No. 4-11-0398

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

MORR-FITZ, INC., an Illinois corporation D/B/A FITZGERALD PHARMACY, Licensed and Practicing in the State of Illinois as a Pharmacy; L. DOYLE, INC., an Illinois corporation D/B/A EGGELSTON PHARMACY, Licensed and Practicing in the State of Illinois as a Pharmacy; KOSIROG PHARMACY, INC., an Illinois corporation D/B/A KOSIROG REXALL PHARMACY, Licensed and Practicing in the State of Illinois as a Pharmacy; LUKE VANDER BLEEK; and GLENN KOSIROG, Plaintiffs-Appellees, v. ROD R. BLAGOJEVICH, Governor, State of Illinois; FERNANDO GRILLO, Secretary, Illinois Department of Financial and Professional Regulation; DANIEL E. BLUTHARDT, Director, Division of Professional Regulation; and the STATE BOARD OF PHARMACY, in their official capacities, Defendants-Appellants.	On Appeal from an Order of the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois Case No. 05-CH-495 The Honorable John W. Belz Judge Presiding

CORRECTED BRIEF OF *AMICI CURIAE* CHRISTIAN LEGAL SOCIETY, CATHOLIC CONFERENCE OF ILLINOIS, THE NATIONAL CATHOLIC BIOETHICS CENTER, AND CHRISTIAN PHARMACISTS FELLOWSHIP INTERNATIONAL IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The *amici curiae* are several national and Illinois-based organizations that recognize and take seriously the significant religious freedom issues presented by this case. The administrative rule involved in this case – which would force Illinois pharmacists to choose between their religious conscience rights and their careers – is a dramatic intrusion upon these paramount rights, rights that are long recognized and that the General Assembly has acted to protect. In addition, these rights are constitutionally protected from being trampled in the manner advanced by the Defendants here.

Although the pharmacists, the rules and the statutes involved in this case are all based in Illinois, the implications of this case are far-reaching, affecting free exercise of religion interests across the country. Accordingly, your *amici* submit this brief in support of the Plaintiffs in this case and request that this Court affirm the trial court and invalidate the Rule that poses a serious threat to the ability of health care professionals, such as Plaintiffs, to practice their professions consistent with the dictates of their consciences and as their religious beliefs require.

Christian Legal Society

The Christian Legal Society ("CLS") is a non-profit organization, incorporated in the State of Illinois, as a national association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and members at over 140 accredited law schools. CLS's legal advocacy and information division, the Center for Law & Religious Freedom (the "Center"), works for the protection of religious belief and practice, as well as for the autonomy of religion and religious organizations from the government. The Center strives to preserve religious freedom in order that men and women might be free to follow

their conscience. The founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Among such inalienable rights is the right of religious liberty.

CLS, through the Center, was a leading member of the Coalition of the Free Exercise of Religion, which was formed in response to the U.S. Supreme Court's 1990 decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). The Coalition drafted and lobbied for the enactment of the Religious Freedom Restoration Act ("RFRA"). 42 U.S.C. §2000bb, *et seq.* After RFRA's adoption, CLS defended the Act, filing *amicus* briefs urging courts to find RFRA constitutional.

In the wake of the Supreme Court's 1997 decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), CLS played a leading role in a coalition formed to draft and support new religious freedom legislation. That effort led to the adoption of the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, which the Supreme Court upheld against an Establishment Clause challenge in *Cutter v. Wilkinson*, 544 U.S. 209 (2005). In addition to supporting RLUIPA, CLS assisted numerous state legislators, including Illinois legislators, to adopt legislation protecting religious exercise through individual state RFRAs. A robust interpretation of the Illinois RFRA is particularly necessary where the religious right being protected is a health care professional's right to abstain from taking human life.

Catholic Conference of Illinois

The Catholic Conference of Illinois ("the Catholic Conference") is the public policy voice of the Roman Catholic Church in Illinois. It is led by a board consisting of the bishops of the Illinois dioceses, along with other appointed religious leaders and lay Catholics. The

many ministries of the Roman Catholic Church have served millions of Illinoisans over the years.

For many years, the Catholic Conference has served as representative and advocate for its members, addressing the social, economic, political and legal matters affecting the Roman Catholic Church and the faithful in Illinois. As the representative of the Roman Catholic Church in Illinois, including all of its dioceses, bishops and other members of the faithful, the Catholic Conference has a profound interest in this case.

The National Catholic Bioethics Center

The National Catholic Bioethics Center ("NCBC") is a non-profit research and educational institute committed to applying the moral teachings of the Catholic Church to ethical issues arising in health care and the life sciences. NCBC provides consultations to institutions and individuals seeking its opinion on the appropriate application of Catholic moral teachings to these ethical issues.

Christian Pharmacists Fellowship International

The Christian Pharmacists Fellowship International ("CPFI") is a non-profit interdenominational fellowship of Christian pharmacists whose members include Illinois pharmacists. CPFI is greatly concerned about its members' rights of conscience and their ability to exercise those rights in their professional practice. CPFI believes that pharmacists have a moral and legal responsibility to refuse to dispense a prescription that in the pharmacist's judgment might be harmful to the patient, either directly or indirectly. CPFI therefore opposes regulatory efforts to force pharmacists to dispense prescriptions against their best judgment and moral conscience. CPFI believes strongly in the sanctity of human

life and supports the rights of Christian pharmacists, based upon Biblical principles and their moral convictions, to exercise their conscience within the realm of professional practice.

INTRODUCTION

"This is largely a case involving a question of law – whether pharmacists and pharmacies can be compelled to violate their consciences and religious beliefs in violation of two Illinois statutes and the first amendment." *Morr-Fitz, Inc., v. Blagojevich*, 231 Ill.2d 474, 504 (2008). The answer to this question under these two statutes – the Illinois Religious Freedom Restoration Act, 775 ILCS 35/1, *et seq.*, and the Illinois Health Care Right of Conscience Act, 745 ILCS 70/1, *et seq.* – is a firm "No."

Religious freedom and individual rights of conscience are among our most cherished and defining freedoms. In separate but complementary pieces of legislation – the Illinois Religious Freedom Restoration Act and the Illinois Health Care Right of Conscience Act – the Illinois General Assembly has acted to ensure that these freedoms are fully and properly protected against intrusion and abuse. In 1998, the General Assembly enacted, with overwhelming bipartisan support, the Religious Freedom Restoration Act ("RFRA") to protect religious exercise in Illinois by restoring the high level of protection for religious exercise that had been weakened by the United States Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). In codifying RFRA at the state level, Illinois became a model for states across the country in the movement to protect this paramount freedom.

Likewise, the Illinois Health Care Right of Conscience Act ("HCRCA") is intended to – and by its plain terms does – protect the conscience rights of health care workers

(including pharmacists and pharmacies) in Illinois whose jobs put them in situations where their religious convictions can be implicated. These situations often arise, as in this case, in the context of birth control and abortifacients (such as Plan B, which is the focus of the Rule[1] in this case) which violate many health care workers' religion-based beliefs about the beginning of human life and its sacred value.[2] The HCRCA recognizes this reality and in its express language protects these individuals' conscience rights *and* their ability to remain in their professions without sacrificing their consciences.

By promulgating the Rule in utter disregard for the religious freedom and conscience rights of the Plaintiffs in this case, and all others across Illinois who object on religious and conscientious grounds to providing the abortifacient Plan B drug, Governor Blagojevich[3], the Illinois Department of Financial and Professional Regulation and the State Board of Pharmacy ignored the General Assembly's expressed will to protect healthcare workers' consciences and brazenly demanded that Plaintiffs choose between violating their beliefs or abandoning their careers. Governor Blagojevich made it crystal clear that this, in fact, was his intent, stating that the Rule requires pharmacies to "fill prescriptions without making moral judgments" and to make sure that pharmacists' religious beliefs do not "stand in the

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[1] 68 Ill.Adm. Code §1330.91(j) which requires Illinois pharmacies and pharmacists to stock and dispense certain drugs known as "emergency contraceptives", including "Plan B" and the "morning after pill" hereinafter referred to as "the Rule."

