
IN THE SUPREME COURT OF ILLINOIS

MORR-FITZ, INC., an Illinois corporation D/B/A **FITZGERALD PHARMACY**,
Licensed and Practicing in the State of Illinois as a Pharmacy; **L. DOYLE, INC.**, an
Illinois corporation D/B/A **EGGLESTON PHARMACY**, Licensed and Practicing in the
State of Illinois as a Pharmacy; **KOSIROG PHARMACY, INC.**, an Illinois corporation
D/B/A **KOSIROG REXALL PHARMACY**, Licensed and Practicing in the State of
Illinois as a Pharmacy; **LUKE VANDER BLEEK**; AND **GLEN KOSIROG**,

Plaintiffs-Appellants,

v.

ROD R. BLAGOJEVICH, Governor, State of Illinois; **FERNANDO E. GRILLO**,
Secretary, Illinois Department of Financial and Professional Regulation; **DANIEL E.**
BLUTHARDT, Acting Director, Division of Professional Regulation; and the **STATE**
BOARD OF PHARMACY, in their official capacities,

Defendants-Appellees.

On Appeal from the Appellate Court of Illinois Fourth Judicial District (4-05-1050),
and the Circuit Court for the Seventh Judicial Circuit, Sangamon County Circuit Court
(05 CH 495),
Honorable John. W. Belz, Judge Presiding

**AMICUS CURIAE BRIEF OF THE ILLINOIS PHARMACISTS ASSOCIATION
AND THE AMERICAN PHARMACISTS ASSOCIATION**

Richard C. Baker (IL Bar No. 3126795)
Mauck & Baker, LLC
1 North LaSalle, Suite 600
Chicago, IL 60602
Telephone: 312.726.1243
Facsimile: 312.726.1039

Kimberly A.R. Daniels (*pro hac vice*)
Trial Counsel
Thomas More Law Center
24 Frank Lloyd Wright Dr.
P.O. Box 393
Ann Arbor, MI 48106
Telephone: (734) 827-2001
Facsimile: (734) 930-7160

Counsel for Amici Curiae

POINTS AND AUTHORITIES

INTRODUCTION1

INTEREST OF AMICI.....1

BACKGROUND2

 Ill. Admin. Code tit. 68, § 1330.91(j) (2006).....2

 225 ILCS 85/30(a)(2) (2004).....2

 745 ILCS 70/1 *et seq.* (2004).....2

 775 ILCS 35/1 *et seq.* (2004).....2

 U.S. CONST. amend. I.....2

 U.S. CONST. amend XIV, § 1.....2

 Hyde-Weldon Amendment, Pub. L. No. 108-447, § 508(d), 118 Stat. 2809,
 3163 (2004).....3

 Title VII, 42 U.S.C. §§ 2000e *et seq.* (2005).....3

 Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* (2004)3

 Illinois Administrative Procedures Act, 5 ILCS 100/5-5 *et seq.* (2004).....3

 Pharmacy Act, 225 ILCS 85/1 *et seq.* (2004).....3

 Transcript of Proceedings at 31, *Morr-Fitz v. Blagojevich*, No. 05-CH-495
 (Ill. 7th Cir. Nov. 18, 2005)3

Abbott Laboratories v. Gardner, 387 U.S. 136, 138-139 (1967)3

Morr-Fitz v. Blagojevich, No. 4-05-1050 (Ill. App. Ct. Mar. 19, 2007).....3, 4

Bio-medical Labs., Inc. v. Trainor, 68 Ill. 2d 540, 546 (1977).....3

ARGUMENT4

 I. PHARMACISTS AND PHARMACY OWNERS NEED THIS COURT TO
 CLARIFY THEIR RIGHTS AND RESPONSIBILITIES UNDER
 CONFLICTING ILLINOIS LAW.....4

A. The Appellate Court’s Decision Fails to Resolve Direct Conflicts Within Illinois Law.	4
745 ILCS 70/2 (2004)	5
745 ILCS 70/3 (2004)	5
<i>Vandersand v. Wal-Mart Stores, Inc.</i> , No.06-3292 at 11-13 (C.D. Ill. July 31, 2007)	5
Ill. Admin. Code tit. 68, § 1330.91(j)	5, 6
29 Ill. Reg. 5586 (Apr. 15, 2005).....	6
Press Release, Governor Rod Blagojevich, In Response to Lawsuit Filed by Pat Robertson's American Center for Law and Justice Challenging Governor's Emergency Rule for Pharmacies (Apr. 13, 2005) (cited R. at C-00140)	6
745 ILCS 70/5 (2004)	6
745 ILCS 70/7 (2004)	6
B. Uncertainty Regarding Illinois Law Harms the Pharmacy Profession in Illinois.	6
C. Pharmacists Should Not be Required to Risk Prosecution in Order to Learn Their Rights and Obligations Under Illinois Law.	8
<i>Morr-Fitz v. Blagojevich</i> , No. 4-05-1050 (Ill. App. Ct. Mar. 19, 2007)	8, 9
II. THIS COURT SHOULD INVALIDATE THE RULE AS A VIOLATION OF ESTABLISHED ILLINOIS LAW PROTECTING PHARMACISTS' RIGHTS OF CONSCIENCE	10
A. This Court Has Discretion to Decide This Case on the Merits Instead of Remanding for Further Review	10
<i>Shortridge v. Sherman</i> , 84 Ill. App. 3d 981, 986 (1980)	10
<i>David v. Russo</i> , 119 Ill. App. 3d 290, 298 (1983)	10, 11
<i>Bardolph v. Arnold</i> , 112 N.C. App. 190, 193 (N.C. Ct. App. 1993)	11
745 ILCS 70/2.....	12

