

# DOES “EMERGENCY” TRUMP CONSCIENCE, THUS DRAWING ANOTHER LINE IN THE SAND FOR PHARMACISTS?

## INTRODUCTION

Lines are drawn every day. The law draws lines by deciding how fast a person should drive, when a person becomes a burglar, and when a baby actually becomes a “person.”<sup>1</sup> The courts of the United States have taken it upon themselves to draw lines defining whether life begins at conception, three months, or birth.<sup>2</sup> Within this decision on life, the individual consciences of people are highly valued and protected by both the Illinois<sup>3</sup> and United States Constitutions.<sup>4</sup> Specifically, the issues surrounding a contraceptive and a woman having the right to obtain it have all led back to the focus on her right of choice—her right of conscience. Yet, what about the conscience of the other person in the transaction—the pharmacist? In Illinois, the question of whose conscience is protected was emphasized in the struggle between pharmacists’ conscientious objections to dispensing the morning-after pill and the rights of patients seeking to obtain it.<sup>5</sup> Pharmacists in at least four states have obtained legislative protection and are allowed to object to filling certain prescriptions, Illinois became the fifth state to

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<sup>1</sup> See, e.g., 625 ILL. COMP. STAT. ANN. 5/11-601 (West 2008) (setting forth speed limits); 720 ILL. COMP. STAT. ANN. 5/19-1 (West 2003) (defining burglary); *Roe v. Wade*, 410 U.S. 113, 163 (1973) (determining when the State must protect fetal life).

<sup>2</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860, 873, 877 (1992) (affirming *Roe* but rejecting trimester system, substituting viability); *Roe*, 410 U.S. at 163–65 (permitting abortion based on trimester system).

<sup>3</sup> ILL. CONST. art. I, § 3 (“The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege[,] or capacity, on account of his religious opinions; but *the liberty of conscience hereby secured* shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State . . .”) (emphasis added).

<sup>4</sup> U.S. CONST. amend. I; see also *Casey*, 505 U.S. at 851 (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943) (“We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes.”).

<sup>5</sup> See *Vandersand v. Wal-Mart Stores*, 525 F. Supp. 2d 1052 (C.D. Ill. 2007), *dismissed per stipulation*, No. 06-3292, 2008 WL 2774915 (C.D. Ill. May 29, 2008); *Menges v. Blagojevich*, 451 F. Supp. 2d 992 (C.D. Ill. 2006), *dismissed*, No. 05-3307 (C.D. Ill. May 13, 2008); *Morr-Fitz, Inc. v. Blagojevich*, 867 N.E.2d 1164 (Ill. App. Ct. 2007), *appeal allowed*, 875 N.E.2d 1113 (Table) (Ill. Sept. 26, 2007).

provide some legislative protection in April of 2008; other states are considering similar bills.<sup>6</sup>

Many articles take the perspective of the patient's rights, emphasizing the view that in the end the pharmacist must always do whatever the patient wants—thus ignoring the pharmacist's conscience.<sup>7</sup> In being denied the right of conscience, however, the pharmacist loses the same right that women fought so hard to obtain. This Note discusses the pharmacist's right of conscience to refuse to fill a morning-after pill prescription, the history of this issue in Illinois, and the consequences of such laws. More specifically, it looks at the history of Illinois's law and the case *Morr-Fitz, Inc. v. Blagojevich*.<sup>8</sup> In Part I, this Note considers the administrative rule ("Final Rule"), enacted based on Governor Blagojevich's Emergency Rule ("Emergency Rule"), and the amended rule ("Amended Rule"). Part II examines the specific facts of *Morr-Fitz*. Part III looks at two state laws that the Final Rule clearly violated.<sup>9</sup>

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<sup>6</sup> Lora Cicconi, Comment, *Pharmacist Refusals and Third-Party Interests: A Proposed Judicial Approach to Pharmacist Conscience Clauses*, 54 UCLA L. REV. 709, 711 (2007) (citing ARK. CODE ANN. § 20-16-304 (2005); GA. COMP. R. & REGS. 480-5-.03(n) (2005); MISS. CODE ANN. § 41-107-5 (2005); S.D. CODIFIED LAWS § 36-11-70 (2004)); see also ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2005) (amended 2008).

<sup>7</sup> See, e.g., Cicconi, *supra* note 6, at 709, 713; Mary K. Collins, *Conscience Clauses and Oral Contraceptives: Conscientious Objection or Calculated Obstruction?*, 15 ANNALS HEALTH L. 37, 57–58 (2006); Natalie Langlois, Note, *Life-Sustaining Treatment Law: A Model for Balancing a Woman's Reproductive Rights with a Pharmacist's Conscientious Objection*, 47 B.C. L. REV. 815, 815, 845 (2006); Claire A. Smearman, *Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists*, 48 ARIZ. L. REV. 469, 473–75 (2006); Holly Teliska, Recent Development, *Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*, 20 BERKELEY J. GENDER L. & JUST. 229, 231 (2005).

<sup>8</sup> 867 N.E.2d 1164 (Ill. App. Ct. 2007), *appeal allowed*, 875 N.E.2d 1113 (Table) (Ill. Sept. 26, 2007). A petition for leave to appeal was granted before the Illinois Supreme Court on the issue of standing and the appellants asked the court to determine if the Final Rule "is facially invalid under the Health Care Right of Conscience Act." Appellant's Brief, *Morr-Fitz, Inc.*, 867 N.E.2d 1164 (Oct. 31, 2007) (No. 104692) (on file with the Regent University Law Review).

<sup>9</sup> While an argument could be made under the Free Exercise of Religion Clause of the First Amendment of the U.S. Constitution, it will not be addressed in this Note. Should a pharmacist bring this type of claim before the courts, he would need to provide an analysis similar to the following:

The First Amendment, applicable to the states by the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. CONST. amend. I. The rights of the pharmacists, as protected by the Free Exercise of Religion Clause, were infringed upon when Governor Blagojevich and the Joint Commission of Administrative Rules ("JCAR") restricted the pharmacist's conduct through the Emergency Rule and the Final Rule. No longer could pharmacists in Illinois safeguard their rights under the First Amendment. By the simple action of enforcing the Final Rule, Illinois substantially burdened pharmacists in order to serve its own narrow interest.

Lastly, Part IV notes the potential effect the Amended Rule will have on pharmacists, patients, the Illinois Legislature, and the Illinois Supreme Court.

#### I. EMERGENCY RULE BY GOVERNOR BLAGOJEVICH MADE PERMANENT

The Food and Drug Administration ("FDA") defines an emergency contraceptive as "a method of preventing pregnancy after a contraceptive fails or after unprotected sex."<sup>10</sup> Levonorgestrel ("Plan B" or the "morning-after pill") is the FDA-approved regimen marketed for such use.<sup>11</sup> The initial pill must be taken within three days (seventy-two hours) after contraceptive failure or unprotected sex, and a second pill must be taken twelve hours later.<sup>12</sup> The morning-after pill's mode of preventing pregnancy sparks controversy. Unlike normal birth control pills, the sole active ingredient in the morning-after pill is the synthetic form of the hormone progesterone.<sup>13</sup> The morning-after pill works by: (1) "preventing fertilization of an egg (the uniting of sperm with the egg)"; (2) inhibiting ovulation; (3) "preventing attachment (implantation)" of a fertilized egg to the lining of the uterus (womb); or (4) some combination of these processes.<sup>14</sup>

Ethical and practical concerns present substantial hurdles to studying the actual physiological effects of this regimen.<sup>15</sup> Given these difficulties, it is presently impossible to state unequivocally its mode of action in humans; some contend, however, that it is not an abortifacient.<sup>16</sup> Currently, the FDA firmly holds that "Plan B will not do

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In analyzing discrimination of a party's free exercise of religion, a court applies the tenet found in *Employment Division v. Smith*, which holds that a "neutral law of general applicability" does not violate the First Amendment freedom. 494 U.S. 872, 879 (1990). If the government action specifically targets religion, however, and is therefore not a neutral law of general applicability, the *Sherbert v. Verner* test would apply. *See id.* at 882–86. Under the *Sherbert* test, the government must have a compelling government interest that is applied in the least restrictive means in order for the law not to violate the First Amendment. *Sherbert v. Verner*, 374 U.S. 398, 406–08 (1963). Because the Final Rule did not specifically target religion, the *Smith* test applies. *See Smith*, 494 U.S. at 872.

