IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, 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 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;	)	
Plaintiff,	)	
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,	)	Case No. 2005-CH495
Defendants.	)	

PLAINTIFFS' MOTION AND SUPPORTING MEMORANDUM FOR PRELIMINARY INJUNCTION

NOW COME Plaintiffs, MORR-FITZ, INC., D/B/A FITZGERALD PHARMACY, L. DOYLE, INC., D/B/A EGGELSTON PHARMACY, and KOSIROG PHARMACY, INC., D/B/A KOSIROG REXALL PHARMACY (hereinafter collectively "Plaintiffs") by and through their attorneys, Mailee R. Smith, Americans United for Life, Chicago, Illinois, and Edward R. Martin, Jr., Americans United for Life, St. Louis, Missouri, and hereby move this Honorable Court to enter a Preliminary Injunction against Defendants, as authorized by 735 ILCS §§ 11-101 and 11-102, restraining and enjoining Defendants Blagojevich, Grillo, Bluthardt, and the

State Board of Pharmacy (hereinafter collectively "Government Defendants"), their officers, agents, employees, successors, attorneys, and all those in active concert or in participation with them, from enforcing the Rule codified at 68 Ill. Adm. Code § 1330.91(j) (the "Rule"), and further moves this Court for an order setting a date for a hearing on this motion.

In support of this motion, Plaintiffs incorporate herein by reference its Verified Complaint for Declaratory and Injunctive Relief, and the declarations of Luke Vander Bleek and Glenn Kosirgo in support of this motion. In its Verified Complaint, Plaintiffs allege that the Government Defendants, by filing, enforcing, and threatening to enforce the Rule, have violated and will in the absence of the requested injunctive relief continue to violate Plaintiffs' rights, under federal and state law, not to participate in the destruction of human life in violation of its religious beliefs and moral conscience, and to be free from coercion to do so. The Government Defendants have also pressured and will continue to pressure Plaintiffs to violate those same rights of its employees. Accordingly, the Government Defendants should be enjoined from enforcing the Rule.

INTRODUCTION

This case concerns the Government Defendants' attempt to force Illinois pharmacists to dispense certain alleged "contraceptive" products against their will. In particular, the Rule provides that, when presented with a prescription for any contraceptive, "a pharmacist *must* dispense the contraceptive . . . *without delay*, consistent with the normal timeframe for filling any other prescription." 69 Ill.Admin.Code §1330.91(j) (emphasis supplied). Violating this rule carries severe penalties, including license revocation. 225 ILCS 85/30.

The Plaintiffs are three Illinois corporations that own and operate pharmacies in the state. The owners and pharmacists of each Plaintiff, however, have religious and moral objections to

dispensing certain products defined by the Rule as "contraceptives." In particular, Plaintiffs object to dispensing so-called "contraceptive" products that may "prevent" pregnancy after intercourse by preventing an already-fertilized egg from implanting in the uterus. The Plaintiffs believe that life begins at conception and, therefore, that preventing a fertilized egg from implanting constitutes the destruction of human life and, therefore, an abortion. Accordingly, they cannot comply with the Rule without violating their religious and moral beliefs, and those of their employees.

By promulgating this Rule and forcing pharmacies to dispense such contraceptive—under threat of license revocation—Illinois is forcing the Plaintiffs to choose between violating their consciences and violating the law. A preliminary injunction is proper here because the government is not permitted to subject its citizens to the coerced "choice" between forced participation in abortions and losing their businesses.

Two statutes and one provision of the Illinois Constitution directly control. First, the Illinois Health Care Right of Conscience Act, 745 ILCS 70/1 *et seq.* provides that:

> The General Assembly finds and declares that people and organizations hold different beliefs about whether certain health care services are morally acceptable. *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 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 (emphasis supplied). The Rule plainly violates this provision by coercing Plaintiffs into providing health care services to which they are morally and religiously opposed.

Secondly, Illinois' Religious Freedom Restoration Act ("RFRA") recognizes that the free exercise of religion is a fundamental right protected by the Illinois Constitution. 775 ILCS 35/10(a)(1); Ill. Const. Art. I, § 3. To protect this constitutional right, RFRA provides that the 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 interest." 775 ILCS 35/15. In enacting RFRA, the legislature expressly adopted the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963). 775 ILCS 35/10(a)(6) and (b)(1) (also citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972) which applies the same standard). In striking down a state ruling that denied a woman unemployment benefits because of her refusal to work on her Sabbath day, the Court explained the burden in terms that are dispositive here:

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Sherbert, 374 U.S. at 404. Because the General Assembly expressly adopted this standard as the governing test for free exercise cases, Plaintiffs cannot be coerced to "choose between following the precepts of [their] religion" and forfeiting their careers and businesses on the one hand, and "abandoning one of the precepts of [their] religion in order to" keep their licenses on the other hand. *Id.* Illinois does not permit the imposition of such a burden on religion. 775 ILCS 35/10.