B. The Illinois Health Care Right of Conscience Act Protects the Rights of Pharmacists Who Object to Prescribing Emergency Contraception.....	11
745 ILCS 70/2.....	12
745 ILCS 70/3.....	12
745 ILCS 70/5.....	12
<i>Carter Coal Co. v. Human Rights Comm'n</i> , 261 Ill. App. 5 (1994)	13
<i>Moncivaiz v. DeKalb County</i> , 2004 WL 53994 (N.D.Ill. Mar. 12, 2004)	13
C. The Illinois Religious Freedom Restoration Act Protects the Rights of Pharmacists Who Object to Prescribing Emergency Contraception.....	13
775 ILCS 35/1 <i>et seq.</i> (2004).....	13
775 ILCS 35/151.....	13
775 ILCS 35/10(b)(2)	13
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	14
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972).....	14
775 ILCS 35/10(a)(6), (b)(1)	14
CONCLUSION.....	14
CERTIFICATE OF COMPLIANCE.....	15
APPENDIX.....	16

INTRODUCTION

Amici the Illinois Pharmacists Association and the American Pharmacists Association respectfully file this amicus brief in support of the Appeal filed by Plaintiff-Appellants (“Plaintiffs”) in this case. The question that Plaintiffs have presented is of paramount importance to pharmacists, pharmacy owners and their employees across the State of Illinois, who need to know whether the State’s new legal requirement that pharmacies provide emergency contraception (the “Rule”) takes precedence over the protections for pharmacists’ rights of conscience found in Illinois and federal law. In addition, the appellate court’s decision imposed a ripeness standard that, for all practical purposes, would prevent any Illinois pharmacist from obtaining judicial review without first violating the new Rule requiring them to dispense emergency contraception. Such a heightened ripeness standard poses a clear conflict with numerous precedents from this Court and from the United States Supreme Court, both of which have held that people do not have to await prosecution before they can challenge a regulation.

Having lived without resolution of this important issue for almost three years, and given the purely legal questions at issue, Amici ask this Court to exercise its discretion and reach the merits of this case. Pharmacists, pharmacy owners, and their employees have a right to act in accord with their consciences, a right supported by, among other laws, the Illinois Health Care Right of Conscience Act and the Illinois Religious Freedom Restoration Act. The Rule violates both these enactments, and it should be invalidated.

INTEREST OF AMICI

The Illinois Pharmacists Association represents some 2,000 practicing pharmacists in Illinois, including over three-quarters of Illinois’ independent pharmacies. It is dedicated to enhancing the professional competency of pharmacists, advancing the

standards of pharmacy practice, improving pharmacists' effectiveness, and leading in the resolution of public policy issues affecting pharmacists. The American Pharmacists Association is the first-established and largest national pharmacist organization in the United States, representing more than 60,000 practicing pharmacists, pharmaceutical scientists, student pharmacists and pharmacy technicians. It provides professional information and education for pharmacists and advocates for improving medication use and advancing patient care in the United States. The pharmacist members of both organizations seek guidance as to their rights and obligations under Illinois law with regard to dispensing emergency contraceptives.

BACKGROUND

This case concerns a challenge to an Illinois administrative rule requiring pharmacies to dispense contraceptives “without delay, consistent with the normal timeframe for filling any other prescription.” *See* Ill. Admin. Code tit. 68, § 1330.91(j) (2006) (the “Rule”). The Illinois Pharmacy Practice Act of 1987 allows several different disciplinary actions for administrative violations, including probation, reprimand, or revocation of a pharmacy license. *See* 225 ILCS 85/30(a) (2) (2004).

Plaintiffs consist of several individual pharmacists and their Illinois corporations that operate three Illinois pharmacies. Their complaint, filed in September 2005, alleged that the Rule was invalid in light of laws that protect the rights of pharmacists and pharmacy owners who conscientiously object to participating in the dispensation of certain forms of contraception. Specifically, the complaint alleged that the Rule violated the Illinois Health Care Right of Conscience Act, 745 ILCS 70/1 *et seq.* (2004) (the “Right of Conscience Act”), the Illinois Religious Freedom Restoration Act, 775 ILCS 35/1 *et seq.* (2004), the First and Fourteenth Amendments to the U.S. Constitution, and

the Hyde-Weldon Amendment, Pub. L. No. 108-447, § 508(d), 118 Stat. 2809, 3163 (2004).¹ The circuit court ruled in favor of the Defendants on a motion to dismiss, holding that “this lawsuit is just too speculative at this time.” Transcript of Proceedings at 31, *Morr-Fitz v. Blagojevich*, No. 05-CH-495 (Ill. 7th Cir. Nov. 18, 2005).