<sup>10</sup> FDA: Center for Drug Evaluation and Research, Plan B: Questions and Answers (Dec. 14, 2006), <http://www.fda.gov/cder/drug/infopage/planB/planBQandA20060824.htm>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; Duramed Pharmaceuticals, Inc., Plan B: Emergency Contraception, When Should I Take Plan B?, <http://go2planb.com/plan-b-info.aspx> (last visited Nov. 29, 2008).

<sup>13</sup> Association of Reproductive Health Professionals, *What You Need to Know: The Facts About Emergency Contraception* (Jan. 2008), <http://www.arhp.org/uploadDocs/ecfactsheet.pdf>.

<sup>14</sup> FDA, *supra* note 10.

<sup>15</sup> *See generally* 2 WOMEN AND HEALTH RESEARCH: ETHICAL AND LEGAL ISSUES OF INCLUDING WOMEN IN CLINICAL STUDIES (Anna C. Mastroianni et al. eds., 1994) (presenting papers ranging from the ethical issues of including pregnant women in clinical trials to compensation for research injuries).

<sup>16</sup> *See* Association of Reproductive Health Professionals, *supra* note 13.

anything to a fertilized egg already attached to the uterus. The pregnancy will continue.”<sup>17</sup>

On August 24, 2006, the FDA approved Plan B for over-the-counter sale to women over the age of eighteen, while requiring girls seventeen years of age and under to have a prescription.<sup>18</sup> Furthermore, in dispensing the drug, a pharmacist must provide pharmaceutical care (“medication therapy management services”<sup>19</sup>) and must treat a patient holding a prescription for the pill the same as a patient holding any other prescription.<sup>20</sup>

In Illinois, Governor Blagojevich’s Emergency Rule, later made permanent by the Joint Commission of Administrative Rules (“JCAR”),<sup>21</sup> brought the controversy surrounding the morning-after pill and a pharmacist’s right of conscience to the forefront of the medical and legal fields.

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<sup>17</sup> FDA, *supra* note 10.

<sup>18</sup> Press Release, FDA News, FDA Approves Over-the-Counter Access for Plan B for Women 18 and Older; Prescription Remains Required for Those 17 and Under (Aug. 24, 2006), <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01436.html>; *see also* Letter from Steve Galson, Dir., Ctr. for Drug Evaluation & Research, FDA, to Joseph A. Carrado, Vice President, Clinical Regulatory Affairs, Duramed Research, Inc. 2 (Aug. 24, 2006), <http://www.fda.gov/cder/foi/appletter/2006/021045s011ltr.pdf>.

<sup>19</sup> 225 ILL. COMP. STAT. ANN. 85/3(aa) (West Supp. 2008). Such services consist of:

[T]he evaluation of prescription drug orders and patient medication records to resolve conflicts with the following:

- (1) known allergies;
- (2) drug or potential therapy contraindications;
- (3) reasonable dose, duration of use, and route of administration, taking into consideration factors such as age, gender, and contraindications;
- (4) reasonable directions for use;
- (5) potential or actual adverse drug reactions;
- (6) drug-drug interactions;
- (7) drug-food interactions;
- (8) drug-disease contraindications;
- (9) identification of therapeutic duplication;
- (10) patient laboratory values when authorized and available;
- (11) proper utilization (including over or under utilization) and optimum therapeutic outcomes; and
- (12) drug abuse and misuse . . . .

*Id.* The services further require the pharmacist to “provid[e] patient counseling designed to enhance a patient’s understanding and the appropriate use of his or her medications.” *Id.*; *see also id.* at 85/3(bb) (defining “pharmacist care” as “the provision by a pharmacist of medication therapy management services . . . intended to achieve outcomes that improve patient health, quality of life, and comfort and enhance patient safety.”).

<sup>20</sup> Press Release, Ill. Gov’t News Network, Office of the Governor, Gov. Blagojevich Moves to Make Emergency Contraceptives Rule Permanent (Apr. 18, 2005), <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=3862>.

<sup>21</sup> *See* Joint Committee on Administrative Rules, About JCAR, <http://www.ilga.gov/commission/jcar/> (last visited Nov. 29, 2008).

*A. Governor Blagojevich’s Emergency Rule*

On April 1, 2005, pharmacists in Illinois woke up and went to work unaware that Governor Blagojevich was in the process of passing the Emergency Rule that would require them to dispense emergency contraceptives or else face severe consequences.<sup>22</sup> The Governor’s Emergency Rule read 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. 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 either be transferred to a local pharmacy of the patient’s choice or returned to the patient, as the patient directs.

2) For the purposes of this subsection (j), the term “contraceptive” shall refer to all FDA-approved drugs or devices that prevent pregnancy.<sup>23</sup>

Under Illinois Rules, an agency is permitted to pass an emergency rule if there is “the existence of any situation that any agency finds reasonably constitutes a threat to the public interest, safety, or welfare.”<sup>24</sup> But an “emergency” did not exist in the Illinois situation because patients could get their prescriptions filled at another pharmacy or by another pharmacist. Therefore, as the law requires, public notice should have been given, or a public hearing held (if the circumstances mandated by the provision existed), by the Governor or agency prior to the Emergency Rule’s promulgation.<sup>25</sup> In addition, the State Board of Pharmacy must review, approve, or authorize the “emergency rule” before enforcing it on pharmacists because of its power to revoke or

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<sup>22</sup> Notice of Emergency Amendment to Pharmacy Practice Act of 1987, 29 Ill. Reg. 5586 (Apr. 15, 2005); *see also* Notice of Proposed Amendment to Pharmacy Practice Act of 1987, 29 Ill. Reg. 5823 (Apr. 29, 2005).

<sup>23</sup> 29 Ill. Reg. at 5596 (emphasis added).

<sup>24</sup> 5 ILL. COMP. STAT. ANN. 100/5-45(a) (West 2005 & Supp. 2008).

If any agency finds that an emergency exists that requires adoption of a rule upon fewer days than is required by Section 5-40 [5 ILL. COMP. STAT. ANN. 100/5-40] and states in writing its reasons for that finding, the agency may adopt an emergency rule without prior notice or hearing upon filing a notice of emergency rulemaking with the Secretary of State under Section 5-70 [5 ILL. COMP. STAT. ANN. 100/5-70]. . . . [A]n emergency rule becomes effective immediately upon filing under Section 5-65 [5 ILL. COMP. STAT. ANN. 100/5-65] or at a stated date less than 10 days thereafter.

*Id.* at 100/5-45(b).

<sup>25</sup> *Id.* at 100/5-40(b).

change the status of a pharmacist's license.<sup>26</sup> The Board did not do so until after the Emergency Rule had already been put in place.<sup>27</sup>

*B. The Joint Commission on Administrative Review Made Governor Blagojevich's Emergency Rule Permanent with Slight Changes*

In mid-April 2005, Governor Blagojevich filed a permanent rule with the JCAR, and, like the Emergency Rule, the Final Rule "require[d] drug stores that stock and dispense contraceptives to fill birth control prescriptions without delay."<sup>28</sup> On August 16, 2005, the JCAR made Governor Blagojevich's Emergency Rule permanent.<sup>29</sup> As permitted by Illinois law, only slight changes were made to the Emergency Rule so that the pharmacist's drug utilization review would remain intact.<sup>30</sup> The Final Rule stated:

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

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<sup>26</sup> See 225 ILL. COMP. STAT. ANN. 85/11 (West 2007 & Supp. 2008).

<sup>27</sup> Press Release, Gov. Blagojevich Moves to Make Emergency Contraceptives Rule Permanent, *supra* note 20.

<sup>28</sup> *Id.*

<sup>29</sup> Press Release, Ill. Gov't News Network, Office of the Governor, State Commission Gives Permanent Approval to Gov. Blagojevich's Emergency Rule Protecting Illinois Women's Right to Birth Control: Governor Applauds Timely JCAR Action (Aug. 16, 2005), <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=4247>.

<sup>30</sup> Joint Committee on Administrative Rules, *Illinois Rulemaking Process*, <http://www.ilga.gov/commission/jcar/ILRulemakingProcess.pdf> (last visited Nov. 29, 2008) ("During the JCAR review, JCAR and the agency can agree to modifications in the rulemaking that are adopted through written JCAR Agreements."); Press Release, Gov. Blagojevich Moves to Make Emergency Contraceptives Rule Permanent, *supra* note 20.