For these reasons, the Rule is plainly unconstitutional and invalid. The facts demonstrate that Plaintiffs are likely to succeed on the merits, have an inadequate remedy at law, and will

suffer irreparable harm in the absence of preliminary injunctive relief. Accordingly, as set forth in more detail below, a preliminary injunction is required to protect Plaintiffs' rights.

FACTS

1. The Plaintiffs

Plaintiff Morr-Fitz, Inc, d/b/a Fitzgerald Pharmacy, is a "c" corporation with one shareholder, Luke D. Vander Bleek. Morr-Fitz operates pharmacies in Morrison and Prophetstown, Illinois. Vander Bleek is the chief pharmacist at the Morrison pharmacy, and has been a licensed and practicing Illinois pharmacist since 1986. Vander Bleek is also a practicing Catholic who believes that life begins at conception, and that he is therefore prohibited from dispensing "morning after" contraceptives because of their abortifacient mechanism of action. Based on Vander Bleek's religious conscience and belief, and through his control, Morr-Fitz's pharmacies do not sell "morning after" contraceptives. (Vander Bleek Affidavit)

Vander Bleek is also the majority shareholder in Plaintiff L. Doyle, Inc., a subchapter S corporation. L. Doyle, Inc. ("Doyle") operates pharmacies in Sycamore and Genoa, Illinois. Based on Vander Bleek's religious conscience and belief, and with the support of the sole minority shareholder, Doyle's pharmacies do not sell "morning after" contraceptives. (See Vander Bleek Affidavit)

Plaintiff Kosirog Pharmacy, Inc. is a subchapter S corporation, with one shareholder, Glenn Kosirog. Kosirog is the son of the founder of Kosirog Pharmacy, Inc. and operates a single pharmacy in Chicago, Illinois, which his father founded in 1956. Glenn Kosirog has been a licensed and practicing Illinois pharmacist since 1983. Kosirog is also a Christian who believes that life begins at conception and that he is therefore prohibited from dispensing "morning after" contraceptives because of their abortifacient mechanism of action. Based on

Kosirog's religious conscience and belief, and through his control, Kosirog's pharmacy does not sell "morning after" contraceptives. (See Kosirog Affidavit)

Plaintiffs reasons for conscientious objection as to dispensing certain forms of "emergency" contraception is informed by professional understanding of how "emergency" contraceptives work. For example, the "emergency" contraceptive "Plan B" is the trade name for the hormone levonorgestrol, a hormone found in some more standard birth control protocols (along with estrogen). For the use of levonorgestrol as an "emergency" contraceptive, it is administered at a much higher dose than standard birth control to accomplish prevent pregnancy. The high dosage effects this in one of there ways: by stopping the release of eggs from the ovary, by stopping the fertilization of eggs, or by stopping the egg (fertilized or not) from attaching to the uterus. The pharmacological effect of certain "emergency" contraceptives is such that it can cause a fertilized egg to be discarded and thereby destroyed.

2. The Rule

On or about August 16, 2005, the Joint Committee on Administrative Rules (JCAR) made permanent the Governors's Emergency Rule. The permanent rule, as approved by JCAR reads as follows:

> j) Duty of Division I Pharmacy to Dispense Contraceptives
>
> 1) Upon receipt of a valid, lawful prescription for a contraceptive, a pharmacy must dispense the contraceptive, or a suitable alternative permitted by the prescriber, to the patient or the patient's agent without delay, consistent with the normal timeframe for filling any other prescription. If the contraceptive, or a suitable alternative, is not in stock, the pharmacy must obtain the contraceptive under the pharmacy's standard procedures for ordering contraceptive drugs not in stock, including the procedures of any entity that is affiliated with, owns, or franchises the pharmacy. However, if the patient prefers, the prescription must be transferred to a local pharmacy of the patient's choice under the pharmacy's standard procedures for transferring prescriptions for contraceptive drugs, including the procedures of any entity that is affiliated with, owns, or franchises

the pharmacy. Under any circumstances an unfilled prescription for contraceptive drugs must be returned to the patient if the patient so directs.

2) For the purposes of this subsection (j), the term "contraceptive" shall refer to all FDA-approved drugs or devices that prevent pregnancy.

3) Nothing in this subsection (j) shall interfere with a pharmacist's screening for potential drug therapy problems due to therapeutic duplication, drug-disease contraindications, drug-drug interactions (including serious interactions with nonprescription or over-the-counter drugs), drug-food interactions, incorrect drug dosage or duration of drug treatment, drug-allergy interactions, or clinical abuse or misuse, pursuant to 225 ILCS 85/3(q).

