Case No. 104692

IN THE SUPREME COURT OF ILLINOIS

MORR-FITZ, INC, an Illinois corporation D/B/A FITZGERALD PHARMACY, Licensed and Practicing in the State of Illinois as a Pharmacy; L. DOYLE, INC., an Illinois corporation D/B/A EGGLESTON PHARMACY, Licensed and Practicing in the State of Illinois as a Pharmacy; KOSIROG PHARMACY, INC., an Illinois corporation D/B/A KOSIROG REXALL PHARMACY, Licensed and Practicing in the State of Illinois as a Pharmacy; LUKE VANDER BLEEK; and GLENN KOSIROG

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from the Appellate Court of Illinois, Fourth District (4-05-1050),
There Heard On Appeal from the Circuit Court for the Seventh Judicial Circuit,
Sangamon County Circuit Court (05 CH 495),
The Honorable John W. Belz, Judge Presiding

BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS

IN SUPPORT OF APPELLEES

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POINTS AND AUTHORITIES

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Illinois ("ACLU") is a statewide, nonprofit, nonpartisan organization of 23,000 members, dedicated to the defense and promotion of the guarantees of individual liberty secured by state and federal constitutions and related statutes. The ACLU, and its affiliated organizations nationwide, representing a membership of over 550,000, has an extensive tradition of supporting religious freedom, women's equality, and the rights of individuals to make and effectuate decisions relating to medical care and reproductive choice. Each of these fundamental values is implicated in the instant case, in which three Illinois pharmacy corporations ("plaintiff pharmacies") and two individual pharmacists ("plaintiff pharmacists"), who are also controlling owners in plaintiff pharmacies, challenge an administrative rule, promulgated by the Illinois Department of Financial and Professional Regulation in an effort to balance the State's interest in preserving religious liberty while assuring that women have access to constitutionally protected reproductive healthcare and medication.

The State of Illinois has recognized a critical public health concern that arises when valid, lawful prescriptions for contraception are not filled in a timely fashion because pharmacies have failed to assure access to such medication. In response, the State has, through the challenged regulation, imposed obligations on retail pharmacies designed to preserve each of the constitutionally based values at issue in this case. Proceeding from its long-held position of profound respect for each of these values, the ACLU is uniquely situated to assist the Court in its evaluation of Illinois' attempt to create a mechanism to reconcile the competing interests involved when religious belief affects rights to reproductive healthcare.

INTRODUCTION

On August 25, 2005, after required notice, comment, hearing and approval by the General Assembly's Joint Committee on Administrative Rules, the Illinois Department of Financial and Professional Regulation (the "Department") promulgated an administrative rule that set forth the circumstances in which pharmacies are obligated to dispense prescription contraceptives. Ill. Admin. Code tit. 68, § 1330.91(j) (2008) (effective Aug. 25, 2005) (the "Rule"). The Rule responded to a series of incidents in Illinois and elsewhere in which women were denied prescription contraceptives because pharmacies had failed to create mechanisms to assure prompt access to such medication when a pharmacist on staff objected to dispensing it. 29 Ill. Reg. 5586 (Apr. 15, 2005).

Under the Rule, if a pharmacy has a prescribed contraceptive in stock, the pharmacy "must dispense the contraceptive" to a customer presenting a valid prescription. Ill. Admin. Code tit. 68, § 1330.91(j)(1) (2008). If the prescribed drug is out of stock, the pharmacy must, at the customer's direction: (1) "obtain the contraceptive under the pharmacy's standard procedures for ordering contraceptive drugs not in stock," (2) transfer the prescription to a local pharmacy of the customer's choice, or (3) return the unfilled prescription to the customer. *Id.* A pharmacy that does not regularly stock any prescription contraception has no "standard procedures for ordering contraceptive drugs" and is therefore under no obligation to order and dispense the patient's medication.[1]

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[1] The Department recently initiated the regulatory process to amend the Rule to further clarify the obligations imposed. 31 Ill. Reg. 15399 (Nov. 26, 2007) (to be codified at Ill. Adm. Code tit. 68, § 1330.91). The proposed amendment reiterates in concrete terms that the Rule does not "prohibit[] a pharmacy from deciding not to sell contraception." *Id.* at

The plaintiff pharmacies stock and dispense prescription contraception generally but refuse to stock or dispense certain contraceptive medication prescribed as appropriate treatment by women's healthcare providers.[2] They contend that the Rule "coerces" them into violating their religious beliefs and is thus invalid under the United States and Illinois constitutions as well as various state and federal statutes that, they argue, permit them to refuse to stock or dispense such medication. The plaintiff *pharmacists* are not subject to the Rule, as it imposes obligations only on *pharmacies*. Ill. Adm. Code tit. 68, § 1330.91(j). The pharmacists nevertheless raise the same claims as the pharmacies.

