**No. 07-36039, 07-36040**

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

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

**v.**

**MARY SELECKY, Secretary of the Washington State Department of Health, *et al.***
*Defendants-Appellants,*

**v.**

**JUDITH BILLINGS, *et al.*,**
*Defendant-Intervenors-Appellants*.

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**On Appeal from the United States District Court**
**For the Western District of Washington**

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# BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of Plaintiffs–Appellees
Supporting Affirmance

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## FRAP RULE 26.1 DISCLOSURE STATEMENT

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## INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation upon which America was built. The NLF and its donors and supporters–including those residing in the State of Washington–are concerned with the outcome of this case because of the effect it will have on First Amendment liberties and the freedom of conscience retained by pharmacists.

This Brief is filed pursuant to consent by all parties.

## SUMMARY OF THE ARGUMENT

Former state Senator Talmadge and a group of current and former state senators and representatives filed a brief *Amici Curiae* in this case alleging that Appellee's Equal Protection argument should be dismissed for three reasons based on statutory analysis. However, each of their three reasons is fundamentally flawed, and their argument should not be given any weight. The statutes at issue recognize and attempt to strike a balance between the fundamental rights of free exercise of religion and of conscience, and the right of individuals to receive health care under the terms provided for under their contract and by statute. Wash. Rev. Code §§ 48.43.065, 70.47.160 (2004). Your *Amicus* makes four arguments that Appellees do not make. First, *Amicus* will show that Senator Talmadge misconstrued the terms of the statutes. Second, *Amicus* will show that Senator

Talmadge misunderstood the context of the statutes. Third, *Amicus* will show that Senator Talmadge misunderstood the intent of the statutes. *Amicus* will also argue that, assuming *arguendo* that the Board of Pharmacy of the state of Washington had a compelling state interest in promulgating the regulation, it was not narrowly tailored.

Senator Talmadge's first mistake was when he discussed the fact that the Legislature intended to merely recognize the fundamental rights of free exercise and of conscience, and not to create any new rights. His error was in overemphasizing that point, and not realizing that the statutes recognized two different types of rights, two constitutional right and one statutory right. He further compounded this mistake by consistently asserting that the Appellees were arguing that the Legislature had created new rights under the statutes, which they did not. Furthermore, the controversy that Senator Talmadge created over the recognition of rights, rather than the creation of rights, is merely a matter of semantics. By striking a balance between fundamental rights and statutory rights, the Legislature has created a statutory means to protect those pre-existing rights. This would violate the Equal Protection Clause because the regulation passed by the Board of Pharmacists seeks to deny pharmacists the same fundamental right of conscience that the statutes recognized and afforded to other individual health care providers. Senator Talmadge also incorrectly asserted that the Appellees argued that the right

of conscience would trump the statutory rights under the statutes. Senator Talmadge further confused the issue when he raised the third subsection of the statutes, which are inapplicable and not even mentioned by the Appellees.

Senator Talmadge's second error was in arguing that the statutes were narrower than they really are. Senator Talmadge claimed that the statutes only applied in a narrow set of circumstances. However, that claim is made up out of whole cloth. None of the citations that Senator Talmadge provided for this assertion support his claim. Furthermore, by the plain text of the statutes, at the very least, Appellees Mesler and Thelen were intended to be within the class of health care providers whose fundamental rights of free exercise and of conscience the Legislature intended to strike.

Senator Talmadge's third error was in reading what he considered to be a narrow exception within the statutes directly out of them. He accused the Appellees of arguing that their rights should trump those covered by the statutory rights, and then he asserts that the statutory rights trump the fundamental rights. His third argument distorts the balance the Legislature intended to strike between the competing rights, and would deny the fundamental rights recognized by the statutes, because it solely focuses on the statutory rights under the statutes. Appellees Mesler and Thelen are clearly intended to be protected under the plain text of the statutes, and Senator Talmadge seeks to exclude them.