[2] Plaintiffs believe that such drugs can cause the death of a human life because they can act to prevent the implantation of a fertilized egg.

[3] Curiously, former Governor Blagojevich has become "he who must not be named" in Appellees' Brief. One searches their brief in vain for the name of the progenitor of the rules at issue in this case. As shown herein, Defendants cannot so easily ignore the flagrantly discriminatory intent, statements and history surrounding the Rule.

way" of providing customers with Plan B contraception. *Morr-Fitz*, 231 Ill.2d at 482. Lest there be any question about it, Governor Blagojevich made his point even more plain: pharmacists with religious objections to prescribing contraceptives/abortifacients should "find another profession." *Id.* at 482, 501.

Although the Defendants' arguments to this Court are less ham-fisted than those provided by the former governor, the Defendants' position – that Plaintiffs must comply with the executive branch's edict and act in violation of their legislatively protected conscience rights or forego their professions – remains equally violative of Plaintiffs' rights, and therefore equally illegitimate. The Rule has a "concrete and coercive impact on plaintiffs, ... affecting their business operations on a day-to-day basis and exposes plaintiffs to strong sanctions," *Morr-Fitz*, 474 Ill.2d at 492, in violation of the express protections afforded the Plaintiffs under RFRA and the HCRCA. The circuit court, following the clear guidance and rationale of the Illinois Supreme Court, correctly determined that the Defendants have no right to browbeat Plaintiffs into forfeiting their protected religious exercise and conscience rights in exchange for a license to practice pharmacy in the State of Illinois. Illinois law prohibits it. Accordingly, the trial court should be affirmed.

ARGUMENT

I. THE RULE VIOLATES PLAINTIFFS' RIGHTS UNDER THE ILLINOIS RELIGIOUS FREEDOM RESTORATION ACT.

Plaintiffs cannot comply with the Rule without violating their consciences and religious beliefs. The Illinois RFRA protects Plaintiffs from being forced to sacrifice their

free exercise religious rights upon the altar of administrative fiat. RFRA exists to protect the Plaintiffs from the very type of abuse the executive branch seeks to impose upon them.

For decades, beginning with the principal cases of *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and their progeny, First Amendment free exercise jurisprudence was well settled: No law that burdened the free exercise of religion would be upheld unless a compelling state interest justified the substantial infringement of free exercise rights. *See Sherbert*, 374 U.S. at 406; *Yoder*, 406 U.S. at 214. Under these cases, it had long been held that government action that infringed upon a person's exercise of religious freedom had to be justified by a compelling state interest achieved by the least restrictive means. *See, e.g., Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999); *U.S. v. Lee*, 455 U.S. 252 (1982).

This high level of protection is appropriate for what has been called our "first freedom." *See, e.g. Diaz v. Collins*, 872 F.Supp. 353, 357 (E.D. Tex. 1994); *People v. DeJonge*, 501 N.W.2d 127, 442 Mich. 266, 275 (Mich. 1993). *See also* Michael W. McConnell, *Why is Religious Liberty the 'First Freedom'?*, 21 Cardozo L. Rev. 1243 (2000).

In 1990, the United States Supreme Court modified this well-settled body of law when it decided the case of *Employment Division v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court held that challenges to the constitutionality of laws that are facially neutral toward religion and generally applicable are generally not subject to this "compelling interest" test. But in *Smith* itself, the Court discussed possible exceptions to its new rule. *Smith,* 494 U.S. at 881-885. Less than three years later, the Supreme Court unanimously struck down a municipal regulatory scheme that created exemptions for non-religious slaughter of animals

while prohibiting the same conduct done for religious purposes. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). Upon close examination, the Court determined that the law was not neutral and generally applicable and, therefore, it must meet the "compelling interest/least restrictive means" test despite *Smith*. *Id.* at 531-537. Just two months ago, the United States Supreme Court again unanimously limited *Smith's* scope and exempted religious employers from generally applicable nondiscrimination laws in hiring decisions regarding ministerial employees. *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694, 706-707 (2012).

When the *Smith* decision was announced in 1990, the reaction was overwhelmingly negative. Congress and individual states (including Illinois) moved to enact legislation to restore the pre-*Smith* balance that protected free exercise of religion by requiring both a compelling interest and that the law be narrowly tailored, and that the courts subject such infringements to the exacting "strict scrutiny" standard. Congress correctly saw the *Smith* decision as a dramatic departure from the Supreme Court's long history of jurisprudence in the field of free exercise claims. In direct response to this decision, Congress enacted the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb, *et seq.*, which restored the pre-*Smith* compelling interest test.

The Federal RFRA was a deliberate and conscious expression of Congress' will that religious freedoms only be overcome by "those interests of the highest order and those not otherwise served." *Rader v. Johnston*, 924 F.Supp. 1540, 1556 (D. Neb. 1996). RFRA prohibits the Federal Government from substantially burdening a person's exercise of religion, unless the Government "demonstrates that application of the burden to the person"

represents the least restrictive means of advancing a compelling interest. 42 U.S.C. § 2000bb-1(b). *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006).

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held the Federal RFRA unconstitutional when applied to the states, ruling that the law exceeded Congress' authority under the Section 5 enforcement provision of the Fourteenth Amendment to the Constitution. *Boerne*, 521 U.S. at 536. In response to the ruling in *Boerne* that Congress exceeded its authority in enacting a Federal RFRA, individual states (including Illinois) began to enact their own RFRAs to restore the protection of strict scrutiny in evaluating laws that burden the exercise of religion. At least fifteen states have enacted state RFRAs or constitutional amendments that reject the *Smith* standard.[4] *See* W. Cole Durham and Robert Smith, *Chart of State Religious Freedom Restoration Acts and State Supreme Court Decisions.* 1 Religious Organizations and the Law § 2:66 (2011).

In addition to those states that have enacted RFRAs, several states have interpreted their state constitutions to require the pre-*Smith* compelling interest standard. Eleven state supreme courts have interpreted their states' constitutions to require strict scrutiny of laws that place a substantial burden on the free exercise of religion, effectively incorporating the pre-*Smith* standard into their state constitutions.[5] W. Cole Durham and Robert Smith, *Free Exercise Analysis Under State Religious Freedom Restoration Acts and State Supreme Court*

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[4] Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Louisiana, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee and Texas.

[5] Alaska, Hawaii, Indiana, Maine, Massachusetts, Michigan, Minnesota, New York, Ohio, Washington, and Wisconsin.

Decisions. 1 Religious Organizations and the Law § 2:65 (2011). By contrast, only eight states' supreme courts have "shown any inclination" to follow *Smith*, and of those, several did so in cases that did not turn on questions of state constitutional law, leaving in doubt whether they would apply the less protective rational basis standard of review to laws burdening free exercise of religion under their state constitutions.[6] *See id.* State court support of the pre-*Smith* strict scrutiny standard is wide and broad and includes those states that have enacted their own RFRAs, and states that have interpreted their state constitutions to incorporate the pre-*Smith* strict scrutiny standard.

There is absolutely no basis in Illinois' constitutional history or case law for endorsing the *Smith* standard. Illinois was in the forefront of the move to restore the level of protection for the free exercise of religion that prevailed before *Smith* and became one of the first states to enact a state-based RFRA, doing so in 1998, within one year of the *Boerne* decision. *See* Kelleen Patricia Forlizzi, *State Religious Freedom Restoration Acts as a Solution to the Free Exercise Problem of Religiously Based Refusals to Administer Health Care*. 44 New Eng. L. Rev 387, 401-02 (and accompanying footnotes) (Winter 2010). The Illinois General Assembly acted to ensure the continued protection of religious freedom by enacting its own RFRA, 775 ILCS 35/1, *et seq*., the text of which is essentially the same as its federal counterpart. The statute makes clear that in Illinois, facially neutral laws that burden the free exercise of religion will be subject to strict scrutiny under the pre-*Smith*

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[6] Kansas, Maryland, Mississippi, Nebraska, Nevada, New Jersey, Virginia, and Wyoming.

compelling interest test.[7] *See* Forlizzi, *supra, State Religious Freedom Restoration Acts.* 44 New Eng. L. Rev. at 400-02 (and accompanying footnotes). The Illinois RFRA is one of the

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[7] 775 ILCS 35/10 provides as follows:

§ 10. Findings and purposes.

