Case No. 4-11-0398

IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

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 **EGGELSTON 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 **GLENN KOSIROG**,

Plaintiffs-Appellees,

v.

PAT QUINN, Governor, State of Illinois; **BRENT E. ADAMS**, Secretary, Illinois Department of Financial and Professional Regulation; **JAY STEWART**, Director, Division of Professional Regulation; and **STATE BOARD OF PHARMACY**, in their official capacities,

Defendants-Appellants.

On Appeal from the Order of the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois, Honorable John W. Belz, Judge Presiding (05-CH-495)

AMICUS CURIAE **BRIEF OF AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS, CATHOLIC MEDICAL ASSOCIATION, PHYSICIANS FOR LIFE, AND NATIONAL ASSOCIATION OF PRO LIFE NURSES, IN SUPPORT OF PLAINTIFFS-APPELLEES**

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POINTS AND AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are national medical organizations that have previously appeared in this matter before the Illinois Supreme Court[2] and have members who could be drastically affected by the outcome of this case**.** The logical extension of this case is that, if pharmacists and pharmacies are forced to provide life-ending drugs against their consciences, *Amici's* members could be forced to provide healthcare services in violation of their consciences and without judicial recourse.

Specifically, *Amicus* American Association of Pro-life Obstetricians & Gynecologists (AAPLOG) is a non-profit professional medical organization consisting of over 2,000 obstetrician-gynecologist members and associates. The American College of Obstetricians and Gynecologists (ACOG) recognizes AAPLOG as one of its largest special interest groups. AAPLOG maintains the position that physicians and healthcare professionals may object to the performance of medical procedures for reasons of conscience, and in particular religious, ethical, or moral reasons.

Amicus Christian Medical & Dental Associations (CMDA) is a non-profit professional medical organization consisting of over 16,000 physicians, with over 500 members in the State of Illinois whose professional careers and practices would be directly impacted by any rulings in this case. After much thoughtful consideration and debate, CMDA has adopted the position that physicians may object to certain medical

[1] In accordance with Illinois Civil Appellate Court Rule 345, *Amici* have filed a Motion for Leave to File this Brief.

[2] *Amici* filed a brief before the Supreme Court on October 24, 2007, arguing that the case should not be dismissed.

procedures or treatments based upon conscience, including religious, moral, or ethical beliefs.

Amicus Catholic Medical Association (CMA) consists of more than 1,500 physician members nationwide. CMA seeks to uphold the principles of Catholic faith and morality in the science and practice of medicine. CMA members know from science that human life begins at conception and believe that human life should be accorded all human rights and protection under the law after conception and until natural death. CMA also assists the Church in communicating Catholic medical ethics to the medical profession and the community-at-large.

Amicus Physicians for Life is also a national nonprofit medical organization. The organization seeks to encourage physicians to educate their patients regarding the innate value of human life at all stages of development and affirms a physician's right to object, on religious, moral, or ethical grounds, to performing medical procedures adverse to his or her conscience.

Amicus National Association of Pro Life Nurses (NAPN) is a national nurses' organization with members in every state of the union, including Illinois. NAPN is dedicated to promoting respect for every human life from conception to natural death and to affirming that the destruction of that life, for whatever reason and by whatever means, does not meet the ideals and standards of good nursing practice.

This Court's determination as to whether the Rule at issue in this case infringes on the Plaintiffs' right of conscience will significantly impact *Amici's* abilities to effectively commend ethical standards to their members as guiding principles for their practices and to continue to encourage their members to adhere to their principles in their practice of

medicine. This Court's determination will also impact the ability of *Amici's* members to seek judicial recourse when forced to violate their consciences.

Amici urge this Court to affirm the opinion of the lower court.

SUMMARY OF ARGUMENT

Freedom of conscience is a fundamental right that has been revered since the founding of our nation. But the Defendants in this case, as well as organizations with which they admit to involving in the rulemaking process,[3] are attempting to unconstitutionally force pharmacies (and, therefore, their owners) to either violate their consciences and religious tenets, or violate the "law." The alleged impetus for this unconstitutional action is ensuring "access" to "emergency contraception."

This claim is unmerited. First, the trial court rightly concluded that there is no evidence of an access "problem," and any statements to the contrary at this stage in litigation amount to either hearsay or misinformation. *See* Part I.A., *infra*. In fact, Defendants' *amicus* American Civil Liberties Union of Illinois (ACLU) admits that ***"[t]here was not a shred of evidence that any pharmacy other than plaintiffs had asserted religious objections to the Rule."*** Brief of *Amicus Curiae* The American Civil Liberties Union of Illinois, at 32 (hereinafter "ACLU Brief"). If there is "not a shred of evidence" of other religious objections, how is there an access problem because of religious objection? And if there are no other pharmacies making religious objections, how could a Rule targeting the conscience rights of pharmacists making religion-based

[3] As discussed in Part I.B., *infra*, Defendant Adams admitted to the trial court that he wanted to include Planned Parenthood "in the loop" in order to know what other states were doing. As explained by the district court in *Stormans v. Selecky*, Planned Parenthood's involvement in the promulgation of the state of Washington's pharmacy rule tainted the rule in that state. For further discussion, *see* Part I.B., *infra*.

objections improve such an access "problem" that has nothing to do with religion (if it even exists)? Further, how can a Rule targeting a "problem" that does not exist be narrowly tailored?

Second, as demonstrated recently in *Stormans v. Selecky*—a case frequently cited (and misapplied) by the Defendants—there is no "problem" of access to "emergency contraceptives." Because the Defendants and the ACLU compare the Plaintiffs and situation here with the plaintiffs and situation in *Stormans*, the recent decision in *Stormans* is instructive. *See* Part I.B., *infra*. In fact, that case sheds much light on the case at hand, and easily dispels many of the Defendants' claims.

In addition, Defendants and the ACLU attempt to persuade this court that Plaintiffs here are in the minority, and that their views are not "legitimate"[4] with regard to the life-ending post-fertilization effect of "emergency contraception." This is simply not true. "Emergency contraception" does have a post-fertilization effect (*i.e.*, it prevents an embryo from implanting in the uterus) which is considered by many citizens—including large numbers in the medical community—to be the moral equivalent of abortion, as both abortion and preventing an embryo from implanting in the womb cause the destruction of an innocent human life. *See* Part II, *infra*.