Additionally, your *Amicus* argues, assuming *arguendo* that the regulation in this case was supported by a compelling state interest, rather than a important or legitimate interest, that it is not narrowly tailored. After the Board of Pharmacy had voted to start drafting a regulation that provided for a right of conscience, it received severe political pressure, and promptly changed its position. Under the regulation that was adopted, the Board of Pharmacy provides no effective right of conscience to pharmacists. However, the Board of Pharmacy had no real concern regarding the availability of Plan B, because, as the District Court noted, the vast majority of pharmacies carry Plan B, and the Board of Pharmacy had already drafted a regulation providing for a right of conscience. Furthermore, the Board of Pharmacy knows what narrowly tailoring looks like, because, as will be discussed in your *Amicus's* first section, the Legislature already struck a balance between health care providers and patients covered by insurance providing for a conscientious objection.

## ARGUMENT

### I. THE ANALYSIS OF THE RIGHT OF CONSCIENTIOUS OBJECTION CONTAINED IN THE *AMICI BRIEF* FILED BY FORMER SENATOR TALMADGE AND OTHERS IS INCORRECT BECAUSE IT MISCONSTRUED THE TERMS OF THE STATUTES, MISUNDERSTOOD THE CONTEXT OF THE STATUTES, AND MISUNDERSTOOD THE INTENT OF THE STATUTES.

Following a period of national attention, the Washington Board of Pharmacy issued a regulation that effectively excluded a right of conscience for pharmacists

who could not fill Plan B prescriptions because of their religious convictions. *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245, 1251 (W.D. Wash. 2007). Following the enactment of that regulation, Plaintiffs-Appellees challenged them below. In their Motion for Preliminary Injunction, Plaintiffs-Appellees discussed, among other things, how the legislature recognized the fundamental rights of free exercise of religion and of conscience in two statutes. Mot. Prelim. Inj. at 16, *Stormans, Inc. v. Selecky*, No. 07-5374 (W.D. Wash. Aug. 10, 2007). One of those statutes is in the chapter governing the health insurance reform, Washington Revised Code § 48.43.065 (2004), and the other is in the chapter covering basic health care plans for low-income people, Washington Revised Code § 70.47.160 (2004). These statutes, §§ 48.43.065 and 70.47.160 (hereinafter Statutes), are word-for-word identical, except for the provisions within each statute establishing whose rights would be protected in the respective Subsections (1). One of the arguments that Appellees presented in their Motion for Preliminary Injunction was that the Board was denying pharmacists the same fundamental right that other health care professionals enjoyed in contravention of the two statutes, and that denial was a violation of the Equal Protection Clause.

In their *Amici* Brief, former Senator Talmadge and others (hereinafter Talmadge) believed that Appellees' argument could be dismissed through statutory analysis, and gave three reasons to do so. However, each of the three reasons is

fundamentally flawed. As will be discussed below, Talmadge is correct that the Insurance Statutes only *recognized* the "fundamental right to exercise [] religious beliefs and conscience," §§ 48.43.065, 70.47.160, and do not *create* any rights. The purpose of the Statutes are to balance pharmacists' fundamental right of free exercise and of conscience with the right of people enrolled in programs covering "basic health plan services" to receive those services. *Id.* However, throughout his brief, Talmadge consistently treats the balance as favoring the statutory right to health care, and treats the fundamental right of religious exercise and conscience as less important. This is not the balance the Legislature struck.

This section of the Brief will examine each of Talmadge's arguments in turn. This section will explain, first, that Talmadge has misconstrued the terms of the Statutes, distorting the balance struck by the Legislature. This section will explain, second, that Talmadge misunderstood the context of the Statutes, as evidenced by his claim that they did not apply to the Appellees at all. Third and finally, this section will explain that Talmadge misunderstood the intent of the legislation, in that his reading of the balance struck would completely eliminate the protection offered to religious health care providers.

### A. Talmadge Misconstrued the Terms of the Statutes When He Discussed the Legislature's Intent to Strike a Balance that Includes the Right of Conscientious Objection.

