No. 1-001546

IN THE APPELLATE COURT OF ILLINOIS FOURTH JUDICIAL DISTRICT

MORR-FITZ, Inc., an Illinois corporation D/B/A FITZGERLAD PHARMACY, Licensed and Practicing in the State of Illinois as a Pharmacy: L. DOYLE, INC., an Illinois corporation D/B/A EGGLESTON PHARMACY, Licensed and Practicing in the state of Illinois as a Pharmacy; KOSIROG PHARMACY, INC., an Illinois corporation D/B/A KOSIROG REXALL PHARMACY, Licensed and Practicing in the State of Illinois as a Pharmacy; LUKE VANDER BLEEK; AND GLEEN KOISROG **Plaintiffs-Appellants** **v.** ROD R. BLAGOJEVICH, Governor, State of Illinois; FERNANDO E. GRILLO, Secretary, Illinois Department of Finanical and Professional Regulation; DANIEL E. BLUTHARDT, Acting Director, Division of Professional Regulation; and the STATE BOARD OF PHARMACY, in their official capacities, **Defendants-Appellees**	Appeal from the Circuit Court for the Seventh Judicial Circuit, Sangamon County Circuit Court Case No. 2005-CH495 The Honorable John W. Belz, Judge Presiding

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Harold Hestnes, *pro hac vice*
Paul P. Daley, *pro hac vice*
Mark L. Rienzi, *pro hac vice*
Jared C. Miller, *pro hac vice*
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, Massachusetts 02109
Telephone: 617.526.6000
Facsimile: 617.526.5000

Mailee R. Smith (IL Bar No. 6280167)
AMERICANS UNITED FOR LIFE
310 South Peoria Street, Suite 300
Chicago, Illinois 60607
Telephone: 312.492.7234

Francis J. Manion, *pro hac vice* pending
AMERICAN CENTER FOR LAW AND JUSTICE
6375 New Hope Road
New Hope, Kentucky 40052
(502) 549-7020

Attorneys for Plaintiffs-Appellants

ORAL ARGUMENT REQUESTED

TABLE OF AUTHORITIES

CASES

INTRODUCTION

The Plaintiffs are two individual pharmacists and three Illinois corporations subject to an administrative rule requiring them to dispense emergency contraceptives, to which the Plaintiffs have religious and moral objections. The Plaintiffs, who have refused prescriptions for emergency contraception in the past, filed this suit seeking declaratory and injunctive relief against the Rule. In particular, Plaintiffs allege that the Rule is invalid on its face because it impermissibly attempts to coerce them to provide health care services in violation of their religion.

In response, the Government asserts that Plaintiffs have not pled an "actual controversy" and lack "a sufficient personal stake in the litigation" because it is "speculative whether plaintiffs will ever be called upon to dispense emergency contraception, let alone subject to discipline." Gov. Br. 15. For these reasons, the Government asserts that the Plaintiffs lack standing to challenge the Rule and instead must await an "interchange with a customer bearing an emergency contraceptive prescription" (*id.* at 23) and then (if the Plaintiffs choose to risk their licenses and reject the prescription) wait further to see whether, and to what extent, the Government chooses to enforce the Rule.

The Government's Brief ignores several key principles of law that require the conclusion that the Plaintiffs have standing. First, the Government ignores the entire line of cases cited in Plaintiffs' Brief holding that a plaintiff is not required to violate a statute in order to challenge it. Here, as persons who have asserted a protectable interest within the scope of the Rule and have pled that they will be harmed by enforcement of the Rule, the Plaintiffs have standing under Illinois and federal law. In fact, in raising a pre-

enforcement challenge to restrictions on their conduct, Plaintiffs assert what the United States Supreme Court has deemed a "classic case or controversy under Article III."

The Government's brief also ignores the fundamental purpose of the declaratory judgment remedy—namely to permit parties to obtain judicial determination of their rights *before* they have taken actions that may compromise those rights. In this context, because a customer could walk into the pharmacy on any day with a prescription for emergency contraception—as has happened to Plaintiffs in the past and will surely happen again—the Plaintiffs are entitled to this relief now. There is no later point at which declaratory relief would achieve the purpose for which the legislature intended it.

Third, the Government's brief fails to recognize the procedural posture of this appeal. In particular, this is an appeal from a dismissal for lack of standing. All well-pleaded facts are to be accepted as true, and all reasonable inferences must be drawn in Plaintiffs' favor. Accordingly, the Government's repeated efforts to disprove Plaintiffs' standing with *merits* arguments are inappropriate.

Lastly, the Government's brief also fails to rebut Plaintiffs' demonstration that they have standing under both the Religious Freedom Restoration Act and the Health Care Right of Conscience Act because they have asserted actionable burdens and coercion under those laws.

I. The Government's Brief Ignores Dispositive Principles of Standing Law.

A. Plaintiffs Do Not Need to Violate the Law to Create Standing.

Plaintiffs' Opening Brief established that a plaintiff does not need to violate a law to create standing. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t 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."); *Buege v. Lee*, 56 Ill. App. 3d 793 (1978) ("[W]e do not think that plaintiff should be required to provoke a disciplinary proceeding against himself"); Plaintiffs' Opening Brief ("Pl. Br.") at 20-29.

Here, the Plaintiffs are plainly the targets of the Rule, have been presented with prescriptions for emergency contraception in the past, can expect to be presented with them in the future, and are confronted by a state government that plainly intends to fully and aggressively enforce the Rule. *See, e.g.*, C-00108-111 (Compl. ¶¶ 24-26, 32-34, 41-45) (noting past receipt and rejection of prescriptions); Pl. Br. 13-16 & n.2 (detailing government statements concerning the Rule and evidence of intent to enforce); *see also Menges v. Blagojevich*, (C.D. Ill. Sept. 6, 2006) (denying Governor's motion to dismiss free exercise and other challenges to Rule; citing allegation that Governor had stated in writing that the defendants intended to enforce the Rule by "any and all means necessary") (attached in Reply Appendix at A-1 – A-28); Letter of Governor Blagojevich to Mr. Paul Caprio of Family-Pac (referenced in *Menges* opinion at A-7 and attached at A-37) ("You need to know, we intend to vigorously protect" the right to access to birth control; "Please be aware that we will continue to take any and all necessary steps to

ensure a woman's access to her health care.").[1] Accordingly, the Plaintiffs have standing under *Steffel*, *Buege*, and the other cases cited in Plaintiffs' Brief at 20-29. *See also City of Chicago v. Dep't of Human Rights*, 141 Ill. App. 3d 165, 169 (1986) ("The requirement that an actual controversy be present does not mean that a party must have been wronged and suffered an injury *nor that a party must allege the existence of the possibility of imminent harm*. Rather, an actual controversy may be found "where the mere existence of a claim, assertion or challenge to the plaintiff's legal interests portends the ripening seeds of litigation."" (emphasis supplied) (internal citations omitted)).

In fact, the United States Supreme Court has deemed the type of challenge set forth by the Plaintiffs to be a "classic 'case' or 'controversy' within the meaning of Article III." *Diamond v. Charles*, 476 U.S. 54, 64 (1986) (noting that abortion providers

---

[1] The Government offers a strained interpretation of the Rule, arguing that it does not actually require all Division I pharmacies to fill all valid prescriptions for emergency contraceptives. Gov. Br. 4-5. Instead the Government argues that a pharmacy could avoid the Rule entirely by not stocking any prescription contraceptives at all, and thus rendering itself permanently unable to comply with the Rule's "out of stock" provision, which requires the requested drug to be ordered "under the pharmacy's standard procedures for ordering contraceptive drugs not in stock." *Id.*

This interpretation is irrelevant to the standing issues raised in this appeal and, in any case, is contrary to the plain language of the Rule. The Plaintiffs' policies at issue in this case extend only to emergency or "morning after" contraceptives, not to standard contraceptives. *See, e.g.*, C-00130 ("Emergency Contraceptive Policy"); C-00108 -00111 (Compl. ¶¶ 22-25, 30-33, 41-44); *see also* Affidavits of Glenn Kosirog and Luke VanderBleek, A-38 – A-40. Accordingly, even if the Government's strained interpretation were correct, the Plaintiffs remain subject to the Rule and have standing. In any case, the Government's interpretation ignores the first sentence of the Rule, which plainly imposes a "duty" by which the pharmacy "must dispense the contraceptive or a suitable alternative," "without delay," and "consistent with the normal timeframe for filling any other prescription." 68 IL ADC 1330.91(j) It is not at all clear that a pharmacy could safely follow the course suggested in the Government's brief, namely to keep itself permanently out of stock and use the Rule's "out of stock" ordering provision to avoid compliance with the Rule's plain commands.

who were subject to restriction had standing to seek pre-enforcement relief against state officials charged with enforcing the law).

