Nos. 12-35221, 12-35223

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

MARY SELECKY, et al.,
Defendants-Appellants,
and
JUDITH BILLINGS, et al.,
Intervenors-Appellants

On Appeal from the United States District Court for the Western District of Washington, Tacoma Division
Case No. 07-CV-05374-RBL (Honorable Ronald B. Leighton)

AMICI CURIAE BRIEF OF AIDS UNITED, DISABILITY RIGHTS LEGAL CENTER, GAY AND LESBIAN MEDICAL ASSOCIATION, LAMBDA LEGAL, LESBIAN HEALTH INITIATIVE OF HOUSTON, INC., MAUTNER PROJECT, NATIONAL CENTER FOR LESBIAN RIGHTS, NATIONAL CENTER FOR TRANSGENDER EQUALITY, NATIONAL COALITION FOR LGBT HEALTH, TRANSGENDER LAW CENTER, AND WORLD AIDS INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLANTS AND INTERVENORS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, all *amici* organizations are tax-exempt nonprofit organizations. None of the *amici* organizations issue stock or have any corporate parent.

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY

Amici represent a leading group of legal and public health rights organizations: AIDS United, Disability Rights Legal Center, Gay and Lesbian Medical Association, Lambda Legal, Lesbian Health Initiative of Houston, Inc., Mautner Project, National Center for Lesbian Rights, National Center for Transgender Equality, National Coalition for LGBT Health, Transgender Law Center, and World AIDS Institute. *Amici* are committed to ensuring equal and timely access to healthcare for lesbian, gay, bisexual, and transgender (LGBT) persons and people living with HIV. *Amici* file this brief with the consent of all parties pursuant to Federal Rule of Appellate Procedure 29(a).[1] *Amici* attach a more detailed description of each organization as an appendix to this brief. *See* Appendix A.

SUMMARY OF ARGUMENT

The Washington State Board of Pharmacy regulates the pharmacy profession to protect and promote the public health, safety and welfare of Washington residents. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1113-14 (9th Cir. 2009) (citing Wash. Rev. Code Ann. § 18.64.005). In April 2007, the Board passed rules

[1] Pursuant to Fed. R. App. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amici* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity—other than *amici*, their members, and counsel—contributed monetarily to this brief's preparation or submission.

regulating pharmacies' and pharmacists' ability to destroy or refuse to return an unfilled lawful prescription and obligation to deliver lawfully prescribed drugs or devices to patients in a timely manner. These new rules comply with the requirements of both the Free Exercise Clause and the Equal Protection Clause because they are neutral, generally applicable, and were not enacted with discriminatory intent.

None of the parties disputes that the new rules are facially neutral. As this Court has already determined, the new rules "ensure safe and timely patient access to lawful and lawfully prescribed medications." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1131 (9th Cir. 2009). The Board's purpose in enacting the new rules to promote and protect the health, safety, and welfare of Washington residents was not only legitimate, but compelling. Serious and, in some cases, life-threatening health consequences may arise from the denial of timely access to healthcare, including timely access to prescribed medications. Of particular interest to *amici,* lesbian, gay, bisexual and transgender ("LGBT") persons and people living with HIV or seeking medication to reduce the risk of acquiring HIV are especially likely to face denial of medications or other treatment. Significant research illustrates the serious negative health consequences of unequal access to healthcare for LGBT persons and people living with HIV, including (1) increased stress; (2) immediate health consequences for patients seeking time-sensitive treatment; (3) increased

stigma; and (4) increased mistrust toward healthcare professionals. This brief addresses the myriad ways in which a denial of healthcare—and denial of access to timely prescription medications in particular—can jeopardize the health, safety, and welfare of LGBT persons and people living with HIV, thus illustrating some of the compelling policy interests advanced by the new rules. It further discusses how creating an exception that would allow denial of care based on personal beliefs would have a particularly detrimental impact on LGBT persons and people living with HIV and would eviscerate the rules' purpose of ensuring safe and timely patient access to lawful and lawfully prescribed medications.

ARGUMENT

Defendants' opening brief shows how the district court's decision misapplied the relevant legal framework for analyzing a facially neutral law and therefore erroneously determined that the regulations in this case have a discriminatory impact and intent. Brief for Defendants at 27-35, *Stormans, Inc. v. Selecky*, Nos. 12-35221 & 12-35223 (9th Cir. Aug. 13, 2012). *Amici* submit this brief to supplement Defendants' arguments regarding the compelling, neutral, and non-discriminatory purposes and operation of the regulations by highlighting the negative impacts of denying access to healthcare, including lawfully prescribed medications, to LGBT persons and people living with HIV. The severe and enduring impact that denial of equal access to healthcare has on these communities

provides further evidence that the Board had legitimate, and indeed compelling, reasons for adopting the new rules that are neutral, generally applicable, and nondiscriminatory with respect to religious belief or practice.