On appeal, the Fourth District of the Appellate Court of Illinois affirmed the circuit court’s dismissal. *See Morr-Fitz, Inc. v. Blagojevich*, No. 4-05-1050 (Ill. App. Ct. Mar. 19, 2007) (“Opinion”). The appellate court relied on the ripeness test initially adopted by the Supreme Court of the United States in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 138-39 (1967), and adopted by this Court in *Bio-medical Labs., Inc. v. Trainor*, 68 Ill. 2d 540, 546 (1977) (agencies should be protected from “judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties”) (quoting *Abbott Labs*). Under that test, a claim is ripe depending on “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Abbott Labs.*, 387 U.S. at 138-39. Purporting to apply this standard, the appellate court held that the “chances of plaintiffs suffering any hardship in the future as a result of this rule are so slim, albeit not impossible, [that] they do not outweigh the judiciary’s traditional reluctance to get involved in administrative determinations such as this.” *Morr-Fitz*, No. 4-05-1050 at 12.

¹ Plaintiffs further alleged that the Rule requires them to violate the rights of their employees under Title VII, 42 U.S.C. §§ 2000e *et seq.* (2005), and the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* (2004); and that the Rule’s enactment violated the Illinois Administrative Procedures Act, 5 ILCS 100/5-5 *et seq.* (2004) and the Pharmacy Act, 225 ILCS 85/1 *et seq.* (2004).

In dissent, Justice Turner found that, given the Governor’s emphatic statements in opposition to any right of religious conscience regarding this Rule in particular, the Plaintiffs face the “risk of the revocation of their professional licenses,” which amounts to “the ultimate in government coercion, threatening their very livelihood in the workforce within the State of Illinois.” *Id.* at 22. Moreover, the Defendants have “placed substantial pressure on them to modify or violate their religious beliefs or face the threat of government sanction.” *Id.* at 24. Thus, Justice Turner found that Plaintiffs had stated a ripe claim under the state Right of Conscience Act and the state Religious Freedom Restoration Act. *See id.*

The Plaintiffs filed a Petition for Rehearing on April 6, 2007. The appellate court denied rehearing on April 18, 2007. Plaintiffs then filed a Petition for Leave to Appeal on May 22, 2007. This Court granted that petition on September 26, 2007.

ARGUMENT

I. PHARMACISTS AND PHARMACY OWNERS NEED THIS COURT TO CLARIFY THEIR RIGHTS AND RESPONSIBILITIES UNDER CONFLICTING ILLINOIS LAW.

As organizations that represent tens of thousands of pharmacists and pharmacy owners in Illinois and across the country, Amici urge this Court to clarify the state of the law governing pharmacists’ conscience rights. The appellate court’s decision leaves our members — and all Illinois pharmacists and pharmacy owners — in a state of needless uncertainty and confusion about their rights and responsibilities under Illinois law.

A. The Appellate Court’s Decision Fails to Resolve Direct Conflicts Within Illinois Law.

The Rule on its face poses a conflict with other Illinois laws, including in particular the Right of Conscience Act. That statute provides that the State of Illinois

shall:

protect the right of conscience of all persons . . . who are engaged in the delivery of . . . health care services and medical care whether acting individually, corporately, or in association with other persons... [and that the State will affirmatively] prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care. 745 ILCS 70/2 (2004).

The term “health care” is specifically defined to include “family planning, counseling, referrals, or any other advice in connection with the use or procurement of contraceptives.” 745 ILCS 70/3 (2004). *See also Vandersand v. Wal-Mart Stores, Inc.*, No.06-3292 at 11-13 (C.D. Ill. July 31, 2007) (pharmacists are covered by the Illinois Right of Conscience Act).

Yet the Rule affirmatively requires the Plaintiffs and all other pharmacists to dispense emergency contraceptives “without delay, consistent with the normal timeframe for filling any other prescription,” with no exception for religious or conscientious objectors. *See Ill. Admin. Code tit. 68, § 1330.91(j)*. Not only is the Rule in apparent conflict with the Right of Conscience Act, but the Governor of Illinois has expressly

announced that the Rule should take precedence over the rights of those who object to participating in the provision of emergency contraception.²

Moreover, the Right of Conscience Act and the Rule create a catch-22 situation for pharmacies. On the one hand, the Right of Conscience Act provides that employers may not “discriminate” against conscientious objectors, 745 ILCS 70/5 (2004), and even that it is “unlawful” for a “private employer” to “orally question about, to impose any burdens in terms or conditions of employment on, or to otherwise discriminate against, any applicant, in terms of employment.” 745 ILCS 70/7 (2004). But on the other hand, the Rule mandates that pharmacies dispense emergency contraception as soon as a customer requests it. The Rule thus requires that pharmacies do exactly what state law forbids: inquire whether applicants for pharmacist positions are willing to fulfill such prescriptions, for if a store has no such pharmacist on staff, it will be unable to comply with the Rule. *See* tit. 68, § 1330.91(j).