Talmadge's first erroneous reason emphasized that the Statutes neither created nor expanded any rights, but merely recognized the conflicting rights and struck a balance between the two. While that statement is largely correct, he glossed over a significant fact in reaching his conclusion, that there are two different types of rights involved in this case. The first type includes the right to free exercise of religious belief and the right of conscience. These were recognized by the Legislature as fundamental rights. §§ 48.43.065, 70.47.160. The second type of right is the statutory right to receive the benefits of the basic health plan provided for under the statute. *Id.* *See also* (Br. for Philip Talmadge, *et al.*, as *Amici Curiae* supporting Defs.-Appellants 10). By emphasizing the legislature's recognition of these rights rather than the creation of them in the Statutes, Talmadge made it appear that this point was contested; however he erred in mischaracterizing Appellees' argument.

Talmadge claimed that Appellees argued that the Insurance Statutes created or expanded rights. (Br. for Talmadge 13-14.) Talmadge then emphasizes that the Statutes "merely *recognized* existing competing rights of individuals." (Br. for Talmadge 14 (emphasis in original).) However, Appellees did not argue that the Insurance Statutes created or expanded any new rights as Talmadge asserts. (Br.

for Talmadge 13-14.) Appellees very explicitly stated in their Motion for Preliminary Injunction below that the Legislature merely recognized the right of conscientious objection, and argued that the licensing regulations in the instant case violated the Equal Protection Clause for "deny[ing] this fundamental right of conscience" to pharmacists. Mot. Prelim. Inj. at 15-16.

This controversy that Talmadge has created is merely a matter of semantics. By *recognizing* the fundamental right of religion and conscience within the Statutes that sought to balance potentially conflicting rights, and then striking that balance, the Legislature has added *statutory protection* for these pre-existing rights. To the extent that the regulation in the instant case would attempt to restrict the fundamental rights of pharmacists in a manner contrary to the balance struck by the legislature, while other health care professionals are not being denied their rights, the regulation violates the Equal Protection Clause. *Id.*

Furthermore, Appellees did not argue that the right of conscience "trump[s] the overarching right of BHP enrollees" as Talmadge asserts. (Br. for Talmadge 15.) Nor do Appellees consider the statutes "in the absence of the competing and overriding interest of timely access to covered services." (*Id.* 16.) In fact, the Appellees had a standard operating procedure of referring patients who requested Plan B to nearby pharmacies who could fill the prescription, *Stormans, Inc.,* 524 F. Supp. 2d at 1249, Mot. Prelim. Inj. at 7. This is identical to the Statutes' method of

ensuring individuals receive the covered health care from health carriers. §§ 48.43.065(b), 70.47.160(b).

In his brief, Talmadge argued that the purpose of the statutes was to strike a balance between the "*recognized* existing competing individual rights." (Br. for Talmadge 14 (emphasis in original).) However, as discussed above, neither Appellees nor your *Amicus* contest that claim. Talmadge's error was in the conclusion that he drew from that balance. As noted above, he criticized the Appellees for emphasizing the right of conscientious above the rights of the enrollees, (*Id.* at 15), which they did not do. At the same time, however, he attempted to trump the rights of health care providers though his quotation of the Statutes. In his brief, Talmadge "quotes" the applicable section as follows:

> (2)(a) No individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstances to participate in the provision of or payment for a specific service if they object to so doing for reason of conscience or religion. . . . .
>
> (b) The provisions of this section are not intended to result in an enrollee being denied timely access to any service included in the basic health plan . . . .

(*Id.* at 14, quoting § 70.47.160(2).) In eliding the section, Talmadge left out an important sentence of Subsections (2)(a). At the end of subsection (2)(a) there is an additional sentence that states "[n]o person may be discriminated against in

employment or professional privileges because of [their conscientious] objection."[1] §§ 48.43.065(2)(a), 70.47.160(2)(a). While the main purpose of the Statutes was to balance the competing rights, as discussed above, the Legislature also chose to prohibit discrimination against people who refuse to participate in specific services that would violate their conscience or religious belief. §§ 48.43.065(2)(a), 70.47.160(2)(a).