I. THE BOARD HAD COMPELLING NONDISCRIMINATORY REASONS FOR SEEKING TO ENSURE THAT ALL CITIZENS, INCLUDING LGBT PERSONS AND PEOPLE LIVING WITH HIV, HAVE TIMELY ACCESS TO PRESCRIBED MEDICATIONS

The Washington State Board of Pharmacy regulates the practice of pharmacy and develops rules for dispensing, distributing, wholesaling, and manufacturing drugs and devices to protect and promote the public health, safety, and welfare of Washington residents. *Stormans, Inc. v. Selecky*, No. C07-5374RBL, Findings of Fact and Conclusions of Law [*hereinafter* "Findings of Fact"], at ¶¶ 9-10 (D. Wa. Feb. 22, 2012); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1113-14 (9th Cir. 2009) (citing Wash. Rev. Code Ann. § 18.64.005). Upon realizing that the pharmacy industry lacked clear authority regarding the destruction or confiscation of lawful prescriptions and refusals by pharmacists to dispense lawfully prescribed medication, the Board initiated a rulemaking process to address these issues. *Stormans*, Findings of Fact at ¶¶ 31-77; *Stormans*, 586 F.3d at 1114. The Board then adopted two new rules on April 12, 2007. *Stormans*, Findings of Fact at ¶ 62; *Stormans*, 586 F.3d at 1114. The first rule prescribes disciplinary action for an individual pharmacist who destroys or refuses to return an unfilled lawful prescription, who violates a patient's privacy, or who unlawfully

discriminates against, or intimidates or harasses a patient. *Stormans*, Findings of Fact at ¶ 101; *Stormans Inc. v. Selecky*, 844 F. Supp. 2d 1172, 1177 (W.D. Wash. 2012); *Stormans*, 586 F.3d at 1114 (citing Wash. Admin. Code § 246-863-095). The rule also creates a right of refusal for individual pharmacists who have a personal objection to dispensing certain medications. *Stormans*, 844 F. Supp. 2d at 1176-77; *Stormans*, 586 F.3d at 1116. The second rule requires pharmacies "to deliver lawfully prescribed drugs or devices to patients and to distribute drugs and devices approved by the U.S. Food and Drug Administration for restricted distribution by pharmacies . . . in a timely manner consistent with reasonable expectations for filling the prescription." *Stormans*, Findings of Fact at ¶¶ 101-03; *Stormans*, 844 F. Supp. 2d at 1176; *Stormans*, 586 F.3d at 1116 (citing Wash. Admin. Code § 246-869-010). Both this Court and the district court have determined that these rules are facially neutral. *Stormans*, 586 F.3d at 1130 (noting that the district court correctly concluded that the new rules are facially neutral as they make no reference to any religious practice, conduct, or motivation); *Stormans*, 844 F. Supp. 2d at 1188 (finding that the laws are facially neutral).

Consistent with its goal of protecting and promoting public health, safety, and welfare, the Board passed the new rules "to ensure safe and timely patient access to lawful and lawfully prescribed medications." *Stormans*, 586 F.3d at

1131. A vast body of research supports the Board's decision and demonstrates that safe and timely patient access to healthcare, including access to prescribed medications, is essential in promoting public health, safety, and welfare. This is particularly true for LGBT persons and people living with HIV. Research illustrates that a lack of access to healthcare, including lawfully prescribed medications, creates serious health consequences for LGBT persons and people living with HIV, including (1) increased stress; (2) immediate health consequences for patients seeking time-sensitive treatment; (3) increased stigma; and (4) increased mistrust toward healthcare professionals.

A. Limited Access To Healthcare Increases Stress and Negative Health Outcomes

Denial of healthcare is linked to negative health outcomes among minority communities. It is well documented that experiencing inequality increases stress, particularly among members of historically stigmatized groups. *See* Vickie M. Mays et al., *Race, Race-Based Discrimination, and Health Outcomes Among African Americans*, 58 Ann. Rev. Psychol. 201, 203-05 (2007) (discussing links between status-based inequality and stress). Indeed, members of stigmatized minority groups often suffer from elevated social stress levels referred to as "minority stress." Pamela J. Sawyer et al., *Discrimination and the Stress Response: Psychological and Physiological Consequences of Anticipative Prejudice in Interethnic Interactions,* 102 Amer. J. of Pub. Health 1020, 1020

(2012); Ilan Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 Psychol. Bull. 674, 675 (2003). This chronic social stress stemming from status-based prejudice and unequal access causes more serious harms than the stresses of daily living. Meyer, *supra,* at 676. Since LGBT people have historically faced severe stigma and inequality, stressors that continue to exist today, they have elevated rates of minority stress. *Id.* These minority stressors include being subjected to denial of rights, coping with social stigma, and, in certain cases, having to conceal one's identity due to the lasting effects of chronic encounters with continuous perceived discrimination in treatment. *Id.* at 680-81; *see also* Elizabeth A. Pascoe & Laura Smart Richman, *Perceived Discrimination and Health: A Meta-Analytic Review*, 135 Psychol. Bull. 531 (2009) (discussing the negative health effects of chronic stress related to inequality).

Studies have documented the negative impact of chronic stress due to disparate healthcare treatment. Minority stress has been linked to poor mental health outcomes. *See* Meyer, *supra*, at 679-90 (discussing research evidence on the prevalence of mental disorders in the LGBT community and attributing this excess in prevalence to minority stress). Minority stress also has been linked to a higher prevalence of depression, anxiety, and substance use among lesbians, gays, and bisexuals. *See, e.g.,* Katie A. McLaughlin et al., *Responses to Discrimination*

and Psychiatric Disorders Among Black, Hispanic, Female, and Lesbian Gay, and Bisexual Individuals, 100 Amer. J. of Pub. Health 1477, 1480 (2010). Respondents who had experienced unequal treatment within the year had greater odds of being associated with a psychiatric disorder. *Id.* at 1480-81.