This sincerely held belief provides Plaintiffs ground to conscientiously object to the provision of "emergency contraception." Plaintiffs' freedom to do so is protected under both state and federal law. *See* Part III, *infra*.

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[4] Defendants claim that the exceptions to the Rule "demonstrate nothing other than legitimate, time-honored reasons" to not dispense "emergency contraception." Brief of Defendants-Appellants, at 30. In other words, a conscientious objection is not seen as "legitimate" by Defendants. As discussed *infra*, the district court in *Stormans* found this type of distinction to be "telling" of the rule's unconstitutionality.

ARGUMENT

On April 1, 2005, former Governor Rod Blagojevich issued an "emergency rule" requiring Division I Pharmacists to fill all legal prescriptions for contraceptives (including "emergency contraception"), along with the threat that any pharmacist that violated the Rule would face significant penalties. That Rule was subsequently codified in the administrative code (hereinafter "Rule"). The alleged impetus for the Rule was to guarantee access to "emergency contraception," but, as demonstrated below, there was no "problem" related to access before or after the issuing of the Rule. As such, there is no state interest that can survive any level of judicial scrutiny.

I. THERE IS NO "PROBLEM" OF ACCESS TO "EMERGENCY CONTRACEPTION"

A. There is "not a shred of evidence" in the record indicating an access "problem" in Illinois

Judge Belz made explicit findings in his decision—findings which fatally undercut Defendants' claims that the Rule was necessary to ensure access to "emergency contraception" in the state. Without this "access" reasoning, Defendants' Rule is totally baseless and cannot survive even the lowest level of judicial scrutiny, as the Rule serves no state interest whatsoever.

The lack of evidence related to access could not be clearer. "[T]he Court heard no evidence of a single person who ever was unable to obtain emergency contraception because of a religious objection." *Morr-Fitz, Inc. v. Blagojevich*, Order Granting Declaratory and Injunction Relief, at 3-4 (Cir. Ct. of the 7th Jud. Cir. Apr. 5, 2011) (hereinafter "Belz Order"). The Defendants presented *no evidence* of a person unable to access "emergency contraception" because a pharmacist declined to fill the request for

religious reasons. The Defendants could not present even one woman. "*Nor did the government provide any evidence* that anyone was having difficulties finding willing sellers of over-the-counter Plan B, either at pharmacies or over the internet." *Id*. at 4 (emphasis added). The Defendants had *no evidence*. And the Defendants even "conceded that any health impact from Plaintiffs' religious objections would be minimal." *Id*. Specifically as applied to the Plaintiffs, the Defendants "acknowledged that the proximity of willing competitors nearby Plaintiffs' pharmacies made any health-related impact of their religious constraints unlikely." *Id*. at 6-7.

As this Court is well-aware—and as admitted by the Defendants—it is the trier of fact's role to resolve conflicts in the evidence, assess witness credibility, and determine the weight to be given testimony. Brief of Defendants-Appellants, at 23 (citing *Prairie Eye Ctr., Ltd. v. Butler*, 329 Ill. App. 3d 293, 298-99 (4th Dist. 2002)). Judge Belz' findings of fact cannot be reversed on appeal unless they are against the manifest weight of the evidence. Here, neither Defendants nor their *amicus* can refute Judge Belz' findings of fact. The Defendants presented *no* evidence and *conceded* other points related to access. It would have been against the manifest weight of evidence had Judge Belz ruled in favor of the Defendants, after they failed to present any evidence. Defendants cannot now refute Judge Belz findings of fact, when they presented no evidence of an access "problem."

Even now, Defendants do not claim that even a single woman has been unable to obtain "emergency contraception" in a timely manner, either before or after the Rule was issued. The only "evidence" discussed by Defendants involves requests made to the Plaintiffs. Defendants claim, "[w]ith regard to Plan B, plaintiffs' own testimony bears

out that there is a compelling need" for the Rule, as both plaintiff witnesses testified having received "multiple requests" for "emergency contraception." *Id*. at 33. But the fact that "emergency contraception" has been requested of Plaintiffs does not demonstrate that women have trouble obtaining access. The same women could have subsequently visited a nearby pharmacy. Moreover, the fact that the Defendants do not go on to claim that those women had trouble gaining access to "emergency contraception" speaks volumes—it further demonstrates there is no evidence of an access problem.

Defendants do claim that "[i]mpending patient access to ['emergency contraception'] poses a tangible and distinct risk to patient health." *Id*. at 40. Yet the Defendants never give one example where there has been a delay or a risk to patient health. Defendants cannot now attempt to cure their lack of evidence with broad-based claims with no factual support in the record.

Defendants' *amicus* ACLU attempts to reconcile this absolute void in evidence by introducing a new "Statement of Facts." ACLU Brief, at 4. This is disingenuous. The asserted information is not part of the record and should not be labeled as such. In reality, the ACLU labels hearsay and uncorroborated stories as "facts" of the case, blurring the line between rhetoric and the actual facts and evidence in the record.

The ACLU claims that the Rule was issued "following a rash of refusals in pharmacies in Illinois…." *Id*. If there was such a "rash of refusals," why did the Defendants present no evidence of actual "refusals"? If there have been, as the ACLU claims, "hundreds of reports," why is it that not a single report led to a woman able to testify for the Defendants? *Id*. Moreover, it is significant that the ACLU does not

explain *why* these refusals were made. If such refusals actually occurred, it is possible that the refusals were made for reasons that would be exempt under the Rule—the drugs could have been out of stock, the drugs could have been contraindicated, etc.