The Government offers no response to these settled principles. Instead, and in direct contrast, the Government argues that the Plaintiffs lack standing because of the theoretical possibility that they *may* never be presented again with a prescription for emergency contraceptives and, if they refuse that prescription, that they may not be disciplined. *See, e.g.*, Gov. Br. 15 ("Plaintiffs lack standing because it is speculative whether plaintiffs will ever be called upon to dispense emergency contraception, let alone be subject to discipline."); *id.* at 23 (arguing that Plaintiffs must wait until they can present the court with "a particular factual context" resulting from an "interchange with a customer bearing an emergency contraceptive prescription"). In effect, because the Rule requires prescriptions to be filled "without delay," the Government's position that Plaintiffs should wait until a prescription is presented essentially requires them to violate the law (or violate their religions) in order to challenge it.

First and foremost, the Government's protestations that it is "speculative" whether Plaintiffs will ever again be presented with a prescription for emergency contraception—and that, if they refuse the prescription it is unclear whether they would be subject to discipline—are unfounded and irrelevant. Plaintiffs operate Division I pharmacies in Illinois subject to the Rule. C-00106 (Compl. ¶¶ 8-12). They alleged in the Complaint that they have been presented with prescriptions for emergency contraception before the Rule took effect. C-00108-111 (Compl. ¶¶ 24-26, 32-34, 41-45). Moreover, the Government plainly believed that the need for emergency contraception in Illinois was sufficiently broad to justify the Rule in the first place. *See* 29 Ill. Reg. 5586, 2005 WL

943559 ("Recent instances of a pharmacy's refusal to dispense legally prescribed contraceptives has resulted in delay and/or prevention of women from meeting their most basic health needs"). More recently, the Government has promulgated a second rule requiring *all* Division I pharmacies to post the Rule and advise customers of where and how to report complaints. Gov. Br. 5 n.2.; 30 Ill. Reg. 14267 (effective August 21, 2006) ("Each Division I pharmacy must prominently display" the required notice.). In fact, the Government has taken enforcement actions against several pharmacists in the state for refusing to fill contraceptive prescriptions, characterizing itself as "vigorously enforcing" the Rule. *See* Illinois Department of Professional Regulation Press Release, September 15, 2005, *Three Complaints Filed Against Pharmacies For Failure to Dispense Contraceptives: IDFPR Vigorously Enforcing Gov. Blagojevich's Birth Control Rules available at* http://www.idfpr.com/newsrls/091505PharmComplaints.asp (last visited Sept. 11, 2006); *Menges* A-6-7, A-9-11; Pl. Br. 13-16.

The Government's arguments, if correct, would doom *all* pre-enforcement challenges to any law. Every pre-enforcement challenge (whether facial or as-applied[2]) could be met with the objection that it is theoretically possible that the plaintiff will never again be in a position to exercise the right at issue on pain of violation of the law. For example, every pre-enforcement challenge to an abortion regulation could be met with the objection that "it is speculative whether plaintiffs will ever be called upon" again to provide the particular type of abortion at issue. *But see Stenberg v. Carhart*, 530 U.S.

---

[2] *See, e.g., Steffel*, 415 U.S. at 475 (pre-enforcement declaratory relief available for as-applied challenges); *American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County*, 221 F.3d 1211, 1214 (11th Cir. 2000) (overturning district court for improperly declining to hear pre-enforcement as-applied challenge).

914 (2000) (pre-enforcement challenge to partial-birth abortion statute). Likewise, every pre-enforcement challenge to any law could be met with the objection that the claim is "dependent upon several future contingencies" (Gov. Br. 15)—namely that the law would be violated, that the violation would come to the attention of authorities, and that authorities would decide to prosecute. Likewise, it is always true of a *pre*-enforcement challenge that a later factual scenario might provide additional context. For example, a pre-enforcement challenge to a speech restriction could be met with the objection that resolution would benefit from "a particular factual context" resulting from the speech actually occurring. *But see Burson v. Freeman*, 504 U.S. 191 (1992) (pre-enforcement challenge to speech regulation at polling places). The very existence of pre-enforcement challenges proves that the Government's view is not the law.

Rather, as set forth in Plaintiffs' Brief and unrebutted by the Government, a party does not need to violate the law to challenge its validity in court. Illinois law is clear that standing to challenge the validity of a law exists where a plaintiff alleges a protected interest within the scope of the law and that his or her rights will be adversely affected by enforcement. *See, e.g.*, *Illinois Gamefowl Breeders Ass'n v. Block*, 75 Ill. 2d 443, 452 (1979) ("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."). While the Government's brief attempts to distinguish *Gamefowl* on its facts (Gov. Br. 28) the Government nowhere denies that the legal standard set forth there by the Illinois Supreme Court is controlling law. As set forth in Illinois Law and Practice:

> Even in cases in which it appears that no actual controversy exists, a party initiating an action for a declaratory judgment concerning the validity of a legislative enactment has the right to a determination of rights if he or she pleads both facts demonstrating a protected interest that clearly falls within the ambit of the enactment and that his or her rights will be affected adversely by its enforcement. Therefore, a declaratory-judgment action ordinarily is a proper method of testing the validity or constitutionality of a statute or ordinance, and an opinion determining such constitutionality is not a mere "advisory opinion."

Illinois Law Practice, Declaratory Judgments, §24 (West 2006); *see also Village of Chatham v. County of Sangamon*, 351 Ill. App. 3d 889, 903 (2004) ("In a declaratory judgment action concerning the validity of a statute, a party is entitled to a declaration of rights if (1) it pleads facts showing a protectible interest clearly falling within the operative language of the statute and (2) it will be adversely affected by its enforcement."). This rule of standing applies even where, as here, the defendants assert that it is "speculative" that plaintiffs will ever be penalized. *See, e.g., Boles Trucking, Inc. v. O'Connor,* 138 Ill. App. 3d 764, 773 (1985) ("Defendants claim that standing cannot be demonstrated until plaintiffs are actually penalized, an event which is speculative, and that consequently plaintiffs do not assert violations of their equal protection and due process rights. In declaratory judgment actions involving the validity of a statute, a party is entitled to a declaration of rights "if he pleads facts showing a protectable interest clearly falling within the operative language of the [statute] and that he will be adversely affected by its enforcement." (quoting *Eagle Books, Inc. v. City of Rockford,* 66 Ill. App. 3d 1038, 1040 (1978))).[3]

---

[3] Relying on a boilerplate statement that justiciability must be determined on a "case by case basis" (Gov. Br. 27 (citing in *Babbitt v. United Farm Workers Nat'l. Union*, 442 U.S. 289, 298 (1979))), the Government generally focuses on drawing factual distinctions between Plaintiffs' situation and other cases. But the Government nowhere

Thus a party subject to a law's constraints has standing to seek declaratory relief without having to violate the law. In fact, the very purpose of the Declaratory Judgment Act is "to make possible a binding declaration of rights *without* requiring the parties to make an irrevocable change in position which might jeopardize those rights." *Gamefowl*, 75 Ill. 2d at 452; *see also Buege*, 56 Ill. App. 3d at 798 ("It is central to the purpose of the declaratory judgment procedure that it allow 'the court to take hold of a controversy one step sooner than normally, that is, after the dispute has arisen, but before steps are taken which give rise to claims for damages or other relief. The parties to the dispute can learn the consequences of their actions *before acting*.") (citing Ill. Ann. Stat., ch. 110, par. 57.1 Historical and Practice Notes, at 132 (Smith-Hurd 1968) (emphasis supplied)); *Beahringer v. Page*, 204 Ill. 2d 363, 372-373 (2003) (same). The

---

addresses the legal principle set forth in *Babbitt* and controlling here: "When contesting the constitutionality of a criminal statute, "it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights." *When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."* *Babbitt*, 442 U.S. at 298 (*citing Steffel* and *Doe v. Bolton*) (emphasis supplied); *see also Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 31-32 (1st Cir. 1999) ("[C]ourts will assume a credible threat of prosecution in the absence of compelling contrary evidence."); Pl. Br. 13-16, 26-27. The Government's failure to address these standards is further reflected by their reliance on older cases such as *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) and *International Longshoremen's and Warehousemen's Union v. Boyd*, 347 U.S. 222 (1954), Gov. Br. at 19-20 and 26, which conflict with the later *Babbitt* and *Steffel* approach. *See, e.g.*, Richard J. Pierce, Jr., *Administrative Law Treatise* § 15.12, at 1053 (4th ed. 2002) ("The old approach is illustrated by *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), which should be understood *even though it clearly is no longer law.*" (emphasis supplied)); *see id.* ("This crabbed approach created considerable unnecessary injustice. Some statutes and rules cause significant harm before they are applied to any specific conduct because they have a powerful effect in shaping conduct").