(a) The General Assembly finds the following:

(1) The free exercise of religion is an inherent, fundamental, and inalienable right secured by Article I, Section 3 of the Constitution of the State of Illinois.

(2) Laws "neutral" toward religion, as well as laws intended to interfere with the exercise of religion, may burden the exercise of religion.

(3) Government should not substantially burden the exercise of religion without compelling justification.

(4) In *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement under the First Amendment to the United States Constitution that government justify burdens on the exercise of religion imposed by laws neutral toward religion.

(5) In *City of Boerne v. P. F. Flores*, 65 LW 4612 (1997) the Supreme Court held that an Act passed by Congress to address the matter of burdens placed on the exercise of religion infringed on the legislative powers reserved to the states under the Constitution of the United States.

(6) The compelling interest test, as set forth in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), is a workable test for striking sensible balances between religious liberty and competing governmental interests.

(b) The purposes of this Act are as follows:

(1) To restore the compelling interest test as set forth in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), and to guarantee that a test of compelling governmental interest will be imposed on all State and local (including home rule unit) laws, ordinances, policies, procedures, practices, and governmental actions in all cases in which the free exercise of religion is substantially burdened.

(2) To provide a claim or defense to persons whose exercise of religion is substantially burdened by government.

"most notable," as it served as a model for the later state RFRAs. *Id.* at 400. Furthermore, the Illinois RFRA "figur[es] 'prominently in the small body of cases in which state and federal courts have construed and applied state Religious Freedom Restoration Acts.'" Brian L. Porto, Annotation, *Validity, Construction, and Operation of State Religious Freedom Restoration Acts*, 116 A.L.R. 5th 233, 238 (2004).

A. The Text and Legislative History of the Illinois RFRA Demonstrate That the Statute is to be Interpreted Broadly to Achieve Its Purpose of Ensuring Strong Protection in Illinois for Free Exercise of Religion Rights.

"The free exercise of religion is an inherent, fundamental, and inalienable right secured by Article I, Section 3 of the Constitution of the State of Illinois." 775 ILCS 35/10(a)(1). Thus begin the substantive provisions of the Illinois Religious Freedom Restoration Act, making clear – in the broadest, strongest language – that in Illinois the free exercise of religion is entitled to, and under the law, will receive the highest level of protection. Declaring the free exercise of religion to be a right that is "inherent, fundamental and inalienable" places it among the pantheon of the highest of protected freedoms, a right that can only be impinged by an interest that is even more urgent and of a greater magnitude than one that is "inherent, fundamental and inalienable." Significantly, the statute contains neither exceptions nor limitations to this protection.

The Illinois RFRA is consistent with the protection of religion enshrined in other provisions of the Illinois constitution, the Preamble of which provides that it was established by "... the People of the State of Illinois - grateful to Almighty God for the civil, political and religious liberty which He has permitted us to enjoy and seeking His blessing upon our

endeavors ..." Illinois Const., Preamble. The Illinois Constitution further provides that "communications that ... incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religious ... affiliation are condemned." Illinois Const. Art. I, § 20.

The Illinois RFRA was passed for the express purpose of guaranteeing that *any* government action which substantially burdens this inherent, fundamental, and inalienable right does so only when supported by a "compelling governmental interest" and even then can only be allowed if the infringement is narrowly tailored to achieve this compelling interest. *See* 775 ILCS 35/10(b)(1). Whether the purported governmental interest is compelling and whether the infringing statute is narrowly tailored will be subject to the exacting standard of strict scrutiny,

The Illinois RFRA explicitly states that the *Yoder* "compelling interest" test is to be applied to government actions in *all* cases in which the free exercise of religion is substantially burdened. *Diggs v. Snyder*, 333 Ill. App. 3d 189, 194 (5th Dist. 2002) (citing 775 ILCS 35/10 (a)(6) and 775 ILCS 35/10 (b)(1)).

The breadth and strength of the Illinois RFRA is evident in both the text and the legislative history of the statute. The statute's purposes are "[t]o guarantee that a test of compelling governmental interest will be imposed on *all* State and local ... laws ... in all cases in which the free exercise of religion is substantially burdened" and "[t]o provide a claim or defense to *persons* whose exercise of religion is substantially burdened by the government." 775 ILCS 35/10(b)(1) and (b)(2) (emphasis added).

As the legislative history of the act makes clear, the scope of religious free exercise protected by the Illinois RFRA was broad and without exception. Its purpose was to "insure that individuals from *all* religious denominations are *fully protected* in their right to practice their religion." Transcript of Debate on H.B. 2370, Comments of Rep. Gash (D-Highland Park), p. 289 (April 1, 1998) (emphasis added). Likewise, according to Senator Parker (R-Northbrook):

> [*N*]*o area of law*--including public health and safety, civil rights, education, and any others--is exempt from the standard that RFA [sic] establishes. Again, no Statute necessarily constitutes a compelling governmental interest ... [and] ... simply restores a standard of review to be applied to *all* State and local laws and ordinances in *all* cases in which the free exercise of religion is substantially burdened... I want to stress, because there have been several questions: Remember that, up until recently, State and local governments have had to follow the same standards ... we are proposing here.

H.B. 2370, 90th Leg., Day 20-21, 26 (Ill. 1998) (Remarks of Sen. Parker) (R-Northbrook) (emphasis added).

In re-establishing pre-*Smith* protection for the free exercise of religion, and with particular relevance in this case, the Illinois RFRA explicitly references and incorporates the Supreme Court's decision in *Sherbert v. Verner*, 374 U.S. 398 (1963), 775 ILCS 35/10 (a)(6); 775 ILCS 35/10 (b)(1), which upheld an employee's free exercise rights in the face of a rule that violated those rights. *Sherbert* involved an employee who was fired because she would not work on Saturday, pursuant to the dictates of her religion as a Seventh Day Adventist. The Supreme Court made clear that ***forcing someone to choose between the requirements of her religion and her employment was an impermissible substantial burden to her free exercise of religion rights***:

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

Sherbert, 374 U.S. at 404. In passing the Illinois RFRA, the General Assembly expressly incorporated the *Sherbert* standard as Illinois law. See 775 ILCS 35/10(a)(6) and (b)(1). The Rule advanced by the executive branch in this case is a clear violation of the protections codified by the General Assembly in the Illinois RFRA and it is no less a burden on the Plaintiffs' rights to be protected from the violation of their free exercise rights in their workplace than that involved in *Sherbert*, which the Supreme Court held impermissible.

B. The Rule Substantially Burdens the Plaintiffs' Free Exercise of Religion and is Not Narrowly Tailored to Advance the Government's Purported Interest.

1. The rule substantially burdens Plaintiffs' free exercise rights.

It is self evident that a rule that forces Plaintiffs to choose between violating their consciences by providing a drug that can cause the death of a human life at its earliest stage of existence, on the one hand, and practicing their professions as pharmacists, on the other hand, is a substantial burden on Plaintiffs' free exercise rights. Indeed, as the Supreme Court recognized in *Sherbert*, forcing a person to choose between the precepts of her religion and her livelihood is an unconstitutional substantial burden on that person's free exercise of religious rights. As the Illinois Supreme Court recognized, Plaintiffs cannot comply with the Rule without violating their consciences and, therefore, the Rule has a "concrete and coercive

impact on plaintiffs [and] affects their business operations on a day-to-day basis and exposes the plaintiffs to strong sanctions." *Morr-Fitz*, 231 Ill.2d at 492.

The Illinois RFRA recognizes that the free exercise of religion is a fundamental right under the Illinois Constitution and declares that the right to free exercise of religion is an "inherent, fundamental and inalienable" right. 775 ILCS 35/10(a). Accordingly, the Illinois RFRA prohibits the government from substantially burdening a person's free exercise of religion, even if the burden results from a rule of general applicability, unless the government proves that the burden to the person's exercise of religion is (1) in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering the governmental interest. 775 ILCS 35/15.

