

Case Nos. 07-36039 & 07-36040

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

v.

MARK SELECKY, Secretary of the Washington State
Department of Health, et al.,
Defendants/Appellants,

And

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

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA
No. CV-07-05374-RBL

MOTION FOR LEAVE TO FILE BRIEF OF
THE AMERICAN ISLAMIC FORUM FOR DEMOCRACY,
THE SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND, AND
PROFESSOR DOUGLAS LAYCOCK AS *AMICI CURIAE*
IN SUPPORT OF APPELLEES' PETITION FOR REHEARING AND
FOR REHEARING EN BANC

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURAIE*

Pursuant to Federal Rule of Appellate Procedure 29 and to Ninth Circuit Rule 29-2, the American Islamic Forum for Democracy (“AIFD”), the Sikh American Legal Defense and Education Fund (“SALDEF”), and Professor Douglas Laycock respectfully move for leave to file the accompanying brief in support of the petition for rehearing and rehearing en banc.

The American Islamic Forum for Democracy (“AIFD”) is a not-for-profit, public policy research and human relations organization founded in 2003. AIFD was formed in order to serve as a vehicle for promoting the complete compatibility of America’s founding Constitutional principles and the very personal faith of Islam practiced by Muslims. AIFD’s formative ideology is based upon the central American principle which separates religion from government while promoting pluralism, equality, and the free expression of all faiths. These principles when promoted by American Muslims can serve as the most effective counter and ideological alternative to the dangers posed by Islamism or “political Islam.”

SALDEF is a national civil rights and educational organization. Its mission is to protect the civil rights of Sikh Americans and ensure a fostering environment in the United States for future generations of Sikh Americans. SALDEF seeks to empower Sikh Americans through advocacy, education, and media relations, and

participates as an *amicus curiae* in a wide variety of cases involving religious liberty.

Douglas Laycock is the Yale Kamisar Collegiate Professor of Law at the University of Michigan and the Alice McKean Young Regents Chair in Law Emeritus at the University of Texas at Austin. He has studied the law of religious liberty for more than thirty years; he has published more than sixty articles and an edited book on the topic. The William B. Eerdmans Publishing Company is publishing his collected writings on religious liberty in four thick volumes. He represented the church in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

The *amici curiae* submitting this brief take no position on the underlying dispute regarding the use of emergency contraceptives. But they are deeply concerned that, under the panel's decision, a court in the Ninth Circuit may not consider legislative history and context, no matter how compelling, when evaluating whether a governmental entity enacted a law for the purpose of discriminating against religious minorities. The *amici curiae* accordingly submit this brief to explain how the panel's decision conflicts with Supreme Court precedent, to highlight the adverse impact the decision will have on the liberties of religious minorities within the jurisdiction of the Ninth Circuit, to contrast the panel's decision with the decisions of other United States Courts of Appeals, and

to emphasize that this type of discriminatory law would not be permissible in the equal-protection or establishment context.

This motion for leave to file the accompany *amici curiae* brief should be granted.

Respectfully submitted.

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INTEREST OF *AMICI CURIAE*

The American Islamic Forum for Democracy (“AIFD”) is a not-for-profit, public policy research and human relations organization founded in 2003. AIFD was formed in order to serve as a vehicle for promoting the complete compatibility of America’s founding Constitutional principles and the very personal faith of Islam practiced by Muslims. AIFD’s formative ideology is based upon the central American principle which separates religion from government while promoting pluralism, equality, and the free expression of all faiths. These principles when promoted by American Muslims can serve as the most effective counter and ideological alternative to the dangers posed by Islamism or “political Islam.” AIFD is concerned that the panel’s decision here conflicts with the Constitution’s protection of the free exercise of religion.

The Sikh American Legal Defense and Education Fund (“SALDEF”) is a national civil rights and educational organization. Its mission is to protect the civil rights of Sikh Americans and ensure a fostering environment in the United States for future generations of Sikh Americans. SALDEF seeks to empower Sikh Americans through advocacy, education, and media relations, and participates as an *amicus curiae* in a wide variety of cases involving religious liberty. SALDEF is concerned that members of minority faiths, including Sikhs, will be adversely affected by the rule announced by the panel in this appeal.