This appeal is from a ruling in which the appellate court concluded that plaintiffs' challenges to the Rule were not ripe for judicial review. *Morr-Fitz, Inc. v. Blagojevich*, 371 Ill. App. 3d 1175, 867 N.E.2d 1164 (4th Dist. 2007). This Court granted plaintiffs

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15410 (to be codified at Ill. Adm. Code tit. 68, § 1330.91(j)(2)). It also sets forth a protocol for permitting an off-site pharmacist to authorize a non-pharmacist employee to dispense contraceptive medication when the only pharmacist on duty is one who objects to dispensing such drugs. *Id.* at 15410 (to be codified at Ill. Adm. Code tit. 68, § 1330.91(j)(3)). This regulatory process in ongoing.

[2] Specifically, plaintiff pharmacies refuse to stock emergency contraception, *see* Pl.App. 78-80, ¶ 24, 32, 43, a higher dose of ordinary birth control pills—which plaintiffs do stock—that can be taken after sexual intercourse to prevent pregnancy. Emergency contraception can be taken up to five days after unprotected intercourse but is most effective the sooner it is taken—particularly within the first 24 hours. Plan B website, *available at* http://www.go2planb.com/For Prescribers/ Index.aspx. Delay in obtaining this medication increases a woman's risk of an unintended pregnancy.

leave to appeal that ruling. However, plaintiffs do not limit their appeal to the court of appeals' ripeness determination. In addition to asserting that their claims are ripe, plaintiffs argue that this Court should rule on the facial validity of the Rule under the Illinois Health Care Right of Conscience Act ("HCRCA"), 745 ILCS 70 *et seq.* (2008).

Plaintiffs' facial attack on the Rule is not properly before this Court, as it was neither addressed by the courts below nor included in plaintiffs' petition for leave to appeal to this Court. *See* Brief of Defendants-Appellees ("Def. Br.") at 33-35. Even if the Court were to address this issue, defendants' arguments demonstrate that the Rule is in full accord with HCRCA. *See, e.g., id.* at 39-40 (HCRCA does not apply to pharmacists and pharmacies); *id.* at 41 (the need for emergency contraception constitutes an "emergency" under the provision in HCRCA requiring healthcare providers, regardless of religious objection, to provide care in an emergency situation); *id.* at 41-42 (the Rule's structure, requiring only that pharmacies that choose to sell contraception do so evenhandedly, is consistent with HCRCA).

However, in the event that the Court reaches plaintiffs' newly raised facial attack, *amicus* seeks to be of assistance by addressing the framework for evaluating such a claim. *Amicus* submits that plaintiffs' construction of HCRCA to create absolute, unfettered rights to exercise religious beliefs would impermissibly disregard competing constitutional interests and the full statutory framework erected by the legislature.[3] The ACLU does not address the propriety of the court of appeals' ripeness decision but

[3] *Amicus* does not address the other claims plaintiffs include in their First Amended Complaint but have not raised in this appeal.

instead limits its comments to the unlikely event that the Court reaches plaintiff's HCRCA claim.[4]

ARGUMENT

HCRCA was enacted in 1977 to, among other things, protect healthcare providers from discrimination based on religious belief. 745 ILCS 70/5; *id.* § 10. Seemingly broad in its application, the statute does not define or otherwise provide an analytical framework for evaluating what constitutes "discrimination" arising out of government action that affects religious liberty. Plaintiffs seize on this void to assert an absolute, unqualified right to exercise their religious beliefs in the context of their professional activities, regardless of the impact on the government's interest in protecting other individuals who hold competing and equally compelling constitutional rights. If HCRCA were interpreted to afford unfettered exercise of religious belief, it would run afoul of such competing fundamental rights. Plaintiffs' unprecedented construction would create bad policy as well. It would render government ineffective to address important societal issues any time its action had an effect—however slight—on religious exercise. It would erect unlawful barriers to contraceptive access and, undoubtedly, numerous other constitutionally protected rights.