Government's position—that the Plaintiffs need to wait until they are again presented with a prescription for emergency contraception after the Rule has gone into effect—would effectively eliminate the possibility of the Plaintiffs "learn[ing] the consequences of their actions before acting," because the Rule requires the prescription to be filled "without delay." *Cf. Rhode Island Ass'n of Realtors v. Whitehouse*, 199 F.3d 26, 33 (1st Cir. 1999) ("It would be little short of perverse to deny a party standing because the statute she challenges is so potent that no one dares violate it, especially when the result is widespread self-censorship."). It is precisely for situations like the Plaintiffs' that declaratory judgments exist at all, and why the Illinois Supreme Court has stated that "the declaratory judgment statute must be liberally construed and should not be restricted by unduly technical interpretations." *First of America Bank v. Netsch*, 166 Ill. 2d 165, 1174 (1995); *see id.* (noting that the declaratory judgment procedure "is used to afford security and relief against uncertainty").

Standing cases from the abortion context provide a particularly useful comparison. When an abortion provider challenges an abortion regulation, he or she raises a constitutional claim that necessarily requires the assumption that a patient will, at some point in the future, come into the clinic and request a service. If the Government's position in this case were correct, then such abortion providers could be denied standing on the argument that it is "speculative" that a patient will enter and request a particular type of abortion, or that the government will enforce the law at issue. Nevertheless, abortion providers are routinely found to have standing in these contexts. *See, e.g.*, *Planned Parenthood v. Farmer*, 220 F.3d 127, 147 (3d Cir. 2000) ("[P]laintiffs have performed in the past, and intend to perform in the future, concededly constitutionally

protected procedures such as the D&E . . . . *They were entitled to know what they could not do.*" (emphasis supplied)); *see also* Pl. Br. 31 & n.5 (citing pre-enforcement cases).

The Government offers no convincing distinction between the Plaintiffs' predicament and that of the abortion providers who are routinely found to have standing. Instead, the Government argues only that, when an emergency contraceptive is out of stock, a customer *may* choose to go to a different pharmacy. Gov. Br. 31. Of course a patient who comes to a clinic seeking an abortion *may* elect to have a type of abortion that does not implicate the challenged law, *may* choose to go to a different clinic, or *may* choose to continue her pregnancy. None of these possibilities changes the fact that, in both the abortion clinic and the pharmacy, the customer *may* seek precisely the service that raises the constitutional issues, and the providers in both contexts are "entitled to know what they could not do." *Farmer*, 220 F.3d at 147; *see also Roland Machinery Co. v. Reed*, 339 Ill. App. 3d 1093, 1099 (2003) ("Declaratory judgments are intended to allow the trial court to settle and fix the rights of the parties and provide "relief against uncertainty" *before* the parties change their position.") (emphasis in original); *Beahringer v. Page*, 204 Ill. 2d 363, 372-373 (2003) ("The declaratory judgment procedure allows . . . [t]he parties to the dispute [to] learn the consequences of their action before acting." (citing *Gamefowl, Buege, and First of America*)).

Nor does the Government provide any plausible explanation for its claim that the Plaintiffs are not sufficiently "interested" in the controversy to provide standing. Gov. Br. 22. As pharmacists and pharmacies that are (a) required to act in accordance with the Rule, and (b) asserting that they have rights not to be so coerced, the Plaintiffs are manifestly "interested" because they "possess a personal claim, status, or right which is

capable of being affected" and the case "touch[es] the legal relations of the parties." *Gamefowl*, 75 Ill. 2d at 450. Indeed, as religious objectors to providing emergency contraception, the Plaintiffs are precisely the group targeted by the Rule in the first place (Pl. Br. 15 (quoting Gov. Blagojevich)); it would be perverse to deny them standing to challenge the Rule for lack of sufficient interest in the controversy.

In sum, the Government provides no adequate response to Plaintiffs' claims that they do not need to risk prosecution to challenge the Rule, or that the declaratory judgment remedy exists precisely for this situation. The Plaintiffs have presented what the United States Supreme Court called a "classic case or controversy under Article III" and, accordingly, Plaintiffs have standing.[4]

---

[4] The Government's suggestion that the Plaintiffs have "incorrectly characterized how emergency contraception operates" (Gov. Br. 8, n.5) is irrelevant and incorrect. First and foremost, any dispute about the scientific basis for Plaintiffs' religious and ethical beliefs is, at most, an issue for the merits stage (and only if the Court actually chooses to probe the "validity" or "correctness" of Plaintiffs' religious and moral objections). When considering a motion to dismiss for lack of standing, this consideration is even less relevant, as all pleaded facts must be accepted as true and all inferences drawn in Plaintiffs' favor. *In re Estate of Schenkler*, 209 Ill. 2d 456, 461 (2004).

The Government's contention about "how emergency contraception operates" however, is based not on scientific articles or sources purporting to be objective; rather, the Government relies only on political opinion and commentary pieces. Gov. Br. 8, n.5 (citing op-ed from *St. Louis Post-Dispatch*, and a "commentary" piece in *Obstetrics and Gynecology*). These opinion essays hardly disprove Plaintiffs' understanding of how emergency contraception works. To the contrary, the Government's "evidence" actually admits that emergency contraception may work as the Plaintiffs fear—by preventing implantation of an already-fertilized egg. Gov't A-4 ("Admittedly, this evidence is not conclusive."). In any case, both the FDA and Plan B's manufacturer acknowledge that emergency contraception may work as the Plaintiffs allege: by preventing implantation of a fertilized egg. *See* FDA's Decision Regarding Plan B: Questions and Answers, *available at* http://www.fda.gov/ CDER/drug/infopage/planB planBQandA.htm ("If fertilization does occur, Plan B may prevent a fertilized egg from attaching to the womb (implantation).") (attached at A-32) (last visited Sept. 11, 2006); About Plan B, available

B. Plaintiffs Have Standing Because They Have Asserted A Justiciable Claim Under the Religious Freedom Restoration Act.

As set forth in Plaintiffs' opening brief, the Plaintiffs also have standing because they have asserted that the Rule violates their rights to be free from religious burdens. Pl. Br. 35-36 & 38-39. The Government's response to this argument is to (a) deny, as a substantive matter, that the Rule imposes such a burden (Gov. Br. 34) and (b) assert that the Religious Freedom Restoration Act ("RFRA") does not allow Plaintiffs to "leapfrog" over ordinary justiciability requirements (*id.* at 33). Neither argument overcomes Plaintiffs' demonstration of standing.

It is of course no surprise that the Government claims they have not, in fact, burdened Plaintiffs' rights to free exercise under RFRA and the federal and state constitutions. But that assertion is a merits argument. The Plaintiffs have pled, however, that the Rule *does* violate their rights by imposing a substantial burden on their religious liberties (C-00114 (Compl. ¶ 61)) and because it was enacted for the purpose of coercing religious objectors (C-00114 (Compl. ¶ 59)). Among other things, the Rule imposes a chill—and is designed to impose a chill—on Plaintiffs' exercise of their religious liberties. *See, e.g., Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S. 707, 717-718 (1981) ("Where the state . . . denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("The ruling forces her to

---

at http://www.go2planb. com/section/about/index.html (Plan B "may inhibit implantation by altering the endometrium") (A-35) (last visited Sept. 11, 2006).

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."). Moreover, the Plaintiffs have asserted that the Rule is void because it targets religious activity. *See* C-00114 (Compl. ¶ 59); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."); *Menges* A-17 ("The Plaintiffs' allegations, if true, may establish that the object of the Rule is to target pharmacists, such as the Plaintiffs, who have religious objections to Emergency Contraceptives, for the purpose of forcing them either to compromise their religious beliefs or to leave the practice of pharmacy. Such an object is not religiously neutral. If so, the Rule may be subject to strict scrutiny."); Pl. Br. 36-37. At the motion to dismiss stage, courts "must accept as true all well-pleaded facts in plaintiffs' complaint and all inferences that can reasonably be drawn in plaintiff's favor." *In re Estate of Schlenker*, 209 Ill. 2d 456, 461 (2004).