Douglas Laycock is the Yale Kamisar Collegiate Professor of Law at the University of Michigan and the Alice McKean Young Regents Chair in Law Emeritus at the University of Texas at Austin. He has studied the law of religious liberty for more than thirty years; he has published more than sixty articles and an edited book on the topic. The William B. Eerdmans Publishing Company is publishing his collected writings on religious liberty in four thick volumes. He represented the church in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). He has a continuing interest in the proper interpretation and application of that decision in particular, and more generally, in a workable and enforceable interpretation of the Free Exercise Clause.

The *amici curiae* identified above submit this brief pursuant to the attached motion for leave to file an *amici curiae* brief.

INTRODUCTION

The *amici curiae* submitting this brief take no position on the underlying dispute regarding the use of emergency contraceptives. But they are deeply concerned that, under the panel's decision, a court in the Ninth Circuit may not consider legislative history and context, no matter how compelling, when evaluating whether a governmental entity enacted a law for the purpose of discriminating against religious minorities.

The regulations at issue in this case arose, according to the district court’s opinion, out of Washington State’s open, concerted effort to prohibit pharmacists and pharmacies from freely exercising their religious convictions, specifically, the right to decline to dispense emergency contraceptives. Looking at the evidence available at the preliminary-injunction stage, the district court concluded that “the overriding objective of the subject regulations was, to the degree possible, to eliminate moral and religious objections from the business of dispensing medication,” and “[f]rom the very beginning . . . the focus of the debate has been on Plan B and on religious objection to dispensing the drug.” *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245, 1259, 1260 (W.D. Wash. 2007).

The *amici curiae* do not know and take no position on whether the evidence will, after full examination, demonstrate that discrimination occurred here. But the panel’s approach—treating as irrelevant the allegations that the regulations were adopted for a discriminatory purpose—allows governments to achieve “neutrality” merely by drafting laws and regulations so they are facially neutral. Under the panel’s approach, a governmental entity can choose words to accomplish its object that do not expressly refer to religion, and a court must conclude that the law is neutral for purposes of the Free Exercise Clause, even if the evidence demonstrates that the entity intentionally designed the law to suppress religious exercise. This “text only” approach, which requires the Ninth Circuit to close its eyes to even the

most overt efforts to intentionally discriminate based on religion, ignores the Supreme Court’s directive that “[f]acial neutrality is not determinative,” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). The approach also greatly reduces the Free Exercise Clause’s effectiveness within the Ninth Circuit, conflicts with decisions of other federal circuit courts, and treats free-exercise rights as inferior to equal-protection rights. This Court should grant rehearing *en banc*.

ARGUMENT

I. **The panel’s determination that facial neutrality ends a religious-discrimination inquiry cannot be reconciled with the U.S. Supreme Court’s directive in *Lukumi*.**

In *Lukumi*, the Supreme Court expressly “reject[ed] the contention . . . that [its free-exercise] inquiry must end with the text of the laws at issue.” 508 U.S. at 534 (Section II.A.1, opinion of the Court). To the contrary, the Court noted that “[t]here are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct.” *Id.* at 533. “Facial neutrality,” the Court explained, “is **not** determinative.” *Id.* at 534 (emphasis added). The Court was clear, even repetitive, on this point: “The Free Exercise Clause, like the Establishment Clause, extends **beyond** facial discrimination. . . . Official action that targets religious conduct for distinctive treatment **cannot** be shielded by mere compliance with the requirement of facial neutrality.” *Id.*

(emphases added). Because the record in *Lukumi* “compel[led] the conclusion that suppression of the central element of the Santeria worship service was the object of the [challenged] ordinances,” *id.*, the Supreme Court held that the ordinances, which were “**designed to persecute or oppress** a religion or its practices,” *id.* at 547 (Section IV, opinion of the Court) (emphasis added); *see also id.* at 559 (Souter, J., concurring in part and in judgment) (joining Section IV), were not neutral and violated the Free Exercise Clause. And, as the Petition for Rehearing correctly points out, the Court struck down one of the four challenged ordinances, even though it was facially neutral, specifically because of its history. *See id.* at 539–540; Pet. for Rehr’g En Banc at 10.