68 Ill. Adm. Code 1330.91(j). The Rule was promulgated in direct response to an alleged incident in which a pharmacist refused to fill a prescription for morning-after contraceptives. "Ill. Pharmacists Required to Fill Prescriptions for Birth Control," Kari Lyderson, Washington Post, April 2, 2005, A2. The purpose and effect of the Rule is to force pharmacists to dispense contraceptives despite their religious and conscientious objections.[1]

ARGUMENT

A preliminary injunction is appropriate where the movant can establish 1) that it has an ascertainable right needing protection; 2) that there is no adequate remedy at law; 3) that it will suffer irreparable harm if relief is not granted; and 4) that it has a likelihood of success on the merits. *Wilson*, 349 Ill. App. 3d at 248; *Keefe-Shea Joint Venture, Inc. v. City of Evanston*, 332 Ill. App. 3d 163, 169 (Ill. App. Ct. 1st Dist. 2002). The trial court must also decide whether the balance of hardships to the parties supports granting injunctive relief. *Bollweg v. Marker*, 353 Ill. App. 3d 560, 572 (Ill. App. Ct. 2nd Dist. 2004). The decision to grant or deny injunctive

[1] Governor Blagojevich was clear in his reasoning when, less than two weeks after promulgating the eemergency rule, he indicated that personal religious beliefs cannot be invoked by pharmacies. See Press Release of Governor Rod Blagojevich, April 13, 2005 at http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=1&RecNum=3849 accessed on October 27, 2005.

relief rests within the sound discretion of the trial court. *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & W. Ry. Co.*, 195 Ill. 2d 356, 366 (Ill. 2001).

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

In order to establish that the Plaintiffs are likely to succeed on the merits, Plaintiffs must only raise a fair question as to the existence of the rights claimed. *Keefe-Shea*, 332 Ill. App. 3d at 174.[2] The Plaintiffs have done far more than merely raise a fair question as to the existence of their rights; rather, as set forth in more detail below, Illinois law clearly and unequivocally protects citizens from exactly the type of government coercion created by the Rule.

A. The Plaintiffs Are Likely to Succeed On Their Claims That the Rule Violates the Illinois Health Care Right of Conscience Act.

The Illinois Health Care Right of Conscience Act, 745 ILCS 70/1 *et seq.*, states that it is the public policy of the State of Illinois to "respect and protect the right of conscience of all persons … who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually [or] corporately…." 745 ILCS 70/2.[3] The

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[2] Although Plaintiffs have made a strong showing of likelihood of success, such a showing is not necessarily required where, as here, the Plaintiffs seek to maintain the status quo. Until the challenged Rule was promulgated, the Plaintiffs (and all other pharmacists) were free to refuse participation in health care regimens to which they were religiously or morally opposed. An exception to the necessity of establishing a likelihood of success occurs when plaintiffs are seeking to simply maintain the status quo. *Joerger*, 221 Ill. App. 3d at 407-08 (stating that "status quo" is characterized as the last, peaceable uncontested status which preceded litigation) (quotation omitted). In fact, if a plaintiff "seeks only to maintain the status quo until the ultimate issue is decided, the injunction is properly allowed or maintained even where there may be serious doubts as to the ultimate success of the complaint." *Blue Cross Ass'n v. 666 N. Lake Shore Dr. Assoc.*, 100 Ill. App. 3d 647, 651 (Ill. App. Ct. 1st Dist. 1981).

[3] Under the act, "health care" is defined as *any phase* of patient care, including but not limited to counseling, referrals or advice regarding the use or procurement of contraceptives. 745 ILCS 70/3 (also including "medicine"). According to the Illinois Pharmacy Practice Act, the definition of the "practice of pharmacy" is as follows:

> [T]he 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 (1) patient counseling, (2) interpretation and assisting in the monitoring of appropriate drug use and prospective drug utilization review, (3) providing information on the therapeutic values, reactions, drug interactions, side effects, uses, selection of medications and medical devices, and outcome of drug therapy, (4) participation in drug selection, drug monitoring, drug utilization review, evaluation, administration, interpretation, application of pharmacokinetic and laboratory data to design safe and effective drug regimens, (5) drug research (clinical and scientific), and (6) compounding and dispensing of drugs and medical devices.

Act prohibits all forms of discrimination upon such entities that, by reasons of their religious or conscientious convictions, refuse to obtain or deliver certain health care services and medical care. *Id.* Of particular importance here, the act also prohibits not only all "impositions of liability," but also "all forms of . . . coercion . . . upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions . . . " *Id.* Here, by enacting the Rule, the Government Defendants are impermissibly trying to coerce the Plaintiffs to provide contraceptives despite their religious and conscientious objections. Moreover, this coercion is deliberate, rather than incidental; the Governor himself has admitted that the law is designed to force pharmacies to not let religious beliefs "stand in the way" of giving customers what they want.[4] This type of coercion is precisely what the Rights of Conscience Act prohibits.