B. Uncertainty Regarding Illinois Law Harms the Pharmacy Profession in Illinois.

The lack of a judicial resolution of this conflict between legislative and executive enactments — not to mention the conflict with constitutional rights — leaves Illinois

² 29 Ill. Reg. 5586 (Apr. 15, 2005); Press Release, Governor Rod Blagojevich, In Response to Lawsuit Filed by Pat Robertson’s American Center for Law and Justice Challenging Governor’s Emergency Rule for Pharmacies (Apr. 13, 2005) (cited R. at C-00140) (“Pharmacists—like everyone else—are free to hold personal religious beliefs, but pharmacies are not free to let those beliefs stand in the way of their obligation to their customers.”).

pharmacists and pharmacy owners without guidance as to how to manage their pharmacies and professional careers. Without a ruling on the merits of Plaintiffs' claims, Illinois pharmacists, pharmacy owners, and their employees do not know whether the Rule promulgated by the Defendants overrides the Right of Conscience Act, the Illinois Religious Freedom Restoration Act, or the United States Constitution.

Thus, Illinois pharmacists with conscientious objections to dispensing emergency contraception do not know whether they can continue to practice in the state or should look for work elsewhere. Similarly, pharmacy owners with such objections do not know whether they should invest in their businesses as they otherwise would or leave the state or the profession altogether if they cannot comply with the Rule. Because of this uncertainty, even pharmacists with no moral objections to emergency contraception must determine whether they can accept employment in pharmacies whose owners have such objections, since those pharmacies are apparently at risk of losing their licenses. This state of affairs also calls into question the status of the Right of Conscience Act should other moral dilemmas arise in the future, such as have arisen in Oregon, where pharmacists can opt not to participate in physician-assisted suicides.

This Court's review is particularly appropriate and necessary given that since 2005 Illinois pharmacists have been left in a state of uncertainty on this issue. *See* Appendix A-1, Letter to Governor Blagojevich from the Illinois Pharmacists Association, American Pharmacists Association, and American Society of Health Systems Pharmacists (Apr. 5, 2005). While the American Pharmacists Association and the Illinois Pharmacists Association have policies advising their members regarding these and other

difficult questions facing the profession,³ such professional statements are insufficient to guide the actions of Illinois pharmacists and pharmacy owners, who currently must contemplate legal penalties for attempting to navigate Illinois' apparently conflicting law. This Court can resolve the conflict that exists between the Rule requiring pharmacies to dispense any and all contraceptives on the one hand, and various state and federal legislative enactments protecting pharmacists' and pharmacy owners' rights of conscience on the other. Without such judicial resolution, individual pharmacists, pharmacy owners, and the profession as a whole will continue to suffer harm.

C. Pharmacists Should Not be Required to Risk Prosecution in Order to Learn Their Rights and Obligations Under Illinois Law.

Given these conflicts, pharmacists and pharmacy owners in the state of Illinois require clarity as to their legal rights and obligations. But the appellate court affirmed the dismissal of Plaintiffs' challenge to the Rule on the theory that "it is extremely unlikely based on the allegations in Plaintiffs' complaint that one of the individual Plaintiffs in this case will ever be placed in a position where he will either have to violate his conscience or the letter of the Rule." *Morr-Fitz*, No. 4-05-1050 at 18. Thus, the appellate court predicted that the "Plaintiffs will not suffer any hardship by our denial of judicial consideration." *Id.*

³ See Appendix A-4, Official Policy of the American Pharmacists Association; Subject: Pharmacist Conscience Clause; Appendix A-5, American Pharmacists Association; Code of Ethics for Pharmacists; Appendix A-6 Illinois Pharmacists Association Policy I-A-40: Pharmacist Conscience Clause.

As the Plaintiffs showed with undisputed evidence, however, customers have requested emergency contraception from them at least 15 times since the enactment of the Rule. One pharmacy owned by Plaintiff Luke Vander Bleek even had to close after a potential pharmacist declined employment precisely because of his fears that the Defendants would make good on their promise to seek administrative sanctions against the Plaintiffs. *See Vander Bleek Aff.* p. A-25–A-28; *Kosirog Aff.* p. A-29–A-30. Moreover, Justice Turner in his dissent noted that Governor Blagojevich has warned pharmacists that the State will vigorously enforce the Rule, stating: “The intent of the Governor’s statements are clear and undeniable – either comply with the Rule or else.” *Morr-Fitz*, No. 4-05-1050 at 22.