Plaintiffs' claim must be evaluated within a framework that gives appropriate weight to such countervailing interests, allowing for the proper allocation of competing rights. Under Illinois law governing statutory interpretation, the Illinois Religious

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[4] As shown below, the Rule survives the appropriate scrutiny in the face of plaintiffs' claims. *Amicus* believes that the State could impose even greater obligations on pharmacies to protect access to contraception.

Freedom Restoration Act ("RFRA"), 775 ILCS 35/1 *et seq.* (2008), provides such a framework for HCRCA claims involving government regulation that affects religious exercise.[5] RFRA was enacted in 1998, two decades after HCRCA, to establish a consistent standard for examining government action affecting religious liberty. *See* 775 ILCS 35/10(b)(1); *id.* § 15. RFRA's strict level of scrutiny, while rigorous, commands an exacting evaluation of competing interests.[6]

The Rule plaintiffs challenge was enacted to stem the serious public health consequences that arise when women are denied access to contraception at retail pharmacies intended to serve the public. *See* 29 Ill. Reg. 5586 (Apr. 15, 2005) ("Recent

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[5] In other contexts, other frameworks might be considered. For example, in the area of employment, the reasonable accommodation/undue burden requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(j) (2008), and the Illinois Human Rights Act, 775 ILCS 5/2-101(F) (2008), would provide appropriate guidance. *See, e.g., Kenny v. Ambulatory Centre of Miami, Florida, Inc.*, 400 So.2d 1262 (Fla. App. Ct. 1981).

[6] This was the analysis applied to government regulation affecting religious belief in 1977, when HCRCA was enacted. *See Sherbert v. Verner*, 374 U.S. 398 (1963); *Yoder v. Wisconsin*, 406 U.S. 205 (1972). In 1990, the United States Supreme Court held in *Employment Division v. Smith*, 494 U.S. 872, that the strict scrutiny standard did not apply to neutral government action of general applicability. Later, in 1997, the Court held that the federal Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.* (1993), which was enacted to reinstate the strict scrutiny standard, could not be applied to the states. *City of Boerne v. Flores*, 521 U.S. 507 (1997). In response, Illinois passed RFRA to restore this standard.

instances of a pharmacy's refusal to dispense legally prescribed contraceptives has resulted in a delay and/or prevention of women from meeting their most basic health need, including pregnancy prevention and treatment of various medical conditions."). Like the right to religious liberty, the right to access contraception is a fundamental right, vital to the health and well-being of women and their families. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) (only through control of their reproductive lives, can women "participate equally in the economic and social life of the Nation").[7] The State sought to protect each of these fundamental rights when it promulgated the challenged Rule.

Plaintiffs ask this Court to construe HCRCA to elevate religious rights to a level at which no countervailing interests—even fundamental rights—merit consideration.

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[7] Access to safe and effective contraception has become a critical component of basic preventative healthcare for women. Since 1965, when the Supreme Court first recognized a fundamental right to contraception, *Griswold,* 381 U.S. 479, maternal mortality rates have dropped by 62 percent, and infant mortality rates by 72 percent. Planned Parenthood Federation of America, *Griswold v. Connecticut*-the Impact of Legal Birth Control and Challenges that Remain (June 2007), *available at* http://www.plannedparenthood.org/ files/PPFA/fact-griswold.pdf. Recognizing these and other benefits of access to safe and effective birth control, the federal Centers for Disease Control declared family planning to be one of the 10 most significant U.S. public health achievements of the 20th Century. Centers for Disease Control, *Ten Great Public Health Achievements-United States*, 1900-1999, 48 Morbidity and Mortality Wkly. Rep. 241, 241 (1999).

Plaintiffs' effort to afford themselves absolute rights improperly demeans such competing interests. When evaluated within the RFRA framework, which recognizes the existence of competing and equally important state interests, plaintiffs' effort to invalidate the challenged Rule fails, for, even if the Rule imposed a substantial burden on plaintiffs' religious exercise, the Rule is narrowly tailored to serve compelling government interests. It should thus be upheld.