Furthermore, Sections 5 and 7 of the Right of Conscience Act prohibit an entity from discriminating against its employees or potential employees on the basis of their conscientious refusal to provide health care services to which they are morally opposed. 745 ILCS 70/5, 70/7; *see also* Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.*, (prohibiting discrimination against applicants and employees based upon their religious beliefs). Yet that is precisely what the Rule requires the Plaintiffs to do, in that complying with the Rule requires the staffing of their pharmacies with employees who will fill the prescriptions in question (and, therefore, discrimination against their employees who will not fill such prescriptions).[5]

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225 ILCS 85/3(d). The Act further defines "pharmacist" as "an individual health care professional and provider currently licensed in this State to engage in the practice of pharmacy." 225 ILCS 85/3(k-5). The Act includes in its definition of "health care worker" those "pharmacists licensed under the Pharmacy Practice Act of 1987." 225 ILCS 47/15(d).

[4] Press Release of Governor Rod Blagojevich, April 13, 2005 at http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=1&RecNum=3849 accessed on October 27, 2005

[5] Likewise, the Rule would also require Plaintiffs to violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (2005), which requires employers to accommodate the religious beliefs of employees, as long as doing so would not impose an undue hardship on the business of the employer. 42 U.S.C. § 2000e(j) (2005). Title VII specifically states that a state statute "which purports to require or permit the doing of any act which would be an

For each of these reasons, the Rule is plainly in violation of the Illinois Rights of Conscience Act.

B. The Plaintiffs Are Likely to Succeed On Their Claim That the Rule Violates the Illinois Religious Freedom Restoration Act.

The facts and law demonstrate that the Rule violates the Illinois Religious Freedom Protection Act, because it substantially burdens Plaintiffs' exercise of religion without a compelling interest and is not the least restrictive means of satisfying such interest. 775 ILCS 35/15. In enacting RFRA, the General Assembly recognized that the free exercise of religion is a fundamental right protected by the Illinois Constitution. 775 ILCS 35/10(a)(1). To protect this fundamental right, Illinois expressly adopted the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). 775 ILCS 35/10(a)(6) and (b)(1).

The two cases expressly adopted by Illinois are particularly instructive here. In *Sherbert v. Verner*, a Seventh Day Adventist was discharged by her employer because she would not work on Saturday, the Sabbath Day of her faith. 374 U.S. at 401. When she was unable to obtain work because of her refusal to work on Saturdays, she filed a claim with for unemployment compensation. *Id.* The government denied her benefits because she failed to accept work "without good cause." *Id.* The South Carolina Supreme Court affirmed, overruling a free exercise claim, stating that the denial of benefits under state law "places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience." *Id.*

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unlawful employment practice under this title" is void. 42 U.S.C. § 2000e-7 (2005). When a federal statute is in conflict with a state statute, the state statute is pre-empted. U.S. CONST. VI, §1, l. 2; *California Federal Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987). Because the Rule requires employers to their employees rights granted under Title VII, the Rule is void.

The United States Supreme Court reversed. Embracing a much broader view of free exercise, the Court found that appellant's practice of refusing to work on Saturday derived from the practice of her religion, and that the government "pressure upon her to forego that practice was unmistakable." *Id.* at 402. The Court then made clear that forcing someone to choose between the precepts of their religion and their livelihood plainly and substantially burdens the free exercise of religion:

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Sherbert, 374 U.S. at 404. In this case, as in *Sherbert*, the government is attempting to coerce the Plaintiffs into choosing between following the precepts of their religion (and risking their businesses) or abandoning those precepts (to keep their jobs). The state constitution and RFRA forbid imposition of that choice.

The second case expressly adopted by the General Assembly supports this principle as well. In *Wisconsin v. Yoder*, the state of Wisconsin had attempted to force Amish citizens to comply with the state's compulsory school attendance law. The Court found that the Amish respondents' refusal to comply with the law was "not merely a matter of personal preference, but one of deep religious conviction." *Id.* The Court found that the compulsory attendance law burdened the respondents exercise of their religion:

> The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs . . . . [T]hey must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.

Id. at 218 (finding the burden impermissible in the absence of a compelling state interest, which Wisconsin could not offer).

Here, as in *Yoder*, the impact on Plaintiffs' religious obligations is severe and inescapable. While the Rule does not carry criminal sanctions, it carries the possibility of losing Plaintiffs' entire businesses and livelihood with the threat of license revocation. Such sanctions are far more severe than the mere $5 fine imposed upon respondents in *Yoder*. *Id.* at 208. Like those respondents, the Plaintiffs here would be forced to either abandon their beliefs or migrate to some other location (or, despite years of investment in their businesses, to another profession). The state constitution and RFRA plainly prohibit the government from forcing such a choice.