Given this evidence, the appellate court’s dismissal of Plaintiffs’ claim imposed an unprecedented and overly stringent ripeness standard. It has never been the law that parties must be put literally “out of business” (*Id.* at 18) before they are allowed to file a lawsuit challenging a governmental regulation and to have their day in court. If the Plaintiffs’ evidence is not sufficient to demonstrate a need for judicial review at the present time, then nothing would be sufficient short of a literal act of disobedience.⁴

⁴ The appellate court distinguished the many cases cited by Plaintiffs that establish ripeness on the theory that the cases concerned statutes or ordinances, whereas “plaintiffs are seeking declaratory relief from an administrative rule.” *Morr-Fitz*, No. 4-05-1050 at 11. This is a distinction with no difference at all. No court has ever suggested that challenges to administrative rules have to meet an especially heightened standard of ripeness (outside of the doctrine of administrative exhaustion, which the appellate court did not rely on at all, *See id.* at 19).

Understandably, most pharmacists and pharmacy owners are unwilling to run the risk to their business and reputation by violating the law solely in order to meet the appellate court's heightened ripeness standard. Thus, it is unlikely that our organizations' members will bring a lawsuit *ex ante* in order to clarify and vindicate their legal rights. In other words, if this Court does not reverse the dismissal of Plaintiffs' case, it is doubtful that other pharmacists or pharmacy owners will risk judicial review in the face of prosecution. Instead, pharmacists, pharmacy owners, and their employees across Illinois will be left in a state of perpetual uncertainty and confusion. This Court should avert this untenable situation by clarifying pharmacists' legal rights and duties regarding this important and timely issue.

II. THIS COURT SHOULD INVALIDATE THE RULE AS A VIOLATION OF ESTABLISHED ILLINOIS LAW PROTECTING PHARMACISTS' RIGHTS OF CONSCIENCE.

A. This Court has discretion to decide this case on the merits instead of remanding for further review.

In the interest of judicial economy and in order to alleviate the threats to pharmacists' conscience created by application of the Rule, this Court should exercise its discretion and resolve the issue on the merits. Remanding for further review would cause unnecessary delay without adding any material fact to the record that would facilitate adjudication of this case.

The issue before this Court is one of pure law: whether the Rule is facially invalid under the Right of Conscience Act and the Religious Freedom Restoration Act, among other governing laws. When, as here, a case presents an issue that is solely a matter of law, it is appropriate for an appellate court to issue a final judgment on the merits.

Shortridge v. Sherman, 84 Ill. App. 3d 981, 986 (1980); *see also David v. Russo*, 119 Ill.

App. 3d 290, 298 (1983) (this Court has broad discretion in deciding whether to remand a case that poses questions of law).

Further delay would only perpetuate the confusion of Illinois pharmacists and pharmacy owners faced with the choice of violating their conscience, finding another line of work, or moving to another state because of the Rule. Any time a pharmacist does not fill a prescription for Plan B because of her conscientious beliefs, she faces serious risks and could suffer harm. Plaintiffs, for example, have already had to close one pharmacy as a result of the Rule's implementation. Other Illinois pharmacists should not have to suffer such consequences because of unnecessary delay in adjudicating the applicability of the Rule. Because of the significant impact this law has on the livelihood of Illinois pharmacists and pharmacy owners, this Court should exercise its discretion and enter final judgment on the merits of this case. *See Bardolph v. Arnold*, 112 N.C. App. 190, 193 (N.C. Ct. App. 1993) (appellate courts may determine an appeal on the merits where the case involves a legal issue of public importance).

B. The Illinois Health Care Right of Conscience Act Protects the Rights of Pharmacists Who Object to Prescribing Emergency Contraception.

The Right of Conscience Act provides legal recourse to pharmacists and pharmacy owners forced to administer prescriptions in violation of their conscience. The Act states:

It is the public policy of the State of Illinois to respect and protect the right of conscience of *all persons* who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; and to prohibit all forms of . . . *coercion* . . . upon persons or

entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care. 745 ILCS 70/2 (emphasis added).

By its plain wording the Right of Conscience Act protects the rights of pharmacy owners and pharmacists who conscientiously object to prescribing emergency contraception. It defines “health care” to mean “*any phase of patient care, including but not limited to, family planning. . . or any other advice in connection with the use or procurement of contraceptives and sterilization or abortion procedures; medication; or other care or treatment rendered by a . . . health care facility*” 745 ILCS 70/3 (emphasis added). It prohibits any “public official” from “discriminating against *any person in any manner, including but not limited to, licensing. . . because of such person’s conscientious refusal to . . . participate in any way in any particular health care service contrary to his or her conscience*” (emphasis added). 745 ILCS 70/5.

A federal district court recently confirmed that this statutory language prohibits discrimination against a pharmacist “for his refusal to participate in the dispensing of medication because of his beliefs.” *Vandersand v, Wal-Mart Stores, Inc.*, No.06-3292 at 11 (C.D. Ill. July 31, 2007). In *Vandersand*, the plaintiff pharmacist had been placed on leave by his employer because of his refusal to participate in the provision of emergency contraception. The court expressly rejected the argument that the Right of Conscience Act did not apply to pharmacists, holding that “any person. . . who refuses to participate in any way in providing medication because of his conscience is protected by the Right of Conscience Act.” *Id.* at 12.