For the same reasons, the Government's assertion that Plaintiffs are attempting to "leapfrog" justiciability requirements is incorrect. Plaintiffs do not assert that RFRA *exempts* them from justiciability requirements, but rather that their RFRA claims *demonstrate* that they have, in fact, asserted a valid and justiciable case or controversy. RFRA and the state and federal constitutions grant rights to the Plaintiffs, and RFRA expressly provides that claims of burdens on those rights may be asserted "as a claim or defense in a judicial proceeding." 775 ILCS 35/20 ("Judicial Relief"). Accordingly,

because the Plaintiffs have asserted that the Rule imposes burdens in violation of these rights, they have asserted a valid and justiciable controversy, and therefore have standing.

C. Plaintiffs Have Standing Because They Have Asserted a Justiciable Claim Under The Health Care Right of Conscience Act.

For similar reasons, the Plaintiffs have asserted a separate justiciable claim under the Health Care Right of Conscience Act, 745 ILCS 70/1 *et seq.* (the "Act"). *See* Pl. Br. 31-34 & 38-39. In particular, the Plaintiffs asserted that the Act bars the government from coercing participation in health care services contrary to one's conscience. The Act states that it is the public policy of Illinois to "respect and protect the right of conscience of all persons" providing health care services, and outlaws "all forms of coercion . . . upon" persons who refuse "to act contrary to their conscience or conscientious conviction." 745 ILCS 70/2. Plaintiffs assert that by its very nature, and without any enforcement action against them, the Rule is a deliberate "form of coercion" to make objecting pharmacists "act contrary to their consciences." *Id.*; Pl. Br. 33-34; C-00114 (Compl. ¶¶ 58-59). The Act makes clear that anyone subject to such coercion "may commence a suit therefor." 745 ILCS 70/12. Thus the Plaintiffs have manifestly pled an "actual case or controversy."

As with RFRA, the Government again offers only a brief merits defense. But beyond the bald (and incorrect) assertion that "[n]o prohibited actions have occurred" (Gov. Br. 33) the Government does not explain why the claim asserted under the Act is not justiciable. Likewise, the Government again asserts that Plaintiffs are trying to use the Act to "leapfrog" the justiciability requirement. As with RFRA, however, the Act is relevant not because Plaintiffs claim it lets them "leapfrog" the justiciability requirement, but because Plaintiffs' claims under the Act demonstrate why they have standing. The

Act makes it illegal to engage in coercion against conscientious objectors to providing health care services, the Plaintiffs have clearly alleged (and the Governor has candidly admitted) that the Rule itself is designed to coerce such objectors, and the Plaintiffs have alleged that they are such objectors and are subject to the Rule. Accordingly, Plaintiffs have alleged a justiciable claim under the Act and have standing.

II. Administrative Exhaustion is Not Required.

For the reasons set forth in Plaintiffs' opening brief at 37-41, administrative exhaustion is not required.

In particular, because this is a facial challenge to the Rule, administrative exhaustion is not required. *See Canel v. Topinka*, 212 Ill.2d 311, 319 (2004) ("An aggrieved party may seek judicial review of an administrative decision without complying with the exhaustion of remedies doctrine where a statute, ordinance or rule is attacked as unconstitutional on its face."); *Midland Hotel Corp. v. Director of Employment Sec.*, 282 Ill. App. 3d 312, 319 (1996); *Miller v. Illinois Dep't of Pub. Aid*, 69 Ill. App. 3d 477, 480 (1979). This rule makes sense, because a challenge to the validity of a rule presents purely legal questions and does not require a case-specific administrative record or the exercise of agency expertise:

> [A] plaintiff who challenges the validity of a statute on its face need not exhaust administrative remedies. The reason for this exception is apparent: administrative review is confined to the proofs offered and the record created before the agency. A facial attack to the constitutionality of a statute, which presents purely legal questions, is not dependent for its assertion or its resolution on the administrative record.

Arvia v. Madigan, 209 Ill. 2d 520, 532-33 (2004). None of the cases the Government relies on at Gov. Br. 34-37 required exhaustion for facial challenges; all are therefore inapplicable.

The Government does not contest the law on this point. *See* Gov. Br. 37. Rather, the Government asserts (without citation of any kind) that this Court should nevertheless impose an exhaustion requirement on Plaintiffs' facial challenge because Plaintiffs have also pled an as-applied challenge, and it "would make little sense" to separate the claims. *Id.* Here, of course, Plaintiffs' as-applied challenge is a pre-enforcement challenge; accordingly, like the facial challenge, exhaustion is not required because Plaintiffs' as-applied challenge "presents purely legal questions [and] is not dependent for its assertion or its resolution on the administrative record." *Arvia*, 209 Ill. 2d at 533; *see, e.g.*, *Midland Hotel Corp.*, 282 Ill. App. 3d at 319 (exception to exhaustion doctrine where "no issues of fact are presented or agency expertise is not involved"); *Canel*, 212 Ill.2d at 319 ("A party may also seek review where issues of fact are not presented and agency expertise is not involved.").

In *Dock Club, Inc. v. Illinois Liquor Control Commission*, 83 Ill. App. 3d 1034 (1980), and *AEH Construction, Inc. v. State of Illinois, Department of Labor*, 318 Ill. App. 3d 1158 (2001), both of which the Government relies upon, the question before the court was *whether* the law in question applied to a particular factual situation at issue. *See* Gov. Br. 36-37. By contrast, there is no question that the Rule would apply to the Plaintiffs when they are presented with a prescription for emergency contraception. The issue here is not the interpretation or application of the Rule, but rather whether the Rule itself conflicts with state and federal law. That legal issue is squarely within the expertise of the court, not a particular agency, and does not require the development of an incident-specific administrative record.

Nor does the government provide any response to the enforcement provisions of RFRA and the Right of Conscience Act, which expressly authorize plaintiffs to bring claims *affirmatively*, and *in court*, and thus cannot be read to require Plaintiffs to assert these rights only defensively, in an administrative prosecution. Pl. Br. 38-39. In response, the Government merely asserts (again with no citation of any kind) that these statutes "operate consistently with well-established principles of administrative exhaustion." Gov. Br. 38. The Government provides no authority for its attempt to transform the legislature's grant of rights to affirmatively seek *judicial* relief into mere defensive measures to be raised in an administrative action.

Lastly, the Government's Brief for the first time asserts that Plaintiffs were required to seek a variance from the Director of the Department of Professional Regulation (a defendant in this action). This contention is meritless for at least three reasons. First, as set forth above, administrative exhaustion simply does not apply in this case.[5] Second, even if exhaustion were required, the Government does not suggest that

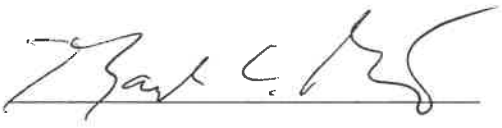
---

[5] Indeed, the lone case cited by the Government for the proposition that an administrative variance procedure must be exhausted acknowledges that "a plaintiff who challenges the validity of an ordinance on its face need not exhaust administrative remedies." *Northwestern Univ. v. City of Evanston*, 74 Ill. 2d 80, 87 (1978); *see also id.* at 88 ("A party will not, of course, be required to exhaust his administrative remedies when it would be patently useless to seek relief."). For the same reason, the Government's citation to *Baugher v. Walker* (Gov. Br. 21-22) is inapposite. *Baugher* did not involve a facial challenge. *Baugher*, 47 Ill. App. 3d 573 (1977). Furthermore, *Baugher* required interpretation and potential application of a prohibition on "gross immorality"—specifically whether a threatened boycott of Public Aid prescriptions violated that prohibition—and the plaintiffs in *Baugher* "neither alleged nor testified that they were participants in this collective boycott." *Id.* at 574, 578.

the Director can grant the relief sought here—namely a declaration that the Rule is null and void, at least as to the Plaintiffs. To the contrary, the variance procedure is designed for particularized, case-by-case analysis. *See* ILCS 85/11 (variance available in "individual cases" and requiring case-specific findings including that "no party will be injured by the granting of the variance" and that compliance "would, in the particular case, be unreasonable or unnecessarily burdensome"). This type of analysis would then require the Plaintiffs to seek relief only when a customer with a prescription has requested emergency contraception, which is precisely the predicament Plaintiffs seek to avoid in this lawsuit. Lastly, the Rule was expressly enacted to coerce religious objectors into providing emergency contraception. It borders on the absurd to suggest that pharmacies who have religious objections to providing emergency contraception are eligible for variances on that ground, especially in light of the Governor's public statement that "[P]harmacies are not free to let [religious] beliefs stand in the way of their obligation to their customers." Pl. Br. 15. Accordingly, seeking a variance on the grounds asserted here would be futile. *Canel*, 212 Ill. 2d at 319 (exhaustion not required if administrative procedure is futile).