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 [ILL. COMP. STAT. ANN. 85/3(q)].<sup>31</sup>

*C. The Final Rule Was Amended Based on a Legal Settlement*

On April 16, 2008, the Final Rule was amended as "the result of an agreement based upon a legal settlement with the Department [of Financial and Professional Regulation] regarding the dispensing of contraceptives to patients."<sup>32</sup> The Amended Rule provides additional subsections that address several issues that the Final Rule did not address. Specifically, Subsection 2) addresses what pharmacies should do regarding its stock of emergency contraceptives, Subsection 3) notes the protocols to be followed when a pharmacist objects to dispensing an emergency contraceptive, and Subsection 4) requires a pharmacy to have a nonobjecting pharmacist available at all times or another licensed pharmacist available for remote medication order processing ("RMOP").<sup>33</sup> Subsections 5) and 6) in the Amended Rule were previously Subsections 2) and 3) in the Final Rule.<sup>34</sup> The exact language of the Amended Rule, with the newly added and amended language italicized and a portion of Subsection 3) omitted, is as follows:

j) Duty of *Retail* Pharmacy to Dispense Contraceptives

1) Upon receipt of a valid, lawful prescription for a contraceptive, a *retail pharmacy serving the general public* 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, *subject to the remaining provisions of this subsection (j)*. 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 *contraceptive, or a suitable alternative, is not in stock and 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

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<sup>31</sup> ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2005) (amended 2008) (emphasis added).

<sup>32</sup> Notice of Adopted Amendment to the Pharmacy Practice Act, 32 Ill. Reg. 7116, 7116 (May 2, 2008) (codified as amended at 68 ILL. ADMIN. CODE tit. 68, § 1330.91).

<sup>33</sup> ILL. ADMIN. CODE tit. 68, § 1330.91(j)(2)–(4) (2008).

<sup>34</sup> Compare ILL. ADMIN. CODE tit. 68, § 1330.91(j)(5)–(6) (2008), with ILL. ADMIN. CODE tit. 68, § 1330.91(j)(2)–(3) (2005).

prescription for contraceptive drugs must be returned to the patient if the patient so directs.

2) *Each retail pharmacy serving the general public shall use its best efforts to maintain adequate stock of emergency contraception to the extent it continues to sell contraception (nothing in this subsection (j)(2) prohibits a pharmacy from deciding not to sell contraception). Whenever emergency contraception is out-of-stock at a particular pharmacy and a prescription for emergency contraception is presented, the pharmacist or another pharmacy registrant shall attempt to assist the patient, at the patient's choice and request, in making arrangements to have the emergency contraception prescription filled at another pharmacy 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.*

3) *Dispensing Protocol - In the event that a licensed pharmacist who objects to dispensing emergency contraception (an "objecting pharmacist") is presented with a prescription for emergency contraception, the retail pharmacy serving the general public shall use the following dispensing protocol:*

*A) All other pharmacists, if any, then present at the location where the objecting pharmacist works (the "dispensing pharmacy") shall first be asked to dispense the emergency contraception (any pharmacist that does not object to dispensing these medications is referred to as a "[nonobjecting] pharmacist").*

*B) If there is an objecting pharmacist and no [nonobjecting] pharmacist is then available at the dispensing pharmacy, any pharmacy (the "remote pharmacy") or other [nonobjecting] pharmacist shall provide [RMOP] to the dispensing pharmacy. RMOP includes any and all services that a licensed pharmacist may provide, as well as authorizing a non-pharmacist registrant at the dispensing pharmacy, to dispense the emergency contraception to the patient under the remote supervision of a [nonobjecting] pharmacist. For purposes of this subsection (j) and the Pharmacy Practice Act, a registered pharmacy technician is authorized to engage in RMOP involving emergency contraception.*

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*4) A retail pharmacy that serves the general public is responsible for ensuring either that there is a [nonobjecting] pharmacist scheduled at all times the pharmacy is open, or that there is a licensed pharmacist available to perform RMOP for emergency contraception at all times the pharmacy is open and no [nonobjecting] pharmacist is available at the pharmacy.*

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

6) 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 [ILL. COMP. STAT. ANN. 85/3(q)].<sup>35</sup>

## II. *MORR-FITZ, INC. V. BLAGOJEVICH*

### A. *The Parties to the Current Case*

The present case before the Illinois Supreme Court involves two pharmacists and three Illinois corporations who, at the time suit was filed, were subject to the Final Rule, which required them to dispense emergency contraceptives upon a patient's request without delay.<sup>36</sup> Luke Vander Bleek and Glenn Kosirog are the two pharmacists who have been adversely affected by Governor Blagojevich's Emergency Rule and the Final Rule.<sup>37</sup> They have strongly held conscientious objections to filling emergency contraception requests.<sup>38</sup> As pharmacists, they are proactive in their desire to follow their oaths of administering medicine to patients in order to maintain life.<sup>39</sup> In their efforts to be proactive, both have formed their beliefs and consciences and believe that "life begins at conception and therefore does not allow [them] to dispense the morning-after pill and/or 'Plan B' because of their abortifacient mechanism of action, i.e., they can cause abortions by preventing an already-fertilized egg from implanting in the womb."<sup>40</sup>

In passing the Emergency Rule, Governor Blagojevich required "pharmacies in Illinois that sell contraceptives [to] accept and fill prescriptions for contraceptives without delay."<sup>41</sup> On April 1, 2005, he indicated that the government would enforce the Emergency Rule against pharmacists who violate it, and that they would face "significant

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<sup>35</sup> *Id.* § 1330.91(j) (italics added). The omitted subsections outline the various requirements for RMOP. *See id.* § 1330.91(j)(3)(B)(i)–(vii).

<sup>36</sup> First Amended Complaint for Declaratory & Injunctive Relief ¶¶ 2–6, *Morr-Fitz, Inc. v. Blagojevich*, No. 2005-CH495 (Ill. Cir. Ct. Oct. 28, 2005) [hereinafter Complaint] (on file with the Regent University Law Review). While the case involves both pharmacies and pharmacists, this Note focuses solely on the pharmacist's right of conscientious objection.

<sup>37</sup> *See id.* ¶¶ 5–6, 22, 41.

<sup>38</sup> *Id.* ¶¶ 22, 41.

<sup>39</sup> *See id.* ¶¶ 31, 42; US PharmD, Pharmacist Code of Ethics § IV, [http://www.uspharmd.com/pharmacist/Pharmacist\\_Oath\\_and\\_Code\\_of\\_Ethics.html](http://www.uspharmd.com/pharmacist/Pharmacist_Oath_and_Code_of_Ethics.html) (last visited Nov. 29, 2008) ("A pharmacist has a duty to tell the truth and to act with conviction of conscience.").

<sup>40</sup> Complaint, *supra* note 36, ¶¶ 30, 41.

<sup>41</sup> Press Release, Ill. Gov't News Network, Office of the Governor, Gov. Blagojevich Takes Emergency Action to Protect Women's Access to Contraceptives (Apr. 1, 2005), <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=3805>.

penalties” for failure to comply with the Emergency Rule.<sup>42</sup> On April 13, 2005, Governor Blagojevich, in another press release, declared that “[p]harmacists—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.”<sup>43</sup> He confirmed that the government “will vigorously defend a woman’s right to get her prescription for birth control filled without delay, without hassle[,] and without a lecture.”<sup>44</sup> In addition, once the Final Rule was in place, the Governor’s Office stated that the Department of Financial and Professional Regulation required every drug store to post signs providing a “toll-free pharmacy hotline number . . . and website . . . where a customer can file a complaint if they [sic] believe they were treated unfairly.”<sup>45</sup>

Almost one month after the Illinois Supreme Court heard oral arguments in *Morr-Fitz*, the Amended Rule became effective.<sup>46</sup> The Amended Rule addresses issues that the Final Rule did not. As amended, the Rule appreciates that a situation might occur where a pharmacist conscientiously objects to filling a prescription for an emergency contraceptive.<sup>47</sup> The amendment outlines the steps that pharmacists and pharmacies must take in such a situation.<sup>48</sup> Thus, the Amended Rule recognizes that a pharmacist may object without facing direct repercussions, such as the revocation of his pharmaceutical license. Even though the Amended Rule appreciates that a pharmacist

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<sup>42</sup> Complaint, *supra* note 36, ¶ 57.

<sup>43</sup> Press Release, Ill. Gov’t News Network, Office of the Governor, 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 (Apr. 13, 2005), <http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=3849>.