Under the Illinois RFRA, the party alleging that a law violates its rights must first demonstrate that its exercise of religion has been substantially burdened. If it does so, the government is required to demonstrate that it has a compelling interest and that the law is the least restrictive means of furthering that interest. *See, e.g., Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F.Supp.2d 961, 993 (N. Dist. Ill. 2003). Furthermore, even after *Smith*, where a facially neutral statute is enacted to target the activities of a religion, the law is subject to strict scrutiny. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).[8]

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[8] As explained below, the Rule was clearly intended to target individuals, such as Plaintiffs, who objected on conscience grounds to prescribing Plan B and force them to do so, despite their objections. As Governor Blagojevich stated, the Rule required pharmacists to "fill prescriptions without making moral judgments" and that pharmacists' religious beliefs should not "stand in the way" and if Illinois pharmacists objected to providing Plan B, they should "find another profession."

The statute does not specifically define what constitutes a "substantial burden," *Diggs*, 333 Ill. App. 3d at 194, but under *Yoder*, "the 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." *Id.* at 194-95 (citing *Yoder*, 406 U.S. at 217-18). Furthermore, a substantial burden exists where the government puts substantial pressure on an adherent to modify his behavior and violate his beliefs." *Jolly v. Coughlin*, 76 F.3d 468 (2nd Cir. 1996) (interpreting Federal RFRA).

The recent decision of the Federal District Court for the Western District of Washington in *Stormans, Inc. v. Selecky*, 2012 WL 566775 (W.D.Wash. 2012), is particularly instructive. The Washington regulation involved in *Stormans* served as the model for the Rule involved here. In upholding the free exercise rights of the pharmacists *and pharmacy* involved in *Stormans*, the Court stated:

> [A] pharmacy employing a pharmacist with a religious objection to Plan B can discharge its obligation under the delivery rule by having another on-duty pharmacist deliver the medication. The practical effect ... nevertheless directly and adversely impacts pharmacists with a religious objection to dispensing Plan B. Pharmacies without the need or ability to have two pharmacists on duty at all times cannot employ a pharmacist with a religious objection to dispensing Plan B without risking a violation of the delivery rule, if a patient with a valid Plan B prescription seeks to have it filled at that pharmacy ... Because a pharmacy must fill a prescription for Plan B, if it employs a pharmacist who objects, it must staff a second pharmacist simply to ensure that the pharmacy can comply. In effect, the conscientious objector costs the pharmacy twice what a single, non-conscientious objector does. For pharmacies that need only one pharmacist per shift, such a cost is unreasonable, and the pharmacy's only real option is to fire the conscientious objector. The delivery rule thus renders the pharmacist's right to conscientious objection illusory ... In the case of a pharmacy owner with religious objections to Plan B, there is no option other than to leave the business – and the Board was well aware of this result when it designed the rule. *Stormans, Inc. v. Selecky*, 2012 WL 566775 (W.D.Wash. 2012) at *2-3.

As the *Stormans* court went on to explain, "[t]he burden of the [rules in question] falls 'almost exclusively' on those with religious objections to dispensing Plan B." *Id.* at *13. Accordingly, the court invalidated the rule and ruled in favor of the conscience objecting pharmacists and pharmacy.

Despite the clear text of the statute and the abundant legislative history that the Illinois RFRA is intended to be broadly protective of free exercise rights, the Defendants advance a narrowing interpretive gloss that would dramatically limit the protections provided under the statute. Defendants argue, somewhat awkwardly, that the Illinois RFRA does not protect Plaintiff pharmacies because a "'person's exercise of religion' [is] something that pharmacies simply do not do" (Appellee's Brief ("App. Br.") 46). In other words, Defendants assert that a pharmacy is not a "person" and, therefore, cannot have protectible interests under RFRA.

First, this constricted interpretation of the statute is the polar opposite of the broad protections the Illinois RFRA was enacted to provide to the "inherent, fundamental and inalienable" rights the statute protects. There is no basis whatsoever – and Defendants nowhere identify any – for adopting a limiting construction to the protections of the Illinois RFRA. Second, Defendants cite no support whatsoever for its conclusion that RFRA's protections do not apply to the pharmacies wholly owned by (and which can only act through) the individual Plaintiffs and their individual employees. The plain language of the Illinois RFRA protects the free exercise of religion without distinguishing between natural and corporate persons. *See* 775 ILCS 35/10, 15.

Tellingly, Defendants point to no authority to support this distinction, neither in the text of the statute nor in Illinois case law. Indeed, when Illinois courts have interpreted RFRA, they have *rejected* the very distinction Defendants advance here, recognizing that the statute protects the religious rights of corporate persons. *See, e.g., Oak Grove Jubilee Center, Inc. v. City of Genoa*, 347 Ill.App.3d 973 (2nd Dist. 2004). In addition, corporations are recognized as "persons" under Illinois law, including the Illinois Commercial Code and the Illinois Administrative Procedure Act. *See* 810 ILCS 5/1-201(a)(27) (defining "person" to include "corporation"); 5 ILCS 100/1-60 (likewise). Defendants' attempt to define pharmacies out of the broad protections of the Illinois RFRA is a result in search of a justification and the Illinois RFRA provides Defendants with no support in this effort. The plain language of RFRA provides no basis for this unwarranted narrowing of the statute's protections. The interpretation of RFRA advanced by the executive branch Defendants in this case – that it provides no protection for Plaintiffs who would be forced to become complicit agents of Defendants in actions violating their most fundamental religious beliefs and convictions – renders the statute a farce, and such a reading must be rejected.

2. Defendants' purported interest is not compelling.

Defendants claim that they have a "compelling interest" in "establishing a uniform system of efficient local drug distribution... " (App. Br. 31-32). However, Defendants' embrace of this purported "compelling interest" is only a recent phenomenon and, even then, it is riddled with exceptions. First, Defendants admit that they did nothing whatsoever to advance their purported "compelling" interest prior to April 2010. *See* April 5, 2011 Order Granting Declaratory and Injunctive Relief, p. 3. The purportedly "compelling" nature of

this interest did not suddenly arise in April 2010 and the fact that the executive and administrative agency Defendants did nothing before then to advance this interest reveals that the interest cannot be considered a "compelling" one. Moreover, the purported interest in this case is further undermined because it is an interest of one branch of government – the executive branch and its administrative agency – that transgresses clear enactments of the Illinois General Assembly, which established protections for Plaintiffs' religious free exercise rights and conscience rights as participants in the provision of health care in Illinois. The legislative branch of Illinois' government has spoken with clarity, twice, to the very situation presented in this case and the executive branch cannot through administrative fiat nullify these legislative enactments.

In addition, in admitting the existence of *non-religious* exceptions to the Rule, Defendants reveal both that the Rule must meet the compelling interest test because it is not generally applicable and, furthermore, that the claimed interest is something less than compelling. For example, Defendants admit that a doctor, nurse, or hospital could decline to distribute Plan B without being subject to the Rule, even though the consequences would be the same as if a pharmacist were to decline to distribute it. *Id.* at 6. The Rule also allows pharmacies to avoid selling drugs or to obtain variances for "common sense business" reasons *other than religion. Id.* As the trial court correctly concluded, "[t]hese facts are in direct contrast to the government's compelling interests argument." *Id.*

More fundamentally, Defendants mischaracterize the nature of the compelling interest. Because the Rule infringes on the Plaintiffs' "inherent, fundamental and inalienable" free exercise of religion rights, Defendants must demonstrate that they have a

compelling interest that requires the government to force unwilling pharmacists and pharmacies – such as Plaintiffs here, who believe as a matter of conscience, that compliance with the Rule would make them complicit in ending human life – to provide emergency contraception. Defendants can point to no such compelling interest and the fact that the Rule contains numerous non-religious exceptions to the requirements of the Rule makes it clear that the purported interest is not as Defendants claim and, instead, the Rule is more about silencing objection and forcing compliance than it is about the provision of drugs to individuals in Illinois whose access to the drug necessitates overriding the Plaintiffs' religious objections.