Furthermore, the Legislature has fashioned a method of protecting the fundamental rights of religion and conscience in the subsection covering health carriers in the respective statutes that will prove useful as an analogy. Section (b) of each of the Statutes provides a three step process for health carriers to ensure enrollees "timely access to any service" denied based on conscience or religious belief. §§ 48.43.065(2)(b), 70.47.160(2)(b). First, health carriers must provide written notice to the enrollee of services that the carrier refuses to cover, second, they must provide in writing instructions of enrollee can directly access those services, and third, when an enrollee is denied coverage for a specific service, the health carrier must provide the instructions from step two. *Id.* None of these requirements would force a person to violate his or her conscience or religious belief.

[1] While the term "professional privilege" is not defined in any statute, or in the case law, it likely refers to the ability to engage in the profession, in this case, to engage in the profession of pharmacy. *See* Wash. Rev. Code §§ 18.64.043, 43.70.280 (2008).

Finally, Talmadge concluded his discussion of the preexistence of the rights of conscientious objection by discussing Subsection (3) of each of the statutes. (Br. for Talmadge 15-16.) Subsections (3) of each statute dictates that those "with a religious or moral tenant opposed to a specific service" cannot be forced to "purchase coverage for that service" if it violates their conscience. §§ 48.43.065 (3)(a), 70.47.160(3)(a). At the same time, Subsections (3) prohibits an employee from being denied coverage that their employer objected to. §§ 48.43.065(3)(b), 70.47.160(3)(b). However, discerning how these conflicting mandates relate to each other is not important in this case, because Talmadge's discussion of them is a red herring. Subsections (3) of the Statutes are not applicable to this case because they specifically govern employer provided health plans. This case has nothing to do with purchasing health care coverage for another person. Appellees did not make any arguments based on Subsection (3) as Talmadge seems to imply, making it even more irrelevant to this discussion.

### B. Talmadge Misunderstood the Context of the Statutes When He Discussed the Legislature's Balancing of the Competing Rights and Asserted that the Statutes Are Restricted More Than They Are.

The Statutes apply directly to protect the fundamental rights, at the very least, of Appellees Mesler and Thelen in this case, because they are included within the narrow exception created by the balance that the Legislature established. Furthermore, the district court held that it could not protect the individual

Appellees for purposes of the preliminary injunction without also extending that protection to the pharmacies as well. *Stormans, Inc.*, 524 F. Supp. 2d at 1266.

The statutory language protecting the right of conscientious objectors provides that "[n]o individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstances to participate in the provision of or payment for a specific service if they object to so doing for reason of conscience or religion." §§ 48.43.065, 70.47.160.

Appellants fall within this narrow exception that the Legislature created in its careful balancing. Talmadge claims that "[t]his regulatory regime affects health care providers only to the extent that those providers are intimately connected with–or their services are driven by–regulated 'health carriers.'" (Br. for Talmadge 20-21.) However, that assertion is not supported by law, by rules of statutory construction, or by the basic rules of grammar. Talmadge offers no authority for this bald assertion that Appellees Melser and Thelen should not be protected by the Statutes, because they "affect[] health care providers only to the extent that those providers are intimately connected with–or their services are driven by–regulated 'health carriers.'" (*Id.*) The footnote at the end of his paragraph only defines health carriers. (*Id.* at 21.) It does not support his assertion that the Statutes only "affect[] health care providers to the extent that those

providers are intimately connected with . . . regulated 'health carriers.'" (*Id.* at 20-21.) As far as your *Amicus* can ascertain, this claim is made up out of whole cloth. Furthermore, the "intimately connected" language that Talmadge uses is derived from the definition of a health care *service contractor* in Titles 48. Wash. Rev. Code § 48.44.010(3) (2004). That definition is wholly inapplicable to Talmadge's assertion about Appellees.