The ACLU does cite four complaints filed against four Illinois pharmacies during 2005. *Id*. However, the ACLU leaves out significant facts. For example, the first "complaint" cited involved an Osco drugstore which twice refused to fill prescriptions for "emergency contraception." *Id*. But the ACLU presents no evidence to establish that Osco refused to dispense for religious reasons. It is conceivable that these refusals were made because the drugs were out of stock. And in none of the examples given does the ACLU claim that a woman was unable to obtain "emergency contraception" in a timely manner, the claimed impetus of the Rule. In fact, at trial Defendant Adams testified that he is not aware of a single actual person who was unable to obtain "emergency contraception" because of religious objection. Tr. 130.[5]

It is also conceivable that the requests for "emergency contraception" leading to the ACLU's claimed complaints were not from women who needed "emergency contraception" at all.[6] For example, the federal court for the Central District of Illinois describes the following occurrence in *Vandersand v. Wal-Mart Stores, Inc*., 525 F. Supp.

[5] The Defendants' medical expert, Dr. Warren Wallace, also acknowledged that he is unaware of any instance in which a religious refusal to sell Plan B actually resulted in someone not getting the drug. Record Vol. IX 108 (hereinafter "Tr.").

[6] In *Stormans*, discussed *infra*, the federal district court found that many of the examples given by the defendant state of Washington could have been manufactured. *See* Part I.B., *infra*.

2d 1052 (C.D. Ill. 2007).[7] In 2006, Illinois pharmacist Vandersand received a call from a nurse practitioner at Planned Parenthood, who asked whether he would dispense "emergency contraceptives." *Id*. at 1054. He said he would not, and gave her his name when she requested it. *Id*. A few minutes later, the same nurse practitioner from Planned Parenthood called again, asking Vandersand if there were any other pharmacies in town. *Id*. Vandersand gave the caller the name and telephone number of another pharmacy. *Id*. The nurse practitioner told Vandersand that one of her patients might be coming to the pharmacy, and if she did to please ask her to call the nurse practitioner. *Id*. Vandersand agreed. Approximately one hour later, the patient called the pharmacy, and the call was taken by a pharmacy technician who passed along the message and telephone number of the nurse practitioner. *Id*. The patient never requested "emergency contraception" from either the pharmacy or Vandersand. *Id*. She was never refused "emergency contraception" by either the pharmacy or Vandersand. *Id*. Yet a "complaint" was lodged against Vandersand with the Illinois Department of Financial and Professional Regulation.

It is exactly this type of fictitious request and behavior that conceivably led to the "complaints" cited by the ACLU. And perhaps the Defendants choose not to introduce any similar evidence because they knew it was not remotely persuasive or indicative of an actual "problem" with access.

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[7] Defendants claim that federal court decisions do not pose persuasive authority for this court. Brief of Defendants-Appellants, at 43. However, the facts as discussed in *Vandersand* are applicable here in demonstrating a pattern and practice of abortion advocates baiting pharmacists in order to manufacture false complaints about access to "emergency contraception." Further, Defendants cannot "have it both ways." Defendants repeatedly cite (and misapply) the case *Stormans v. Selecky*, but do not want the Plaintiffs or their *amici* to be able to cite federal cases.

Moreover, the ACLU subsequently states that the claimed "refusals" were not related to religious reasons. In attempting to show that the Rule is narrowly tailored, the ACLU actually states, "***"[t]here was not a shred of evidence that any pharmacy other than plaintiffs had asserted religious objections to the Rule."*** ACLU Brief, at 32. That inherently means that the complaints cited by the ACLU had nothing to do with conscience.

As such, the ACLU, even in attempting to introduce new evidence, fails to show that there is "problem" of access to "emergency contraception" stemming from religious objection. Its statement above actually proves to the contrary.

In all, the Defendants and ACLU present nothing but rhetoric. Rhetoric does not amount to evidence. Because there is no "problem" of access to "emergency contraception," Defendants can assert no state interest strong enough to overcome the Rule's violation of both federal and state laws, discussed *infra*. Indeed, the manifest weight of the evidence demonstrates there was no need for the Rule whatsoever.

B. Defendants' misapply *Stormans*, which in reality bolsters the Plaintiffs' case

Defendants and the ACLU cite the Washington case *Stormans v. Selecky* multiple times, but they use the case inappropriately[8] and, in the meantime, the district court has ruled contrary to the state's actions in that case.

[8] Defendants cite *Stormans* as if the Ninth Circuit had conclusively "upheld" the Washington pharmacy rule as "surviv[ing] constitutional scrutiny." *See, e.g.*, Brief of Defendants-Appellants, at 11, 18. However, the district court in *Stormans* rejected such a view, as the Ninth Circuit decision was simply a consideration of the preliminary injunction. *See Stormans v. Selecky*, 2012 U.S. Dist. LEXIS 22370, **41-42 (Feb. 22, 2012) (page 22-23 of the slip opinion). After noting the Ninth Circuit's own statements that the factual record upon consideration of the preliminary injunction was "thin," "sparse," or "otherwise incomplete," the district court held that the "argument that the core question is settled as matter of law is rejected." *Id*. (page 23 of the slip opinion).

Specifically, the case in Washington involves a rule much like the Rule here—in fact, the Defendants admit in their brief that the Illinois Rule was patterned after the Washington rule. Brief of Defendants-Appellants, at 11. This admission proves fatal for Defendants, as a federal district court in Washington has now determined the Washington rule is violative of the First Amendment to the U.S. Constitution.[9]

Because both the Defendants and the ACLU[10] draw comparisons between the two cases, an examination of the district court's conclusions and findings is instructive here. First, as here, the court found that "*the evidence at trial revealed no problem of access to Plan B or any other drug before, during, or after the rulemaking process*." *Stormans* Findings & Conclusions, at ¶ 78 (emphasis added). In fact, the Washington Board of Pharmacy had commissioned a survey which "confirm[ed] that *Plan B is widely available*, and *religious objections do not pose a barrier to access*." *Id*. at ¶¶ 82-83 (emphasis added).