To prevail, Defendants must establish that there is a compelling interest in trampling Plaintiffs' religious exercise and that this is necessary to achieve the government's purported interest. Further, the burdening of Plaintiffs' rights must be unavoidable. In other words, if the interest is not of the highest order – compelling – or if there is a narrower way by which the Defendants could seek to achieve their interest, then the Rule fails. Defendants cannot meet this high standard.

Amicus curiae the American Civil Liberties Union of Illinois ("ACLU") attempts to discount the several exceptions built into the Rule, claiming that they are not exceptions at all or that they are "irrelevant." (ACLU Br. 26, *et seq.*). However, the ACLU's arguments only expose the Defendants' *lack* of a compelling interest. For example, with respect to the exception in the Rule which provides that a pharmacy is not required to dispense medication if the patient cannot pay for it, the ACLU asserts, "[t]hat the government has not eliminated all barriers...does not undercut its compelling interest in otherwise facilitating access."

(ACLU Br. 27). Access to Plan B is not as important, the ACLU seems to suggest, if the customer does not have enough money. While the ACLU suggests that the exceptions do not "take[] away from the state's interest in...foster[ing] access to...contraceptive[s]," it is hard to imagine how simply allowing pharmacies and pharmacists to quietly exercise their consciences would "take away" from such a stated interest, especially where, as here, the General Assembly has enacted two statutes – the Illinois HCRCA and the Illinois RFRA – making clear that it is the policy of the State of Illinois to protect health care providers' religious exercise and conscience rights.

3. The Rule is not narrowly tailored and it not the least restrictive means of achieving the stated interest.

The Circuit Court properly held that Defendants did not prove that the Rule was narrowly tailored and that there were no less restrictive means to improve access to the drugs in question, or to pharmaceuticals generally. April 5, 2011 Order Granting Declaratory and Injunctive Relief, p. 6. There are numerous alternative means of access to the drugs in question, including numerous competitor pharmacies within short distances from Plaintiffs' pharmacies. *See id.*, at p. 4. There are also numerous alternative methods Defendants could have employed to widen access, including distributing the drugs in question themselves, or "using its websites, phone numbers, and signs to help customers find willing sellers" of such drugs. *Id.* at p. 6.

Defendants admit that the Rule's requirement that pharmacies "provide a woman seeking [Plan B] assistance in finding it" may violate Plaintiffs' religious beliefs. (App. Br. 37). Indeed, the Circuit Court found that the Rule did substantially burden Plaintiffs'

exercise of religion. April 5, 2011 Order Granting Declaratory and Injunctive Relief, p. 5. Yet Defendants assert that the Rule – which compels Plaintiffs to violate their beliefs – is somehow still narrowly tailored. (See App. Br. 35-40).

Defendants claim that the Rule is narrowly tailored in that it "provides a great deal of discretion to pharmacy owners...[and] allow[s] them to accommodate religious and other personal objections of their staff members." (App. Br. 35). Defendants contend that "Religious beliefs do not always require adherents to attempt to stop others from following the dictates of their own conscience with respect to personal matters, even when such conduct is explicitly or implicitly condemned as sinful." (App. Br. 36). Defendants then single out Plaintiffs as a "smaller class of individuals" who are affected by the Rule because they would exercise their consciences by declining to participate in conduct that violates their beliefs. *Id.* Here, Defendants' rhetorical structure betrays the Rule's lack of narrow tailoring and Defendants' targeting of Plaintiffs' beliefs. By admitting that the Rule accommodates the exercise of some religious beliefs, but not all, Defendants underscore the lack of narrow tailoring inherent in the rule. By insisting that only the "smaller class" of religious believers that includes Plaintiffs must violate their beliefs under the Rule, Defendants betray the Rule's targeting of Plaintiffs and those who would hold their beliefs.

C. Enactment of a Rule that Chills the Free Exercise of Religion Creates a Substantial Burden on Such Exercise in Violation of RFRA.

To constitute a showing of a substantial burden on religious practice, a plaintiff must demonstrate that the governmental action "prevents him from engaging in conduct or having a religious experience that his faith mandates." *Diggs*, 333 Ill. App. 3d at 195. The Circuit

Court properly rejected Defendants' argument that Plaintiffs had not suffered an injury because the Rule had not yet been enforced against them personally. The harm inherent in the Rule is not merely the "concrete measures" of enforcement resulting from its violation but also the chilling effect it has on the Plaintiffs' fundamental right to the free exercise of their religion. The Rule, by its very existence, requires Plaintiffs to fear the consequences of acting in accord with their sincerely held religious beliefs.

As the Illinois Supreme Court ruled when it previously reviewed this case, the Rule "poses harm to the plaintiffs that is even greater than financial loss. Plaintiffs allege that the rule chills their first amendment rights. Plaintiffs are forced to comply with the rule or else compromise their rights to act according to their consciences and religious tenets." *Morr-Fitz*, 231 Ill.2d 474, 494 (2008).

Indeed, as the Illinois Supreme Court noted, "courts routinely find not just harm, but irreparable harm, where a plaintiff asserts a chill on free exercise rights." *Id.* at 494-95 (citing *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir.2002)). Indeed, courts have routinely found an injury where a plaintiff has felt a chilling effect on its First Amendment rights. In *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082 (10th Cir. 2006), the Tenth Circuit Court of Appeals stated that "a chilling effect on the exercise of a plaintiff's First Amendment rights may amount to a judicially cognizable injury in fact, as long as it arise[s] from an objectively justified fear of real consequences." *Id.* at 1088. In affirming the lower court's finding that the case was ripe for adjudication, the Tenth Circuit stated that the challenged law, "by its very existence, chills the exercise of the Plaintiffs' First Amendment rights." *Id.* at 1098. Similarly, in *Minnesota Citizens Concerned For Life*

v. FEC, 113 F.3d 129 (8th Cir. 1997), the Eighth Circuit Court of Appeals stated that "[s]ufficient hardship is usually found if the regulation ... chills protected First Amendment activity." *Id.* at 132 (discussing "ripeness" under the *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), line of cases) (emphasis added). In *Muslim Cmty. Assoc. v. Ashcroft*, 459 F. Supp. 2d 592 (E.D. Mich. 2006), a "facial" pre-enforcement challenge to a statute, the Federal District Court for the Eastern District of Michigan held that the Patriot Act caused a chilling effect on the plaintiffs' First Amendment rights, including the right of free exercise of religion, and this was sufficiently concrete harm to allow them to bring a claim. *Id.* at 598 ("Plaintiffs need only show a 'threat' of present injury to satisfy constitutional standing requirements on their First Amendment claims.").

There can be no doubt that Plaintiffs' fear of suffering real consequences under the Rule is objectively justified based on the numerous indications on the part of Defendants that Defendants fully intended to enforce the Rule "vigorously." The Rule's stated intent is to require pharmacists to suppress their religious convictions or face the repercussions; there can be no doubt that a "chilling effect" on religious objectors is objectively reasonable and, in fact, intended. That Defendants appear impervious to the chilling effect of the Rule on Plaintiffs' free exercise rights underscores the vital importance of RFRA and the HCRCA (and the role of this Court) in protecting these fundamental freedoms from abuse.[9]

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[9] Defendants also seek to convince this Court to ignore the well documented history of Defendants' devising a Rule targeting Plaintiffs and their religious free exercise and conscience rights and Defendants urge that the revealing statements of the Rule's progenitor, Governor Blagojevich, should be dismissed. While it is understandable that Defendants wish to distance themselves from such blatantly discriminatory statements, the history of the Rule cannot be so easily overlooked. Just as more sophisticated bigots cannot rehabilitate Jim Crow legislation through supplying a superficially nondiscriminatory rationale for the

In enacting the Illinois RFRA, the General Assembly was concerned about protecting individuals from laws that would chill their free exercise of religion. In order to ensure that this fundamental right was fully protected, the Illinois General Assembly included a private right of action expressly providing that a person whose exercise of religion has been burdened in violation of the act may assert that violation "as a claim or defense in a judicial proceeding and may obtain appropriate relief" against the government. 775 ILCS 35/20. This language emphasizes that the Illinois RFRA can be used preemptively by individuals to halt the enforcement of a law the mere enactment of which has chilled their free exercise of religion by the threat of its enforcement.