I. UNDER ILLINOIS LAW, RFRA PROVIDES THE FRAMEWORK FOR EVALUATING HCRCA CLAIMS OF GOVERNMENT DISCRIMINATION BASED ON RELIGION.

A. HCRCA Fails to Define an Analytical Framework for Evaluating Government Regulation That Affects Religious Liberty.

HCRCA protects healthcare providers from discrimination based on their religious or conscience objections to providing specific healthcare. 745 ILCS 70 *et seq.*[8] The statute does not set forth a definition of "discrimination;" nor does it elucidate a method of evaluating compelling government interests in issue. Since its enactment, HCRCA has been the subject of only a handful of lawsuits. These cases are narrow and fact specific. No court has invalidated a state statute or regulation on the ground that it conflicted with rights based in HCRCA. Indeed, no case even discusses how a claim of

[8] HCRCA protects "sincerely held...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 faith." 745 ILCS 70/3(e). Plaintiffs allege that their objections arise out of religious belief. Pl.App. 78-80, ¶ 22, 30, 41.

interference with religious liberty under HCRCA should be analyzed—in any context, let alone one involving government regulation.[9]

B. Illinois RFRA Provides the Framework for Evaluating Plaintiffs' Claims under HCRCA.

Plaintiffs' quest for unqualified rights directly conflicts with the structure the General Assembly announced for evaluation of government conduct affecting religious liberty when it passed RFRA. The General Assembly enacted RFRA for the purpose of imposing a strict scrutiny standard for government regulation that affects religious liberty:

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[9] *See Vandersand v. Wal-Mart Stores, Inc.*, No. 06-3292, 2007 WL 2385128 at *5 (C.D. Ill. July 31, 2007) (discussion of HCRCA limited to whether pharmacists are protected under the act); *Nead v. Bd. of Trustees of Eastern Illinois Univ.*, No. 05-2137, 2006 WL 1582454 at *5-6 (C.D. Ill. June 6, 2006) (discussion of HCRCA limited to whether federal court should exercise supplemental jurisdiction over HCRCA claim); *Moncivaiz v. Dekalb County*, No. 03-C-50226, 2004 WL 539994 at *3 (N.D. Ill. March 12, 2004) (discussion of HCRCA limited to fact that defense to claim was based on facts outside the complaint and thus not properly considered on motion to dismiss); *Cohen v. Smith*, 269 Ill. App. 3d. 1087, 1096, 648 N.E.2d 329, 336 (Ill. App. Ct. 1995) (discussion of HCRCA limited to fact that court could not conclude, on a motion to dismiss, that plaintiffs did not hold sincere beliefs that have some relation to their belief in God); *Free v. Holy Cross Hosp.*, 153 Ill. App. 3d 45, 47-50, 505 N.E.2d 1188, 1189-90 (Ill. App. Ct. 1987) (HCRCA claim dismissed because it was premised on objecting nurse's professional ethical beliefs, not covered by the act).

> Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest.

775 ILCS 35/15. The General Assembly asserted its intent to apply this standard for evaluating all government interference with religious exercise. 775 ILCS 35/10(b)(1); *see also* 90th Gen. Assem., Senate Proceedings, May 13, 1998, at 20-21 (statements of Sen. Parker); 90th Gen. Assem., House Proceedings, May 19, 1998, at 15 (statements of Rep. Gash) ("RFRA simply restores a standard of review to be applied to all, and I emphasize all, state and local laws and ordinances.").

In enacting RFRA, the General Assembly recognized that government action affecting religious belief often involves competing rights and thus requires careful balancing and analysis:

> Although this standard is stringent, it is not intended to be impossible to satisfy. The government will win RFA[sic] cases whenever it has chosen the least restrictive means of furthering a compelling government interest. By way of example only, courts in certain circumstances have found fire, public health and safety, civil rights, child welfare, and other laws as meeting the compelling government interest test.

90th Gen. Assem., Senate Proceedings, May 13, 1998, at 20-21 (statements of Sen. Parker).