This was the case even in rural areas—those areas that *amicus* ACLU claims pose a "particular challenge" in timely accessing "emergency contraception." *See* ACLU Brief, at 7. The *Stormans* court reported, **"***no Board witness, or any other witness, was able to identify any particular community in Washington—rural or otherwise—that*

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[9] The opinion in the case, *Stormans v. Selecky*, can be found at 2012 U.S. Dist. LEXIS 22370 (Feb. 22, 2012). The findings of fact and conclusions of law can be found at 2012 U.S. Dist. LEXIS 22375 (Feb. 22, 2012). For ease of reference for this court, the *Stormans* decision will be referred to as "*Stormans* Opinion," followed by a page number in the Lexis document as well as in the slip opinion. The findings of fact and conclusions of law will be referred to as "*Stormans* Findings & Conclusions" and will reference the paragraph specifically cited.

[10] While the ACLU does not go into as much detail as the Defendants do, the ACLU does draw a comparison between "the plaintiff pharmacies here (and in *Stormans*)." ACLU Brief, at 21 n.13.

lacked timely access to emergency contraceptives or any other time-sensitive medication." Stormans Findings & Conclusions, at ¶ 89 (emphasis added).

In this glaring "absence of general, empirical, or systematic evidence of an access problem," the state introduced into evidence "refusal stories"—attempts to show actual situations where women were refused access to Plan B. *Id*. at ¶ 91. But the court blew enormous holes through this "evidence." Like the ACLU's examples here, many of the refusals were "inaccurately reported," "unsubstantiated," involved "mere hypotheticals," or involved permitted conduct under the rule's "exceptions." *Id*. at ¶¶ 93-100. The court also acknowledged that *many of the stories were "manufactured" by Planned Parenthood and other activists. Id*. at ¶ 99. "[M]any of the refusal stories were not the result of natural encounters with access problems, but were instead manufactured by an active campaign of test shopping." *Id*. Clearly, this may also be the case regarding the "complaints" filed in Illinois.

In other words, the defendants in Washington, like the Defendants here, completely lacked any evidence of an "access" problem.

Further, the court in Washington extensively outlined the biased and activist role played by state defendants. The court highlighted the "unprecedented" role played by Planned Parenthood in the process. *See*, *e.g*., *id.* at ¶274(b). The Court also detailed numerous other communications as well as statements made by witnesses during the trial. The creation of the Washington rule was not a "neutral, bureaucratic process," but *"a highly political affair, driven largely by … outspoken opponents of conscientious objections to Plan B." Id*. at ¶ 274 (emphasis added).

As in Washington, the Rule at issue here is the result of a highly political affair, driven by Defendants determined to force pharmacists and pharmacies to dispense "emergency contraception" in violation of their consciences. When Governor Blagojevich initially issued the "emergency rule" that would morph into the Rule in litigation today, he did so with the threat that any pharmacist that violated the Rule would face significant penalties. Thereafter, the Governor made certain public statements emphasizing that the goal of the Rule is to coerce compliance by pharmacists who have religious objections to dispensing certain contraceptives. The Governor acknowledged that the Rule was prompted by the actions of individual pharmacists who had declined to fill contraceptive prescriptions because of religious and moral opposition to "emergency contraception." *See Menges v. Blagojevich*, 451 F. Supp. 2d 992, 997 (C.D. Ill. 2006). In a press release issued shortly after the Rule, the Governor stated that "pharmacies are not free to let [religious] beliefs stand in the way of their obligation to their customers." Governor's Press Release (Apr. 13, 2005).

In a letter issued to licensed physicians statewide on or about April 26, 2005, the Governor again affirmed that his Rule was in response to the actions of pharmacists opposed to "emergency contraception" and asked the physicians to report any pharmacists who refused to fill such prescriptions. *See Menges*, 451 F. Supp. 2d at 997. In a separate letter to the organization Family-Pac, the Governor again stated that his Rule was in reaction to pharmacists who disagree with certain methods of birth control, advising that if individual pharmacists refused to fill birth control prescriptions, their employers would face significant penalties. *Id.*

In March 2006, the Governor reaffirmed that the Rule is directed at pharmacists who object to dispensing certain drugs on moral grounds. *Id*. At the time, he even went so far as to announce that pharmacists who hold such moral views *should find another profession*. *Id*.

Defendants claim that the actions of past defendants, since replaced in office, do not reflect the current bias of the current Defendants. Yet not only is the initial impetus for the Rule instructive here, but the current Defendants' own statements further buttress the conclusion that pharmacists (and pharmacies) of certain religious belief were unconstitutionally targeted by the Rule. For example, Defendant Adams, Secretary of the Illinois Department of Financial and Professional Regulation and the "lead drafter" of the "Current Rule," testified that he would not give a "variance" for religious reasons. Brief of Defendants-Appellants, at 18; Tr. 114. He further testified that the Department's litigation file containing the history of the rules had the words "Plan B" written on it, and that he "commonly" referred to the rules "as the Plan B rules." Brief of Defendants-Appellants, at 19; Tr. 114. The *Stormans* court treated a similar admission in that case as indicative of the wrongful purpose of the Washington rule.[11]

And as in *Stormans*, Adams brought the pro-abortion group Planned Parenthood "into the loop," so that the state would know what other states were doing (*i.e*., Washington, where Planned Parenthood was engaged in an advocacy campaign aimed at forcing the Washington Board of Pharmacy to trample on the religious liberties of

[11] *See Stormans* Opinion, 2012 U.S. Dist. Lexis 22370, at *59 (page 33 of slip opinion) ("While Defendants argued that the Board's rules intended to prohibit personal objections generally, it is telling that the Board's 'Notice to Pharmacists,' instructing pharmacists on the Board's new rules' operation, was internally titled '<<pharmacy**plnB**103_001.pdf>>.' The title highlights the document's unstated focus.") (emphasis in original).

pharmacists in that state as well). Brief of Defendants-Appellants, at 19. Represented by Pam Sutherland, Planned Parenthood was involved in at least one meeting with the Joint Committee on Administrative Rules. Tr. 132-133. Defendant Adams admitted that he and Ms. Sutherland worked together to "advance the pro choice cause." *Id*. at 133. Both are or have been involved with the group called Personal PAC (with Defendant Adams holding a position on the board), which has had on its letterhead the statement "Pro Choice or No Choice." *Id*. at 133-134. Personal PAC calls Defendant Adams a "pro choice star" and "pro choice activist and leader"—a characterization with which Defendant Adams agreed. *Id*. at 143.