II. THE RULE VIOLATES PLAINTIFFS' RIGHTS UNDER THE ILLINOIS HEALTH CARE RIGHT OF CONSCIENCE ACT.

The Rule is a transparent attempt to coerce Illinois pharmacists and pharmacies to act in violation of their consciences. Such an unwarranted and illegitimate intrusion and abuse of their rights is a violation of Plaintiffs' rights under the Illinois Health Care Right of Conscience Act (in addition to being a violation of the Illinois Religious Freedom Restoration Act) and, accordingly, is invalid.

A. The Government Is Prohibited from Coercing Health Care Workers to Provide Health Care Services That Violate Their Religious Beliefs.

The right to freely exercise one's religion is a right deeply ingrained in American thought and American life. James Madison asserted that:

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statutes, Defendants cannot whitewash over the illegal and discriminatory origins of the Rule here. *See e.g.*, *Church of the Lukumi Babalu Aye*, 508 U.S. at 540-542 (statements by city council members, city attorney, and police chaplain at council meeting disclosed city ordinances' motive to target Santeria religious believers who practiced animal sacrifice).

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

2 James Madison, *Memorial and Remonstrance Against Religious Assessments*, in The Writings of James Madison 183, 184 (Gaillard Hunt ed., 1901) (quoted in Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1453 (1990)). Thomas Jefferson asserted, "No provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority." 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) (quoted in Amanda K. Freeman, *Does 'Emergency' Trump Conscience, Thus Drawing Another Line in the Sand for Pharmacists?* 21 Regent U. L. Rev. 181, 192-93 (2008-2009)).

Health care workers, including pharmacists and pharmacies, clearly do not relinquish their conscience rights merely by virtue of their professions. "[P]rotection of rights of conscience in health care has been a continuing matter of public policy interest for many years." Lynn D. Wardle, *Protection of Health Care Providers' Rights of Conscience in American Law: Past, Present, and Future.* 9 Ave Maria L. Rev. 1, 27 (2010). At least forty-seven states and the District of Columbia have conscience protection laws. *Id.* Additionally, several federal conscience-protection laws for health care workers have been enacted since 1973 when the Supreme Court rendered its *Roe v. Wade* decision. *Id.* at 28. See *also* Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers.* 14 J. Legal Med.

177 (1993). The unique – and uniquely vulnerable – position pharmacists and pharmacies occupy in the modern health care system places them in a role where their rights of conscience can easily be implicated. This is especially true in the case of "emergency contraceptives" which can operate to prevent the implantation of a fertilized egg. A pharmacist – such as Plaintiffs here – who holds the belief that such drugs can cause the termination of a human life at its earliest stages should not be forced to choose between his profession and his conscience. The situation faced by pharmacists has not gone unnoticed by religious leaders. For example, Pope Benedict XVI has encouraged pharmacists to follow their consciences and not fill Plan B requests. *Id.*

The Illinois Health Care Right of Conscience Act protects the rights of Illinois pharmacists who, as a matter of conscience, refuse to provide Plan B. As explained below, the Rule violates Plaintiffs' rights under the Illinois HCRCA.

1. The text of the HCRCA prohibits the violation of Plaintiffs' rights as occurred here.

The Illinois HCRCA provides that "it is the public policy of the State of Illinois to respect and protect the right of conscience of all persons...who are engaged in the delivery of...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...health care services and medical care." 745 ILCS 70/2. The Illinois HCRCA further provides that "health care" is specifically defined 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." *Id.* at 70/3(a) (emphasis added). Thus, the HCRCA specifically applies to contraception services, such as Plan B. It further defines "health care personnel" as "*any* person who furnishes, or assists in the furnishing of, health care services." *Id.* at 70/3(c) (emphasis added). The plain language of the statute includes "any person" – such as pharmacists – involved in the delivery of "health care services" and expressly covers situations involving the procurement of contraceptives. In short, the HCRCA protects Plaintiffs from Defendants' attempt to force Plaintiffs to provide emergency contraception.

Furthermore, the Illinois HCRCA prevents discrimination against any person or health care facility because the person or facility does not provide certain health care services due to exercise of conscience. The statute's language in this area is broad and clear. With regard to *persons*, the statute provides:

> It shall be unlawful for any person, public or private institution, or public official to discriminate against ***any person*** in ***any*** manner, including but not limited to, licensing, hiring, promotion, transfer, staff appointment, hospital, managed care entity, or any other privileges, because of such person's conscientious refusal to receive, obtain, accept, perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care services contrary to his or her conscience.

745 ILCS 70/5 (emphasis added). With regard to *facilities*, the statute provides:

> It shall be unlawful for any person, public or private institution or public official to discriminate against ***any*** person, ***association or corporation*** attempting to establish a new health care facility or operating an existing health care facility, in ***any*** manner ... by reason of the refusal of such person, ***association or corporation*** planning, proposing or operating a health care facility, to permit or perform any particular form of health care service which violates the ***health care facility's conscience*** as documented in its existing or proposed ethical guidelines, mission statement, constitution, bylaws, articles of incorporation, regulations, or other governing documents.

745 ILCS 70/10 (emphasis added). The Illinois HCRCA further prohibits public officials or agencies from denying aid or benefits to a health care facility based on the ***facility's exercise of conscience***. *See* 745 ILCS 70/11. Any argument by Defendants that the HCRCA does not protect the Plaintiff pharmacies' conscience rights, in addition to the conscience rights of the individual pharmacist Plaintiffs in this case, is in defiance of the plain language of the statute. Defendants might dislike this language and perhaps even philosophically disagree with whether a facility (such as a pharmacy) can have conscience rights, but that does not alter the plain language chosen by the General Assembly. The statute protects all Plaintiffs – facilities and the individuals through which they act.

Under the Illinois HCRCA, "Conscience," is "a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths." *Id.* at 70/3(e).

Defendants admit that the Illinois HCRCA "broadly includes *all* phases of patient care" (App. Br. 41) (emphasis added). Nonetheless, Defendants incorrectly assert that the Illinois HCRCA "[d]oes [n]ot [a]pply to the [p]ractice of [p]harmacy" (bold removed) but later acknowledges (albeit in the passive voice) that "[t]here is...ambiguity...as to whether the General Assembly intended [the Illinois HCRCA] to apply to pharmacists...or pharmacies." (App. Br. 41). Any "ambiguity" exists only in Defendants' minds, as the language of the statute and the clear reach of its purpose cannot reasonably be interpreted to not include pharmacists and pharmacies.

Regardless of what Defendants' precise position is, any claim that the HCRCA does not apply to pharmacists is facetious, at best. As noted above, the plain language of the statute covers *all* persons who engage in the delivery of health care, which includes *any* phase of patient care. *See* 745 ILCS 70/3. Furthermore, the Illinois HCRCA specifically lists "contraceptives" and medication as falling within the scope of health care. *Id.* The interpretive gymnastics required to arrive at Defendants' position fall flat.

Defendants' insistence that the "emergency" language at the end of Sections 6 and 9 of the act somehow trumps the plain and broad protections of the Illinois HCRCA is unpersuasive. Defendants correctly note that both sections provide, "Nothing in this Act shall be construed so as to relieve a physician *or other health care personnel* from obligations under the law of providing emergency medical care." (App. Br. 44) (emphasis by State). However, Defendants do not identify any "obligation" that Plaintiff pharmacists are under which would require them to act in violation of their consciences. Furthermore, the term "emergency" is not defined in the Illinois HCRCA, and while Defendants assert that "[p]rovisioning Plan B to a woman who needs it is plainly emergency medical care" (App. Br. 45), this contention is undermined by the stipulated fact that numerous competing pharmacies and other sources of Plan B exist within short distances from Plaintiffs' pharmacies. April 5, 2011 Order Granting Declaratory and Injunctive Relief, p. 4. It is telling that *Defendants failed to identify anyone who failed to receive the drug in an emergent situation. Id.*

Finally, Defendants' reliance on legislative history is unavailing. First of all, as the Federal District Court for the Central District of Illinois noted, "[t]he Courts of Illinois do

not resort to aids for construction, such as legislative history, when the language of a statute is clear." *Vandersand v. Wal-Mart Stores, Inc.*, 525 F. Supp. 2d 1052, 1057 (C.D. Ill. 2007) (holding that the Illinois HCRCA protects pharmacists). Furthermore, Defendants misleadingly position the legislative history it cites as that of "the House Bill that became the Act." (App. Br. 42). In fact, the Health Care Right of Conscience Act was originally enacted in 1977, enshrining the relevant protections still contained in the Illinois HCRCA for "any person" with respect to "family planning," "procurement of contraceptives," and "medication." The legislative history Defendants cite is that of the General Assembly's 1997 *amendments* to the Act, which changed the name of the Act and added minor changes, none of which affected the established protections for "any person" already present in the Right of Conscience Act. *See* P.A. 90-846 (H.B. 725) (citing P.A. 80-616, § 1, eff. Sept. 13, 1977). Finally, Defendants provide no support for their contention that "all references [to pharmacists] were deleted [from the 1997 Bill amending the Right of Conscience Act] prior to the bill's passage when pharmacists lobbied to be removed." (App. Br. 42).