<sup>44</sup> *Id.*

<sup>45</sup> Press Release, Ill. Gov’t News Network, Office of the Governor, Governor Blagojevich Introduces New Rule to Ensure Women’s Access to Prescription Contraceptives After New Tactic to Deny Women Access to Birth Control Surfaces (Mar. 27, 2006), <http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=4738>.

<sup>46</sup> DOCKET: SUPREME COURT OF ILLINOIS MARCH TERM 2008 (Mar. 2008), available at <http://www.state.il.us/court/SupremeCourt/Docket/2008/03-08.pdf> (oral arguments heard on Mar. 18, 2008); Notice of Adopted Amendment to the Pharmacy Practice Act, 32 Ill. Reg. 7116 (May 2, 2008) (amendment effective on Apr. 16, 2008).

<sup>47</sup> See ILL. ADMIN. CODE tit. 68, § 1330.91(j)(3) (2008). For a discussion of the Amended Rule, see *supra* Part I.C. See also Dean Olsen, *Plan B Rule Could Change; Possible Settlement Offers Compromise on Morning After Pill*, ST. J.-REG. (Springfield, Ill.), Oct. 10, 2007, at 1 (“It changes the rule significantly, in that, for the first time, the state now at least recognizes the existence of objecting pharmacists and attempts by this amendment to deal with the problem that that causes,” Francis Manion, a Kentucky lawyer representing the pharmacists [in *Menges v. Blagojevich*] . . .”). For a discussion of the *Menges* case, see *infra* Part III.A.

<sup>48</sup> ILL. ADMIN. CODE tit. 68, § 1330.91(j)(3)(A)–(B) (2008). For the full text, see *supra* note 35 and accompanying text.

might have a conscientious objection, it was passed after *Morr-Fitz* was brought before the Illinois Supreme Court. The attorneys for the plaintiffs believe that *Morr-Fitz* is still relevant.<sup>49</sup> While the effect of the Amended Rule on the outcome of this case is not clear at this time, the Illinois Supreme Court, notably, has not dismissed the case for mootness nor has it published a decision.

The issue in *Morr-Fitz* remains important to the immediate parties, and to pharmacists and pharmacies in both Illinois and in the United States, because the court has yet to decide whose rights will prevail in a conflict over dispensing emergency contraception—the pharmacist's or the patient's.<sup>50</sup> Nine groups filed amicus curiae briefs at the outset of this case in support of the Illinois Supreme Court reaching a decision on this matter so that pharmacists would not have to wonder whether they could follow their consciences or be forced to violate them under the Final Rule.<sup>51</sup> In his address on October 29, 2007 to the 25th International Congress of Catholic Pharmacists, Pope Benedict XVI further emphasized the issue by encouraging pharmacists to conscientiously object to filling Plan B requests.<sup>52</sup>

#### *B. Effects of the Application of the Final Rule on Pharmacists*

With the Board of Pharmacy's approval of the Final Rule—and the JCAR making the Rule permanent—pharmacists were liable under the Pharmacy Practice Act of 1987 for not complying with the Final Rule. The Pharmacy Practice Act of 1987 provides for the following when a pharmacist violates the Act or the Rule:

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<sup>49</sup> See Dean Olsen, *Pharmacist Hopeful for Plan B Challenge: Drugstore Owner at Odds with Rule To Require Stocking of Contraceptive*, ST. J. REG. (Springfield, Ill.), Oct. 15, 2007, at 1 (explaining that though the Amended Rule was "designed [as a settlement] to end a lawsuit filed by several pharmacists in Springfield's U.S. District Court," Vander Bleek's attorney stated that it actually makes their pending challenge "more compelling, because the amended rule arguably makes it more certain that you must stock Plan B").

<sup>50</sup> See Dean Olsen, *Plan B Rule Threatens Religion, Pharmacists Say*, ST. J. REG. (Springfield, Ill.), Mar. 19, 2008, at 17 (explaining the pharmacists' dilemma); Judy Peres, *'Morning-After' Pill Deal Reached; Pharmacists, State Accept Rule Change*, CHI. TRIB., Oct. 11, 2007, at 1 ("Michael Patton of the Illinois Pharmacists Association said the settlement skirts a critical question: Do pharmacists have a legal right not to perform services that violate their beliefs?").

<sup>51</sup> Amicus Curiae Brief of the Ill. Pharmacists Ass'n & the Am Pharmacists Ass'n, *Morr-Fitz, Inc. v. Blagojevich*, No. 104692 (Ill. Oct. 31, 2007).

<sup>52</sup> John-Henry Westen, *Pope Tells Pharmacists Not to Dispense Drugs to Inhibit Implantation; Implications for Plan B at Catholic Hospitals*, LIFESITE NEWS.COM, Oct. 29, 2007, <http://www.lifesite.net/ldn/2007/oct/07102902.html> ("[W]e cannot anaesthetize consciences as regards, for example, the effect of certain molecules that have the goal of preventing the implantation of the embryo or shortening a person's life." (quoting Pope Benedict XVI)).

(a) In accordance with Section 11 of this Act, the Department may refuse to issue, restore, or renew, or may revoke, suspend, place on probation, or reprimand as the Department may deem proper with regard to any license or certificate of registration . . . for any one or combination of the following causes:

. . . .

2. Violations of this Act, or the rules promulgated hereunder.<sup>53</sup>

Under the Final Rule, pharmacists could no longer conscientiously object to filling an emergency contraception request without fearing the revocation of their licenses and, in turn, loss of livelihood. Governor Blagojevich and the Illinois Legislature placed Illinois pharmacists in the precarious position of choosing between following their firmly held convictions or choosing to financially provide for themselves and their families while violating their consciences.

Fortunately, for Illinois pharmacists, the Amended Rule recognizes their right to object to filling a request for an emergency contraceptive, thus alleviating the fear of losing their licenses.<sup>54</sup> As noted above, however, what will happen in the future when pharmacists are presented with the mandate to fill another controversial drug? Will they be able to follow their consciences or forced to lose their licenses?

### III. THE FINAL RULE VIOLATED PRECEDENT AND WAS THEREFORE VOID AND WITHOUT EFFECT

Although many believe that the “right of conscience” issue is a modern issue, the Founding Fathers considered the right of conscience important.<sup>55</sup> Thomas Jefferson wrote, “No provision in our Constitution ought to be dearer to man than that which protects the rights of

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<sup>53</sup> 225 ILL. COMP. STAT. ANN. 85/30(a) (West 2007 & Supp. 2008).

<sup>54</sup> ILL. ADMIN. CODE tit. 68, §1330.91(j)(3) (2008). While the Amended Rule recognizes a pharmacist’s right to object, there is the potential for indirect consequences to an objecting pharmacist and the pharmacy. The Amended Rule requires a pharmacy to either have a nonobjecting pharmacist working at all times or another pharmacist available through remote access (RMOP). *Id.* § 1330.91(j)(4). With these requirements, pharmacists who object could potentially have their hours cut so that the pharmacy can have another nonobjecting pharmacist working in case an RMOP is not available. In addition, this provision could potentially affect a pharmacy’s hiring procedures and encourage religious discrimination. Pharmacist’s who object on the basis of religious belief would become a liability to a pharmacy because the pharmacy must monitor the number of objecting pharmacists to comply with the new rules. Both of these situations raise the possibility of an employment discrimination suit under Title VII. A full discussion of these new potential ramifications is beyond the scope of this Note. *See infra* note 91.

<sup>55</sup> *See, e.g.,* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1451–53 (1990) (explaining the free exercise views of the Founders).

conscience against the enterprises of the civil authority."<sup>56</sup> James Madison, in his *Memorial and Remonstrance*, also wrote:

"The [r]eligion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. . . . It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him."<sup>57</sup>

Madison's views were not without historical precedent; William Penn, for one, espoused the same view.<sup>58</sup>

Illinois laws and the Constitution of the United States continue to uphold the view of the Founding Fathers.<sup>59</sup> Medical professionals are permitted to abstain from performing acts they believe are morally objectionable practices.<sup>60</sup> The issue of conscience came to the forefront of the nation when the United States Supreme Court in *Roe v. Wade* constitutionalized abortion.<sup>61</sup> In the aftermath, federal and state legislatures passed laws protecting the rights of healthcare professionals who feared that they would be forced, against their consciences, to

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<sup>56</sup> 16 THOMAS JEFFERSON, *Reply to Public Address to the Society of the Methodist Episcopal Church at New London (Feb. 4, 1809)*, in THE WRITINGS OF THOMAS JEFFERSON 331, 332 (Andrew A. Lipscomb ed., 1903).