Finally, both Defendants' and the ACLU's briefs are filled with undertones demonstrating a bias against the Plaintiffs. The Defendants claim that the exceptions to the Rule "demonstrate nothing other than legitimate, time-honored reasons" for not dispensing "emergency contraception." Brief of Defendants-Appellants, at 30. The plain meaning is clear: the Defendants do not consider a religious objection to be "legitimate." Significantly, the court in *Stormans* considered the exact same verbiage to be "telling." *Stormans* Opinion, 2012 U.S. Dist. Lexis 22370, at *14 (page 8 of slip opinion). "Indeed, Mr. Saxe's[12] division of reasons not to dispense into illegitimate (i.e., moral reasons) and legitimate (i.e., any other reason) highlights the goal of the Board, the Governor, and the advocacy groups: to eliminate conscientious objection." *Id*. at *15 (page 8 of slip opinion).

Similarly, the ACLU claims that, "[t]o the extent that individual pharmacists… claim a burden [imposed by the Rule]… their burden is of their own making." ACLU

[12] The Washington Board's Executive Director.

Brief, at 29. Such a disrespectful attitude regarding both Plaintiffs' sincerely held religious beliefs and the protections afforded them under state and federal law underscores the original and continued unconstitutional aim of the Rule: to force pharmacists and pharmacies to violate their consciences or "get out of the business."

II. THE POTENTIAL POST-FERTILIZATION EFFECT OF "EMERGENCY CONTRACEPTION" IS OBJECTIONABLE TO A LARGE NUMBER OF HEALTHCARE PROVIDERS AND PROVIDES GROUND FOR THE RIGHT TO OBJECT TO ITS PROVISION

The Defendants and other proponents of the widespread use of "emergency contraception" take great strides to downplay its effects and its implications on the beliefs of a large number of the nation's citizens. For example, the Defendants ignore the post-fertilization effect of "emergency contraception" and state that the "larger community" finds such drugs morally permissible. *See* Brief of Defendants-Appellants, at 36. The ACLU claims that the pharmacies cannot "demonstrate a religious or conscientious basis for their refusal to comply with the Rule." ACLU Brief, at 32. However, the undisputed post-fertilization effect—*i.e.*, life-ending properties—of "emergency contraception" demonstrates a religious or conscientious basis for objecting to the drugs. Moreover, the life-ending mechanism of action is objectionable to a large number of healthcare providers—and regardless, the "majority view" is irrelevant to the Plaintiffs' sincerely held religious beliefs.

The Plaintiffs believe that the life of a human being begins at fertilization,[13] and they cannot dispense "emergency contraception" because the drugs prevent an already-

[13] At trial, Defendants medical expert, Dr. Warren Wallace, who has been a physician at Northwestern University Medical School for 35 years, agreed that there is "a new unique human life" *before* implantation—*i.e.*, at fertilization.

fertilized egg—an embryo—from implanting in the uterus and can even kill an already implanted embryo. It is demonstrated in the medical literature that "emergency contraception" can have such a post-fertilization effect.

Explanations by the Food and Drug Administration (FDA) demonstrate that the Plaintiffs are not exaggerating the effects of "emergency contraception." For example, in regard to Plan B, the FDA states:

> Plan B acts primarily by stopping the release of an egg from the ovary (ovulation). It may prevent the union of sperm and egg (fertilization). ***If fertilization does occur, Plan B may prevent a fertilized egg from attaching to the womb (implantation).***[14]

The same explanation is provided by Duramed Pharmaceuticals, the manufacturer of Plan B One-Step. Duramed states that Plan B One-Step "works primarily by": 1) preventing ovulation; 2) possibly preventing fertilization by altering tubal transport of sperm and/or egg; 3) altering the endometrium, which may inhibit implantation.[15]

Moreover, a new drug classified as "emergency contraception" (both by the FDA and under the Rule) is actually an abortion-inducing drug. Like the abortion drug RU-486, this new drug, Ulipristal Acetate (*ella*), is a selective progesterone receptor modulator (SPRM). Despite its approval for use as "emergency contraception," *ella*—like RU-486—can induce an abortion.[16] This is because an SPRM "works" by blocking

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[14] FDA, *FDA's Decision Regarding Plan B: Questions and Answers* (updated Apr. 30, 2009), available at http://www.fda.gov/cder/drug/infopage/planB/planBQandA.htm (last visited Mar. 16, 2012) (emphasis added).

[15] Duramed Pharmaceuticals, *How Plan B One-Step Works* (2010), available at http://www.planbonestep.com/plan-b-prescribers/how-plan-b-works.aspx (last visited Mar. 16, 2012).

[16] "The mechanism of action of ulipristal in human ovarian and endometrial tissue is identical to that of its parent compound mifepristone [RU-486]." D. Harrison &

progesterone, a hormone that is necessary for pregnancy. By blocking progesterone, *ella* can kill a human embryo even after implantation.

Studies confirm that *ella* is harmful to an embryo.[17] The FDA's own labeling notes that *ella* may "affect implantation"[18] and advices against use of *ella* in the case of known or suspected pregnancy. Notably, at the FDA advisory panel meeting for *ella*, Dr. Scott Emerson, a professor of Biostatistics at the University of Washington and a panelist, raised the point that the low pregnancy rate for women taking *ella* four or five days after intercourse suggests that the drug *must* have an "abortifacient" quality.[19]

Plaintiffs are not alone in their beliefs that being complicit in causing this post-fertilization effect is morally objectionable. For example, the Catholic Church—which in

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J.Mitroka, *Defining Reality: The Potential Role of Pharmacists in Assessing the Impact of Progesterone Receptor Modulators and Misoprostol in Reproductive Health*, 45 ANNALS PHARMACOTHERAPY 115 (Jan. 2011).