Defendants' linguistic contortions to the contrary do not change the straight-forward language of the HCRCA which unambiguously protects "all persons...engaged in the delivery of health care services...by reason of their refusing to act contrary to their conscience...in connection with the use or procurement of contraceptives." The Plaintiffs are clearly protected by the HCRCA.

2. Illinois courts have consistently held that pharmacists are protected by the Illinois HCRCA.

As explained above, the plain text of the HCRCA makes clear that pharmacists are included within the scope of the statute's protections. It is, therefore, unsurprising that the Illinois courts that have looked at the issue have determined that this is the case. Thus, for example, in *Vandersand v. Wal-Mart Stores*, the plaintiff pharmacist was an employee of a Wal-Mart store in Beardstown, Illinois, who declined to dispense Plan B and was placed on leave. *Vandersand v. Wal-Mart Stores*, 525 F. Supp. 2d 1052, 1053 (C.D. Ill. 2007). The pharmacist sued, alleging, among other things, that he was protected by the Illinois HCRCA. *Id.* Wal-Mart claimed the HCRCA did not protect the pharmacist. *Id.* The pharmacist was given only two options by Wal-Mart: to be terminated immediately or to be placed on an unpaid leave of absence. *Id.* at 1055. The District Court held that the pharmacist was within the scope of protection of the HCRCA. *Id.* at 1057. The court stated that "providing medication...constitutes health care services," and that any person, including the plaintiff pharmacist, "who refuses to participate in any way in providing medication because of his conscience is protected by" the HCRCA. *Id.* at 1057. The *Vandersand* court rejected the argument, also made by Defendants here, that the HCRCA did not cover the pharmacist because he was not "health care personnel." The *Vandersand* Court first noted that the anti-discrimination provisions of the HCRCA apply to "any person." *Id.* Furthermore, the court reasoned that, even if the HCRCA did protect only "health care personnel," the pharmacist

furnished "health care services," and anyone who does so is "health care personnel." *Id.* (fn 2).[10]

Defendants' Orwellian suggestion that *pharmacists* are not involved in the provision of *health care* is absurd on its face. The language of the statute makes clear that pharmacists are protected by the HCRCA. Pharmacists provide contraceptives, which are specifically listed as health care in the statute. Pharmacists are an indispensable part of the American health care system. Rather than accept Defendants' invitation to leap into a rabbit tunnel where logic departs, words lose all meaning and the Mad Hatter reigns supreme, this Court should, instead, look to the plain language of the statute and straight forward reason and recognize that pharmacists do, indeed, provide health care and are, therefore, protected by the Illinois HCRCA. As the *Vandersand* court determined and as the trial court here correctly ruled, "the language of the statute is clear" that the HCRCA applies to and covers pharmacists and pharmacies. April 5, 2011 Order Granting Declaratory and Injunctive Relief, p. 5.

3. Courts in other states with right of conscience statutes have applied these statutes to protect pharmacists' conscience rights.

In addition to correctly interpreting the clear language of the Illinois statutes involved here, the trial court's ruling stands alongside the clear weight of authority from other states that have addressed the issue. The circuit court's ruling is consistent with recent decisions in other states that have examined state right of conscience statutes. For example, in *Planned*

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[10] The Circuit Court for the Third Judicial Circuit, Madison County followed *Vandersand* in recognizing the HCRCA's protection of pharmacists in *Quayle, et al. v. Walgreens*, No 06-L-93 (*See* R. C: 656).

Parenthood Arizona v. American Association of Pro-Life Obstetricians and Gynecologists, 257 P.3d 181 (Ct. App. Az. 2011), the Arizona Court of Appeals upheld Arizona's right-of-conscience statute, A.R.S. § 36-2154, against a challenge that argued that the statute violated the state constitution.

In upholding the statute, the Arizona Court of Appeals emphasized that the statute's protection of health care providers' exercise of conscience does not infringe on a woman's right to an abortion or other reproductive rights. First of all, under Arizona Supreme Court precedent, health care facilities, even public ones, do not have to provide abortions (or emergency contraceptives), as long as a woman's right to an abortion (or reproductive right) is not effectively denied, which would occur only where the health care facility in question were the "only reasonable choice available." *Planned Parenthood*, 257 P.3d at 196. Second, any reproductive rights that may exist under the Arizona constitution can only be asserted against governmental acts, not the decisions of private individuals. The court stated, "a woman's right to an abortion or to contraception does not compel a private person or entity to facilitate either." *Id.* The court reiterated, "whatever right a woman may have to 'chart her own medical course,' it cannot compel a healthcare provider to provide her chosen care." *Id.*

The *Planned Parenthood* court also rejected the argument that the right-to-conscience statute allowed medical professionals to "abandon" patients. *Id.* The court noted that common law provides that a physician must meet the applicable standard of care in treating the patient, and that a physician that does not has committed a breach of duty and may be liable for malpractice. *Id.* at 196-97. The court noted that the Arizona constitution prohibits

the abrogation of common-law tort actions and, absent explicit legislative intent to the contrary, it concluded that the right-of-conscience statute did not excuse medical malpractice or eliminate the standard of care. *Id.* at 197.

Here, likewise, no rights were infringed upon due to the Plaintiff pharmacists' exercise of conscience. The evidence of record "showed that all of Plaintiffs' pharmacies are within either reasonably close walking or driving distance to emergency contraception distributors, and that emergency contraception is also available over the internet." April 5, 2011 Order Granting Declaratory and Injunctive Relief, p. 4. Accordingly, like in the Arizona case, Plaintiffs' pharmacies were not the only reasonable choices available for those interested in procuring emergency contraception, and Plaintiffs' exercise of their conscience rights here did not infringe on the rights of anyone seeking emergency contraception.

On February 22, 2012, the United States District Court for the Western District of Washington held unconstitutional the rule on which the Rule in this case is based and upheld the free exercise rights of pharmacists and pharmacies. *Stormans v. Selecky*, 2012 WL 566775 (W.D. Wash. 2012). In its decision, the *Stormans* court relied on the Washington state health care right of conscience statute in ruling in favor of plaintiff pharmacists and pharmacy, thereby finding unconstitutional the Washington regulation that served as the model for the Rule here. *See Stormans Inc. v. Selecky*, 2012 WL 566775 (W.D. Wash. 2012) ("Pharmacists have a statutory right to conscientious objection, and thus, may not be 'required by law or contract in any circumstances to participate in the provision of or payment for a specific service if they object to so doing for reason of conscience or religion'"

(*citing* Wash. Rev.Code § 48.43.065(2)(a), applying to "health care providers," including pharmacists).

B. The Individual and Corporate Plaintiffs Have Conscience Rights That Are Protected Under the HRCA.

The HCRCA specifically recognizes that facilities, as well as individuals, have conscience rights that are protected by the statute. The plain language of the HCRCA, as noted above, speaks of a "health care facility's conscience." 745 ILCS 70/10. The circuit court properly rejected Defendants' argument that the "Plaintiffs ha[d] not proven that pharmacies have a conscience under the Act." April 5, 2011 Order Granting Declaratory and Injunctive Relief, p. 5. The circuit court instead affirmed the protection of the individual Plaintiff pharmacists' and the Plaintiff pharmacies' conscience rights under the HCRCA. As explained by the circuit court:

> [t]he Court finds the testimony of Plaintiffs, Vander Bleek and Kosirog, to be persuasive on this issue. The evidence at trial established that the objections of the individual plaintiffs and their closely held corporations are essentially one and the same, because the individual plaintiffs set the policy and tightly control the day to day operations of their pharmacies.