As both RFRA and HCRCA regulate government conduct affecting religious liberty, they must be construed to avoid conflicting government obligations that could significantly interfere with the government's ability to implement policy in areas affecting critical rights and the welfare of its citizens. "When several statutes relate to the same subject, they are presumed to be governed by one spirit and a single policy, and a court should consider the entire statutory scheme *in pari materia* in a fashion which renders the statutes consistent, useful and logical." *Snyder v. Olmstead*, 261 Ill. App. 3d 986, 990, 634 N.E.2d 756, 760 (3rd Dist. 1994); *see United Citizens of Chicago and Illinois v. Coalition to Let the People Decide in 1989*, 125 Ill.2d 332, 338-39, 531 N.E.2d 802, 804-05 (1988) (construing the Election Code and Municipal Code *in pari materia* and using provisions of the Municipal Code to fill a gap in the Election Code); *see also In re Branning*, 285 Ill. App. 3d 405, 413, 674 N.E.2d 463, 470 (4th Dist. 1996) (under the doctrine of *in pari materia*, "statutes that relate to the same subject should be 'considered with reference to one another so that both sections may be given harmonious effect'") (quoting *People v. Maya*, 105 Ill. 2d 281, 287, 473 N.E.2d 1287, 1290 (1985)).

The goal is to ascertain the legislative intent. *Wade v. City of North Chicago Police Pension Board*, 226 Ill.2d 485, 509, 877 N.E.2d 1101, 1115 (2007) ("The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature."). And, although the touchstone of this analysis is the language of the statute itself, "a court must presume that the legislature, in enacting the statute, did not intend absurdity or injustice, *id.* at 510, and may "consider similar and related enactments," even if they are not "strictly *in pari materia*." *Id.* at 511-12. To that end, the court may even read language omitted through legislative oversight into a statute to achieve legislative

intent. *Id.* at 510 ("When a literal interpretation of a statutory term would lead to consequences that the legislature could not have contemplated and surely did not intend, this court will give the statutory language a reasonable interpretation."). To fully comprehend the legislature's intent, courts must consider "statutes in their entirety, noting the subject they address and the legislature's...objective in enacting them." *State v. Mikusch*, 138 Ill.2d 242, 247-48, 562 N.E.2d 168, 170 (1990).

This Court and others have applied necessary provisions and language from one statute to another as needed to give full effect to the legislature's intent. *See, e.g., Barthel v. Illinois Central Gulf Railroad Co.*, 74 Ill.2d 213, 223-24, 384 N.E.2d 323, 328-29 (1978) (court reviewing claim under the Public Utilities Act rejected plaintiffs' request for strict liability based on statutory silence and allowed defendants to assert the contributory negligence defense of a separate statute that contained "an identical statutory provision" as the Public Utilities Act provision under which plaintiffs sought relief); *United Citizens of Chicago and Illinois*, 125 Ill.2d at 340-41 (provisions of Municipal Code used to fill gap in Election Code).[10]

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[10] In *Kenny,* 400 So.2d 1262, the Florida Appellate Court decided that the Florida religious refusal clause, though silent as to a framework for decision, did not grant absolute, unqualified rights to religious exercise. Instead, it relied on the standard contained in employment discrimination statutes requiring reasonable accommodation unless the employer demonstrated that accommodating the employee's religious objection would cause the employer undue hardship. *Id.* at 1266 (court ruled in plaintiffs' favor because, it concluded, additional accommodation efforts would not have imposed an undue hardship on the employer).

In addition, the principle that where statutes conflict, "the one which was enacted later should prevail as a later legislative expression of intent," *Mikusch*, 138 Ill.2d at 251, also directs this result. S*ee also Moore v. Green*, 219 Ill.2d 470, 480, 848 N.E.2d 1015, 1022 (2006) ("We will presume that the legislature intended the more recent statutory provision to control."). "The 'classic judicial task of reconciling many laws enacted over time, and getting them to make sense in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.' This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (citations and internal quotations omitted).

RFRA is a specific statute with an express standard to address the very situation before the Court. HCRCA, by contrast, is a broad statute purporting to address an array of circumstances and sets forth no method for scrutinizing claims. As RFRA is the later-enacted, more specific statute, HCRCA must be construed to apply RFRA's framework for evaluating identical claims raised. *Moore*, 219 Ill.2d at 480 ("[W]here a general statutory provision and a more specific statutory provision relate to the same subject, we will presume that the legislature intended the more specific provision to govern.").