Talmadge is also incorrect because the Statutes say "[n]o individual health care provider, religiously sponsored health carrier, *or* health care facility may be required by law or contract in any circumstances to participate in the provision of or payment for a specific service if they object to so doing for reason of conscience or religion." §§ 48.43.065(2)(a), 70.47.160(2)(a). (emphasis added). Under the rules of statutory construction, 73 Am. Jur. 2d *Statutes* § 156, and the basic rules of grammar, the "or" makes the three covered persons disjunctive, i.e., not dependent on each other. Therefore, individual health care providers, such as Mesler and Thelen, are protected independent of the fact that they are not a religiously sponsored health carrier or a health care facility.

Talmadge is also wrong on his reading of the law as to what an individual health care provider is. Pharmacies and pharmacists are not health carriers or health care facilities. Wash. Rev. Code § 48.43.005 (2004). However, at the very least, Appellees Mesler and Thelen are individual health care providers under

§ 48.43.005 (16)(a). Washington law defines a health care provider as "[a] person regulated under Title 18 or chapter 70.127 RCW, to practice health or health-related services," *id.*, and pharmacists are among those regulated under Title 18 to practice health or health-related services. Wash. Rev. Code §§ 18.64.002, 18.120 (2004). Furthermore, the definition of "person" specifically includes individuals. Wash. Rev. Code §§ 18.64.011, 48.01.070 (2004). Therefore, under a basic reading of the Statutes, at the very least,[2] Appellees Mesler and Thelen are included in the protected class covered by the Statutes, and fall within that narrow exception in the balance struck by the Legislature.

Despite what should have been a straightforward application of statutory interpretation, Talmadge asserts that "[r]ather than regulating pharmacists or pharmacies, these statues regulate the insurance industry." (Br. for Talmadge 22.) That statement is wrong. The Statutes are included in the Insurance Reform Acts because that is where they make the most sense. While the Statutes are in chapters that regulate insurance, they specifically cover individual health care providers. These provisions also include a prohibition on employers from discriminating

[2] As noted above, the district court held that it could not protect the individual Appellees for purposes of the preliminary injunction without also extending that protection to the pharmacies as well. *Stormans, Inc.*, 524 F. Supp. 2d at 1266.

against employees who refuse to participate in the provision of a specific service based on their religious conscience. [3]

To further compound that misunderstanding of the law, Talmadge then contends that "it is hard to see how statutes enacted as part of a regulatory regime covering *who pays* for health care services can be read to have any meaning in the context of *who is qualified to provide* health care services." (Br. for Talmadge 22 (emphasis in original).) The flaw in his reasoning is that the *statutes* explicitly state that they recognize both the rights of free exercise and of conscientious objection, and the right of enrollees to receive the coverage of their plan, and instructs the insurance commissioner to strike a balance between the rights of an insured and *the person who is to provide* that service. The short answer is that the statutes have a specific context-driven meaning, *because they specifically aim to protect the fundamental rights of individual health care providers*. Furthermore, assuming *arguendo* that this right of conscientious objection is limited to cases covered by health insurance or those provided with basic health care under Title 70, most of Appellees' patients will fit into those categories. In the United States, 58% of the population is covered by private health insurance that includes prescription drug benefits, typically paid for by an employer.[4] Another 12% is covered by Medicare which

[3] As noted above, Talmadge elided this critical sentence from his brief.
[4] Kaiser Family Foundation, *Prescription Drug Trends* 2-3 (May 2007), http://www.kff.org/rxdrugs/upload/3057_06.pdf. The source states that 60% of

includes prescription drug coverage under Part D or another program.[5] Finally another 18 % is covered by Medicaid, which includes prescription drug coverage,[6] meaning that approximately 88% of the United States population has prescription drug benefits under some form of health plan.[7] While these are nationwide figures, the State of Washington "has been a leader among the states in efforts to expand health insurance coverage,"[8] which means that Washington is more than likely on the upper range of the national average.