Further, research shows that LGBT people also experience an increased risk of physical health problems due to minority stress. For example, in a 2011 report presented to the American Psychological Association, researchers found that LGB people who had experienced prejudice-related events were three times more likely to have suffered a serious physical health problem over a one-year follow-up period than those who had not experienced such events. David M. Frost et al., *Minority Stress and Physical Health Among Sexual Minorities*, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Frost-Lehavot-Meyer-APA-2011.pdf (2011). The minority stress factor of concealing one's identity also can have detrimental effects on an LGBT individual's health. In a study tracking the progression of HIV in HIV-positive men, researchers found that men who concealed their sexual orientation experienced more rapid HIV progression than men who did not. Steve W. Cole et al., *Elevated Physical Health Risk among Gay Men Who Conceal Their Homosexual Identity*, 15 Health Psychol. 243, 248-49 (1996). Since the study controlled for factors such as medicine use, sexual behaviors, and health practices, the results suggested that the increased rate of HIV

progression was linked to the stress of having to conceal one's sexual orientation. *Id.* at 227-29. Such research regarding the effects of minority stress demonstrates how denial of access to lawfully prescribed medications can increase stress and negative health outcomes, particularly among members of historically stigmatized groups, including LGBT persons and people living with HIV.

B. Denial of Healthcare Creates Immediate Health Consequences for LGBT Persons and People Living with HIV When Seeking Time-Sensitive Treatment

While the Board need only demonstrate a rational basis related to a legitimate government purpose, the crucial importance of providing patients with timely access to medication evidences that the Board had important, and indeed compelling, reasons for promulgating these rules. Denying time-sensitive treatment, including time-sensitive medication, not only can cause many serious health consequences, but can lead to imminent death.

1. Denial of Time-Sensitive Medical Treatment Can Cause Death

Individuals exposed to HIV can seek post-exposure prophylaxis (PEP) to reduce the likelihood that they will contract HIV. Centers for Disease Control and Prevention, *Antiretroviral Postexposure Prophylaxis After Sexual, Injection-Drug Use, or Other Nonoccupational Exposure to HIV in the United States*, *available at* www.cdc.gov/mmwr/preview/mmwrhtml/rr5402a1.htm (2005) (last accessed August 29, 2012). Prompt access to PEP is likely to significantly decrease the risk

of acquiring HIV. *Id.*; *see also* Miriam Rabkin, *HIV in Primary Care, available at* http://www.medicineclinic.org/ AmbulatorySyllabus/NEW%20HIV.htm; *see also* Miriam Rabkin, *HIV in Primary Care, available at* http://www.medicineclinic.org/AmbulatorySyllabus/NEW%20HIV.htm (explaining that it is likely PEP would significantly reduce the risk of HIV for people who inject drugs). An exception permitting pharmacists to deny this time-sensitive medication based on a personal belief condemning same-sex sexual activity or other conduct that may lead to transmission of HIV would negatively affect LGBT people. It would also affect non-LGBT people, including people who use drugs or engage in other conduct that may create a risk of contracting HIV who seek time-sensitive PEP from a pharmacist with a personal belief against people who engage in those behaviors. In fact, a pharmacist with a personal belief that sexual activity outside of marriage violates his or her religion could theoretically deny critical PEP medication to anyone who fears contracting HIV after sexual activity outside marriage. A pharmacist with personal beliefs against someone who is LGBT, uses drugs, or engages in other conduct that may create a risk of contracting HIV may also rely on such beliefs to attempt to justify denying time-sensitive non-prophylactic HIV medication.

LGBT persons seeking medical treatment other than PEP may also be denied important time-sensitive and life-saving healthcare based on a healthcare

professional's personal belief. In 1995, Tyra Hunter, a transgender woman, bled to death after paramedics halted emergency treatment for her serious injuries resulting from an automobile accident when they discovered she was transgender. *See* Anne C. DeCleene, *The Reality of Gender Ambiguity: A Road Toward Transgender Health Care Inclusion*, 16 Law & Sexuality 123, 137 (2007). In 2001, Robert Eads, a transgender man, was refused treatment by twenty doctors after being diagnosed with cervical and ovarian cancer. *Id*. Importantly, many transgender people report serious problems in accessing prescribed pharmaceuticals and delaying or failing to obtain medications due to fear of encountering hostility or bias. Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 5 (2011), *available at* http://transequality.org/PDFs/NTDS_Report.pdf [hereinafter "*Injustice at Every Turn*"] ("19% of our sample reported being refused medical care due to their transgender or gender non-conforming status[.]"); *see also* Maine HIV Prevention Community Planning Group, *HIV Risk Among Transgender People in Maine* 14 (2003), *available at* http://mehivcpg.org/Trans%20rprt%20finl.pdf (noting comments from focus group participants that "sometimes pharmacies are not cooperative with needle sales," "local pharmacists will not fill needle prescriptions … I'm glad I have resources such as a car and money"). A transgender woman in California noted that she was treated like a "criminal deviant" when picking up her

hormone medication and that her pharmacist told her this was "not a normal prescription" and stated "I don't know if I should be a part of this."). *See* Humboldt Herald, *Transgender discrimination at McKinleyville Rite Aid* (Sept. 1, 2009) *available at* http://humboldtherald.wordpress.com/2009/09/01/transgender-discrimination-at-mckinleyville-rite-aid (last visited August 30, 2012).

