUIT'S DECISION BE ALLOWED TO STAND, GOVERNMENT WILL BE EMBOLDENED TO POLITICIZE EVERY ISSUE AND COMPEL OBEDIENCE TO ITS POLITICAL VIEWS, LEADING TO THE DEVELOPMENT OF A TOTALITARIAN STATE.

The effort by Planned Parenthood to bring Stormans to heel is not an isolated skirmish, but rather is an important battle in an unfolding conflict between the Christian faith and an increasingly secular and coercive ruling culture. For the secular elites, objections to their efforts to impose their faith and morality on the American people based on constitutional barriers generally have fallen on deaf ears. The spirit of the age is that the State should not be constrained by mere parchment barriers from doing its will, for the presumed greater good. As historian and ethicist Professor Herbert Schlossberg explained:

> so "normal" do [the nation-state's] vast powers seem, that to read a document that seeks to limit severely the scope of those powers — even so recent a one as the Constitution of the United States — evokes a sense of great antiquity and strangeness. [H. Schlossberg, Idols for Destruction (Crossway Books: 1990) at 177.]

Here, the Pharmacy Commission has chosen between two conflicting moral codes. In conditioning a license to do business as a pharmacy on its acceptance of the political and moral views of Planned

Parenthood, the Commission is preferring one religious set of presuppositions over another. And, the notion that Americans must bow their knee to a government decision on matters of faith, morals and religion is a manifestation of the Hegelian view that "The State is the Divine Idea as it exists on earth ... We must therefore worship the State as the manifestation of the Divine on earth."[8] Schlossburg observed that, while few would associate themselves with Hegel's statement, many "advocate actions that can be logical inferences only from such a position. For them, the state is the only savior we can expect on earth.... The state ... has replaced God." Schlossberg at 178-79.

Walter Lippman asserted that laws must change because they are based on sentiments that "express the highest promise of the deepest necessity of these times."[9] Similarly, economist John Kenneth Galbraith articulated one of the unspoken premises of the Pharmacy Commission's ruling when he declared "the only reality is the right social purpose."[10] However, Schlossburg concludes that "[l]aws are always theologically based, whether or not they are so acknowledged." Schlossburg at 47. And, when laws are based on sentiments and right social purpose cut

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[8] Hegel, as quoted in Schlossberg at 178.

[9] Walter Lippmann, An Inquiry into the Principles of the Good Society (Little Brown: 1938), p. 324, as quoted in Schlossburg at 14.

[10] J.K. Galbraith, The New Industrial State (Houghton Mifflin: 1967) at 378, as quoted in Schlossburg at 193.

adrift from Christian presuppositions, the result is "**moral inversion**." Schlossberg at 181.

In this case, the Pharmacy Commission operates on an unstated religious axiom which elevates the right to kill one's baby over the baby's right to life. For some ruling elites, it is no longer enough that, due to the prior decisions of this Court, abortion is the order of the day.[11] And, the Commission's ruling demonstrates that, for some, even referrals to other pharmacies to obtain abortifacients is not enough. It is necessary that even those who oppose abortion become morally complicit participants in the act. Indeed, coercion of this sort is being manifest at all levels of government.

The federal government today exhibits little respect for the religious scruples of Americans. The manner in which the Department of Health and Human Services has implemented the Affordable Care Act compels the Little Sisters of the Poor[12] to become complicit in abortion by certifying the eligibility of its

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[11] It has been estimated by supporters of abortion rights that almost one-third of American women will have an abortion before age 45. https://www.guttmacher.org/media/presskits/abortion-US/statsandfacts.html.

[12] *See amicus* brief filed by many of these same *amici* in Zubik v. Burwell & Little Sisters of the Poor v. Burwell, Nos. 14-1418, 14-1453, 14-505, 15-35, 15-119 & 15-191. Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.* (filed Jan. 11, 2016). http://lawandfreedom.com/wordpress/wp-content/uploads/2016/01/Zubik-Little-Sisters- Amicus-Brief.pdf.

employees to receive abortion services.[13] Additionally, although Title VII of the Civil Rights Act of 1964 prohibits discrimination only based on "race, color, religion, sex, or national origin,"[14] on July 15, 2015, the Equal Employment Opportunity Commission took it upon itself to decide that discrimination based on sexual orientation is also prohibited by Title VII. *See* David Baldwin v. Dep't of Transportation, EEOC Appeal No. 120133080 (July 15, 2015).[15]

State governments also are joining in the action. California has enacted a law that went into effect on January 1, 2016, which compels healthcare facilities to provide pro-abortion materials and counseling. Known as the "Reproductive FACT Act," the law "require[s] a licensed covered facility, as defined, to disseminate a notice to all clients, as specified, stating, among other things, that California has public programs that

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[13] The Tenth Circuit has gone so far into the religious arena as to absolve the Little Sisters of the Poor of moral responsibility for such an act — as if judges had the authority to make such religious pronouncements. Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1174 (10th Cir. 2015).

[14] 42 U.S.C. §§ 2000e-2(a), 2000e-16(a).