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court reverse the Circuit Court's Order of Dismissal. As the only remaining issues are matters of law, and because of the continuing risks to Plaintiffs' fundamental rights, Plaintiffs further request that this Court enter declaratory and injunctive relief that the Rule is null and void as violating, *inter alia*, the Health Care Right of Conscience Act, RFRA, and the Free Exercise Clause.

By: 

Mailee R. Smith (IL Bar No. 6280167)
AMERICANS UNITED FOR LIFE
310 S. Peoria Street, Suite 500
Chicago, IL 60607
(312) 492-7234

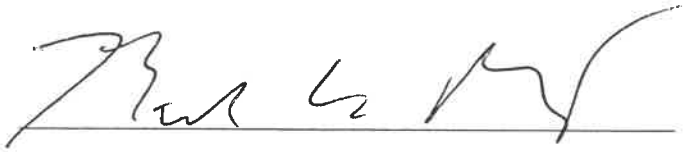
Francis J. Manion *(pro hac vice* pending)
AMERICAN CENTER FOR LAW AND JUSTICE
6375 New Hope Road
New Hope, Kentucky 40052
(502) 549-7020

Harold Hestnes, *pro hac vice*
Paul P. Daley, *pro hac vice*
Mark L. Rienzi, *pro hac vice*
Jared C. Miller, *pro hac vice*
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

CERTIFICATE OF SERVICE

I, Mark L. Rienzi, certify that I served three copies of this brief upon the below named party by UPS overnight mail on September 13, 2006.

Laura Wunder
Assistant Attorney General
100 W Randolph Street, 12th Floor
Chicago, Illinois 60601
312.814.4683



Mark L. Rienzi

APPENDIX

Table of Contents to the Appendix

E-FILED
Wednesday, 06 September, 2006 11:41:58 AM
Clerk, U.S. District Court, ILCD

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

JOHN MENGES, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 05-3307
	)	
ROD R. BLAGOJEVICH, et al.,	)	
	)	
Defendants.	)	

OPINION

JEANNE E. SCOTT, U.S. District Judge:

This matter comes before the Court on the Defendants' Motion to Dismiss the Amended Complaint (d/e 13) and Defendants' Motion to Dismiss Walgreens' Third Party Complaint (d/e 27). The Plaintiffs are licensed pharmacists in Illinois. The Defendants are the Governor of Illinois and other state officials. Third Party/Intervenor Walgreen Co. (Walgreens) is a corporation that operates pharmacies throughout the United States, including Illinois. The Plaintiffs allege in their Amended Complaint that the Defendants promulgated a rule (Rule) to force them to dispense drugs known as the "morning after pill," "Plan B," and "emergency contraceptives" (hereinafter collectively referred to as "Emergency

Contraceptives"), in violation of the Plaintiffs' constitutional right to exercise freely their religious beliefs and in violation of Title VII of the Civil Rights Act of 1964 (Title VII). U.S. Const. Amend I; 42 U.S.C. §§ 2000e-2 & 2000e-7. Amended Complaint for Declaratory and Injunctive Relief (d/e 11) (Amended Complaint). Several of the Plaintiffs were formerly employed by Walgreens. They allege that they have lost their jobs at Walgreens because they would not comply with Illinois' new Rule. Walgreens alleges in its Third Party Complaint that it has been subjected to administrative enforcement actions by the state for not complying with the Rule and civil suits by employees for complying with the Rule. Walgreens seeks a declaratory judgment that the Rule violates Title VII, and also a declaratory judgment that its previous policies conform to both Title VII and the Rule. Third Party/Intervenor Walgreen Co.'s Complaint for Declaratory and Injunctive Relief (d/e 25) (Third Party Complaint). The Defendants now move to dismiss. As explained below, the Plaintiffs state claims. Walgreens states a claim for some of the relief sought, but the Court must dismiss the requests for a declaratory judgment that its policies comply with either Title VII or the Rule. The Motion to Dismiss the Amended Complaint is DENIED, and the Motion to Dismiss the Third Party

Complaint is ALLOWED in part and DENIED in part.

STATEMENT OF FACTS

For purposes of the Motions, the Court must accept as true all of well-pleaded factual allegations in the Amended Complaint and the Third Party Complaint and draw all inferences in the light most favorable to the Plaintiffs and Walgreens. Hager v. City of West Peoria, 84 F.3d 865, 868-69 (7th Cir. 1996); Covington Court, Ltd. v. Village of Oak Brook, 77 F.3d 177, 178 (7th Cir. 1996). The Court may also consider matters of which the Court can take judicial notice, such as public records from other court proceedings. Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 456 (7th Cir. 1998). The Court should only grant the Motions to Dismiss if it appears beyond doubt that the Plaintiffs and Walgreens can prove no set of facts that would entitle them to relief. Doherty v. City of Chicago, 75 F.3d 318, 322 (7th Cir. 1996).

According to the Amended Complaint, Plaintiffs John Menges, Gaylord Richard Quayle, Carol Muzzarelli, Kelly Hubble, and Melanie Antuma (Discharged Plaintiffs) are licensed pharmacists in Illinois who previously worked as pharmacists at Division I pharmacies operated by Walgreens. Plaintiffs Jim Lynch and Amanda Varner allegedly are licensed

Illinois pharmacists who currently work for other Division I pharmacies. Division I pharmacies are pharmacies that engage in general community pharmacy practice and that are open to, or offer pharmacy services to, the general public. 68 Ill. Admin. Code § 1330.5.

The Defendants are duly-elected or appointed government officials of the state of Illinois. Defendant Rod Blagojevich is Governor. Defendant Dean Martinez is Acting Secretary of the Illinois Department of Financial and Professional Regulation (Department), and Defendant Daniel E. Bluthardt is Acting Director of the Department's Division of Professional Regulation. The Plaintiffs allege that the Defendants are responsible for the promulgation, interpretation, application, and enforcement of the regulation at issue.

On April 1, 2005, the Defendants promulgated an Emergency Amendment to § 1330.91 of Title 68 of the Illinois Administrative Code. The Emergency Amendment became permanent in the form of a rule on August 25, 2005. The Rule states:

> 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 filing 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. Admin. Code § 1330.91(j).[1] As quoted above, the term

[1]The Court recognizes that the Food and Drug Administration has decided that Emergency Contraceptives will be available over-the-counter without a prescription to individuals who are at least 18 years of age. The Rule, thus, may be moot as to these individuals because they will no longer present pharmacies with prescriptions for these

"contraceptives" in the Rule includes all FDA-approved contraceptives, which includes Emergency Contraceptives. Plaintiffs allege that Emergency Contraceptives work with a significant abortifacient mechanism of action. Plaintiffs allege that they hold certain religious beliefs that prohibit them from dispensing Emergency Contraceptives.

The Plaintiffs allege that on the day of the announcement of the promulgation of the Emergency Amendment, Defendant Governor Blagojevich explained that the Emergency Amendment was prompted by actions of individual pharmacists in Chicago and elsewhere who had declined to fill prescriptions because of their religious and moral opposition to Emergency Contraceptives.

The Plaintiffs allege that in April 2005, shortly after the promulgation of the Emergency Amendment, the Plaintiffs and all other licensed pharmacists received a letter from the Department informing them of the provisions of the Emergency Amendment. On or about April 26, 2005, Governor Blagojevich sent a letter to every licensed physician in Illinois. According to the Plaintiffs, Governor Blagojevich stated in his letter that the

---

drugs. A prescription will still be required for individuals under the age of 18. Thus, the Rule is still applicable in some circumstances.

Emergency Amendment was in response to the actions of individual pharmacists opposed to the use of Emergency Contraceptives. Governor Blagojevich's letter asked physicians to report any pharmacists who refused to fill a prescription for Emergency Contraceptives.

The Plaintiffs also allege that in April 2005, Governor Blagojevich sent a letter to the executive director of an organization called Family-Pac. In this letter, he stated that the Emergency Amendment was in response to actions by pharmacists who disagreed with these methods of birth control. The letter advised that should individual pharmacists refuse to fill birth control prescriptions, their employer would face significant penalties. The letter further stated that the Defendants intended to enforce the law by any and all steps necessary.

On April 29, 2005, the Joint Committee on Administrative Rules (Joint Committee) of the Illinois General Assembly published a proposed regulation similar to, and a companion to, the Emergency Amendment, which purported to be a permanent version of the Emergency Amendment. The proposed regulation concluded with a statement that those affected by this rulemaking include pharmacists. On August 25, 2005, the Joint Committee formally adopted the Rule, making permanent the provisions of

the Emergency Amendment.