Holding plaintiffs' claims under HCRCA to the RFRA strict scrutiny standard advances the General Assembly's purpose in enacting RFRA while also furthering the two statutes' common goal of protecting religious liberty. RFRA was enacted two decades after HCRCA for the purpose of clarifying the review process for government interference with religious liberty—a process left undefined by HCRCA. Evaluated

within the RFRA framework, the Rule is lawful if it is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.

II. THE CHALLENGED RULE IS NARROWLY TAILORED TO ACHIEVE THE STATE'S COMPELLING INTERESTS.

Below, *amicus* demonstrates that the Rule uses the least restrictive means to further compelling government interests. However, the Court need not get to that analysis as plaintiffs have not suffered a substantial burden. Their complaint's conclusory allegations of "coercion" simply do not rise to the level of substantial burden. Even if plaintiffs could prove a substantial burden, the Rule must be upheld in a strict scrutiny analysis.

A. The Rule Serves Compelling Government Interests in Ensuring Timely Access to Constitutionally-Protected, Time-Sensitive Medication and in Combating Gender Discrimination.

The Rule requires a pharmacy to dispense contraceptives "without delay, consistent with the normal timeframe for filling any other prescription." Ill. Adm. Code tit. 68, § 1330.91(j)(1). If the contraceptive is not in stock, the pharmacy must, at the customer's request, order the drug "under the pharmacy's standard procedures for ordering contraceptive drugs not in stock," transfer the prescription to another pharmacy, or return the prescription. *Id.* This instruction to dispense without delay protects women's health, promotes gender equality, and serves the constitutionally protected right to contraception.

Access to contraception is constitutionally-protected, *see Carey v. Population Services International*, 431 U.S. 678, 687 (1977) ("Restrictions on the distribution of contraceptives clearly burden the freedom to make" fundamental decisions, such as whether to beget or bear a child); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972);

Griswold v. Connecticut, 381 U.S. 479 (1965), and promoting access to reproductive healthcare is a compelling public interest. *American Life League, Inc. v. Reno*, 47 F.3d 642, 655-56 (4th Cir. 1995); *Council for Life Coalition v. Reno*, 856 F. Supp. 1422, 1429-30 (S.D. Cal. 1994).

This constitutional right can only be preserved when women have timely access to prescribed contraception. Plaintiffs object to stocking and dispensing emergency contraception—a class of contraceptive drugs that can help to prevent pregnancy when taken after sexual intercourse. *See generally* American College of Obstetricians & Gynecologists, Birth Control: A Woman's Choice 38-41 (2003). Emergency contraception is most effective when taken within 24 hours of unprotected intercouse. *Id.* at 39; Plan B website, *available at* http://www.go2planb.com/ForPrescribers/Index.aspx. Delay beyond this limited time frame increases the risk that the medication will not succeed in preventing pregnancy and will leave the woman to face the prospect of an unwanted pregnancy or an abortion.[11]

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[11] It is also essential that patients be able to fill prescriptions for daily hormonal contraception, such as "the pill," without delay. The contraceptive pill is dispensed in monthly packets, with each pill being a required daily dose. *See generally* Robert A. Hatcher *et al.*, Contraceptive Technology 405-509 (17th ed. 1998). If a patient is unable to obtain a refill of her monthly prescription once she has completed the previous month's packet, the resulting gap leaves her vulnerable to pregnancy. Skipping even one daily dose of hormonal contraception dramatically affects the patient's level of pregnancy-preventing hormones, thereby increasing the risk of unintended pregnancy.