For these reasons, the Plaintiffs have demonstrated likelihood of success on the merits of their RFRA claim.[6]

C. The Government Defendants' "Actual Controversy" and "Administrative Exhaustion" Arguments Are Inapplicable.

Notably, at the temporary restraining order stage, the Government Defendants did not even attempt to respond to the substance of Plaintiffs' religion and right of conscience claims. *See* Memorandum in Response to Plaintiffs' Motion for A Temporary Restraining Order (hereinafter "Government Memo") at 5-14. Unable to defend the Rule's glaring infirmities, the Government Defendants instead argued that Plaintiffs lacked standing. In particular, the Government Defendants alleged that (1) there was no "actual controversy" because the Plaintiffs had not yet violated the law and the State had not begun administrative enforcement proceedings, and (2) that any such administrative proceedings must be exhausted before filing suit. Government Memo at 5-14. Both arguments fail.

[6] In the interests of brevity, the Plaintiffs have focused solely on their Right of Conscience and RFRA claims, which are more than sufficient to support a preliminary injunction. Plaintiffs are also likely to succeed on the additional relief sought in their complaint.

First, Plaintiffs easily satisfy the requirement for an "actual controversy." An "actual controversy" is present if "there is a legitimate dispute admitting of an immediate and definite determination of the parties' rights, the resolution of which would help terminate all or part of the dispute." *First of America Bank, Rockford N.A. v. Netsch,* 166 Ill. 2d 165, 173 (1995). The requirement exists to prevent courts from granting declarations of rights "involving only abstract propositions of law." *Illinois Gamefowl Breeders Assoc. v. Block*, 75 Ill. 2d 443 (1979). The Court has been clear, however, that the requirement "is not intended to prevent resolution of concrete disputes admitting of a definitive and immediate determination of the rights of the parties." *Id.* A party need not "have been wronged or suffered an injury." *First of America* at 174. Rather, a Plaintiff need only have a "personal claim of right which is capable of being affected." *Id.* The Court has also been clear to explain that the very purpose of the declaratory judgment remedy—which is sought in this case—is to permit parties to settle rights *before* there has been "an irrevocable change in the position of the parties that will jeopardize their respective claims of right." *Id.* In order to carry out these purposes, Illinois "courts have repeatedly held that the declaratory judgment statute must be liberally construed and should not be restricted by unduly technical interpretations." *Id.; see also Roberts v. Roberts*, 90 Ill. App. 2d 184, 187 (1967); *Amos v. Norwood Federal Sav. And Loan Assoc.*, 47 Ill. App. 3d 643 (1977).

An actual controversy exists here. The Government Defendants are attempting to coerce them into providing contraceptives in violation of their religious and conscientious objections. The Right of Conscience Act is not offended only if and when the Government fulfills its promise to take enforcement action leading to the "imposition of liability"; rather, by its plain terms the Act also prohibits "all forms of . . . coercion" upon conscientious objectors. 745 ILCS 70/2. The Rule alone, absent any future enforcement action at all, provides such coercion and,

therefore, provides a cause of action under the Right of Conscience Act.[7] 745 ILCS 70/12. Likewise, even without any future enforcement action, the Rule imposes a real and present burden on Plaintiffs' religion under RFRA, in that they are presently faced with the threat that they must either abandon their religious beliefs or risk losing their licenses. *Sherbert v. Verner* makes clear that the mere "imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Sherbert* at 404. Accordingly, the imposition of this burden necessarily gives rise to a cause of action under RFRA, the very purpose of which is "[t]o provide a claim or defense to persons whose exercise of religion is substantially burdened by the government." 775 ILCS 35/10(b)(2). Plaintiffs' disputes with the Government Defendants are concrete and admits of a "definitive and immediate determination of the rights of the parties." *Illinois Gamefowl Breeders Assoc.* 75 Ill. 2d. at 452; *First of America,* 166 Ill. 2d at 173.

The Supreme Court case of *Illinois Gamefowl Breeders Association* is instructive. In that case, the Association brought an action against the Director of Agriculture to declare certain portions of the Humane Care for Animals Act unconstitutional. *Illinois Gamefowl Breeders Assoc.* 75 Ill. 2d. at 448. Although there was no enforcement action or violation of the Act, the Illinois Supreme Court found that the mere fact that the Association owned animals subject to the regulation of the Act was sufficient to create an actual controversy as to its constitutionality. *Id.* at 452. In particular, the Court stated:

> Plaintiff has alleged that it owns 'animals within the scope, meaning, intent and application of the challenged statute. Such ownership raises the threat of potential criminal prosecution, and, in our judgment is sufficient to entitle plaintiff to bring a declaratory judgment action challenging the constitutionality of the statute.

[7] And, to be clear, such coercion is the very point of the Rule, which was enacted in direct response to the conscientious objections of a pharmacist who did not want to be involved in providing morning after contraceptives. The Rule only exists *because* the Government Defendants intend for it to coerce compliance despite religious objections.

Id. Here, Plaintiffs own pharmacies and have licenses subject to the Rule, and are plainly and directly "within the scope, meaning, intent and application" of the Rule. *Id.* Indeed, as pharmacists who are religiously and conscientiously opposed to certain contraceptives, the Plaintiffs are *precisely* the group targeted by the Rule in the first place. Accordingly, they have raised an actual controversy.