On March 13, 2006, Governor Blagojevich allegedly reaffirmed publicly his position that the Rule was directed at individual pharmacists who object to dispensing certain drugs on moral grounds. According to the Amended Complaint, Governor Blagojevich further stated that pharmacists who hold such moral views should find another profession.

The statement accompanying the Rule states that the Rule addresses a critical public health care issue of access to prescription contraceptives by mandating that a pharmacy has a duty to dispense contraceptives without delay. 29 Ill. Reg. 13639. The Plaintiffs allege that the Rule does not include all pharmacies and does not require pharmacists always to dispense Emergency Contraceptives without delay. The Rule only addresses Division I pharmacies and so does not require hospitals or hospital emergency rooms to dispense Emergency Contraceptives. The Rule permits a pharmacy to delay in filling a prescription if the medication is not in stock. The pharmacy may follow its routine procedure for filling an out-of-stock prescription. The Rule further allows pharmacists to refuse to provide contraceptives under certain conditions based on the pharmacist's professional judgment. In addition, Plaintiffs claim that Defendant

Martinez and Governor Blagojevich both stated at a public hearing on February 15, 2006, that the Rule exempts Division I pharmacies that do not dispense contraceptives at all.

Walgreens and the Plaintiffs allege that, prior to the promulgation of the Emergency Amendment and the Rule, Walgreens had a policy called the Referral Pharmacist Policy. Pursuant to the Referral Pharmacist Policy, Walgreens allowed its pharmacists nationwide to decline to fill a prescription based on moral or religious objections as long as the prescription could be filled by another pharmacist at that store or at a nearby pharmacy. After the promulgation of the Emergency Amendment, Plaintiffs and Walgreens allege that Walgreens changed the Referral Pharmacist Policy in Illinois to require every pharmacist to fill prescriptions even if it violated his or her moral or religious beliefs. The Plaintiffs and Walgreens allege that Walgreens still has the prior Referral Pharmacist Policy in place in every state other than Illinois.

Before the adoption of the Rule, the Discharged Plaintiffs notified Walgreens of their religious objections to dispensing Emergency Contraceptives and requested an accommodation of their religious beliefs. On or about September 13, 2005, Walgreens allegedly terminated the

employment of Plaintiff Antuma for refusing to dispense Emergency Contraceptives. Walgreens alleges that, beginning in September 2005, the Department filed disciplinary actions against Illinois pharmacies, including Walgreens pharmacies, for violating the Rule because individual pharmacists had refused to dispense Emergency Contraceptives.

According to the Plaintiffs, in November 2005, Walgreens demanded that each of its pharmacists agree in writing to the new policy that required each of them to dispense Emergency Contraceptives. The Plaintiffs allege that pharmacists who refused to sign the policy were placed on unpaid indefinite suspension. This included Plaintiffs Menges, Quayle, and Hubble. Plaintiff Muzzarelli was on personal leave at the time, but was denied permission to return to her employment because she would not agree to the new policy.

On December 1, 2005, Governor Blagojevich allegedly stated in a national television broadcast that Walgreens' actions were in compliance with the Rule and that, in terminating the Discharged Plaintiffs for asserting their religious objections to dispensing Emergency Contraceptives, Walgreens was following the law. According to the Plaintiffs, Governor Blagojevich's spokespersons subsequently reiterated the Defendants'

interpretation of the Rule that pharmacists in Division I pharmacies have no choice but to dispense Emergency Contraceptives and that Walgreens' alleged firing of the Discharged Plaintiffs was appropriate.

The Plaintiffs allege that the decision by Walgreens to change its policy and practices of accommodating the religious and moral beliefs of its pharmacists in Illinois was motivated by the promulgation and enforcement of the Emergency Amendment and the Rule. The Plaintiffs allege that Walgreens referred its employees to Governor Blagojevich's December 1, 2005, statement to explain its Illinois-specific policy which resulted in the indefinite suspension of the Discharged Plaintiffs.

Plaintiffs Lynch and Varner have not yet been subjected to an adverse employment action. They allege, however, that they have been substantially burdened in the exercise of their religious beliefs by operation of the Rule. The Plaintiffs allege that this is especially true in light of the Defendants' interpretation of the Rule and the actions of Walgreens in suspending pharmacists who refuse to dispense Emergency Contraceptives due to their religious beliefs.

The Plaintiffs allege that they have been denied their fundamental constitutional and statutory rights and that the deprivation is continuing.

The Plaintiffs allege that the Rule requires employers to engage in religious discrimination and so is void under Title VII. The Plaintiffs ask the Court to declare that the Rule violates the right to the free exercise of religion and violates Title VII's prohibition against any state law which purports to require or permit unlawful discrimination. They further ask for preliminary and permanent injunctive relief to bar enforcement of the Rule.

Walgreens alleges that, in addition to the Department's enforcement actions, it has been subjected to several civil actions. Several pharmacists who refused to dispense Emergency Contraceptives have filed wrongful discharge actions against Walgreens. These pharmacists have also alleged that Walgreens violated the Illinois Health Right of Conscience Act ("Right of Conscience Act"). 745 ILCS 70/1 et seq. The Right to Conscience Act prohibits employers from discriminating against health care workers who refuse to provide any type of health care because of conscience. 745 ILCS 70/5. Pharmacists have also filed charges of discrimination against Walgreens with the Equal Employment Opportunity Commission for violation of Title VII. Memorandum of Law in Support of Motion to Intervene of Walgreen Co. (d/e 17) at 5-6.

Walgreens now asks for: (1) a declaratory judgment that the Rule

conflicts with Title VII, and that the Referral Pharmacist Policy complies with the Rule and Title VII; and (2) a permanent injunction enjoining enforcement of the Rule to the extent that the Rule prohibits Walgreens from implementing the Referral Pharmacist Policy in Ilinois. The Defendants move to dismiss both the Amended Complaint and the Third Party Complaint.

ANALYSIS

A. FREE EXERCISE OF RELIGION

The First Amendment protects the free exercise of religion. State laws designed to discriminate against individuals because of their religious practices and beliefs are subject to strict scrutiny. The state must demonstrate that the laws serve a compelling state interest and are narrowly tailored to advance that compelling interest. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993). Religious beliefs and practices, however, are varied and many laws unintentionally impinge on those beliefs and practices. If every law that affected religion were subject to strict scrutiny, then virtually all laws would be subject to strict scrutiny. The Supreme Court has, thus, determined that religiously neutral state laws of general applicability are not subject to strict scrutiny even if

they inadvertently affect someone's religious beliefs or practices. Employment Div., Dept. Of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). The issue here is whether the Plaintiffs have alleged sufficient facts which, if true, would establish that the Rule is not a neutral regulation of general applicability, and if so, whether the Rule fails to meet the standard of strict scrutiny.

To determine whether the Rule is religiously neutral, the Court must initially look at the face of the Rule. Church of the Lukumi Babalu Aye, 508 U.S. at 533-34. The Rule, quoted above, is religiously neutral on its face. There is no reference to religion in the Rule.

If a regulation is facially neutral, the Court must then go beyond the face of the Rule to determine the true object of the statute:

> Official 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 governmental 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."

Id., at 534 (quoting Walz v. Tax Commission of City of New York, 397

U.S. 664, 696 (1970)).[2] The alleged statements by Governor Blagojevich indicate that the objective of the Rule was to force individuals who have religious objections to Emergency Contraceptives to compromise their beliefs or to leave the practice of pharmacy. Governor Blagojevich allegedly stated that the Rule was prompted by pharmacists who declined to fill prescriptions for Emergency Contraceptives because of their religious and moral opposition to Emergency Contraceptives. He later allegedly stated that the Rule was directed at individual pharmacists who object to dispensing certain drugs on moral grounds and that such individuals should find another profession.

The Plaintiffs also allege that the effect of the Rule is consistent with Governor Blagojevich's statements about the object of the Rule. Walgreens and the Plaintiffs allege that, as a direct result of the Rule, Walgreens changed its policies to no longer allow an employee/pharmacist who objected to the use of Emergency Contraceptives to refer a patient to another

---

[2]The Defendants cite Grossbaum v. Indianpolis-Marion County Bldg. Authority for the proposition that the personal motivations of the Governor are unimportant. Grossbaum, 100 F.3d 1287 (7th Cir. 1996). Grossbaum involved a free speech claim, not a free exercise claim. Id. at 1296, n. 9. In the Free Exercise context, the Court must look beyond the face of the statute to determine its object. Id. at 1292, n. 3. Governor Blagojevich's statements regarding the object of the Rule are relevant. The Plaintiffs allege that Governor Blagojevich and the other Defendants are responsible for promulgation, interpretation, application, and enforcement of the Rule.

pharmacist to fill a prescription for those drugs. Walgreens, further, required its pharmacists to agree in writing to a new policy that required each of them to dispense Emergency Contraceptives. Walgreens imposed these new policy changes only in Illinois, and only because of the Rule. The Discharged Plaintiffs all allege that they lost their jobs specifically because the Rule forced them either to quit or to compromise their religious beliefs.