Id. "Plaintiffs ***and their pharmacies*** have memorialized their opposition to selling [Plan B] in ethical guidelines and governing documents. The government cannot pressure them to violate their beliefs." *Id.* (emphasis added).

The plain language of the HCRCA, as noted above, speaks of a "health care facility's conscience." 745 ILCS 70/10. Plaintiff Vander Bleek is the sole shareholder of Plaintiff Morr-Fitz, Inc., the corporation that controls the Fitzgerald pharmacy, and is the majority shareholder of Plaintiff L. Doyle, Inc., which does business as the Eggleston Pharmacy.

Morr-Fitz, Inc. v. Blagojevich, 231 Ill.2d 474, 478 (2008). As further explained by the Illinois Supreme Court:

> Through prayerful reflection and consideration as a practicing Catholic, [Vander Bleek] has informed his beliefs and conscience on which he relies to hold that life begins at conception. He therefore does not believe that his convictions allow him to dispense Plan B. He also does not believe that the pharmacies he controls can cooperate in the sale or dispensing of drugs like Plan B and therefore conscientiously objects on behalf of his corporation. Over the past several years, he has affirmed his company policy of not dispensing drugs with abortifacient qualities when his pharmacies were presented with prescriptions for such drugs. Specifically, his company's written policy is that in the event that a prescription for emergency contraception is presented, the pharmacist on duty is to immediately return the prescription to the patient. He is then to communicate in a confidential environment, without lecturing about morality, that company policy does not allow the pharmacy to procure, stock or dispense the product.

Id. Likewise, Plaintiff Kosirog and his pharmacy share a similar policy, and "[i]n specific instances over the past few years when presented with prescriptions for such drugs, Kosirog, on behalf of his pharmacy, has affirmed the aforementioned policy not to dispense such drugs." *Id.* at 480. The individual Plaintiffs and the corporate Plaintiff pharmacies through which the individual Plaintiffs practice their professions have conscience rights that are protected by the HRCA.

Finally, it should be noted that Defendants' argument simply ignores the plain language of the HCRCA, which specifically identifies and protects pharmacists' conscience rights. See 745 ILCS 70/2; 745 ILCS 70/3(a); 745 ILCS 70/3(c). If Defendants do not like the law as it is, they have a remedy: Defendants can advocate for repeal or amendment of the law by the Illinois General Assembly. However, this Court is not the proper avenue for Defendants to seek amendment of the statute. *See, e.g., People v. Biggins*, 96 Ill. 481 (1880)

(if a law is defective, it is the duty of the legislature to amend it; courts cannot make, but can only construe laws).

III. THE RULE CONSTITUTES AN IMPERMISSIBLE EXECUTIVE ENCROACHMENT ON THE ILLINOIS GENERAL ASSEMBLY.

Finally, the Department's promulgation of the Rule constitutes an encroachment on the Illinois General Assembly's exclusive duty to enact the laws of the State of Illinois. By purporting to require pharmacists to dispense Plan B in violation of their consciences – contrary to the plain language of the Illinois RFRA and the Illinois HCRCA – the Rule impermissibly attempts to amend these statutes and in doing so attempts to usurps the General Assembly's exclusive power to make laws. Accordingly, the Rule is a clear executive overreach and must be struck down.

Under the Illinois Constitution, the power to legislate is granted solely to the Illinois General Assembly. *Fox v. Inter-State Assurance Co.*, 84 Ill.App.3d 512, 515 (2nd Dist. 1980) (*citing* Illinois Const., Art. IV, § 1). The doctrine of separation of powers enunciated in the Illinois Constitution prohibits the executive branch from exercising legislative powers. *Id.* at 515-16 (*citing* Illinois Const., Art. II, § 1).

While executive branch officials may have the power to promulgate reasonable rules and regulations as provided by statute, such powers are regulatory and not legislative. *Central Standard Life Ins. Co. v. Gardner*, 19 Ill.App.2d 431, 434-35 (1st Dist. 1958) (*aff'd in part and rev'd in part on other grounds by Central Standard Life Ins. Co. v. Gardner*, 17 Ill.2d 220 (1959)).

As explained above, in enacting both the Illinois RFRA and the Illinois HCRCA , the General Assembly crafted plain language that is wide, broad, and clearly does not exclude pharmacists and pharmacies from the protection of the statutes. *See* 775 ILCS 35/10 (a)(6); 775 ILCS 35/10 (b)(1); 775 ILCS 35/10 (b)(2)); *see also* 745 ILCS 70/1 *et seq.*

The Rule's imposition on pharmacists and pharmacies of the requirement to dispense Plan B thus attempts to limit the meaning of both the Illinois RFRA and the Illinois HCRCA by defining pharmacists and pharmacies out of the plain language of the statutes as enacted by the General Assembly. Under the Illinois Constitution, this executive branch attempt to amend statutes is impermissible.

Similarly, under Illinois law, a court cannot read into a statute exceptions, limitations, or conditions not expressed by the legislature. *Exelon Corp. v. Department of Revenue*, 234 Ill.2d 266, 275 (2009). Courts may not, under the guise of statutory interpretation, create new rights or limitations not suggested by the language of the statute. *In re K.H.*, 313 Ill.App.3d 675, 680 (4th Dist. 2000). Were this court to follow Defendants' suggested course of action and uphold the Rule's application to pharmacists and pharmacies, it would give effect to the Rule's impermissible encroachment on the General Assembly, something this court may not do.

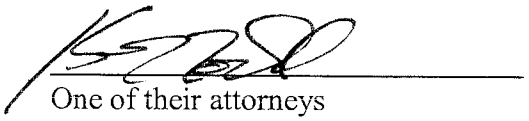
Defendants – and all other Illinois citizens who disagree with the General Assembly's stated policy as expressed through RFRA and HCRCA – have an option: they may appeal to the General Assembly to amend the statutes. Defendants have not done so and their attempt to accomplish the same result through an administrative end-run of this process must be rejected.

CONCLUSION

For these reasons, *amici curiae*, CHRISTIAN LEGAL SOCIETY, CATHOLIC CONFERENCE OF ILLINOIS, THE NATIONAL CATHOLIC BIOETHICS CENTER, and CHRISTIAN PHARMACISTS FELLOWSHIP INTERNATIONAL, urge this Court to uphold the trial court's ruling and grant the relief requested by Plaintiffs-Appellees.

Respectfully submitted,

CHRISTIAN LEGAL SOCIETY,
CATHOLIC CONFERENCE OF ILLINOIS,
THE NATIONAL CATHOLIC BIOETHICS CENTER, and CHRISTIAN PHARMACISTS FELLOWSHIP INTERNATIONAL

By: 
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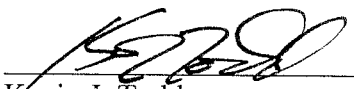
RULE 341(c) CERTIFICATION

I certify that this Brief conforms to the requirements of Rules 341(a) and (b). The length of this Brief, excluding the appendix pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the Brief under Rule 342(a), is 41 pages.



Kevin J. Todd

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he caused three (3) true and correct copies of the foregoing **Corrected Brief of *Amici Curiae* Christian Legal Society, Catholic Conference of Illinois, The National Catholic Bioethics Center, and Christian Pharmacists Fellowship International in Support of Plaintiffs-Appellees** to be served upon:

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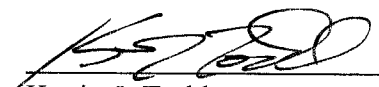
by first-class mail, postage pre-paid, by depositing same in the post office box located at 211 South Clark Street, Chicago, Illinois 60604, this 4th day of April, 2012, before the hour of 5:00 p.m.



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