[17] *See* European Medicines Agency, *Evaluation of Medicines for Human Use: CHMP Assessment Report for Ellaone* 16 (2009), available at http://www.ema.europa.eu/docs/en_GB/document_library/EPAR_-_Public_assessment_report/human/001027/WC500023673.pdf (last visited Mar. 16, 2012) ("As expected, ulipristal acetate is embryotoxic…."). *See also ella* Labeling Information (Aug. 13, 2010), available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf (last visited Mar. 16, 2012).

[18] *ella* Labeling Information, *supra*.

[19] *See* Transcript, Food and Drug Administration Center for Drug Evaluation and Research (CDER), Advisory Committee for Reproductive Health Drugs 106, 157-58, 160, 164 (June 17, 2010), available at http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/ReproductiveHealthDrugsAdvisoryCommittee/UCM218560.pdf (last visited Mar. 9, 2012).

2010 was comprised of almost one-quarter of the U.S. adult population[20]—teaches that the life of each human being begins at the moment of conception (*i.e.*, the point of fertilization). *Catechism of the Catholic Church* ¶ 2322 (2d ed. 1997). Numerous Protestant denominations as well as other religions echo this belief.

Furthermore, national medical organizations support healthcare providers' freedom to abide by their consciences, including their religious and moral beliefs. Most relevant here, the American Pharmaceutical Association (APhA) states in its *Code of Ethics* that pharmacists should avoid any behavior that compromises their "dedication to the best interests of the patients," but also holds that pharmacists have a duty to "act with conviction of conscience."[21]

In its regard to its *Conscience Clause*, APhA states:

> The ability of health professionals to opt out of services they find personally objectionable is an important component of the health care system. APhA's policy supports the ability of a pharmacist to opt out of dispensing a prescription or providing a service for personal reasons and also supports the establishment of systems so that the patient's access to appropriate health care is not disrupted."[22]

Specifically, the APhA takes the following position:

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[20] The Pew Forum on Religion & Public Life, *U.S. Religious Landscape Survey: Summary of Key Findings* (2010), available at http://religions.pewforum.org/reports (last visited Mar. 9, 2012); *see also* Catholic Information Project, *The Catholic Church in America: Meeting Real Needs in Your Neighborhood* 3 (USCCB 2006) (in 2006 the Catholic Church was comprised of 69.1 million Americans).

[21] APhA, *Code of Ethics for Pharmacists* (adopted 1994), available at http://www.pharmacist.com/AM/Template.cfm?Section=Search1&template=/CM/HTMLDisplay.cfm&ContentID=2903 (last visited Mar. 9, 2012).

[22] APhA, *Conscience Clause* (2012), available at http://www.pharmacist.com/AM/Template.cfm?Section=Issues&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=86&ContentID=14490 (last visited Mar. 9, 2012).

> 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. When this policy is implemented correctly, and proactively, it is seamless to the patient….[23]

Likewise, the policy of the American Society of Health-System Pharmacists (ASHP) recognizes "the right of pharmacists … to decline to participate in therapies they consider to be morally, religiously, or ethically troubling."[24]

Analogously, leading professional physicians' organizations have consistently held that physicians should be free to determine which procedures they will perform, in what type of practice they will engage, and what patients they will serve. The American Medical Association (AMA) provides that, with the exception of medical emergencies,[25]

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[23] APhA, *Federal Conscience Clause: APhA Position* (Mar. 2009), available at http://www.pharmacist.com/AM/Template.cfm?Section=Issues&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=20005 (last visited Mar. 9, 2012).

[24] ASHP, Policy Position 0610: *Pharmacist's Right of Conscience and Patient's Right of Access to Therapy* (renewed in 2010).

[25] Defendants try to label the need for "emergency contraception" as a true "emergency." However, with Plan B a woman has up to 72 hours to use the drug under the FDA protocol. With *ella*, a woman has 5 days. The timeline for these drugs does not constitute an "emergency." Moreover, the "harm" in the instance of failure to take "emergency contraception" "in time" is, potentially, a pregnancy—not death or irreparable harm to a major bodily function, as is the general definition of "medical emergency" in the abortion context.

Further, women are generally encouraged to obtain "emergency contraception" *before* intercourse—*i.e.*, before the 72 hours (or 5 days) even begins. For example, the U.S. Department of Health and Human Services (HHS) encourages women to talk to their physicians about obtaining "emergency contraception" at each annual exam. *See* HHS, *Emergency contraception (emergency birth control) fact sheet* (last updated Nov. 21, 2011), available at http://www.womenshealth.gov/publications/our-publications/fact-sheet/emergency-contraception.cfm#i (last visited Mar. 19, 2012). The American College of Obstetricians and Gynecologists also suggests that minors request an advance prescription of "emergency contraception." ACOG Committee on Adolescent Health

a physician shall "be free to choose whom to serve, with whom to associate, and the environment in which to provide medical care."[26]

In E-9.06 of the AMA's *Code of Medical Ethics* (Code), the AMA provides that every individual has "free choice" of which physician to use. However, "[i]n choosing to subscribe to a health maintenance organization or in choosing or accepting treatment in a particular hospital, the patient is thereby accepting limitations upon free choice of medical services."[27] Similarly, a patient has free choice in selecting a pharmacy, but that patient is accepting the limitations that come along with that particular pharmacy.

E-9.06 continues by stating, "[a]lthough the concept of free choice assures that an individual can generally choose a physician, likewise a physician may decline to accept that individual as a patient."[28] Thus, the Code is replete with guidelines allowing physicians to refuse to treat certain persons. E.906 even takes into account differences in

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Care, *Fact Sheet: Emergency Contraception* (2010), available at http://www.acog.org/~/media/Departments/Adolescent%20Health%20Care/Teen%20Care%20Tool%20Kit/EmergContraception.pdf?dmc=1&ts=20120319T1238397480 (last visited Mar. 19, 2012).

It also cannot be overlooked that the Rule does not require that pharmacies stock "emergency contraception." If Defendants were truly concerned about the "emergency" nature of "emergency contraception," they would have required all pharmacies to stock the drugs at all times. But instead, pharmacies can delay in dispensing the drugs simply because the drugs are out of stock.

[26] AMA, *Principles of Medical Ethics* (June 2001), available at http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page (last visited Mar. 9, 2012).