Despite all this, the panel here concluded that facial neutrality alone **is** outcome determinative. Expressly refusing to consider the extensive evidence that the regulations were “designed to persecute or oppress” religious convictions, *Lukumi*, 508 U.S. at 547, the panel concluded that it could not “consider the legislative history of the law,” *Stormans, Inc. v. Selecky*, 571 F.3d 960, 982 (9th Cir. 2009), and thus held that “mere compliance with the requirement of facial neutrality” could shield the State’s targeting of religious conduct, *see Lukumi*, 508 U.S. at 534. This holding directly contravenes the principles and holding of *Lukumi* and should be reversed. Fed. R. App. P. 35(a)(1) & (b)(1)(A).

II. The panel’s decision allows government officials to engage in open, targeted, and intentional discrimination against the exercise of religious beliefs by enacting laws that appear to be facially neutral.

By holding that legislative context is wholly irrelevant to assessing a law’s religious neutrality, the panel allows government officials to intentionally discriminate against particular religious groups through carefully crafted and facially neutral legislation. For example, under the panel’s approach, the Washington legislature could openly declare that the Amish are not welcome in Washington and announce its intent to preclude anyone who endorses Amish belief and practices from living in Washington. The legislature could then hold public hearings to devise ways that might accomplish that goal. Someone at the hearings might suggest that the religiously motivated refusal on the part of the Amish to drive automobiles could provide a facially neutral avenue for discriminating against the Amish, *see Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 877 (1990) (“[T]he ‘exercise of religion’ often involves not only belief . . . but the . . . abstention from[] physical acts,” including “abstaining from . . . certain modes of transportation.”), and the legislature could form a committee to examine that option. If its deliberations resulted in a facially neutral law that precluded any horses or horse-drawn vehicles from using any public road in Washington, that law would withstand a free-exercise challenge in the Ninth Circuit (no matter how great the burden it imposed on the Amish), even if each member of the legislature

and the governor publicly stated in unison that the law's sole purpose was to drive the Amish from the State. This hypothetical could be applied to any number of other religious groups; substitute Scientologists for the Amish and imagine a law precluding any counseling that involves the use of devices that measure electrical impulses, for example.

If the Amish were to object that “the law is not neutral” because “the object of [the] law is to infringe upon or restrict practices because of their religious motivation,” *Lukumi*, 508 U.S. at 533, and because the law was “designed to persecute or oppress [their] religion [and] its practices,” *id.* at 547, future panels of this Court would nonetheless be bound to look only to the law's text and would be precluded from “consider[ing] the legislative history of the law—its historical background, the events leading up to its adoption, and its legislative or administrative history, including [the] contemporaneous statements made by members of the decisionmaking body,” *Stormans*, 571 F.3d at 982. In the Ninth Circuit, then, a facially neutral law passed specifically to target religious beliefs as such is immune from First Amendment restrictions, despite the Supreme Court's recognition that “a law targeting religious beliefs as such is never permissible,” that it is simply “the **minimum** requirement of neutrality . . . that a law not discriminate on its face,” that “[f]acial neutrality is **not** determinative,” and that “[o]fficial action that targets religious conduct for distinctive treatment **cannot** be

shielded by mere compliance with the requirement of facial neutrality.” *Lukumi*, 508 U.S. at 533, 534 (emphases added).

III. Other circuits follow *Lukumi* and look to a statute’s historical context to determine whether the legislative purpose was to restrict the free exercise of religion.

In stark contrast to the panel’s approach here, other circuits, following the Supreme Court’s guidance in *Lukumi*, continue to examine historical background in free-exercise challenges.

For example, in *St. John’s United Church of Christ v. City of Chicago*, the Seventh Circuit followed *Lukumi* to determine whether the object of the law at issue was “to infringe upon or restrict practices because of their religious motivation.” 502 F.3d 616, 631 (7th Cir. 2007) (quoting *Lukumi*, 508 U.S. at 533). In 2002, the City of Chicago faced opposition to its plans to acquire property in an effort to expand and improve Chicago’s O’Hare International Airport. *Id.* at 621. The City sought assistance from the legislature, which enacted the O’Hare Modernization Act (OMA). *Id.* After the OMA’s enactment, St. John’s sued the City, alleging that the City’s proposal to condemn St. John’s cemeteries absent a compelling governmental interest and use of the least restrictive means violated the Free Exercise Clause. *Id.* at 622. The district court concluded that the OMA was constitutional on its face and found no indication that the City’s proposal was motivated by St. John’s religious affiliation. *Id.* at 624.