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Americans have health insurance through an employer provided plan, and that 98% of those have prescription drug benefits.

[5] *Id.* at 3. The source states that approximately 90% of Medicare recipients had some form of prescription drug coverage, and there were forty-two million Medicare recipients in the United States in 2007, Kaiser Family Foundation, *Medicare: A Primer* 18 (March 2007), http://www.kff.org/medicare/upload/ 7615.pdf, which means approximately thirty-eight million Medicare recipients were covered by drug coverage, comprising approximately 12% of the population which was estimated to be 300 million in 2007, *United States – Population Finder*, http://factfinder.census.gov/servlet/ SAFFPopulation?_submenuId=population_0 &_sse=on (last visited May 1, 2008).

[6] Kaiser Family Foundation, *supra* note 4, at 3. The source states that there are fifty-five million low income people covered by Medicaid, which comprises approximately 18% of the population. *United States – Population Finder*, *supra* at note 5.

[7] Because these figures are derived from three distinct categories, there is bound to be a certain amount of overlap, i.e., someone could be covered by Medicare and Medicaid at the same time for a limited period.

[8] John Holahan, Kaiser Family Foundation, *State Responses to Budget Crisis in 2004: An Overview of Ten States – Case Study – Washington*, 1 (2004), http://www.kff.org/medicaid/upload/State-Responses-to-Budget-Crisis-in-2004-Washington-Case-Study.pdf.

### C. Talmadge Misunderstood the Intent of The Statutes When He Read the Statutes in Such a Way as to Eliminate the Very Exception the Legislature Created.

Appellees fall within the exception created by the balance struck in the Statutes. Talmadge incorrectly asserts that including Appellees in this "narrowly crafted exception will swallow the rule." (Br. for Talmadge 22.) However, that is incorrect because Appellees fit perfectly in the narrowly crafted exception, set out in the Statutes, exactly as the Legislature intended.

To accept Talmadge's view would be to ignore the legislative intent to balance the interests, because it only focuses on the rights of the enrollees, and ignores the fundamental rights of the individual health care providers. Appellees and your *Amicus* do not argue that the rights of either should be ignored, but the proper recognition of the exception created by the Legislature to balance the rights of both should be followed. Furthermore, the interest of the state to see that people covered by health insurance are provided with all of the services covered by their plan is still being met as the Statutes prescribed. Appellees have standard operating procedures similar to the procedure the Legislature described in the Statutes, *Stormans, Inc.*, 524 F. Supp. 2d at 1248-49; that is, to notify customers that Plan B is not carried by the pharmacy, and inform them of nearby pharmacies where Plan B can be obtained. *Id.* at 1249. This procedure is more than adequate to allow timely access to Plan B because the majority of pharmacies carry Plan B.

*Stormans, Inc.*, 524 F. Supp. 2d at 1260. This compromise was designed by the Legislature to strike a balance between the fundamental rights of the health care providers (including pharmacists) and the statutory right of the enrollees.[9]

## II. THE PRELIMINARY INJUNCTION WAS APPROPRIATE BECAUSE THE REGULATION IS NOT NARROWLY TAILORED.

Assuming *arguendo* that the Board of Pharmacy had a compelling state interest, as opposed to an important or legitimate interest, in promulgating the regulation, namely, increasing patient access to proscriptions, the regulation is not narrowly tailored.[10] In contrast to the regulation challenged in the instant case, a narrowly tailored rule must be one that honors the legislatively recognized and protected rights of religious exercise and conscience. As Appellees argued below, instead of adopting a conscientious objection rule similar to the ones in the