The Plaintiffs also allege that the Rule was not really designed to make Emergency Contraceptives available but that it was directed at them because of their beliefs. The Plaintiffs allege that the Rule only affects Division I pharmacies. The Rule does not cover hospitals or emergency rooms. The Plaintiffs allege that many women rely on hospital emergency rooms to secure care. If true, the fact that the Rule does not cover hospitals and emergency rooms is some proof that the object of the Rule is not to make Emergency Contraceptives available to everyone; rather, this allegation may indicate that the Rule is directed at pharmacists, such as the Plaintiffs, because they oppose the use of these medications on religious grounds. See Church of the Lukumi Babalu Aye, 508 U.S. at 535-36.

The Plaintiffs also allege that the Rule allows Division I pharmacies to refuse to dispense Emergency Contraceptives on grounds other than the

pharmacist's religious beliefs. Pharmacies can elect not to carry any contraceptives. Plaintiffs allege that pharmacies may also elect not to keep Emergency Contraceptives in stock, and so, delay filling a prescription for Emergency Contraceptives in the same manner as for other out-of-stock medication. The Plaintiffs allege that a delay caused by not carrying the medications in stock does not violate the Rule, but a delay caused by a pharmacist refusing to fill the prescription and asking a second employee/pharmacist at the same facility to fill the prescription violates the Rule. This lack of consistency, if true, may further support the inference that the true object of the Rule is directed at the Plaintiffs, and other pharmacists, because of their beliefs. See Id.

The Plaintiffs' allegations, if true, may establish that the object of the Rule is to target pharmacists, such as the Plaintiffs, who have religious objections to Emergency Contraceptives, for the purpose of forcing them either to compromise their religious beliefs or to leave the practice of pharmacy. Such an object is not religiously neutral. If so, the Rule may be subject to strict scrutiny.

The Court notes that many of the allegations may also be consistent with a finding that the object of the Rule is to make Emergency

Contraceptives generally available. Governor Blagojevich's alleged comments, in particular, may only reflect the Governor's opinion that the burden on pharmacists, such as the Plaintiffs, is a necessary, incidental effect of making these medications generally available to the public. The allegations that pharmacies may sometimes refuse to fill a prescription for Emergency Contraceptives for certain women may also be explained by competing health and safety concerns, rather than a goal of targeting pharmacists, such as the Plaintiffs, for their religious beliefs. And the fact that the Rule does not apply to hospitals and emergency rooms may support an argument that the object of the Rule is not to force individual pharmacists who have religious objections to Emergency Contraceptives to compromise their beliefs or to leave the practice of pharmacy; if forcing such pharmacists out of the profession were the object of the Rule, then one would expect the Rule to apply to hospitals and emergency rooms as well. At this point, however, the Court must draw all inferences in favor of the Plaintiffs. When viewed in that light, the allegations, if true, establish that the object of the Rule may not be religiously neutral.

The Plaintiffs further allege that the Rule is not generally applicable. The Rule is supposed to meet a critical need to make Emergency

Contraceptives available. As explained above, however, the Plaintiffs allege that the Rule is underinclusive. The Rule only applies to Division I pharmacies. The Rule, therefore, does not apply to hospitals and, in particular, emergency rooms. The Rule also allows Division I pharmacies to refuse to dispense Emergency Contraceptives or to delay dispensing them for reasons other than the pharmacist's personal religious beliefs. These allegations, at least, create an issue of fact regarding whether the Rule is generally applicable. If not, the Rule may again be subject to strict scrutiny.

If the Rule is subject to strict scrutiny, then, based on the Plaintiffs' allegations, the Rule may fail. The Plaintiffs allege that the Rule is not narrowly tailored. The purpose is to make Emergency Contraceptives available. The Rule, however, only addresses the obligation of Division I pharmacies to make Emergency Contraceptives available. As explained above, the Plaintiffs allege that the Rule is underinclusive because it does not require hospitals or emergency rooms to dispense these drugs, and does not require Division I pharmacies to dispense these medications without delay every time they are requested. Thus, when viewed in the light most favorable to the Plaintiffs, the Plaintiffs sufficiently allege that the Rule fails to be narrowly tailored to advance a compelling state interest. The Plaintiffs

If the Plaintiffs can prove that the burden of accommodating their beliefs is so slight, then the Plaintiffs' religious beliefs in opposition to Emergency Contraceptives may be within Title VII's definition of religion. At the pleading stage, the Court must accept the Plaintiffs' allegations as true and assume that they can meet this burden.

The Plaintiffs also allege that the Rule requires pharmacies to discriminate against the Plaintiffs because of their religion. The Plaintiffs allege that the Rule prohibits any accommodation of their religion; the Plaintiffs must compromise their religious beliefs or leave the profession. When read in the light most favorable to the Plaintiffs, the allegations indicate that the Rule may require pharmacies either to create a religiously hostile work environment or to discharge pharmacists because of the pharmacists' religion. If the Plaintiffs can establish their allegations, the Rule may conflict with Title VII and may be preempted. The Plaintiffs at this stage state a claim.

The Defendants argue that there is a strong presumption against preemption of state health and safety regulations. Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715 (1985). The Defendants note that this presumption will be overcome only where it

is the "clear and manifest purpose of Congress" to preempt such laws. Garcia v. Volvo Europa Truck, N.V., 112 F.3d 291, 294 (7th Cir. 1997). The Court agrees that this presumption exists, and the Plaintiffs may have a very difficult time overcoming it. The Amended Complaint, however, alleges that the Rule is not a health and safety regulation, but rather, a regulation targeted at the Plaintiffs because of their religious beliefs which has, as its true object, the goal of forcing them to either compromise their religious beliefs or leave the practice of pharmacy. At this point, the Court must accept the Plaintiffs' allegations as true. If the Plaintiffs can prove these allegations, they may be able to overcome the presumption against preemption.

The Defendants also argue that the Rule does not require pharmacies to force pharmacists to fill a prescription for Emergency Contraceptives. The Defendants argue that pharmacies are free under the Rule to let pharmacists refuse to fill Emergency Contraceptives prescriptions as long as another pharmacist is present who will fill the prescription. The Plaintiffs' allegations do not support that interpretation. The Plaintiffs allege that Defendant Governor Blagojevich and the other Defendants are responsible for the promulgation, interpretation, application, and enforcement of the

Rule. The Plaintiffs further allege that Governor Blagojevich stated that a pharmacy would be subject to stiff penalties if an individual pharmacist refused to fill a prescription.[3] The Plaintiffs also allege that Governor Blagojevich stated that Walgreens was following the Rule when it required all of its pharmacists to agree in writing to dispense Emergency Contraceptives. These allegations are inconsistent with the Defendants' contention that the Rule does not require pharmacies to force all pharmacists to dispense Emergency Contraceptives. At this point, the Court must accept the Plaintiffs' allegations as true.[4]

The Defendants also argue that the Plaintiffs' religious beliefs about Emergency Contraceptives are not within Title VII's definition of religion because accommodating those beliefs imposes an undue burden on pharmacies. Whether accommodating the Plaintiffs' beliefs imposes an undue burden is an issue of fact. The Plaintiffs' allegations, if true, could

---

[3]That allegation may indicate that the "without delay" requirement of the Rule prohibits any pharmacist from refusing to fill a prescription and referring the matter to another pharmacist because the referral would cause an impermissible delay under the Rule.

[4]Defendants' arguments, however, may suggest a basis for possible amendment of the Rule to clarify its object and application. The parties are reminded that the Court would, if requested, refer the case to U.S. Magistrate Judge Cudmore to explore settlement possibilities that would be consistent with individual constitutional rights.

show that accommodating these beliefs imposes only a de minimus burden on the Plaintiffs' employers. If so, the Plaintiffs' religious beliefs about Emergency Contraceptives would fit within Title VII's definition of religion. The Court agrees that this point may be very difficult to prove; accommodating the Plaintiffs' beliefs may result in some costs on their employer, either in additional staffing or lost business. Any such costs may be more than de minimus. See Trans World Airlines, Inc. v. Hardiman, 432 U.S. 63, 84 (1977); Endres v. Indiana State Police, 349 F.3d 922, 925 (7th Cir. 2003). At the pleading stage, however, the Court must assume that the Plaintiffs can prove their allegations. The Plaintiffs state a claim.