[15] http://www.eeoc.gov/decisions/0120133080.pdf. *See also* EEOC, "Facts about Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, and Gender Identity," http://www.eeoc.gov/federal/otherprotections.cfm; EEOC, "What You Should Know About EEOC and the Enforcement Protections for LGBT Workers," http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

provide immediate free or low-cost access to comprehensive family planning services, prenatal care, and abortion for eligible women."[16]

The issue of abortion does not stand alone, but is just one part of the agenda of the religion of Secular Humanism,[17] which also embraces same-sex marriage and "rights" based on sexual orientation. The Pharmacy Commission's rules are just the tip of the iceberg of government efforts to condition making a living on deference to the morality of the ruling elite.

A. Practicing Law

Historically, every lawyer had the right to decide without any constraint or supervision whom he would represent.[18] Yet, **California** has adopted a rule undermining that practice, prohibiting lawyers from discriminating based upon sexual orientation "in ...

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[16] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB775.

[17] *See* Torcaso v. Watkins, 367 U.S. 488, 495, n.11 (1961). ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God, are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others.")

[18] *See, e.g.*, American Bar Association, Model Rules of Professional Conduct, Comment on Rule 6.2 ("A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant." The ABA uses "ordinarily" as a qualification because lawyers generally are required to do *pro bono* work.). *Accord* Massachusetts Rules of Professional Conduct, Rule 6.2; State Bar of Arizona Rules of Professional Conduct, Rule 6.2.

accepting or terminating representation of any client." California Rules of Professional Conduct, Rule 2-400(B)(2). Other states have not gone as far, but have adopted rules restricting lawyer discretion to engage in acts now banned as "sexual orientation discrimination," and the trend is certain to continue, imposing the morality of legal elites on lawyers in private practice. For example, the **New York** state bar states that "a lawyer or law firm shall not ... unlawfully discriminate ... on the basis of ... sexual orientation ... in the practice of law, including in hiring...." New York Lawyer's Code of Professional Responsibility, DR 1-102(A)(6) (emphasis added).

B. Practicing Medicine

In response to Roe v. Wade, many states incorporated "conscience clause" exemptions into state laws and medical codes of ethics.[19] Indeed, currently many medical schools do not even teach such practices, in which case those medical students who want to learn how to perform abortions generally obtain outside training.[20] However, there are many who would like to see this pattern reversed, to the point where, at least in certain circumstances, doctors would be forced to perform abortions. The American Congress for Obstetricans and Gynecologists, for example, is following the lead of Planned Parenthood, and is attempting to change government policy to put the coercive arm of the state behind its political views:

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[19] http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf.

[20] http://chronicle.com/article/As-States-Try-to-Curb/139831/.

> Providers with moral or religious objections should either practice in proximity to individuals who do not share their views or ensure that referral processes are in place. In an emergency in which referral is not possible or might negatively have an impact on a patient's physical or mental health, providers have an obligation to provide medically indicated and requested care.[21]

The UK-based Journal of Medical Ethics has gone so far as to claim that "physicians have an obligation to perform all socially sanctioned medical services, including abortions, and thus that the burden of justification lies upon those who wish to be excused from that obligation."[22]

C. Baking a Cake

The Colorado Civil Rights Commission has charged a bakery with discrimination against homosexuals for refusing to facilitate celebration of a same-sex wedding by baking a wedding cake. The creative theory employed was that the bakery constituted a place of public accommodation. That

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[21] http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/The-Limits-of-Conscientious-Refusal-in-Reproductive-Medicine.

[22] http://www.ncbi.nlm.nih.gov/pubmed/8731539.

case is pending on petition for *certiorari* to the Supreme Court of Colorado.[23]

D. Taking a Photograph

In 2013, the New Mexico Supreme Court ruled that a wedding photographer could not refuse to photograph a same-sex wedding, without violating the state's anti-discrimination law. Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013). The legal theory was that refusing to photograph same-sex weddings constituted discrimination "because of" sexual orientation rather than discrimination "because of" the nature of the ceremony involved. This Court denied *certiorari* in that case. *Id.*, 134 S.Ct. 1787 (2014).

E. Becoming Common Laborers

From these developments, it can be observed that those who believe in an all-powerful state and an leftist ideology are systematically fashioning "politically correct" rules according to which no Bible-believing Christian will be able to practice a profession, or own a business, without subordinating his personal faith to the secular faith of the elites.[24] If

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[23] Some of these *amici* filed an *amicus curiae* brief in that case. *See* Masterpiece Cakeshop v. Craig, Brief of *Amici Curiae* U.S. Justice Foundation, *et al.* (Oct. 23, 2015), http://goo.gl/QLdXmw.

[24] Even if some do not discern a full-blown trend, there is still a need for concern, because as Madison counseled, " it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens and one of the

this trend is allowed to continue, the United States will in many ways resemble China and Eastern Europe under Communism, where Christians were not allowed to be licensed professionals or business owners, but were allowed to work as common laborers.

Much of the American elite could envision nothing worse than living in a nation where Christians enjoyed any degree of political power, for fear it would impinge their lifestyle choices.[25] However, if the trend illustrated above continues, coercive totalitarianism is coming to America not through any Christian doctrine, but through the government's implicit embrace of the religion of Secular Humanism, here being employed to put a Christian pharmacy out of business.

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noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle." 5 The Founders Constitution at 82.

[25] *See, e.g.,* A.F. Alexander, Religious Right: The Greatest Threat to Democracy (Blazing Sword Publishing: 2012).

CONCLUSION

For the reasons set out above, the petition for *certiorari* should be granted.

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