<sup>57</sup> McConnell, *supra* note 55, at 1453 (quoting 2 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in THE WRITINGS OF JAMES MADISON 183, 184 (Gaillard Hunt ed., 1901)).

<sup>58</sup> *Id.* at 1451 ("William Penn wrote in 1670 that 'by *Liberty of Conscience*, we understand not only a meer [sic] *Liberty of the Mind*, in believing or disbelieving . . . but the exercise of ourselves in a visible way of worship.'" (quoting 1 WILLIAM PENN, *The Great Case of Liberty of Conscience*, in COLLECTION OF THE WORKS OF WILLIAM PENN 443, 447 (photo. reprint 1974) (Assigns of J. Soble, 1726))).

<sup>59</sup> Letter from George Washington to the United Baptist Churches in Va. (May 10, 1789), in THE AMERICAN REPUBLIC: PRIMARY SOURCES 69, 70 (Bruce Frohnen ed., 2002).

If I could have entertained the slightest apprehension that the Constitution framed in the Convention, where I had the honor to preside, might possibly endanger the religious rights of any ecclesiastical society, certainly I would never have placed my signature to it; and if *I could now conceive that the general government might ever be so administered as to render the liberty of conscience insecure*, I beg you will be persuaded that no one would be more zealous than myself to establish *effectual* barriers against the horrors of spiritual tyranny, and every species of religious persecution. For you, doubtless, remember that I have often expressed my sentiment, that every man, conducting himself as a good citizen, and being accountable to God alone for his religious opinions, ought to be protected in worshipping the Deity according to the dictates of his own conscience.

*Id.* (emphasis added).

<sup>60</sup> Healthcare Right of Conscience Act, 745 ILL. COMP. STAT. ANN. 70/1–70/14 (West 2002).

<sup>61</sup> *Roe v. Wade*, 410 U.S. 113, 153–54 (1973) (concluding that the personal right of privacy includes the decision to have an abortion).

perform abortions.<sup>62</sup> With the advancements in technology and the creation of new pills (that is, emergency contraceptives), the issue of the right of conscience is once again before the nation and health care providers.

For three years, Illinois pharmacists experienced uncertainty regarding whether they had a right to conscientiously object to filling emergency contraceptives; several pharmacists were placed on leave or lost their jobs for objecting to fill a request.<sup>63</sup> Did the Final Rule take precedence over past law, thereby disallowing pharmacists a right of conscientious objection, or was the Final Rule void? The Final Rule, as enacted by the JCAR, violated two Illinois laws. Specifically, the Final Rule violated the Illinois Health Care Right of Conscience Act, and the Illinois Religious Freedom Restoration Act.<sup>64</sup> By violating just one of these laws, the Final Rule should have been determined void and unenforceable. While the Amended Rule clears up some of the confusion by noting that a pharmacist may object to filling a request, the Final Rule still violated the pharmacist's rights during the time that it applied. The question still remains: whose rights will ultimately prevail? Analyzing the Illinois law (Final Rule and Amended Rule), the precedent that the Final Rule violated for three years, and the consequences from both rules, is important for other states so that they can see the potential consequences resulting from the enactment of similar rules.<sup>65</sup>

#### A. Illinois Health Care Right of Conscience Act

Requiring a pharmacist to fill a prescription for the morning-after pill without regard to the pharmacist's conscientious objection directly violated the Illinois Health Care Right of Conscience Act. The Act states:

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<sup>62</sup> Cicconi, *supra* note 6, at 713–14 (citing 42 U.S.C. § 300a-7 (2000) (amending the Public Health Service Act, 42 U.S.C. §§ 201–300iii-4 (2002)); CATHERINE WEISS et. al, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS: ACLU REPRODUCTIVE FREEDOM PROJECT (2002), <http://www.aclu.org/FilesPDFs/ACF911.pdf>; Rachel Benson Gold & Adam Sonfield, *Refusing to Participate in Health Care: A Continuing Debate*, 3 GUTTMACHER REP. ON PUB. POL'Y, 8, 8 (Feb. 2000), <http://www.guttmacher.org/pubs/tgr/03/1/gr030108.pdf>; *Refusing To Provide Health Services*, 2008 GUTTMACHER INST. ST. POLICIES IN BRIEF, [http://www.guttmacher.org/statecenter/spibs/spib\\_RPHS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf)). Today, the term “healthcare professionals” is defined broadly enough to include pharmacists. See *infra* notes 67–68, 90.

<sup>63</sup> See *Vandersand v. Wal-Mart Stores*, 525 F. Supp. 2d 1052, 1055 (C.D. Ill. 2007), *dismissed per stipulation*, No. 06-3292, 2008 WL 2774915 (C.D. Ill. May 29, 2008); *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 995, 998 (C.D. Ill. 2006), *dismissed*, No. 05-3307 (C.D. Ill. May 13, 2008).

<sup>64</sup> See *infra* Part III.A–B.

<sup>65</sup> See Marc Kaufman, *Plan B Battles Embroil States*, WASH. POST, Feb. 27, 2006, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/26/AR2006022601380.html>; Ed Susman, *ACOG: Plan B Availability Varies from State to State*, MEDPAGE TODAY, May 9, 2007, <http://www.medpagetoday.com/MeetingCoverage/ACOG/5603>.

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 . . . health care services and medical care . . . 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 . . . deliver . . . medical care.<sup>66</sup>

The Act defines “health care” as “any phase of patient care, including but not limited to . . . family planning, counseling, referrals, or any other advice in connection with the use or procurement of contraceptives and sterilization or abortion procedures; [or] medication.”<sup>67</sup> It further defines “health care personnel” as “any . . . person who furnishes, or assists in the furnishing of, health care services.”<sup>68</sup> “Conscience,” the focal point of the issue, is defined as “a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths.”<sup>69</sup>

Not only did the Final Rule ignore the fact that the law explicitly permits a pharmacist to make a conscientious objection, but it further ignored the fact that the Health Care Right of Conscience Act holds that it is unlawful for any public official to discriminate against any person on that basis—including discrimination in licensing.<sup>70</sup> The Act takes any violation of this rule seriously by permitting “[a]ny person . . . injured by any public . . . agency . . . by reason of any action prohibited by this Act [to] commence a suit . . . and . . . recover *threefold* the actual damages . . . sustained by such person.”<sup>71</sup>

As previously noted, both pharmacists in *Morr-Fitz, Inc. v. Blagojevich* have firmly held beliefs that a baby is human at conception; therefore, filling a request for the morning-after pill would violate their consciences.<sup>72</sup> Understandably, problems arise if this Rule applies to someone who often changes religious beliefs, or even someone who used

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<sup>66</sup> 745 ILL. COMP. STAT. ANN. 70/2 (West 2002) (emphasis added).

<sup>67</sup> *Id.* at 70/3(a).

<sup>68</sup> *Id.* at 70/3(c).

<sup>69</sup> *Id.* at 70/3(e).

<sup>70</sup> *Id.* at 70/5. The statute reads:

It shall be unlawful for any . . . public official to discriminate against any person in any manner, including but not limited to, licensing . . . or any other privileges, because of such person’s conscientious refusal to . . . participate in any way in any particular form of health care services contrary to his or her conscience.

*Id.*

<sup>71</sup> *Id.* at 70/12 (emphasis added).