In addition, Plaintiffs receive protection under the Right of Conscience Act because their beliefs are related to abortion. *See, e.g., Carter Coal Co. v. Human Rights Comm'n*, 261 Ill. App. 5 (1994) (the Act prohibits disciplinary action against one who refuses to participate in abortions). Such protection is not limited to the performance of an abortion, but extends to those faced with assisting in the provision of health care. *See Moncivaiz v. DeKalb County*, 2004 WL 539994 (N.D.Ill. Mar. 12, 2004) (a person who was not hired because she refused to translate to non-English speakers their option to have an abortion has a claim under the Act against the county).

Given the straightforward language of the Act, these decisions and that in *Vandersand* come as no surprise. This Court should likewise hold that the Right of Conscience Act protects pharmacists and pharmacy owners from being forced to choose between acting against their consciences and losing their livelihood.

C. The Illinois Religious Freedom Restoration Act Protects the Rights of Pharmacists Who Object to Prescribing Emergency Contraception.

The Illinois Religious Freedom Restoration Act (“IRFRA”), 775 ILCS 35/1, also protects the rights of objecting pharmacists, pharmacy owners, and their employees. It provides that the “[g]overnment may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest.” 775 ILCS 35/15. The purpose of IRFRA is to “provide a claim or defense to persons whose exercise of religion is substantially burdened by government.” 775 ILCS 35/10(b)(2). The statute specifies that courts should apply this test in accordance with the U.S. Supreme Court decisions in *Sherbert v.*

Verner, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). 775 ILCS 35/10(a)(6), (b)(1).

Under this standard, the government’s denial of benefits to an individual based on her religious practices substantially burdens her because the “pressure” upon that individual to “forego that practice is unmistakable.” *Sherbert*, 374 U.S. at 404. Here Plaintiffs face just such a substantial burden as a result of the Rule’s requirement that they dispense emergency contraception in violation of their deeply held religious beliefs or risk losing their professional licenses. *See id.* at 404 (“The effect of [the] law is to impede the observance of . . . religion,” because “indirect ‘discouragements’ undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonments, fines, injunctions, or taxes”). Similarly, the Rule is clearly not the least restrictive means of achieving the goal of increasing access to emergency contraception. Rather, forcing every single pharmacy in the State to dispense emergency contraception at the risk of their livelihoods runs roughshod over the religious beliefs of those who object to providing the drug. Less restrictive alternatives plainly exist—such as permitting doctors to dispense the drug directly or maintaining databases of pharmacies that carry the drug. The requirements of the Rule amount to a facial violation of the IRFRA.

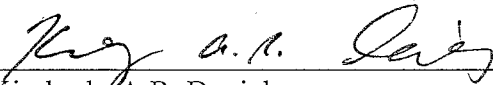
CONCLUSION

This Court should rule in favor of Plaintiffs. If the appellate court’s unprecedented ripeness standard is allowed to stand, Illinois pharmacists, pharmacy owners, and their employees will be left in a state of confusion as to whether the State can require them to prescribe emergency contraception in violation of their conscientious beliefs, and in apparent violation of state and federal law.

Given that pharmacists and pharmacy owners have endured such uncertainty for almost three years now, this Court should reach the merits of the purely legal questions at issue. The plain language of the Illinois Health Care Right of Conscience Act and the Illinois Religious Freedom Restoration Act protects the rights of these professionals not to be coerced into acting against their beliefs. The Rule violates both these enactments, and it should be invalidated.



Richard C. Baker (IL Bar No. 3126795)
Mauck & Baker, LLC
1 North LaSalle, Suite 600
Chicago, IL 60602
Telephone: 312.726.1243
Facsimile: 312.726.1039



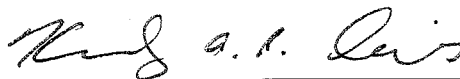
Kimberly A.R. Daniels
(*pro hac vice*)
Trial Counsel
Thomas More Law Center
24 Frank Lloyd Wright Dr.
P.O. Box 393
Ann Arbor, MI 48106
Telephone: (734) 827-2001
Telephone: (734) 930-7160

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the appendix, is 18 pages.



Richard C. Baker



Kimberly A.R. Daniels

APPENDIX

Letter to Governor Blagojevich from the Illinois Pharmacists Association,
American Pharmacists Association and American Society of Health Systems
Pharmacists (Apr. 5, 2005) A-1

Official Policy of the American Pharmacists Association, Subject: Pharmacists
Conscience Clause A-4

American Pharmacists Association, Code of Ethics for Pharmacists..... A-5

Illinois Pharmacists Association Policy I-A-40: Pharmacist Conscience Clause..... A-6

April 5, 2005

The Honorable Rod R. Blagojevich
Governor, State of Illinois
Office of the Governor
207 State House
Springfield, IL 62706

Governor Blagojevich:

The undersigned organizations, representing pharmacists in Illinois and across the country, respectfully request rescission of the emergency rule issued April 1, 2005, requiring pharmacies to provide contraceptives based on a valid, lawful prescription without delay. The order, as worded, poses substantial risk to patient care and creates a substantial challenge for pharmacists licensed to practice in Illinois.