In sum, a pharmacist who denies time-sensitive medication, including post-exposure prophylaxis and HIV-related medication, based on a personal belief about the person seeking the medication, may cause immediate and life-threatening health consequences for that person.

2. Denial of Time-Sensitive Medical Treatment Can Exacerbate the Underlying Condition for Which Treatment Was Sought

Even when denial of time-sensitive treatment is not fatal, it can lead to other severe consequences, including exacerbating the underlying condition that prompted a patient to seek treatment. This can be especially dangerous for patients living with HIV, whose survival depends on effective medical treatment. Patients with HIV are particularly susceptible to sudden declines in health, and denial of or substandard treatment puts them at special risk. In *Woolfolk v. Duncan,* a recently diagnosed HIV-positive man described being treated "like an outcast" after informing his primary care physician of his status. 872 F. Supp. 1381, 1386-87 (E.D. Pa. 1995). Though the physician—disclaiming the knowledge and skill to treat someone with HIV—said that he would refer the plaintiff to an infectious

disease specialist, he never did. *Id.* at 1386. Later, when the plaintiff sought treatment for sudden lower chest pain, the doctor's inattentiveness to his medical needs and refusals to authorize emergency room treatment allegedly resulted in emergency admittance to the hospital for nearly two weeks with gastrointestinal hemorrhaging, pneumonia, a staph infection, and an AIDS diagnosis. *Id.* at 1386-87.

For patients with HIV, missing as few as two doses of medication can have a significant impact on maintenance of proper medication levels. *See generally* R.J. Smith, *Adherence to Antiretroviral HIV Drugs: How Many Doses Can You Miss before Resistance Emerges?*, 273 Proc. Royal Soc'y B 617, 621 (2006). Their dependence on pharmacists and other healthcare professionals to provide timely treatment means that it is critically important that they be afforded timely access to medications without bias or judgment.

3. Denial of Time-Sensitive Medical Treatment Can Prolong Painful Conditions

Lack of treatment can also result in severe and prolonged pain for patients. In emergency situations, when time is a factor for both healthcare professionals and patients, health professionals may nevertheless delay or refuse patients with whom they are uncomfortable. Transgender and gender non-conforming patients bear the brunt of this discomfort. For example, while 19% of transgender individuals report being refused medical treatment due to their gender identity,

expressly disclosing their gender identity results in the rate of denial rising to 23%. *See Injustice at Every Turn* at 74-75. Furthermore, many transgender individuals report being refused emergency room treatment when it is discovered that they are transgender, even when rushed to the hospital by ambulance with severe injuries. In a recent report, one transgender woman reported that she was forced to wait two hours in the emergency room without treatment for injuries sustained from a fall on ice after her healthcare provider discovered her breasts beneath her masculine attire. *Id*. at 73.

Even in non-emergency situations, transgender patients who are unable to access care because of adverse treatment based on their gender identity may suffer months or even years of pain as a result. Jaime M. Grant et. al., Nat'l Gay and Lesbian Task Force & Nat'l Center for Transgender Equality, *National Transgender Discrimination Survey: Public Use Data Set* (2011) (on file with authors) [hereinafter "*NTDS Public Use Data Set*"]. Denial of healthcare services can be especially painful in the context of sexual and reproductive health problems, which transgender patients are equally, if not more, at risk for than the general population, including HIV infection,[2] unplanned pregnancy,[3] sexual assault,[4] and

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[2] Transgender individuals face four times the rate of HIV infection as the general population. Centers for Disease Control and Prevention, *HIV Among Transgender People* (2011), *available at* http://www.cdc.gov/hiv/transgender/pdf/transgender.pdf (last visited August 13, 2012).

delay of preventative reproductive healthcare due to negative experiences with medical professionals.[5] One transgender man reported "living with excruciating pain in my ovaries because I can't find a doctor who will examine my reproductive organs." *See Injustice at Every Turn* at 77.

People with HIV are also highly susceptible to prolonged painful conditions if denied treatment based on their HIV status. In *Rose v. Cahee*, a woman with HIV was diagnosed with gallbladder disease and referred for surgery after suffering painful gall stones for months. *Rose v. Cahee*, 727 F. Supp. 2d. 728, 733-34 (E.D. Wis. 2009). After discovering her HIV status, however, the surgeon refused to perform the operation. *Id.* at 734. While finding another doctor and scheduling a second procedure, she was forced to endure nearly three months of excruciating pain during intermittent flare-ups of her condition that could have been eliminated if she had received prompt medical attention. *Id.* at 734-35. Depriving patients of timely access to necessary medical treatment can prolong or intensify painful conditions and directly cause unnecessary suffering.

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[3] S. Reisner, B. Perkovich & M.J. Mimiaga, *A Mixed Methods Study of the Sexual Health Needs of New England Transmen Who Have Sex with Nontransgender Men,* 24 AIDS Patient Care & STDS 501, 510 (2010).

[4] Transgender individuals face up to a one in two chance of being sexually assaulted. *See* Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 Aggression & Violent Behavior 170, 172 (2009) (citations omitted).