[27] *See* AMA, *Code of Medical Ethics*, Opinion 9.06, available at http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion906.page (last visited Mar. 9, 2012).

[28] *Id*.

insurance coverage, stating, "[i]n selecting the physician of choice, the patient may sometimes be obliged to pay for medical services which might otherwise be paid by a third party."[29] Thus, the AMA places the responsibility of choosing the appropriate healthcare provider on the patient's shoulders, regardless of the financial obstacles for the patient.

In the World Medical Association's (WMA) *Statement on Professional Responsibility for Standards of Medical Care*, the organization recognizes that a "physician should be free to make clinical and ethical judgements [sic] without inappropriate outside interference."[30] Likewise, pharmacists should be free to make ethical decisions for their practice without inappropriate interference from outside the medical profession. WMA's statement goes on to affirm that "[p]rofessional autonomy and the duty to engage in vigilant self-regulation are essential requirements for high quality care" which benefit patients.[31]

In summary, "emergency contraception" undisputedly possesses a post-fertilization effect that is objectionable to a large number of healthcare providers nationwide. To require that the Plaintiffs provide "emergency contraception" clearly conflicts with their sincerely held religious beliefs that preventing an embryo from implanting is terminating a human life. And not only does the Rule conflict with the

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[29] *Id*.

[30] WMA, *Statement on Professional Responsibility for Standards of Medical Care* (2006), available at http://www.wma.net/en/30publications/10policies/m8/ (last visited Mar. 9, 2012).

[31] *Id*.

conscience of the Plaintiffs, but it also conflicts with the conscience provisions of both pharmaceutical and physicians' organizations alike.

III. PLAINTIFFS' RIGHTS OF CONSCIENCE ARE GUARANTEED UNDER STATE AND FEDERAL LAW

As this Court is well aware, the individual Plaintiffs object to the use of "emergency contraception," will not partake in the use or effects of "emergency contraception" by issuing it to customers, and will not allow their businesses to be run in such a way as to comply with the use and effects of "emergency contraception." Yet the various Defendants have made clear over the years that Plaintiffs' objection to "emergency contraception" will result in significant penalties.

Fortunately, the Plaintiffs have a form of judicial recourse. Both state and federal law protect the Plaintiffs from exactly this kind of invidious coercion.

A. The Right of Conscience is guaranteed under the Illinois Healthcare Right of Conscience Act and the Illinois Religious Freedom Restoration Act

Illinois grants comprehensive conscience protection to its citizens through both the Illinois Healthcare Right of Conscience Act and the Illinois Religious Freedom Restoration Act. These laws specifically and intentionally protect members and corporations of the healthcare profession and also provide judicial recourse to those harmed by the State in violation of these laws.

Illinois Healthcare Right of Conscience Act

Illinois maintains one of the most comprehensive right of conscience laws in the nation, protecting all healthcare providers in all healthcare settings. The Illinois Healthcare Right of Conscience Act (the Act) sets forth the clear public policy of the state: "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…." 745 ILL. COMP. STAT. 70/2 (emphasis added). It is also the public policy of the state "to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability" upon "persons ***or entities***" that refuse 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." *Id*. (emphasis added).

According to the Act, no healthcare personnel can be held civilly or criminally liable to a person or public official for refusing to perform, assist, counsel, suggest, recommend, refer, or participate in a form of heath care service which is contrary to his or her conscience. *Id*. at 70/4. Likewise, it is unlawful for the State to discriminate against any person because of that person's conscientious refusal to receive, obtain, accept, perform, assist, counsel, suggest, recommend, refer, or participate in any way in a healthcare service contrary to his or her conscience. *Id*. at 70/5.

Corporations which own or operate a health care facility are afforded the same protection. *Id*. at 70/9. A corporation must merely document its refusal (not the reason for its refusal) "in its ethical guidelines, mission statement, constitution, bylaws, articles of incorporation, regulations, ***or*** other governing documents." *Id*. (emphasis added). Thus, the Act provides a broad number of ways a corporation can document its refusal to dispense "emergency contraception." The Plaintiffs did so here.

In sum, the State cannot force either an individual or a corporation to violate his or her conscience. Furthermore, when a public or private person or entity commits "any

action prohibited" under the Act, the injured person or corporation may commence a lawsuit. *Id*. at 70/12.

Under the Act, the following broad definitions apply:

- "**health care**" means "any phase of patient care," including family planning and medicine;
- "**health care personnel**" means any person "who furnishes, or assists in furnishing of, health care services;"
- "**health care facility**" means any dispensary[32] or "location wherein health care services are provided;" and
- "**conscience**" means "a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths."

Id. at 70/3.

These definitions are further illuminated by the Illinois Pharmacy Practice Act, which provides the following broad definitions:

- "**pharmacist**" is "an individual *health care professional* and provider currently licensed by this State to engage in the practice of pharmacy;" and
- "**practice of pharmacy**" includes the dispensing of prescription drug orders and patient counseling.

225 ILL. COMP. STAT. 85/3(d) & (k-5) (emphasis added).

[32] One definition of "dispensary" is "an outpatient pharmacy." TABER'S CYCLOPEDIC MEDICAL DICTIONARY 619 (20th ed. 2001). Likewise, the Defendants' medical expert, Dr. Warren Wallace, testified that he has heard the term "dispensary" used to refer to a pharmacy. Tr. 102.

Read together, these statutes clearly indicate that "health care personnel" covers not only physicians and nurses, but a host of healthcare providers, including pharmacists; likewise, a pharmacy is encompassed within the meaning of "health care facility." As such, Plaintiffs are protected—both individually and corporately—by the Illinois Healthcare Right of Conscience Act and cannot be coerced by the Defendants to choose between their livelihood and their religious convictions.

Illinois Religious Freedom Restoration Act

After the United States Supreme Court issued its decision in *Employment Division v. Smith*, *see infra* Part III.B., the Illinois General Assembly reacted by passing the Illinois Religious Freedom Restoration Act (RFRA). The General Assembly made the following findings:

- The free exercise of religion is an inherent, fundamental, and inalienable right secured by *Article I, Section 3 of the Constitution of the State of Illinois*;
- Laws "neutral" toward religion, as well as laws intended to interfere with the exercise of religion, may burden the exercise of religion;
- Government should not substantially burden the exercise of religion without compelling justification.