We support the premise of the Governor's order to ensure women have access to health care. It is unfortunate, however, that your office failed to work with the profession to address these concerns. The order, as issued, is flawed. Specifically, the order creates a professional dilemma for pharmacists: the requirement to dispense a valid, lawful prescription 'without delay' could require a pharmacist to dispense a valid, lawful—but clinically inappropriate—medication 'without delay'. This requirement conflicts with the responsibilities outlined in the Illinois Practice Act, specifically requiring pharmacists to conduct prospective drug utilization review.¹

Such a review could identify, in a valid, lawful prescription, a clinical problem that requires the pharmacist to work with the medication prescriber to resolve the situation. For example, a woman may be prescribed an oral contraceptive by one physician but may also be receiving treatment from an internist or cardiologist for a deep vein thrombosis condition. The pharmacist would recognize therapy to treat the condition (such as warfarin) on the profile and identify the potential problem. Contacting the appropriate prescribers would not allow the pharmacist to dispense the product "without delay". But failure to contact the involved prescribers would require the pharmacist to ignore their role in conducting prospective drug utilization review. While we expect pharmacists to resolve this question in favor of the patient, they do so at the risk of sanction under the emergency order. The potential for harm is much higher for receiving the oral contraceptive in this situation than waiting the time it might take to discuss this with the prescribers.

Unfortunately, your spokesperson's comment to the media that the order would not interfere with our profession's role in 'patient counseling' is neither helpful nor relevant. The conflict is not with the pharmacist's role in helping patient's understand their

¹"Practice of pharmacy" means the provision of pharmaceutical care to patients as determined by the pharmacist's professional judgment in the following areas, which may include but are not limited to ... (2) interpretation and assisting in the monitoring of appropriate drug use and prospective drug utilization review, ... " 225 ILCS 85/3(d).

therapy, but with the prospective review for the clinical appropriateness of the therapy. Our concern with this requirement is not limited to pharmacists. Careful review of the statement from the American Medical Women's Association supporting the order notes that their support for the pharmacist continuing in their role of identifying contraindications.² Unfortunately, the emergency order is inconsistent with the pharmacist maintaining this role.

Further, the order requires pharmacists and pharmacy operators to comply with one specific set of beliefs. Our profession is composed of individuals, not automatons. Prohibiting pharmacists from stepping away from certain activity because of their personal moral beliefs requires each pharmacist practicing in Illinois to abide by one set of beliefs. Not only is this approach inconsistent with the idea that individuals should have a choice in the activities in which they participate, it is a recipe for disaster. It is possible to assure patient access to legally prescribed therapy as well as accommodate individual pharmacist's beliefs, but we must work together to do so.

There are important alternatives to the flawed approach announced last week. A far more proactive approach to expanding access to contraceptive therapy for women in Illinois would be to clarify that pharmacists are authorized under state law to expand their role under collaborative drug therapy management agreements. In this structure, pharmacists would work with physicians to establish the parameters where pharmacists both initiate and dispense contraceptive therapy for certain patients—thus expanding access by narrowing the situations where a woman must see a physician to access emergency contraception or other appropriate interventions. Illinois could join the growing list of states where pharmacists provide such services³—expanding patient access while simultaneously navigating the conscience issue because women are directed to those facilities where pharmacists expand access to therapy.

Another approach would establish a public registry where pharmacies that carry and dispense all contraceptive therapy are listed. The limited number of pharmacies where access may not be available would not register, and thus women would be proactively directed to alternative sources.

Again, we emphasize that we support the premise of the Governor's order to ensure women have access to health care, but the solution is fatally flawed. By compromising the pharmacist's ability to exercise their clinical judgment, the order puts women's health at risk. We strongly encourage you to reconsider this action and work with the profession to address these concerns. All patients must have access to appropriate medications. And no patient need be aware of a pharmacist's individual moral code. But no pharmacist should be forced to ignore their professional, clinical judgment. The

² "Unless the physician is notified of contraindications, AMWA [the American Medical Women's Association] believes that pharmacies should guarantee seamless delivery, without delay (within the standard practice for ordering), judgment, or other interference, of all contraceptive drugs and devices lawfully prescribed by a physician." AMWA NewsFlash, April 1, 2005.

³ For example, pharmacists may initiate emergency contraceptive therapy in collaboration with prescribers in Alaska, California, Hawaii, Maine, New Mexico, and Washington State.

emergency order implies that contraceptive medications and the women who take them do not deserve the same care from the pharmacist and the recognition for potential harm afforded to all other prescription medications.

Thank you for your consideration of our request. We look forward to initiating a dialogue to address this important issue.

Sincerely,

Michael Patton
Executive Director
Illinois Pharmacists Association

John A. Gans, Pharm.D.
Executive Vice President
American Pharmacists Association

Henri R. Manasse, Jr., Ph.D., Sc.D.
Executive Vice President and Chief Operating Officer
American Society of Health-System Pharmacists

Contact information for IPhA:
Mike Patton, 204 W. Cook Street
Springfield, IL 62704-2526 (217) 522-7300

Contact information for APhA:
John A. Gans, 2215 Constitution Ave NW
Washington DC 20037-2985 (202) 628-4410

Contact information for ASHP:
Henri R. Manasse, 7272 Wisconsin Avenue
Bethesda, MD 20814 (301) 657-3000



American Pharmacists Association™

Improving medication use. Advancing patient care.