Likewise, in *First of America*, the Illinois Supreme Court found that an actual controversy exists where a plaintiffs rights have merely been placed into doubt by a claim or assertion of another party. In particular:

> Our courts have recognized that '[t]he mere existence of a claim, assertion or challenge to plaintiff's legal interests, * * * which cast[s] doubt, insecurity, and uncertainty upon plaintiff's rights or status, damages plaintiff's pecuniary or material interests and establishes a condition of justiciability.'

First of America at 175 (quoting *Roberts v. Roberts*, 90 Ill. App. 2d 184, 187 (1967))(alteration in *First of America*). In *First of America,* the rights placed into doubt concerned payment obligations to the government regarding a sale that had not yet occurred—a right that certainly would not be characterized a fundamental or constitutional. In this case, the Rule manifestly casts "doubt, insecurity, and uncertainty" on Plaintiffs' *fundamental* and constitutional rights to religious and conscientious objection. Accordingly, an actual controversy exists.

Nor can the Government Defendants rely on *Baugher v. Walker,* 47 Ill. App. 3d 573 (1977), for the premise that no actual controversy exists. The plaintiffs in *Baugher* were pharmacists who sought protection from disciplinary action over a possible group boycott by pharmacists over reimbursement issues. In a letter, the Director of the Department of Registration and Education stated that a group boycott by pharmacists would be conduct the Department considered "gross immorality" and therefore a violation of the Pharmacy Practice

Act. *Id.* The pharmacists sued claiming that any such action would damage their business interests and property rights, and that an administrative action would damage their reputation. The court found that there was no actual controversy because the plaintiffs had not even alleged that they were participants in the group boycott referenced in the Director's letter.[8]

In contrast, the Plaintiffs here have asserted in their complaint and in affidavits that they intend to engage in prohibited conduct. Given the existence of the Rule, there can be no doubt that Plaintiffs' fundamental rights have been placed into doubt sufficient to create an actual controversy, as in *Illinois Gamefowl Breeders* and *First of America.* Moreover, unlike in *Baugher*, the Plaintiffs here have been granted affirmative statutory rights by the legislature to commence a suit based on not only the imposition of liability (which might follow from any eventual administrative action), but also any government "coercion" and any government imposition of a substantial burden on religion. Accordingly, Plaintiffs are not prospectively in conflict with the government, they are presently and immediately in conflict, and they have suffered and continue to suffer harms deemed by the legislature sufficient to commence and sustain a lawsuit.[9]

The Government Defendants get no further with their argument that the law requires Plaintiffs to simply await prosecution and allow the administrative process to run its course.

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[8] *See Baugher* at 578 ("In the case at bar, the allegedly threatening portion of the letter, if it is a threat at all, is directed at a group of pharmacists who have, *as a group*, refused "to fill prescriptions which are to be paid by the Department of Public Aid." The plaintiffs neither alleged nor testified that they were participants in this collective boycott, nor was theirs a class action suit. Therefore any controversy between the existing parties is, at best, based on a state of facts which had not arisen and which was not certain to arise. As a result, the trial court should not have considered the plaintiffs' action for a declaratory judgment.")

[9] *Baugher* is also distinguishable in that the actual statute at issue—which prohibited "gross immorality"—was open to considerable interpretation. In other words, it would be entirely unclear to a court in advance what actions would constitute "gross immorality" so as to place the plaintiffs in danger of losing their licenses. In the instant case, there is no such gray area. Rather, the Rule requires the filling of all prescriptions for contraceptives, which are explicitly defined in the Rule as products approved by the FDA to prevent pregnancy. Therefore, unlike in *Baugher*, the Plaintiffs here face a Rule which, on its face, requires actions which they are statutorily and constitutionally protected from being forced to take. Accordingly, the controversy here is actual, immediate, and not subject to interpretation.

Government Memo at 11-15. First and foremost, the doctrine of administrative exhaustion simply does not apply where, as here, a challenge is brought to the constitutionality of a statute on its face. *Kane County v. Carlson*, 116 Ill. 2d 186, 199 ("There are exceptions to the exhaustion requirement, however. The rule does not apply when a party challenges the constitutionality of a statute on its face."); *see also Earnhardt v. Director of Illinois Dept. of Revnue* 191 Ill. App. 3d 613, 636 (Ill. App. 5 Dist., 1989). In any event, both the Rights of Conscience Act and RFRA expressly create affirmative rights to *bring lawsuits in court*, rather than just assert defenses if and when a prosecution (administrative or otherwise) is brought. For example, Section 12 of the Rights of Conscience Act provides that "Any person, association, corporation, entity or health care facility injured by . . . any action prohibited by this Act *may commence a suit therefor* . . . ." 745 ILCS 70/12. Likewise, Section 20 of RFRA (which is entitled "Judicial relief") states that "[i]f 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.*" 775 ILCS 35/20. Accordingly, there can be no doubt that the legislature intended for plaintiffs to be able to commence a suit asserting these rights and not merely await an illegal administrative prosecution.