For the same reasons, Walgreens states a claim for a declaratory judgment regarding whether the Rule is preempted by Title VII. Walgreens also states a claim for injunctive relief to enjoin the enforcement of the Rule. The Defendants argue that the request for an injunction is barred by the Eleventh Amendment because this Court cannot define state law and enjoin state officials to follow its interpretation of state law. Pennhust State School & Hosp. v. Halderman, 465 U.S. 89, 104 (1984). This Court, however, has the authority to interpret the Rule for the purpose of declaring whether the Rule violates Title VII. Fitzpatrick v. Bitzer, 427 U.S. 445, 457

An Illinois retail pharmacy has the responsibility to fill prescriptions for all FDA approved drugs if they are in stock and, based on professional pharmaceutical judgment, are not contraindicated for a medical reason. The new rule more clearly spells out specific procedures to be used when drug stores are presented with a prescription for birth control pills.

The rule clearly defines the responsibilities of licensed retail pharmacies in Illinois to fill all FDA approved birth control prescriptions without delay if the drugs are in stock and a legal prescription has been presented. If the drugs requested are not in stock, the pharmacy must do one of the following:

1. Provide a medically acceptable alternative drug as approved by the prescriber, or
2. At the request of the patient,

   a) order the drug from their supplier,
   b) transfer the prescription to a different drug store or
   c) return the prescription to the patient.

To view a copy of the complaint please click here:**Walgreens 1529**

To view a copy of the complaint please click here: **Walgreens 3539**

To view a copy of the complaint please click here: **Osco Drug 3260**

Acrobat Reader 5.0 is necessary to access PDF documents.
CLICK ON the "Get Acrobat Reader" icon to download the product free.

OFFICE OF THE GOVERNOR
ROD R. BLAGOJEVICH - GOVERNOR

NEWS

FOR IMMEDIATE RELEASE
April 13, 2005

STATEMENT FROM GOV. ROD BLAGOJEVICH

In response to lawsuit filed by Pat Robertson's American Center for Law and Justice challenging Governor's emergency rule for pharmacies

"Today we learned that Pat Robertson's American Center for Law and Justice has filed a lawsuit to prevent us from ensuring that women have equal access to health care. We will vigorously defend a woman's right to get her prescription for birth control filled without delay, without hassle and without a lecture. If a pharmacy wants to be in the business of dispensing contraceptives, then it must fill prescriptions without making moral judgments. Pharmacists – like everyone else – are free to hold personal religious beliefs, but pharmacies are not free to let those beliefs stand in the way of their obligation to their customers."

Responding to complaints filed against a licensed Illinois pharmacy that refused to dispense prescription contraceptives, Gov. Rod Blagojevich filed an emergency rule on April 1 that clarifies pharmacies in Illinois that sell contraceptives must accept and fill prescriptions for contraceptives without delay. The emergency rule is effective for 150 days. The Blagojevich Administration is seeking a permanent rule to replace the emergency rule when it expires.

FDA's Decision Regarding Plan B: Questions and Answers

Please see Questions and Answers, August 24, 2006

1. What is emergency contraception?

Emergency contraception is a method of preventing pregnancy to be used after a contraceptive fails or after unprotected sex. It is not for routine use. Drugs used for this purpose are called emergency contraceptive pills, post-coital pills, or morning after pills. Emergency contraceptives contain the hormones estrogen and progestin (levonorgestrel), either separately or in combination. FDA has approved two products for prescription use for emergency contraception – Preven (approved in 1998) and Plan B (approved in 1999).

2. What is Plan B?

Plan B is emergency contraception, a backup method to birth control. It is in the form of two levonorgestrel pills (0.75 mg in each pill) that are taken by mouth after unprotected sex. Levonorgestrel is a synthetic hormone used in birth control pills for over 35 years. Plan B can reduce a woman's risk of pregnancy when taken as directed if she has had unprotected sex. Plan B contains only progestin, levonorgestrel, a synthetic hormone used in birth control pills for over 35 years. It is currently available only by prescription

3. How does Plan B work?

Plan B works like other birth control pills to prevent pregnancy. 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). If a fertilized egg is implanted prior to taking Plan B, Plan B will not work.

4. What steps did FDA take in considering switching Plan B from prescription to nonprescription (over-the-counter (OTC)) status?

FDA received an application to switch Plan B from prescription to nonprescription status. FDA staff reviewed the scientific data contained in the application which included among other data, an actual use study and a label comprehension study.

On December 16, 2003, we held a public advisory committee meeting with a panel of medical

OFFICE OF THE GOVERNOR
JRTC, 100 West Randolph, Suite 16
Chicago, Illinois 60601

ROD BLAGOJEVICH
GOVERNOR

April 11, 2005

Mr. Paul Caprio
Executive Director, Family-Pac
Paul Caprio & Associates
414 North Orleans Street, Ste. 312
Chicago, IL 60610

Dear Mr. Caprio:

This weekend, I learned of your directive to pharmacists in Illinois to ignore the emergency rule I issued on April 1. That emergency rule requires pharmacies to fill women's prescriptions for birth control. Filling prescriptions for birth control is about protecting a woman's right to have access to medicine her doctor says she needs. Nothing more. Nothing less. You need to know, we intend to vigorously protect that right.

Today, I am writing to remind you of the consequences that pharmacies in Illinois would face for violating the emergency rule and denying a woman her right to health care. In your call to pharmacists urging them to violate the emergency rule I issued, you neglected to remind them of the penalties their employers will face if they deny a woman her right to health care.

If a pharmacist refuses to fill a woman's prescription for birth control, their employer faces significant penalties, ranging from fines to losing their license to fill prescriptions of any kind. You should be aware that we fully intend to enforce the law to ensure a woman's right to have her prescription filled, and we are making sure that pharmacies across Illinois are aware of their obligation.

As you know, women in Illinois, and in over a dozen states across the nation, have been denied access to health care by pharmacists who disagree with the use of birth control. If a woman is given a prescription for birth control by her doctor, she has every right to expect her pharmacy to fill that prescription in the same way – and in the same period of time – that any prescription is filled.

Please be aware that we will continue to take any and all necessary steps to ensure a woman's access to her health care.

Sincerely,

Rod Blagojevich

Rod Blagojevich
Governor Illinois

EXHIBIT
tabbies E

TOTAL P.02

APR-18-2005
TOTAL P.21

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, et al.

Plaintiffs-Appellants

v.

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

Defendants-Appellees.

Case No. 05-MR-47

AFFIDAVIT OF GLENN KOSIROG

COMES NOW Glenn Kosirog, of plaintiff-appellant, Kosirog Pharmacy, Inc., and after first being duly sworn, states as follows:

1. I am a plaintiff-appellant in this case and make this affidavit based upon personal knowledge.

2. They pharmacy operated by Kosirog Pharmacy, Inc., does sell ordinary prescription contraceptives. It does not sell emergency contraceptives.

Dated this 11th day of September, 2006.

Glenn Kosirog

Subscribed and sworn to before me, Glenn Kosirog, this 11th day of September, 2006.

"OFFICIAL SEAL"
Irene S. Subota
Notary Public, State of Illinois
My Commission Exp. 11/08/2007

Notary Public

My Commission Expires:

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, et al. Plaintiffs-Appellants, v. ROD R. BLAGOJEVICH, Governor, State of Illinois; FERNANDO E. GRILLO, Secretary, Illinois Dept. of Financial and Professional Regulation; DANIEL E. BLUNTHARDT, Acting Director, Division of Professional Regulation; and the STATE BOARD OF PHARMACY, in their official capacities, Defendants-Appellees	)	Case No. 05-MR-47

AFFIDAVIT OF LUKE VANDER BLEEK

COMES NOW Luke Vander Bleek, of plaintiffs-appellants, Morr-Fitz, Inc. and L. Doyle, Inc. and after first being duly sworn, states as follows:

1. I am a plaintiff-appellant in this case and make this affidavit based upon personal knowledge.

2. The pharmacies operated by Morr-Fitz, Inc., and L. Doyle, Inc., do sell ordinary prescription contraceptives. They do not sell emergency contraceptives.

Dated this 11th day of September, 2006.

Luke Vander Bleek

Subscribed and sworn to before me, Luke Vander Bleek, this 11Th day of September, 2006.

"OFFICIAL SEAL"
SUZY PEPPERS
Notary Public, State of Illinois
My Commission Expires 5/24/10

Notary Public

My Commission Expires: 5/24/2010