[5] *See supra*, this section.

C. Healthcare Denial Exacerbates the Effects of Stigma on LGBT Persons and People Living with HIV

Healthcare professionals, including publicly licensed pharmacists, who refuse to treat LGBT persons and patients living with HIV for reasons of personal discomfort perpetuate a stigma that can, itself, have dangerous consequences. The Centers for Disease Control and Prevention ("CDC") cite sexual orientation-based and HIV-related stigma as social determinants of health directly linked to the persistence of the epidemic. *See* Press Release, Centers for Disease Control and Prevention, *New CDC Campaign Fights Stigma and Apathy Fueling HIV Epidemic* (July 16, 2012), *available at* http://www.cdc.gov/nchhstp/newsroom/LetsStopHIVTogether2012-PressRelease.html (last visited August 13, 2012) [hereinafter "*CDC Press Release*"]. Both the National HIV/AIDS Strategy[6] and the CDC's HIV Prevention Strategic Plan cite stigma as one of the primary barriers hindering progress toward

[6] The White House Office of National AIDS Policy, *National HIV/AIDS Strategy for the United States* 36 (2010), *available at* http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf ("Working to end the stigma and discrimination experienced by people living with HIV is a critical component of curtailing the epidemic. The success of public health policy depends upon the cooperation of the affected populations. People at high risk for HIV cannot be expected to, nor will they seek testing or treatment services if they fear that it would result in adverse consequences of discrimination. HIV stigma has been shown to be a barrier to HIV testing and people living with HIV who experience more stigma have poorer physical and mental health and are more likely to miss doses of their medication.").

reducing HIV infections. Centers for Disease Control and Prevention, *CDC HIV Prevention Strategic Plan* 112 (2007), *available at* http://www.cdc.gov/hiv/resources/reports/psp/pdf/psp.pdf. A recent report noted that 45% of Americans report discomfort with the idea of having their food prepared by someone who has HIV, 36% reported discomfort with having a roommate with HIV, and 29% reported discomfort with the idea that their child's teacher has HIV, even after thirty years of public education that HIV is not transmitted through food preparation or sharing space with someone living with HIV. Kaiser Family Foundation, *HIV/AIDS at 30: A Public Opinion Perspective* 7 (2011), *available at* http://www.kff.org/kaiserpolls/upload/8186.pdf. This same report also noted that 29% of Americans agree that "it's people's own fault if they get AIDS," and 16% of Americans reported that they "sometimes think that AIDS is a punishment for the decline in moral standards." *Id.* at 8.

"[S]tigma remains a major barrier to HIV testing, condom use and other prevention strategies." *See CDC Press Release*, *supra*. Unfortunately, some healthcare professionals, including pharmacists, play a role in the perpetuation of stigma among LGBT people. According to a recent study in Colorado, 21% of all LGBT respondents—and 53% of transgender respondents—reported being refused services by healthcare professionals or their staff. One Colorado Education Fund, *Invisible: The State of LGBT Health in Colorado* 19 (2011), *available at*

http://www.one-colorado.org/wp-content/uploads/2012/01/OneColorado_HealthSurveyResults.pdf. Eighteen percent of LGBT people of color reported that discrimination on the basis of race or ethnicity kept them from seeking services often or sometimes. *Id.* at 9. A significant percentage of transgender respondents (11%) also reported having to travel more than 100 miles to seek services from an LGBT-friendly healthcare provider. *Id.* at 18.

Because of their position of trust and knowledge of the most private details of their patients' lives, healthcare professionals, including pharmacists, who perpetuate stigma by refusing services to LGBT persons and people living with HIV can cause more harm than others who discriminate.[7] Some health professionals put patients in dangerous situations and perpetuate harmful stigma based on their personal discomfort with a patient's sexual orientation, gender identity, or medical condition. For example, in a recent survey conducted by an

[7] Denials in health care settings can range from simple denial because of sexual orientation, gender identity, or HIV status to outright verbal assault. *See, e.g.*, Lambda Legal, *When Health Care Isn't Caring: LGBT People and People Living with HIV Speak Out* 2 (2010), *available at* http://data.lambdalegal.org/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf [hereinafter "*When Health Care Isn't Caring*"] ("We don't treat people like you."); *NTDS Public Use Data Set* ("At 15 I was beaten and raped and went to an emergency room where a 'doctor' told me that 'you can't rape a faggot.'"); *Injustice at Every Turn* at 84 (transgender patient reported the following statements from doctor: "I can't believe you are wasting my time. Do you know what your problem is? You just want to be a boy. You want to be a boy and that's never gonna happen so just do yourself a favor and get over it.").

LGBT advocacy organization, 25.7% of respondents living with HIV reported being blamed by healthcare professionals for their health problems, along with 12.2% of LGB respondents and 20.3% of transgender respondents. *When Health Care Isn't Caring* at 11.[8] Being blamed for one's health condition can further negatively affect an individuals' health. In fact, recent statistics on transgender people illuminate one of the most severe consequences of stigma. While the suicide attempt rate for the general population is 1.6%, the rate among transgender people is 41%. *Injustice at Every Turn* at 2. However, when a transgender person encounters mistreatment based on gender identity, the person's risk of attempting suicide rises to 58.8%, nearly forty times that of the general population. *Id. NTDS Public Use Data Set*. These alarming statistics highlight how denying medication to a transgender patient due to a personal belief about a patient's gender identity and/or decision to transition could have a devastating impact on a transgender patient's health.