**Official
Policy of the
American
Pharmacists
Association**

**Subject: Pharmacist Conscience
Clause**

**2004
1998** APhA recognizes the individual pharmacist's right to exercise conscientious refusal and supports the establishment of systems to ensure patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal.

(JAPhA 38(4): 417. July/August 1998)

**American
Pharmacists
Association**

2215 Constitution Ave., NW
Washington, DC 20037-2985



American Pharmacists Association

Improving medication use. Advancing patient care.

CODE OF ETHICS FOR PHARMACISTS

PREAMBLE

Pharmacists are health professionals who assist individuals in making the best use of medications. This Code, prepared and supported by pharmacists, is intended to state publicly the principles that form the fundamental basis of the roles and responsibilities of pharmacists. These principles, based on moral obligations and virtues, are established to guide pharmacists in relationships with patients, health professionals, and society.

I. A pharmacist respects the covenantal relationship between the patient and pharmacist.

Considering the patient-pharmacist relationship as a covenant means that a pharmacist has moral obligations in response to the gift of trust received from society. In return for this gift, a pharmacist promises to help individuals achieve optimum benefit from their medications, to be committed to their welfare, and to maintain their trust.

II. A pharmacist promotes the good of every patient in a caring, compassionate, and confidential manner.

A pharmacist places concern for the well-being of the patient at the center of professional practice. In doing so, a pharmacist considers needs stated by the patient as well as those defined by health science. A pharmacist is dedicated to protecting the dignity of the patient. With a caring attitude and a compassionate spirit, a pharmacist focuses on serving the patient in a private and confidential manner.

III. A pharmacist respects the autonomy and dignity of each patient.

A pharmacist promotes the right of self-determination and recognizes individual self-worth by encouraging patients to participate in decisions about their health. A pharmacist communicates with patients in terms that are understandable. In all cases, a pharmacist respects personal and cultural differences among patients.

IV. A pharmacist acts with honesty and integrity in professional relationships.

A pharmacist has a duty to tell the truth and to act with conviction of conscience. A pharmacist avoids discriminatory practices, behavior or work conditions that impair professional judgment, and actions that compromise dedication to the best interests of patients.

V. A pharmacist maintains professional competence.

A pharmacist has a duty to maintain knowledge and abilities as new medications, devices, and technologies become available and as health information advances.

VI. A pharmacist respects the values and abilities of colleagues and other health professionals.

When appropriate, a pharmacist asks for the consultation of colleagues or other health professionals or refers the patient. A pharmacist acknowledges that colleagues and other health professionals may differ in the beliefs and values they apply to the care of the patient.

VII. A pharmacist serves individual, community, and societal needs.

The primary obligation of a pharmacist is to individual patients. However, the obligations of a pharmacist may at times extend beyond the individual to the community and society. In these situations, the pharmacist recognizes the responsibilities that accompany these obligations and acts accordingly.

VIII. A pharmacist seeks justice in the distribution of health resources.

When health resources are allocated, a pharmacist is fair and equitable, balancing the needs of patients and society.

Adopted by the American Pharmacists Association membership, October 27, 1994.

2006-06:

Introduced By: Luke VanderBleek, President-elect, Region 8

Organization: Illinois Pharmacists Association

Subject: Current House of Delegates Policy I-A-40: Pharmacist Conscience Clause - 1999

Motion:

Replace the language of Policy I-A-40 Pharmacist Conscience Clause - 1999 with:

IPhA affirms pharmacists' status as health care professionals. Pharmacists, pharmacies, and pharmacy owners are involved in the direct provision of health care and are therefore protected by the Illinois Health Care Right of Conscience Act, 745 ILCS. IPhA supports pharmacists', pharmacies, and pharmacy owners' rights of conscientious refusal. Refusal based on conscience should be conducted in a confidential, professional, and compassionate manner. IPhA asserts that pharmacists, pharmacies, and pharmacy owners are not legally required to provide pharmaceutical services when those services are personally found to be conscientiously objectionable. This policy shall not be construed to imply that pharmacists, pharmacies, and pharmacy owners possess a right to obstruct or impede a patient's fulfillment of legally prescribed therapy.

~~(Motion to postpone fails) (Motion Amended x 2)~~

~~Motion Passed as Amended.~~

Motion by Luke VanderBleek / Moura Maroney

*Motion to Postpone by Jeff Ellis / Donna Kay
Failed.*

amendment by Tim O'Connor / Tom Zeddy, Passed.

*amendment by Jeff Ellis / Judy Hanson-Sommers.
- failed*

*amendment by Gary Bellamy / Martin Wudley.
Passed.*

Motion as Amended x 2 - Passed.