On appeal, the Seventh Circuit followed *Lukumi*'s directive to begin with the statutory text, namely the OMA's amendment of the Illinois Religious Freedom Restoration Act (IRFRA). *St. John's*, 502 F.3d at 632. The amendment provided in pertinent part: "Nothing in this Act [*i.e.*, IRFRA] limits the authority of the City of Chicago to exercise its powers under the O'Hare Modernization Act for the purposes of relocation of cemeteries or the graves located therein." *Id.* The Seventh Circuit, finding "nothing inherently religious about cemeteries or graves," concluded that the statute at issue was facially neutral and that the relocation of cemeteries did not, on its face, infringe on a religious practice. *Id.* at 632, 633.

But, like *Lukumi*, the Seventh Circuit's analysis did not end with the statutory text. The Seventh Circuit recognized that "[e]ven if a law passes the test of facial neutrality, **it is still necessary to ask whether it embodies a more subtle or masked hostility to religion.**" *Id.* at 633 (emphasis added). The Seventh Circuit explained that to answer that question, courts "must look at available evidence that sheds light on the law's object, including the effect of the law as it is designed to operate." *Id.*

St. John's alleged that the City targeted its rights when it asked the legislature, as part of the OMA, to amend IRFRA. *Id.* Accordingly, the Seventh Circuit considered whether there was evidence in the record that supported the claim that the City targeted religious institutions or practices. *Id.* The Seventh

Circuit noted that the fact that other religious cemeteries were not affected by the OMA “reinforces the proposition that the legislature had the nondiscriminatory purpose of clearing all land needed for O’Hare’s proposed expansion” and concluded that the statute at issue was a neutral law of general applicability. *Id.* at 634; *see also Lighthouse Inst. for Evangelism, Inc. v. City of Long Beach*, 510 F.3d 253, 275 (3d Cir. 2007) (concluding that a redevelopment plan was a neutral law because “there [was] no evidence that it was developed with the aim of infringing on religious practices”).

Moreover, after the Supreme Court’s decision in *Locke v. Davey*, 540 U.S. 712 (2004) (nothing “in the history” of the state constitution at issue “suggest[ed] animus toward religion”), other circuits have continued to examine historical background to determine whether legislative acts were motivated by religious animus. Although a discriminatory animus is not required to find a violation of the Free Exercise Clause,¹ “[p]roof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral.” *Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1145 (10th Cir. 2006); *see also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004) (“A rule that is discriminatorily motivated and applied is not a neutral rule of general applicability.”). Indeed, Justice Scalia, on whose judicial philosophy the panel in the present case relied so

¹ In *Lukumi* itself, all nine justices concluded that the ordinances were unconstitutional, despite the fact that only two justices relied on the evidence that they were adopted with a discriminatory motivation.

heavily, acknowledged in *Locke* that the Court does “sometimes look to legislative intent to smoke out more subtle instances of discrimination, but we do so as a *supplement* to the core guarantee of facially equal treatment, not as a replacement for it.” 540 U.S. at 732 (Scalia, J., dissenting) (citing *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999)).

The First Circuit in *Wirzburger v. Galvin*, for example, considered whether the passage of a provision of the Massachusetts Constitution in 1918 was motivated by an animus toward religion. 412 F.3d 271, 281 (1st Cir. 2005). The provision at issue (the “Religious Exclusion”) “prevent[ed] anyone from proposing new laws or constitutional amendments relating to religion through the popular initiative process.” *Id.* at 280. To show religiously motivated political action, the plaintiffs presented “significant evidence of animus against Catholics in Massachusetts in 1855,” the time a related constitutional amendment (the “Anti-Aid Amendment”) was passed. *Id.* at 281. Specifically, the plaintiffs relied on a statement made by the sponsor of the Anti-Aid Amendment “indicating that he would ‘protect the initiative and referendum against the religious fanatics and against the professional religionists.’” *Id.* The First Circuit did not simply ignore these statements, as the panel here would. Instead, it examined the historical background, including “the wide margin by which the Religious Exclusion was passed,” the presence of significant Catholic representation at the Constitutional

Convention in 1917 and 1918, and the lack of evidence that other legislators at the Convention acted from similar religious motivations. *Id.* at 281–82. As a result of this review of the legislative history, the First Circuit concluded that the passage of the Religious Exclusion was not religiously motivated. *Id.* at 282.