In one troubling study, 45% of LGBT people reported that they had been denied care by a suicide prevention hotline because of their sexual orientation or

[8] This report states: "The respondents were not drawn from a random sample, but instead are people who chose to respond to the survey after it was promoted online and at events. The results are a rich and informative picture of the experiences of thousands of LGBT people and people living with HIV, but cannot be used to draw conclusions about the proportion of all LGBT people and people living with HIV who have had similar experiences."

gender identity. Equality California, LGBTQ Reducing Disparities Project, *First, Do No Harm: Reducing Disparities for Lesbian, Gay, Bisexual, Transgender, Queer and Questioning Populations in California* 119, 121 (forthcoming, on file with *amicus* NCLR). Additionally, 37% reported being denied counseling or therapy related to a gender transition, and 36% reported being denied couples or family counseling. *Id.* Furthermore, those most at risk for suicide frequently report mistreatment from the professionals they entrust with their mental health. *See, e.g.*, *Injustice at Every Turn* at 74 ("When I tried to kill myself and was taken to a suicide center, I was made fun of by staff and treated roughly."). These examples illustrate how even one incident of being denied access to healthcare can lead to negative health consequences, including a threat to physical safety.

D. Unequal Healthcare Access Creates Mistrust Toward Providers and Increases the Likelihood that Individuals Will Delay Necessary Treatment

Unequal access to healthcare can result in a general mistrust of healthcare professionals, which can deter some individuals from seeking treatment for immediate health problems or preventative care. *See* Ruqaiijah Yearby, *Does Twenty-Five Years Make A Difference in "Unequal Treatment"?: The Persistence of Racial Disparities in Health Care Then and Now*, 19 Annals Health L. 57, 59 (2010) (citing Janice Sabin et al., *Physicians' Implicit and Explicit Attitudes About Race*, 20 J. Healthcare Poor & Underserved 896, 907 (2009)) ("experiences of

discrimination in health care lead to delay in seeking care, an interruption in continuity of care, non-adherence, mistrust, reduced health status, and avoidance of the health care system"); Mary E. Clark et al., *The GLBT Health Access Project: A State-Funded Effort to Improve Access to Care*, 91 Amer. J. of Pub. Health 895 (2001) (noting that fear of inequality and stigma keep many LGBT persons from seeking care for themselves and family members). Delaying medical treatment can further increase one's risk of serious illness or death due to undetected disease. *See* Rudolf V. Van Puymbroeck, *Beyond Sex: Legal Reform for HIV/AIDs and Poverty Reduction*, 15 Geo. J. on Poverty L. & Pol'y 781, 790 (2008) (discussing how individuals who fear healthcare inequality may delay getting tested for HIV, which can lead to severely negative health consequences); Ruqaiijah Yearby, *supra*, 19 Annals Health L. at 59-60 (noting the correlation between the history of discrimination in accessing healthcare services and the poor health outcomes for African Americans).

Similarly, in a recent non-scientific survey, almost 56% of lesbian, gay, or bisexual respondents, 70% of transgender or gender non-conforming respondents, and 63% of respondents with HIV reported experiencing refusal of healthcare, refusal to touch or use of excessive precautions, harsh or abusive language, blame for their health status, or physical roughness or abuse by healthcare professionals. *See When Health Care Isn't Caring* at 5. These experiences contribute to a general

distrust of medical providers and increased likelihood of delaying treatment. *See* Jeff Krehely, Center for American Progress, *How to Close the LGBT Health Disparities GAP* 4 (Dec. 21, 2009), *available at* http://www.americanprogress.org/ wp-content/uploads/issues/2009/12/pdf/ lgbt_health_disparities.pdf (explaining that LGBT people are less likely to obtain timely treatment for fear of negative treatment and bias by healthcare providers).

LGBT people of color may be particularly prone to an increased mistrust of healthcare providers based on a long history of disparate treatment in healthcare. LGBT African Americans who grew up in an era of legalized "separate but equal" policies may be more hesitant to visit healthcare professionals due to past experiences at inadequate hospitals. Vernellia R. Randall, *Slavery, Segregation and Racism: Trusting the Health Care System Ain't Always Easy! An African American Perspective on Bioethics*, 15 St. Louis U. Pub. L. Rev. 191, 191-92 (1996) (noting that the history of abuse and inequality in the healthcare system has contributed to a fear and distrust of providers and treatment within the African American community); *see also* Sharon Voas, *Aging Blacks Sick, Scared Past Abuses, Tradition Keep Them From Clinic*. Pitt. Post-Gazette, at B1 (Aug. 27, 1995) (reporting failure of elderly African Americans to seek healthcare treatment due to negative memories of medical experiments lacking informed consent and substandard hospitals). One Colorado Education Fund, *supra*, at 9.

A history of inequality against Asian Americans and Latinos may lead to similar fears and distrust by LGBT Asian Americans and Latinos. *See* Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 Harv. C.R.-C.L. L. Rev. 1, 47 (1996) (noting that the history of "separate but equal" applied to Asian Americans); *see also Gong Lum v. Rice*, 275 U.S. 78 (1927) (approving of "separate but equal" education for Asian Americans).