Lastly, in addition to conflicting with Illinois law on actual controversies and administrative exhaustion, the Government Defendants' position ignores the fundamental rights at issue. In arguing that the Plaintiffs should wait until they turn away a customer and the government attempts to enforce the Rule, the Government Defendants would force the Plaintiffs to violate the law in order to challenge it. The law does not provide time for the Plaintiffs to come to Court, even on an emergency basis, upon receipt of such a prescription. 68 Ill. Admin. Code 69 §1330.91(j) (pharmacist "must" fill the prescription "without delay"). In such

circumstances, Plaintiffs should not be forced to violate the law in order to obtain protection for their fundamental rights. *See, e.g., Steffel v. Thompson*, 415 U.S. 452, 459 (noting, where petitioner had not been arrested that an actual controversy existed because "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (granting injunctive relief to teacher challenging Arkansas statute that prohibited teaching of evolution, despite fact that law had not been broken and state had never taken any enforcement actions).

By comparison, consider the many cases challenging abortion regulations. In such cases, abortion providers are routinely held to have standing and raised an actual controversy merely by asserting that they might be asked to perform a particular procedure; there is no requirement that the abortion provider actually wait for a patient to make the request or the government to then enforce the law. *See, e.g., Stenberg v. Carhart*, 540 U.S. 914 (2000). If such a requirement existed, the government would be empowered to chill the exercise of fundamental right—by passing unconstitutional statutes—but evade review by never following through with an actual prosecution. Where, as here, Plaintiffs constitutional rights are at stake, they are not required to await actual prosecution. *See, e.g., Steffel v. Thompson*, 415 U.S. 452, 459; *Epperson v. Arkansas*, 393 U.S. 97 (1968); *First of America Bank, Rockford N.A. v. Netsch,* 166 Ill. 2d 165, 173 (1995); *Illinois Gamefowl Breeders Assoc. v. Block*, 75 Ill. 2d 443 (1979).

II. PLAINTIFFS HAVE AN ASCERTAINABLE RIGHT NEEDING PROTECTION

The standard for establishing an ascertainable right that requires protection is "not difficult." *Grandberg v. Didrickson*, 279 Ill. App. 3d 886, 889 (Ill. App. Ct. 1st Dist. 1996) (citing *Continental Cablevision v. Miller*, 238 Ill. App. 3d 774, 787 (Ill. App. Ct. 1st Dist.

1992)). To demonstrate a clear and ascertainable right, the Plaintiff must only raise a fair question that it has a substantive interest recognized by statute or common law. *Limestone Dev. Corp. v. Lemont*, 284 Ill. App. 3d 848, 854 (Ill. App. Ct. 1st Dist. 1996).

Plaintiffs have a protectable right not to face coercion from the government to fill prescriptions against their religious and moral beliefs. As set forth in the Complaint, these rights are protected by the Illinois Health Care Right of Conscience Act, 745 ILCS 70/1 *et seq.*, the Illinois Human Rights Act, 775 ILCS 5/101 *et seq.*, and the Illinois Religious Freedom Restoration Act, 775 ILCS 35/1 *et seq.*

Furthermore, Illinois courts consistently maintain that a threatened business interest is an identifiable right that may be protected by injunctive relief. *Continental Cablevision*, 238 Ill. App. 3d at 787; *In re Marriage of Joerger*, 221 Ill. App. 3d 400, 405 (Ill. App. Ct. 4th Dist. 1991); *In re Marriage of Weber*, 182 Ill. App. 3d 212, 219 (Ill. App. Ct. 1st Dist. 1989). Due to the Governor's threat that violators of the Rule will face punishment and the loss of their licenses, the threat to Plaintiffs' business interests is real, severe and sufficient to support an injunction.

III. PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW

There is no adequate remedy at law when damages are difficult to quantify, such as where monetary damages cannot adequately compensate the injury and the injury cannot be measured by pecuniary standards. *Bollweg*, 353 Ill. App. 3d at 576; *Franz v. Calaco Dev. Corp.*, 322 Ill. App. 3d 941, 947 (Ill. App. Ct. 2nd Dist. 2001). To preclude injunctive relief, a remedy must be "clear, complete, and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy." *In re Marriage of Hartney*, 2005 Ill. App. LEXIS 276, *4 (Ill. App. Ct. 2nd Dist. 2005); *C.J. v. Dept. of Human Serv.*, 331 Ill. App. 3d 871, 891 (Ill.

App. Ct. 1st Dist. 2002). Where a remedy is not the most practical and efficient, there is no adequate remedy. *Joerger*, 221 Ill. App. 3d at 407.