The approach of these Courts of Appeals is fully consistent with the fact that the Supreme Court continues to consider legislative history in certain contexts. For example, during this last term, every one of the nine justices, including Justices Scalia and Thomas, joined opinions that relied on legislative history. *See, e.g., Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1892–93 (2009) (majority consisting of Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer, relying on legislative history of federal criminal statute addressing aggravated identity theft); *Shinseki v. Sanders*, 129 S. Ct. 1696, 1704 (2009) (majority consisting of Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, and Alito, stating that “[l]egislative history confirms that Congress intended the Veterans Court ‘prejudicial error’ statute to ‘incorporate a reference’ to the APA’s approach”); *Ministry of Def. & Support for the Armed Forces v. Elahi*, 129 S. Ct. 1732, 1744 (2009) (majority consisting of Chief Justice Roberts and Justices Stevens, Scalia, Thomas, and Alito, stating: “And for those who, like Elahi, argue that the legislative history supports his reading of the statute, we point out that the history suggests that Congress placed the ‘notwithstanding’

clause in § 201(a) for totally different reasons, namely to eliminate the effect of any Presidential waiver issued under 28 U.S.C. § 1610(f) prior to the date of the TRIA’s enactment.”). Indeed, Justice Scalia would likely be shocked to learn from the panel that he won the ongoing debate over interpretive methods, albeit only in one area, in *Lukumi* in 1993. *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION 29–37 (1997) (arguing, four years after *Lukumi*, against the use of legislative history).

IV. The open hostility to religion that the panel’s decision appears to welcome would never be acceptable in the equal-protection or establishment context.

The panel, relying on the fact that two justices in *Lukumi* specifically objected to the use of legislative history (an objection the other seven justices did not join, Pet. for Rehr’g En Banc at 9 & n.1), stated that “the analysis of the legislative history” is “proper in the equal protection context” but not in the free-exercise context. *Stormans*, 571 F.3d at 981, 982 & n.13. But the same concerns that allow courts to consider the purpose of the law in the equal-protection and establishment contexts apply with equal force in the free-exercise context.

The Supreme Court has repeatedly noted in the context of the Religion Clauses that the First Amendment protects against hostility towards religion. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 846 (1995) (stating that “hostility to religion” could “undermine the very neutrality the

Establishment Clause requires”); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118 (2001) (warning that children might “perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum”); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“[T]he Constitution . . . affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”). The panel turns these warnings on their head and calls regulations “neutral” when adopted with open hostility towards religious beliefs and practices.

As the panel correctly noted, the Supreme Court has recognized that facially neutral laws enacted to discriminate based on race—*i.e.*, laws based on racial hostility—violate the Equal Protection Clause. In *Hunt v. Cromartie*, 526 U.S. 541 (1999), the Supreme Court held that “if it can be proved that the law was ‘motivated by a racial purpose or object,’” then **even a “facially neutral law . . . warrants strict scrutiny.”** *Id.* at 546 (emphasis added) (quotation omitted); *see also Locke*, 540 U.S. at 732 (Scalia, J., dissenting) (citing this passage favorably in a free-exercise case). Thus, if the hypothetical at the beginning of this brief replaced the Amish with a racial group and the legislature exhibited the same hostility towards that racial group, this Court would be bound to apply strict scrutiny and, unless the government were to present a sufficiently compelling interest, to strike the law. But the Constitution protects against discrimination

based on religion just as much as it does against discrimination based on race, and the panel's decision provides no reason, other than the previously unheralded victory of textualism in the free-exercise context, for treating rights to free exercise as second-class constitutional rights. The panel's decision must be corrected.

CONCLUSION

This Court should grant rehearing *en banc* to restore the protections of the Free Exercises Clause that the panel's decision has eroded and to address the important issues raised by the petition for rehearing. Alternatively, the panel should amend its opinion to allow future panels of this Court to properly consider the historical context when evaluating whether a law that burdens the free exercise of religion is truly neutral.

Respectfully submitted.

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CERTIFICATE OF SERVICE

Docket Nos. 07-36039 & 07-36040

I hereby certify that the foregoing *Amici Curiae* Brief has been electronically filed 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 August 10, 2009.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have caused the foregoing document to be mailed by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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