<sup>72</sup> Complaint, *supra* note 36, ¶¶ 22, 41.

the Final Rule as a way to avoid working. But the definition of conscience itself states that it must be a “sincerely held set of moral convictions,”<sup>73</sup> and that is the case for many pharmacists who bring these suits. They are not merely beliefs that pharmacists adopt one week and drop the next.<sup>74</sup> The Final Rule disregarded this Act and the pharmacists’ consciences when it stated that a pharmacist *must* dispense the emergency contraceptive without delay.<sup>75</sup>

Two Illinois cases affecting Illinois pharmacists and the Final Rule came before the United States District Court in the Central District of Illinois. Both cases were settled outside of court, with the settlement agreement in the second case resulting in the Amended Rule.<sup>76</sup> While federal district court decisions are not binding on the Illinois Supreme Court, they can be persuasive authority as the court faces the difficult task of determining what law should apply.<sup>77</sup>

Ethan Vandersand, the pharmacist in *Vandersand v. Wal-Mart Stores*, worked in the pharmacy at an Illinois Wal-Mart.<sup>78</sup> While working on February 2, 2006, he received a phone call at 10:30 a.m. from a nurse practitioner asking if he would dispense emergency contraceptives, to which he replied that he would not.<sup>79</sup> He provided the nurse practitioner with the name and number of another pharmacy in town.<sup>80</sup> The nurse practitioner then told Vandersand that her patient might be coming to his pharmacy and to have the patient call her upon arrival.<sup>81</sup> Thereafter, the nurse practitioner’s patient called the pharmacy, and though Vandersand did not talk with the patient, the pharmacist’s technician gave her the nurse practitioner’s number.<sup>82</sup> The patient did not come into the store or submit a prescription or ask for emergency contraceptives.<sup>83</sup>

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<sup>73</sup> 745 ILL. COMP. STAT. ANN. 70/3(e) (West 2002).

<sup>74</sup> Complaint, *supra* note 36, ¶¶ 24, 26, 43, 45.

<sup>75</sup> ILL. ADMIN. CODE tit. 68, § 1330.91(j)(1) (2005) (amended 2008).

<sup>76</sup> *Vandersand v. Wal-Mart Stores*, 525 F. Supp. 2d 1052 (C.D. Ill. 2007), *dismissed per stipulation*, No. 06-3292, 2008 WL 2774915 (C.D. Ill. May 29, 2008); *Menges v. Blagojevich*, 451 F. Supp. 2d 992 (C.D. Ill. 2006), *dismissed*, No. 05-3307 (C.D. Ill. May 13, 2008).

<sup>77</sup> *Nat’l Commercial Banking Corp. of Austl. v. Harris*, 532 N.E.2d 812, 816 (Ill. 1988) (“[T]he general rule is that decisions of the United States district and circuit courts are not binding upon Illinois courts.’ Our court has never meant by this proposition that we will ignore or negate the persuasive authority that a Federal decision may provide when it concerns a similar issue.” (quoting *City of Chicago v. Groffman*, 368 N.E.2d 891, 894 (Ill. 1977))).

<sup>78</sup> *Vandersand*, 525 F. Supp. 2d at 1053 (C.D. Ill. 2007), *dismissed per stipulation*, No. 06-3292, 2008 WL 2774915 (C.D. Ill. May 29, 2008).

<sup>79</sup> *Id.* at 1054.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*



Shortly thereafter, Vandersand informed his supervisor of the incident.<sup>84</sup> Vandersand believed that the nurse practitioner filed a complaint against him with the Illinois Department of Financial and Professional Regulation for violating the Final Rule.<sup>85</sup> Wal-Mart was notified of the official filing of the complaint with the Department.<sup>86</sup> Wal-Mart gave Vandersand only two options: "be terminated immediately or . . . be placed on an unpaid leave of absence."<sup>87</sup> Vandersand chose the unpaid leave of absence and later alleged that he was placed on the unpaid leave because of his conscientious objection to filling a morning-after pill prescription.<sup>88</sup> In this situation, like the pharmacists in *Morr-Fitz*, Vandersand had a sincerely held moral conviction against filling a morning-after pill prescription. Vandersand believes the drugs "act with a significant abortifacient mechanism in a manner and to a degree that ordinary birth control drugs do not"; therefore, his religious faith forbids him "from directly or indirectly participating in causing the death of an innocent human life."<sup>89</sup>

On a Motion to Dismiss the Complaint or Stay Proceedings by Wal-Mart, the federal district court concluded that pharmacists were protected by the Illinois Health Care Right of Conscience Act and denied the Motion.<sup>90</sup> Vandersand claimed that Wal-Mart violated Title VII of the Civil Rights Act of 1964, as well as the Illinois Health Care Right of Conscience Act.<sup>91</sup> Wal-Mart claimed that it was complying with the Final Rule by placing him on leave, and further argued that Vandersand could not bring his claim because he was "not covered by the [Illinois] Right of Conscience Act."<sup>92</sup> The court ruled that a private employer "may not discriminate against any person because, as a matter of conscience, the person refuses to participate in any way in a form of health care services," and therefore "[t]he Right of Conscience Act prohibit[ed] Wal-

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<sup>84</sup> *Id.* at 1055.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1055, 1057.

<sup>89</sup> *Id.* at 1054–55.

<sup>90</sup> *Id.* at 1057–58.

<sup>91</sup> *Id.* at 1055. While the Title VII claim is a legitimate claim, it will not be addressed in this Note. Should a pharmacist bring the religious discrimination argument before a court, however, he must show that

(1) he engages in . . . a religious observance or practice that conflicts with an employment requirement; (2) he called the religious observance or practice to the attention of his employer; and (3) the religious observance or practice was the basis for the employer's adverse employment action against him.

*Id.* (citing Equal Employment Opportunity Comm'n v. Ilna of Hungary, Inc., 108 F.3d 1569, 1575 (7th Cir. 1997)).

<sup>92</sup> *Id.* at 1053.

Mart from discriminating against him for his refusal to participate in the dispensing of medication because of his beliefs.”<sup>93</sup> The court further ruled that the Right of Conscience Act applied to pharmacists, and therefore “[a]ny person . . . who refuses to participate in any way in providing medication because of his conscience is protected by the Right of Conscience Act.”<sup>94</sup> After the court denied the Motion, the case proceeded until the parties filed a Stipulation to Voluntary Dismissal on May 29, 2008, with the Final Order granting dismissal issued on May 30, 2008.<sup>95</sup>

Similarly, the pharmacists in *Menges v. Blagojevich* faced unpaid, indefinite suspension or “substantially burdened” religious exercise because they would not comply with the Final Rule.<sup>96</sup> Before the Final Rule’s promulgation, Walgreens had a nationwide policy that permitted its pharmacists to object on moral or religious grounds to filling a prescription as long as the prescription could be filled by that store or a nearby pharmacy.<sup>97</sup> After the Final Rule, however, Walgreens changed its policy in Illinois and required its pharmacists to fill prescriptions even if doing so violated their religious beliefs.<sup>98</sup> Walgreens specifically required its pharmacists to either sign the new policy requiring them to dispense the emergency contraception or face unpaid indefinite suspension.<sup>99</sup> The plaintiffs alleged that the Final Rule violated Title VII because it “require[d] employers to engage in religious discrimination.”<sup>100</sup> Walgreens sought a declaratory judgment that the Final Rule violated Title VII of the Civil Rights Act of 1964.<sup>101</sup> In addition, Walgreens claimed that because of its attempt to comply with the Final Rule, it faced several civil actions claiming that it violated the Illinois Health Care Right of Conscience Act.<sup>102</sup> While the court ruled that Walgreens had in fact stated a claim,<sup>103</sup> the case was closed on May 13, 2008, due to a settlement agreement between Governor Blagojevich and Walgreens that resulted in the Amended Rule.<sup>104</sup> The pharmacists did not join in

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<sup>93</sup> *Id.* at 1057.

<sup>94</sup> *Id.*

<sup>95</sup> Stipulation to Voluntary Dismissal by Plaintiff, *Vandersand v. Wal-Mart Stores*, No. 06-3292 (C.D. Ill. May 29, 2008), 2008 WL 2774915.

<sup>96</sup> 451 F. Supp. 2d 992, 998 (C.D. Ill. 2006).

<sup>97</sup> *Id.* Walgreens previously sought to intervene in this action, which the court allowed. *Menges v. Blagojevich*, No. 05-3307, 2006 WL 1582461, at \*1 (C.D. Ill. June 8, 2006).

<sup>98</sup> *Menges*, 451 F. Supp. 2d at 998.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 999.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1004.

<sup>104</sup> *Menges v. Blagojevich*, No. 05-3307 (C.D. Ill. dismissed May 13, 2008); *see also* Agreed Joint Motion of Plaintiff Walgreen Co. & Defendants to Stay Case, *Menges v.*

the settlement agreement that resulted in the Amended Rule, but had a separate agreement with the state and all plaintiffs dismissed their claims against Governor Blagojevich.<sup>105</sup>

As previously mentioned, a federal district court decision is not binding on the Illinois Supreme Court; however, it may be persuasive.<sup>106</sup> In both *Vandersand* and *Menges*, pharmacists either lost their jobs or were substantially burdened by being required to comply with the Final Rule. The *Vandersand* court decision on the Motion shows that a pharmacist can have a right of conscience to object to filling a prescription under Illinois precedent.<sup>107</sup> Therefore, the Final Rule should be void. The effect of the Final Rule was harsh—follow your conscience and face severe consequences. Because the Final Rule required a pharmacist to choose either violation of his conscience or the possible revocation of his license, the Final Rule should have been determined void under the Illinois Health Care Right of Conscience Act.