At stake are Plaintiffs' rights of religious freedom and their rights of conscientious refusal to assist in the destruction of human life. In particular, under Illinois law, the Plaintiffs have the statutory right to be free from government coercion to provide health care services to which they are conscientiously object. Likewise, under Illinois law, the Plaintiffs have the statutory and constitutional right to not face the substantial burden on their religious beliefs imposed by the Rule. No monetary damages would suffice to remedy such an extreme and intrusive violation of Plaintiffs' rights of conscience. CITE.

IV. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF INJUNCTIVE RELIEF

To demonstrate irreparable harm, the Plaintiffs need not demonstrate an injury that is beyond repair or compensation in damages. *Bollweg*, 353 Ill. App. 3d at 577. Instead, Plaintiffs need only show transgressions of a continuing nature—*i.e.*, that, without relief, plaintiff will continue to suffer the same injury. *Id.*; *Continental Cablevision*, 238 Ill. App. 3d at 788. The continuation of a loss to a legitimate business interest is sufficient to show that the Plaintiffs will suffer irreparable harm. *Sheehy v. Sheehy*, 299 Ill. App. 3d 996, 1005-06 (Ill. App. Ct. 1st Dist. 1998). In fact, once a protectable right is established, irreparable injury is presumed if that right is not protected. *Cameron v. Bartels*, 214 Ill. App. 3d 69, 73 (Ill. App. Ct. 4th Dist. 1991); *see also C.J.*, 331 Ill. App. 3d at 891 (stating that a continuing violation of a constitutional right which cannot be adequately compensated constitutes a *per se* irreparable harm).

Because Plaintiffs have established a right to be free from government coercion and substantial burdens on their religious beliefs that is not being protected, irreparable harm is presumed. *Id.* In addition, because of the Government Defendants' filing and threatened

enforcement of the Rule, Plaintiffs are chilled in the exercise of its rights of conscience and religious freedom under state and federal law. Indeed, Plaintiffs' failure to dispense or force its employees to dispense morning after contraceptives in violation of its conscience and religious beliefs would jeopardize its license and thus the job of every one of its employees. Thus, Plaintiffs do not have the luxury of exercising their rights of conscience and raising their claims at disciplinary proceedings. Any exercise of their right of conscience subjects Plaintiffs to the possibility of losing their business and subjects their employees to the possibility of losing their employment. These continuing transgressions and the continual threat of loss to Plaintiffs' legitimate business interests demonstrate that Plaintiffs will suffer irreparable harm.

V. THE BALANCE OF HARDSHIPS WEIGHS HEAVILY IN FAVOR OF INJUNCTIVE RELIEF

The balance of hardships also supports injunctive relief. *Keefe-Shea*, 332 Ill. App. 3d at 169. The Plaintiffs will suffer greater harm without the injunction than the Government Defendants will suffer if it is issued. The Rule provides the Plaintiffs with a single, coerced choice: fill prescription for all contraceptives or refuse and risk their businesses. Their harm, as set forth above, is severe and irreparable.

In contrast, there is no evidence that the Government Defendants would suffer *any* hardship by not being permitted to force the Plaintiffs to provide contraceptives against their will. First and foremost, Plaintiffs only control five pharmacies in the entire state. Customers are obviously free to go to pharmacies that are willing to fill such prescriptions and do not need to purchase them from unwilling pharmacists. In any case, the Government Defendants can eliminate any alleged hardship to themselves by making such contraceptives available at public clinics and hospitals, or authorizing doctors (who, after all, are needed to write the prescriptions) to keep a supply on hand and distribute them directly. Accordingly, the Defendants will suffer

no "hardship" at all by being restrained from forcing the Plaintiffs to sell contraceptives over their religious and conscientious objections. The balance of hardships weighs entirely in favor of the injunction.

In any case, under *Blue Cross Ass'n,* the balance of hardships is not even necessary where, as here, the Government Defendants filed the Rule and will enforce it with the full knowledge of Plaintiffs' rights and the consequences that will ensue. *Blue Cross Ass'n*, 100 Ill. App. 3d at 651.

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

A) Set a hearing on Plaintiffs' request for a preliminary injunction;

B) Enjoin the Government Defendants and their officers, agents, employees, successors, attorneys, and all those in active concert or participation with them from enforcing the Rule codified at 68 Ill. Adm. Code § 1330.91(j);

C) Enjoin the Government Defendants and their officers, agents, employees, successors, attorneys, and all those in active concert or participation with them from retaliating in any way against Plaintiffs;

D) Grant such other and further relief as this Court deems appropriate.

Respectfully submitted this 28th day of October, 2005.

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CERTIFICATE OF SERVICE

I, _____, certify under Code of Civil Procedure sec. 1-109 that I served a copy of this notice and the attachments upon each of the persons on the service list by facsimile on October ____ 2005.

_____

SERVICE LIST

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