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[9] Furthermore, simply because the two Statues are almost identical does not restrict their plain language, and thus they should not be cabined as Talmadge advocates. (Br. for Talmadge 25.) The cases that Talmadge quotes are inapposite for his proposition. Three of the cases cited by Talmadge involve harmonizing or construing conflicting statutes. *Willoughby v. Dep't of Labor and Indus. of State of Wash.*, 57 P.3d 611, 614 (Wash. 2002), *State v. Chapman*, 998 P.2d 282, 290 (Wash. 2000). One of the cases discusses the court's duty to read the entire statute. *United States v. McCord*, 33 F.3d 1434, 1444 (5th Cir. 1994). In one case, the court refused to construe the statute in light of the legislative history, when that construction would conflict with the plain language of the statute. *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 494 (D.C. Cir. 2004). In the final case, the court refused to apply a restriction found in one statute, to the provisions of another statute because they were not *in pari materia*. *Beckman v. Wilcox*, 979 P.2d 890, 895 (Wash. 1999).

[10] Your *Amicus* does not agree that increasing patient access to medicine in this manner is a *compelling state interest*, but assumed so for the sake of reaching whether it was narrowly tailored.

Insurance Statutes discussed above, the Washington Board of Pharmacy "drafted a rule with the broadest possible language, forcing pharmacies and pharmacist[s] to carry and dispense Plan B regardless of their religious and moral objection to a drug that unnaturally terminates a woman's pregnancy." Mot. Prelim. Inj. at 14. In fact, the district court noted that it had not been shown evidence establishing that anyone had ever failed to receive Plan B because of a conscientious objection by a pharmacist to the drug. *Stormans, Inc.*, 524 F. Supp. at 1260. It further noted that there are no problems accessing Plan B in general because the vast majority of pharmacies carry it. *Id.* The court found particularly significant the fact that the Board initially proposed a draft regulation providing for a right of conscientious objection. *Id.* at 1261. The court therefore indicated that patients have no problem accessing Plan B. *Id.* at 1261.

Nonetheless, Appellants and its *Amicus* argue, in effect, for a complete exclusion of conscientious objection. Defendant-Intervenors-Appellants claim that the rights of individual pharmacists are protected, and that only the pharmacy has the obligation to provide Plan B upon request. (Br. for Def.-Intervenors-Appellants 45.) However, that putative right is useless because, as the district court notes, the pharmacy would be forced to fire the objecting pharmacist if it could not hire a second pharmacist to fill Plan B prescriptions. *Stormans, Inc.*, 524 F. Supp. at at 1266. Furthermore, Talmadge argues that to allow Appellees to

conscientiously object would be contrary to public interest. (Br. for Talmadge 23.) His argument, however, is not consistent with the statutes discussed above. The Legislature affirmatively decided, as a matter of public policy, that the state must recognize the fundamental rights of free exercise and conscience, and enacted a law establishing a right of conscientious objection.

As mentioned above, the Board initially drafted a set of regulations providing for a right of conscientious objection similar to the ones enacted in the Statutes. *Stormans, Inc.*, 524 F. Supp. 2d at 1251. This demonstrates that the Board knows what narrow tailoring should be. However, after voting to begin drafting a regulation that included a right of conscientious objection, the Board, as documented by the district court, *id.*, received significant political pressure from the governor and others who were opposed to a right of conscientious objection. The Board then did an about face and enacted the regulation at issue. *Id.*

Narrow tailoring, under this assumed compelling state interest, would be more consistent with the Board's original draft and the Appellees' argument, rather than the arguments of Appellants and its *Amici*. This procedure has been the standard operating procedure of Appellees since before the regulation was enacted, *Stormans, Inc.*, 524 F. Supp. 2d at 1248-49, and will continue to serve the interests of both the health care providers and the women seeking Plan B.

## CONCLUSION

For the foregoing reasons, and the arguments submitted by the Appellant and various *Amici Curiae*, this Court should affirm the judgment of the district court.

Respectfully submitted,
this 2nd day of May, 2008

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## CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief *Amicus Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced. This brief contains 4,950 words as calculated by Microsoft Word 2007.

_____

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## CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of The National Legal Foundation in the case of *Stormans, Inc. v. Selecky*, No. 07-36039, 07-36040, on all required parties by depositing two paper copies in the United States mail, first class postage prepaid on May 2, 2008, addressed as follows:

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