775 ILL. COMP. STAT. 35/10(a) (emphasis in original). The purpose of RFRA was to restore the compelling interest test utilized in free exercise claims before the Supreme Court issued its decision in *Smith* and "to provide a claim or defense to persons whose exercise of religion is substantially burdened by government." *Id*. at 35/10(b).

Specifically, RFRA provides that "Government 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." *Id*. at 35/15. "Exercise of religion" is defined as "an act or refusal to act that is substantially motivated by religious belief." *Id*. at 35/5.

The Plaintiffs' objection to "emergency contraception" is motivated by religious belief, bringing that objection under the ambit of RFRA—and the compelling interest test. While the State's alleged motivation here is to ensure access to "emergency contraception," the Rule fails to satisfy the compelling interest test. First, as demonstrated in Part I.A., *supra*, there is no "problem" of access in Illinois. The state has no interest, let alone a compelling one.

Second, the Rule is not narrowly tailored to meet that alleged goal. The ACLU has already admitted that there is not a shred of evidence that religious objection has interfered with "access." Yet this rule is targeted toward pharmacists and pharmacies with religious objection. It is "tailored" for a "problem" that is not a problem. Further, the Rule does not apply to hospitals or emergency rooms—arguably the locations most likely to receive requests for "emergency contraception." This failure to even come close to reaching the alleged goal, coupled with the Defendants' various statements, demonstrates that the purpose of this Rule was not to provide health care to women, but to target pharmacists with worldviews contrary to the Defendants.

As such, the Plaintiffs are provided judicial relief under Section 20 of RFRA: "If a person's exercise of religion has been burdened in violation of this Act, that person may assert that violation as a claim or defense in a judicial proceeding…." *Id*. at 35/20. This

section provides not only a defense against government action, but also an affirmative right to bring an action in court to seek protection. Because the Plaintiffs' exercise of religion has been burdened by a rule coercing them to either submit or be penalized for following their conscience, this Rule should be struck down on the basis that it is not narrowly tailored to achieve its illusory goal.

B. The Right of Conscience is a historic right supported by the First Amendment

The First Amendment promises that Congress shall make no law prohibiting the free exercise of religion. U.S. CONST. amend. I. At the very root of that promise is the guarantee that the government cannot force a person to commit an act in violation of his or her religion.[33] As Thomas Jefferson wrote, "[n]o provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority." Thomas Jefferson to New London Methodists (1809). Jefferson also stated,

> The rights of conscience we never submitted [to rulers], we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others.

Thomas Jefferson, *Notes on Virginia* (1785). Likewise, James Madison stated,

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate…. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.

James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 15 (reprinted in *Everson v. Bd. of Ed*., 330 U.S. 1, 64 (Rutledge, J., dissenting)).

[33] *See generally* McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

Indeed, it cannot be disputed that the right of conscience lies at the very core of the free exercise clause of the First Amendment. Over the years, the United States Supreme Court has shaped free exercise jurisprudence, which can be summarized as follows.

A state law designed to discriminate against an individual because of his or her religious beliefs and practices is subject to strict scrutiny. Thus, the state must show that the law serves a compelling interest and is narrowly tailored to meet that interest. When a law is religiously neutral and of general applicability, it is not subject to strict scrutiny, even if it affects an individual's religious beliefs or practices. *See Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). However,

> [o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against government hostility which is masked, as well as overt. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

Thus, there is a two-part process under federal law. First, a court must initially look at the face of a Rule. Second, if the Rule is facially neutral, the court must go beyond the face of the Rule to determine the true object of the Rule.

Defendants argue there is no reference to religion in the Rule, thereby taking it over the first free exercise hurdle. The second hurdle poses a significant problem for the Defendants, however. First, the statements and actions described above demonstrate that

the intent of the Rule was to force those with religious objections to "emergency contraception" to violate their consciences or leave the practice of pharmacy.

Second, the fact that the Rule does not cover hospitals and emergency rooms demonstrates that the object of the Rule was not to make "emergency contraception" more readily available, but to specifically target pharmacists objecting to "emergency contraception." As such, the Rule also fails to be generally applicable.

Third, there is a blatant lack of consistency in the Rule which also indicates its coercive intent. For example, at one point the Defendants alleged that in order to avoid punishment, pharmacies can elect not to carry any form of contraceptives. But this alleged option under the Rule would serve to decrease the availability of contraceptives, not increase it. Moreover, the Rule allows for a delay if a pharmacy does not keep "emergency contraception" in stock; but that same delay is not allowed when a pharmacist on duty simply cannot fill a prescription for reasons of conscience.

Finally, the Rule seeks to "fix" a "problem" of access that does not exist.

Each of these facts demonstrates that the Rule was promulgated to target religious conduct for distinctive treatment. *See Church of Lukumi Babalu Aye*, 508 U.S. at 534. As such, it is subject to strict scrutiny. Because the alleged purpose for the Rule was to guarantee access to "emergency contraception" (a purpose which, as discussed above, is illusory), and because the Rule leaves out a host of other sources, it is not narrowly tailored and must be struck as a violation of the Plaintiffs' free exercise rights.

CONCLUSION

Under the guise of ensuring access to "emergency contraception," the Defendants issued a Rule which, as demonstrated above, unilaterally violates the Illinois Healthcare Right of Conscience Act, the Illinois Religious Freedom Restoration Act, and the free exercise guarantees of both the State and U.S. Constitutions.

For these reasons, this Court should affirm the lower court.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, certificate of service, and those matters to be appended to the brief under Rule 342(a), is **31 pages**.

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CERTIFICATE OF SERVICE

I hereby certify that on _____, I caused to be served three (3) paper copies of the foregoing *Amici Curiae* Brief to counsel listed below by depositing said copies in U.S.P.S. priority mail, postage paid.

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