This history of substandard healthcare for people of color is particularly problematic for people with HIV. In 2009, African Americans comprised only 14% of the U.S. population but approximately 44% of all new HIV infections. Centers for Disease Control and Prevention, *HIV Among African Americans* 1 (2011), *available at* http://www.cdc.gov/hiv/topics/aa/PDF/aa.pdf. "The HIV infection rate among Latinos in 2009 was nearly three times as high as that of whites." Centers for Disease Control and Prevention, *HIV Among Latinos* 1 (2011), *available at* http://www.cdc.gov/hiv/resources/factsheets/pdf/latino.pdf. A history of mistrust amongst the medical community means that many people living with HIV may be hesitant to obtain the proper treatment. For example, two men in California asserted that necessary dental treatment was delayed after a dental facility refused to provide treatment upon learning of their HIV status. *See Goodman & Ford v. Western Dental Services, Inc.*, Complaint ¶¶ 3-4, 25,

available at http://www.hivlawandpolicy.org/resources/view/297 (last visited Aug. (last visited Aug. 29, 2012). One of the men even attempted to extract his own tooth after being denied treatment. *Id.* at ¶ 17. This problem is further compounded by inadequate resources for testing and treatment in communities of color, which often include neighborhoods most affected by HIV and AIDS. Russell Robinson et al., Center for American Progress, *HIV/AIDS Inequality: Structural Barriers to Prevention, Treatment, and Care in Communities of Color: Why We Need a Holistic Approach to Eliminate Racial Disparities in HIV/AIDS* 2-3 (July 27, 2012), *available at* http://www.americanprogress.org/wp-content/uploads/issues/2012/07/pdf/hiv_community_of_color.pdf. In sum, LGBT persons and people living with HIV who encounter additional structural barriers based on race, ethnicity and class may be less likely to seek alternative sources for healthcare, including medication, if denied treatment by a healthcare professional such as a pharmacist, based on personal beliefs.

II. AN EXCEPTION BASED ON PERSONAL BELIEFS IS STARKLY DIFFERENT THAN BUSINESS-RELATED EXCEPTIONS FOR DENYING MEDICATION AND MAY HAVE SERIOUS NEGATIVE IMPACTS ON HEALTHCARE ACCESS FOR LGBT PERSONS AND PEOPLE LIVING WITH HIV

The district court erroneously determined that the State must have passed the new rules for discriminatory reasons, in part, because it permitted certain business exceptions for pharmacies to refuse to provide medications. *Stormans*, 844 F.

Supp. 2d at 1190 (noting that the rules are "riddled with exemptions for secular conduct, but contain no such exemptions for identical religiously-motivated conduct"). In particular, the court cited a number of exceptions in which a pharmacy can decline to stock a drug, including because: (1) it falls outside the pharmacies' chosen niche; (2) the drug has a short shelf life; (3) the drug is expensive; (4) the drug requires specialized training or equipment; (5) the drug requires compounding; (6) the drug is difficult to store; (7) the drug requires the pharmacy to monitor the patient or register with the manufacturer; (8) the drug has an additional paperwork burden; or (9) the pharmacy has a contract with the supplier of a competing drug. *Id.* at 1190. The district court also noted that a pharmacy can refuse to deliver medications because it declines to accept Medicare, Medicaid or a particular insurance. *Id.* However, there are significant differences between exceptions for personal beliefs and those based on business or logistical reasons.

First, an LGBT person who is refused medication because the pharmacist has personal or moral objections to that person suffers a direct adverse impact as a result of the refusal itself, as well as the denial of access to medication. The very act of treating someone differently because of his or her identity or health condition is inherently harmful and demeaning, independent of the tangible harm of being denied access to needed medications or services. Indeed, a major purpose

of laws requiring equal access to businesses and services is to "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250, 85 S. Ct. 348, 354, 13 L.Ed. 2d 258 (1964) (quoting S. Rep. No. 872, 88th Cong., 2d sess.); *see also Feurer v. Curators of Univ. of Missouri*, No. 4:06CV750 HEA, 2006 WL 2385260, at *2 (E.D. Mo. Aug. 17, 2006) (discrimination involves "inherent harms, such as stigma, insult, and the inability to receive the same opportunities as those who do not face discrimination").

Further, abundant evidence illustrates that an exception based on personal belief would be more detrimental to the public health, safety, and welfare than an exception based on business or logistical reasons. *See infra* Section I. As illustrated by the examples above, allowing personal objections based on identity increases stress and negative health consequences, stigma, mental health risks, and likelihood that patients will avoid or delay medical treatment in the future. A patient denied medication because it is too expensive for the pharmacy to stock experiences no effects aside from the immediate need to find an alternate source. However, a patient denied medication because the pharmacy or pharmacist disapproves of their reason for needing it, whether it be because they had unprotected sex and became pregnant or had unprotected sex and contracted HIV,

involves a judgment about the patient's own conduct, and, as shown above, such stigmatization creates further health risks in and of itself.