While the Amended Rule noted that a situation might occur where a pharmacist objects to filling a prescription, neither the Amended Rule nor a court decision unequivocally permits a pharmacist to step aside without facing adverse consequences. This resolution remains important to the present case of *Morr-Fitz*, as well as future cases which might involve a controversial drug that conflicts with a pharmacist's conscience.

### *B. Illinois Religious Freedom Restoration Act*

The Final Rule's requirement that a pharmacist face consequences—such as losing his license—to maintain his sincerely held religious beliefs violated the Illinois Religious Freedom Restoration Act ("IRFRA").<sup>108</sup> IRFRA echoes the Founders' desire that the free exercise of

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Blagojevich, No. 05-3307 (C.D. Ill. Oct. 5, 2007), 2007 WL 3358899 (explaining that as a result of mediation efforts, Walgreens and the defendants were able to enter into a Mutual Agreement and Understanding).

<sup>105</sup> See Agreed Joint Motion of Plaintiff Walgreen Co. & Defendants to Stay Case, *Menges v. Blagojevich*, No. 05-3307 (C.D. Ill. Oct. 5, 2007), 2007 WL 3358899; see also Associated Press, *Accord Reached on Dispensing Morning-After Pill*, DAILY HERALD, Oct. 11, 2007, <http://www.dailyherald.com/story/print/?id=54972> ("Francis Manion, an attorney for those pharmacists, said the settlement is technically an agreement between Walgreens and the state. Although his clients are dropping their lawsuit, they aren't part of the compromise to let a remote pharmacist oversee filling the prescription."); Editorial, *Fair Compromise on Morning-After Pill*, CHI. DAILY HERALD, Oct. 15, 2007, at 12 ("The American Center for Law and Justice, which is representing [the] pharmacists, agreed to drop the lawsuits but did not agree to be part of the compromise (it is between the state and Walgreens) because it still requires pharmacies to sell the morning-after pill . . .").

<sup>106</sup> *Supra* note 77.

<sup>107</sup> *Vandersand v. Wal-Mart Stores*, 525 F. Supp. 2d 1052, 1057 (C.D. Ill. 2007), *dismissed per stipulation*, No. 06-3292, 2008 WL 2774915 (C.D. Ill. May 29, 2008).

<sup>108</sup> Religious Freedom Restoration Act, 775 ILL. COMP. STAT. ANN. 35/1–35/99 (2001).

religion be readily available to every citizen of the United States.<sup>109</sup> The states, in their own power, have also sought to promote the freedom of religion by including a free exercise of religion clause in each of their Constitutions.<sup>110</sup>

The General Assembly of Illinois has found that “[t]he free exercise of religion is an inherent, fundamental, and inalienable right secured by Article I, Section 3 of the Constitution of the State of Illinois.”<sup>111</sup> Because it is an inherent right, the legislature of Illinois mandates that the

[g]overnment may not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest.<sup>112</sup>

If a person’s religious freedom is substantially burdened by the government in violation of IRFRA, he has a claim or defense against the government and can “obtain appropriate relief against [the] government.”<sup>113</sup> IRFRA specifically “state[s] that the [*Wisconsin v.*] *Yoder* ‘compelling interest’ test [is] to be applied” where the free exercise of religion<sup>114</sup> is “substantially burdened” by government action.<sup>115</sup> “[T]he hallmark of a substantial burden on one’s free exercise of religion is the presentation of a coercive choice of either abandoning one’s religious convictions or complying with the governmental regulation.”<sup>116</sup>

The Final Rule substantially burdened pharmacists because it did not permit pharmacists to exercise their religious convictions.<sup>117</sup>

<sup>109</sup> Letter from George Washington, *supra* note 59; Letter from Thomas Jefferson to the Danbury Baptist Ass’n (Jan. 1, 1802), in *THE AMERICAN REPUBLIC: PRIMARY SOURCES* 88 (Bruce Frohnen ed., 2002).

<sup>110</sup> See, e.g., ALA. CONST. art. I, § 3.01; MISS. CONST. art. III, § 18; MONT. CONST. art. II, § 5; NEV. CONST. art. I, § 4; N.J. CONST. art. I, ¶ 3; VT. CONST. ch. I, art. 3; VA. CONST. art. I, § 16.

<sup>111</sup> 775 ILL. COMP. STAT. ANN. 35/10(a)(1). The Illinois Constitution states, “The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions . . .” ILL. CONST. art. I, § 3.

<sup>112</sup> 775 ILL. COMP. STAT. ANN. 35/15.

<sup>113</sup> *Id.* at 35/20; see also *id.* at 35/10(b)(2) (stating that one of the purposes of the Act is “[t]o provide a claim or defense to persons whose exercise of religion is substantially burdened by government.”).

<sup>114</sup> *Id.* at 35/5. The “exercise of religion” is defined by IRFRA as “an act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.” *Id.*

<sup>115</sup> *Diggs v. Snyder*, 775 N.E.2d 40, 44 (Ill. App. Ct. 2002) (citing 775 ILL. COMP. STAT. ANN. 35/10(a)(6)(b)(1); see also *Wisconsin v. Yoder*, 406 U.S. 205, 214–15 (1972)).

<sup>116</sup> *Diggs*, 775 N.E.2d at 45 (citing *Yoder*, 406 U.S. at 217–18).

<sup>117</sup> See *id.* (“To constitute a showing of a substantial burden on religious practice, a plaintiff must demonstrate that the governmental action ‘prevents him from engaging in

*Vandersand v. Wal-Mart Stores* and *Menges v. Blagojevich* exemplify the effects of this burden on pharmacists. In both cases, the pharmacists were placed on leave and not permitted to work.<sup>118</sup>

Because the Final Rule substantially burdened the religious beliefs of pharmacists, the *Yoder* "compelling interest" test must be applied.<sup>119</sup> In order for the government to place this substantial burden on its citizens, it must first have a compelling government interest.<sup>120</sup> To determine whether a government's interest is compelling, the court will have to look to the specific facts of the case.<sup>121</sup> There is no compelling governmental interest, however, in forcing a pharmacist to deny his conscience and dispense an emergency contraceptive. The government interest is narrow and focused only on a woman's access to a drug—a drug that is surrounded by controversy. Secondly, the method must be the least restrictive means of furthering the compelling government interest.<sup>122</sup> Forcing a pharmacist to choose between filling a prescription and losing his job is not the least restrictive means. There are many ways to fill a request for the morning-after pill. For example, the government could require that the prescription be transferred to another pharmacy, or that the address and phone number of another pharmacy be given. The effect on the customer would be the same if the pill was not in stock. The customer would have to wait to be contacted by that pharmacy when the new stock arrived, or go to another pharmacy. In addition, the present pill just needs to be used within seventy-two hours.<sup>123</sup> Filling the prescription within this seventy-two hour window constitutes immediately filling the prescription, regardless of how the customer obtains the pill.

Not only does the Final Rule fail the compelling state interest and least restrictive means test, but the freedom to act according to firmly held religious beliefs should not come at such a high cost.<sup>124</sup> Under the

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conduct or having a religious experience that his faith mandates." (quoting *Stefanow v. McFadden*, 103 F.3d 1466, 1471 (9th Cir. 1996), *superseded by statute*, Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, § 8, 114 Stat. 806, 807 (2000) (codified as amended at 42 U.S.C. § 2000cc-5 (Supp. 2003))).

<sup>118</sup> *Vandersand v. Wal-Mart Stores*, 525 F. Supp. 2d 1052, 1053 (C.D. Ill. 2007), *dismissed per stipulation*, No. 06-3292, 2008 WL 2774915 (C.D. Ill. May 29, 2008); *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 998 (C.D. Ill. 2006), *dismissed*, No. 05-3307 (C.D. Ill. May 13, 2008).

<sup>119</sup> *Diggs*, 755 N.E.2d at 44–45.

<sup>120</sup> 775 ILL. COMP. STAT. ANN. 35/15.

<sup>121</sup> *Diggs*, 755 N.E.2d at 45 (citing *Abierta v. City of Chicago*, 949 F. Supp. 637, 643 (N.D. Ill. 1996)).

<sup>122</sup> 775 ILL. COMP. STAT. ANN. 35/15.

<sup>123</sup> FDA, *supra* note 10.

<sup>124</sup> *Nead v. Bd. of Trs. of E. Ill. Univ.*, No. 05-2137, 2006 WL 1582454, at \*597 (C.D. Ill. 2006) ("Free exercise of religion does not mean costless exercise of religion, but the

Final Rule, the cost was extremely high—lose your job and financial income or violate your conscience. It was a lose-lose situation for any pharmacist who had an objection to filling an order for the morning-after pill, and the Final Rule violated the state's proper use of power.

The Amended Rule took a step in the right direction by noting that a pharmacist can object to filling a prescription, and by putting protocols in place that are not restrictive on the objecting pharmacist.<sup>125</sup> In fact, the protocols permit another nonobjecting pharmacist or technician to handle the request so that the objecting pharmacist is able to step aside without any further involvement.<sup>126</sup> Thus, the Amended Rule does not substantially burden a pharmacist or violate IRFRA, but rather enables pharmacists to exercise their religious convictions.

If the Final Rule had been left in place, then what was to stop the government from forcing a pharmacist to fill a prescription for RU-486, commonly known as the abortion pill, or a new pill comparable to RU-486?<sup>127</sup> If the government protected every citizen who wanted to obtain a controversial drug from hearing the word “no,” where would the cycle end? Would the government erase the line protecting a pharmacist's conscience and let patients make any demand, thus denying a pharmacist his fundamentally protected right? Because courts have not yet decided this issue and the Amended Rule merely notes that the situation may occur, the question remains. Can pharmacists follow their consciences or must they fill a prescription for a controversial drug that is contradictory to their sincerely held beliefs?

Within the boundaries of contraception exist many different beliefs on the value of human life. When does it begin? What does religion say about it? Does the baby really become a baby at conception? If people—be it pharmacists or patients—are not allowed to form and live by their own beliefs on these issues, then their freedom is severely impaired. A pharmacist should have the liberty to form and follow his own beliefs. If the Final Rule had remained as it were prior to amendment, Illinois would be permitted to force pharmacists to fill morning-after pill prescriptions without delay and without regard to religious objection. What then would have been left of people's belief systems? They would have been nothing more than blank slates upon which the state could

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state may not make the exercise of religion unreasonably costly.” (quoting *Menora v. Ill. High Sch. Ass'n*, 683 F.2d 1030, 1033 (7th Cir. 1982)).

<sup>125</sup> ILL. ADMIN. CODE tit. 68, §1330.91(j)(3) (2008).

<sup>126</sup> *Id.* § 1330.91(j)(3)(A).

<sup>127</sup> RU486Facts.org, What is RU-486?, <http://www.ru486facts.org/index.cfm?page=whatis> (last visited Nov. 29, 2008). The pill works by blocking the hormone needed to continue the pregnancy. *Id.*

write whatever it wanted.<sup>128</sup> Thus, there would be no line drawn to guide a person to live his life in compliance with both his religious beliefs and the law of the land. The Illinois Supreme Court should firmly hold the line that the Illinois Legislature previously drew with IRFRA, and again with the Amended Rule—protecting a pharmacist's right of conscience regardless of the drug or patient. The Final Rule directly violated a pharmacist's right to exercise his religious beliefs in the workplace under the Illinois Religious Freedom Restoration Act without being substantially burdened by the government.

#### IV. THE EFFECT OF THE AMENDED RULE

On April 16, 2008, the Amended Rule became effective, stating that a pharmacist might conscientiously object to filling an emergency contraceptive prescription and outlining the protocol for dispensing the drug.<sup>129</sup> Although the amendment specifically provides steps for when a pharmacist objects to a request for an emergency contraceptive, pharmacies are now required to use their best efforts in maintaining stock of and in dispensing emergency contraceptives merely because they stock a *general* contraceptive.<sup>130</sup> Nonetheless, the amendment is a step in the right direction because it no longer directly violates a pharmacist's rights.<sup>131</sup>

Pharmacists can now safely object to filling a prescription without fear of revocation of their license as long as their actions are in compliance with the requirements of the Illinois Health Care Right of Conscience Act.<sup>132</sup> But, the fact still remains that the Final Rule violated the pharmacist's rights during the three years that it was in force. While it is uncertain what the Illinois Supreme Court will rule in *Morr-Fitz v. Blagojevich* in determining the consequences for the Final Rule's violation of precedent, the court has the following options:

Strike down the current Illinois rule that requires pharmacies to dispense emergency contraception; agree with [the] lower courts in ruling against the pharmacy owners because the owners haven't yet been harmed by the rule; or decide that the owners have legitimate

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<sup>128</sup> See ALDOUS HUXLEY, *BRAVE NEW WORLD* 13–15, 19–22 (1st Harper Perennial Modern Classics ed. 2006). If the state is allowed to have this power over pharmacists it is akin to a state having autocratic power as demonstrated in *Brave New World*. *Id.*

<sup>129</sup> ILL. ADMIN. CODE tit. 68, §1330.91(j)(3) (2008).

<sup>130</sup> *Id.* § 1330(j)(2).

<sup>131</sup> See *supra* Part III. However, as noted previously, the Amended Rule raises concerns of potential discrimination in the hiring process or that an objecting pharmacist's hours will be cut back so that pharmacies can comply with the Amended Rule. See *supra* note 54.

<sup>132</sup> See *supra* analysis in Part III.A.

arguments and send the case back to Sangamon County Circuit Court to rule on those arguments.<sup>133</sup>

The Illinois Supreme Court should hold that the Final Rule was void and unenforceable prior to its amendment, and that any discrimination against a pharmacist during its time on the books violated state law as outlined above. In addition, the supreme court should rule that the Amended Rule needs further amendment to permit a pharmacy to choose whether to stock emergency contraceptives even if they stock contraceptives in general.<sup>134</sup>

Since the Amended Rule is now in effect, the Illinois Supreme Court does not need to require the legislature to amend the Final Rule to protect a pharmacist's right to conscientious objections, unless the court ruled that the Amended Rule did not provide enough protection of a pharmacist's rights. Regarding the Amended Rule's effect on the patients, customers can feel safe with the new protocols in place that steps will be taken to ensure that their request is filled, if not by the pharmacy they entered, then by another pharmacy.<sup>135</sup>

#### CONCLUSION

Under any of the above rules, the Illinois Supreme Court and state legislature should have held the Final Rule unenforceable *before* its amendment three years later because it directly violated Illinois law. Governor Blagojevich and the Illinois Legislature coerced and imposed a substantial burden upon pharmacists by making them choose between maintaining their religious beliefs and keeping their jobs. As evidenced from the controversy over abortion, many people hold different convictions on this issue. Historically, some situations required the law to protect women's rights—the right to fair wages, the right to obtain an inheritance, and so on. Governor Blagojevich's Machiavellian contraception solution, however, is not one of these situations. It has created more controversy than it has provided assistance. His view that a woman should have the right to get what she wants, when she wants it, caused the government to coerce pharmacists into acting in direct conflict with valid law and their consciences for three years.

Just like a doctor or nurse who can abstain from performing certain medical procedures, a pharmacist should have a remedy; a pharmacist should not be forced simply to dispense whatever someone wants.<sup>136</sup>

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<sup>133</sup> Olsen, *supra* note 50.

<sup>134</sup> As mentioned previously, the focus of this Note is on pharmacists; however, due to the adverse effect the Amended Rule has on pharmacies, the Amended Rule should be further amended to protect the pharmacies' choice in a free market.

<sup>135</sup> ILL. ADMIN. CODE tit. 68, §1330.91(j)(3) (2008).

<sup>136</sup> See *supra* note 62 and accompanying text (explaining that legislatures passed laws to protect doctors and nurses who refused to perform abortions).



Pharmacists are not robots, expected to do whatever they are told. They are real people, doing real work. Just because someone holds a conviction and draws a line differently than another person does not mean that the government can inhibit a person's legally protected rights. Before the Amended Rule was implemented three years after the struggle began, Illinois should have followed the precedent established by state law and permitted a pharmacist to refrain from filling a morning-after pill request if it was in clear violation of his or her conscience. Thus, "emergency" should not trump conscience and cause a new line to be drawn in the sand.

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