Second, an exception for personal belief would create serious barriers to healthcare access for LGBT persons and people living with HIV and other groups to which a pharmacy owner may harbor personal objections. Allowing an exception for personal beliefs will not only have an effect on patients' access to certain medications; it will impede certain patients' ability to access any type of medication at all. For example, a pharmacist who refuses to dispense medications to an HIV-positive because of a religious belief that people living with HIV are sinful could result in that pharmacist refusing to fill any prescription for that individual. Such a wholesale denial to an individual of access to any and all medications has a distinct, and far more severe, impact than the limited exceptions that permit pharmacy owners not to stock particular medications for business or safety reasons.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to reverse the district court's decision and hold that the Washington Board's new rules do not

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violate Plaintiffs' constitutional or statutory rights.

Dated: September 4, 2012

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. 29(d), 32(a)(7)(C) AND
CIRCUIT RULE 32-1 FOR CASE NUMBERS 12-35221 & 12-35223**

I certify that: (check appropriate option(s))

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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DATED this 4th day of September, 2012.

NATIONAL CENTER FOR LESBIAN RIGHTS

By /s/ Shannon P. Minter

Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE AND FILING

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 4, 2012.

I certify that all participants in the case are registered CM/ECF users and that services will be accomplished by the appellate CM/ECF system.

NATIONAL CENTER FOR LESBIAN RIGHTS

By /s/ Shannon P. Minter

Attorney for *Amici Curiae*

APPENDIX A

AMICI CURIAE

The mission of AIDS United is to end the AIDS epidemic in the United States through national, regional and local policy/advocacy, strategic grant-making, and organizational capacity building. With partners throughout the country, AIDS United works to ensure that people living with and affected by HIV/AIDS have access to the prevention and care services they need and deserve. AIDS United programs and initiatives include the development and implementation of sound public health policy in response to the HIV/AIDS epidemic. The organization works to advance policies that improve the quality of life and ensure access to treatment and care for all those living with HIV/AIDS.

The Disability Rights Legal Center is a national cross-disability organization that champions the rights of people with disabilities through education, advocacy, and litigation. The DRLC has particular expertise in health-related legal issues through programmatic focus on cancer and HIV/AIDS-related law and policy. Fundamental to championing the rights of people with disabilities, including people living with HIV or AIDS, includes the promotion of comprehensive, accessible healthcare and related services

The Gay & Lesbian Medical Association ("GLMA") is the world's largest and oldest association of LGBT healthcare professionals. GLMA was founded in 1981 in part as a response to the call to advocate for policy and services to address

the growing health crisis that would become the HIV/AIDS epidemic. Since then, GLMA's mission has broadened to address the full range of health issues affecting LGBT people, including ensuring that all healthcare providers provide a welcoming environment to LGBT patients and are competent to address specific health disparities affecting LGBT people.

Lambda Legal is the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual and transgender ("LGBT") people and those living with HIV through impact litigation, education and public policy work. Lambda Legal has a significant interest in the development and enforcement of religiously neutral rules that ensure patient access to medically appropriate care, regardless of sexual orientation, gender identity or HIV status. Lambda Legal's previous work to ensure health care fairness for LGBT and HIV positive people has included path-breaking court victories and policy work to eliminate discriminatory barriers to health care for the constituencies it serves.

The Lesbian Health Initiative of Houston (LHI) was founded in 1992. LHI's mission is to eliminate barriers to healthcare for Lesbian, Gay, Bisexual and Transgender identified-women. Through outreach programs for LGBT women and education initiatives for health care providers, LHI works to increase community visibility, knowledge of LGBT health care issues, and equal access to

health services. LHI advocates for inclusive health care practices on the local, state, and federal level.

Mautner Project, the National Lesbian Health Organization was founded in Washington D.C. in 1990. Its mission is to improve the health of women who partner with women including lesbian, bisexual and transgender individuals, through direct and support service, education and advocacy. Mautner Project supports efforts that promote better health outcomes for sexual minorities.

Founded in 1977, the National Center for Lesbian Rights (NCLR) is a national legal non-profit organization committed to advancing the civil and constitutional rights of lesbians, gay, bisexual, and transgender (LGBT) communities. NCLR has a strong interest in ensuring that LGBT people and people with HIV/AIDS have equal and timely access to necessary medications.

Founded in 2003, the National Center for Transgender Equality ("NCTE") advocates for policy reform at the federal level on a wide range of issues affecting transgender people, including access to health care. NCTE receives inquiries from thousands of transgender people and their loved ones each year, including many who face barriers in accessing health care.

The National Coalition for LGBT Health is committed to improving the health and well-being of lesbian, gay, bisexual, and transgender individuals and communities throughout the United States. Representing thousands of individuals

and over 80 organizations, including community health centers, advocacy organizations, academic/research institutions, grassroots organizations, faith-based institutions, the Coalition advances its mission through public education, coalition-building, and advocacy that focus on research, policy, education, and training.

The Transgender Law Center (TLC) is the leading national legal organization dedicated to advancing the rights of transgender and gender nonconforming people. TLC works to change law, policy, and attitudes so that all people can live safely, authentically, and free from discrimination regardless of their gender identity or expression. TLC opposes any denial of medical services, including pharmacy refusals based on personal bias.

The World AIDS Institute strives to document and preserve the global history of AIDS, to inspire action today to improve the lives of people living with HIV and AIDS, and to strengthen the spectrum of innovative initiatives to find a cure. The World AIDS Institute supports unimpeded access to live-saving HIV/AIDS medications.