The average woman is fertile for approximately three decades of her life—from age 15 to age 44. William D. Mosher et al., *Use of Contraception and Use of Family Planning Services in the United States: 1982-2002* 3 (Advance Data from Vital & Health Stat. No. 350, Dec. 10, 2004). Pregnancies too frequent and too closely spaced—often resulting from the inability to control reproduction—can result in permanent physical health problems for women, and negative outcomes for the newborn children of women who carry these pregnancies to term. *See generally* Guttmacher Institute, Issues in Brief 2002 Series No. 3, *Women and Societies Benefit when Childbearing is Planned* 2 (2002); Kathryn Kost *et al.*, *The Effects of Pregnancy Planning Status on Birth Outcomes and Infant Care*, 30 Fam. Plan. Persp. 223, 229 (1998) (finding that women whose pregnancies are mistimed or unintended are less likely to breastfeed than those who intended to conceive when they did and that the proportion of infants who are premature, low-birth-weight, or small for gestational age is substantially higher if the birth was unintended or mistimed than if it was intended).

The ability of patients to obtain medications their physicians have prescribed—including contraceptive drugs—is crucial to advancing the State's compelling interest in protecting public health and in regulating the licensed professionals who deliver healthcare. *See People v. Adams*, 149 Ill.2d 331, 343, 597 N.E.2d 574, 581 (1992) ("States enjoy broad discretion in devising means to protect and promote public health."); *Methodist Medical Center v. Ingram*, 82 Ill.2d 511, 523, 413 N.E.2d 402, 408 (1980) ("The States have wide regulatory power with respect to the practice of healthcare

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See American College of Obstetricians & Gynecologists, Birth Control: A Woman's Choice 35-36 (2003) (discussing the progestin-only birth control pill).

professions."); *see also Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995) ("States have a compelling interest in the practice of professions within their boundaries, and ... as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.'").

The elimination of gender discrimination is also a critical and compelling state interest. *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984); *see Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67, 92-93 (Cal. 2004) (holding that California's contraceptive equity law, which prohibits employers from carving out from coverage prescription contraceptives from an otherwise comprehensive prescription drug health benefit plan, "serves the compelling state interest of eliminating gender discrimination"). The Rule requires pharmacies to develop systems to ensure access to contraception, medication used exclusively by women to prevent pregnancy, a condition that affects only women's health. As the Supreme Court recognized in *Planned Parenthood v. Casey*, 505 U.S. at 856, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." Access to safe and effective contraception gives women control of their fertility, thus improving their physical well-being and empowering them to make educational and employment choices that have long term health, economic and social benefits for them, their families, and their communities. The Rule therefore furthers the state's interests in protecting access to constitutionally protected healthcare, promoting public health, and remedying gender discrimination at the pharmacy.

B. The Rule is the Least Restrictive Means of Furthering the State's Interests.

The Rule was carefully drafted to properly allocate the competing constitutional interests in securing women's access to essential contraceptive medication and protecting the religious rights of individual pharmacists who may object to dispensing contraceptives. The Rule places the responsibility for dispensing this medication on pharmacies, promoting a system of individual accommodation by the entity in the best position to ensure that protocols exist to accommodate individual employee's objections while ensuring that patients are properly served. *See, e.g., Vandersand v. Wal-Mart Stores, Inc.*, No. 06-3292, 2007 WL 2385128 at *4 (C.D. Ill. July 31, 2007).

In addition, the Department recently proposed an amendment to the Rule which goes even further to protect these competing rights by outlining a concrete mechanism to assist pharmacies in meeting their obligations under the Rule. 31 Ill. Reg. 15399 (Nov. 26, 2007) (to be codified at Ill. Adm. Code tit. 68, § 1330.91). The proposed amendment outlines a "dispensing protocol" that allows a pharmacy employing an objecting pharmacist to coordinate with another pharmacy (referred to in the rule as a "remote pharmacy") to provide "remote medication order processing." 31 Ill. Reg. 15399 at 15410-11. Through this process, a non-objecting licensed pharmacist at the remote pharmacy can authorize a non-pharmacist employee of the dispensing pharmacy to dispense contraception. *Id.* For pharmacies stocking contraception that assert they cannot staff at least one non-objecting pharmacist at all times, the proposed amendment's remote medication order processing provides yet another option for complying with the Rule.

Finally, in those rare cases where the pharmacy owner—as opposed to an individual pharmacist—objects to stocking and dispensing a particular type of contraception, the pharmacy can choose to avoid the Rule's requirements by simply not selling contraception. By its terms, the Rule gives pharmacies the option of taking themselves out of the category of institutions subject to its provision. Ill. Adm. Code tit. 68, § 1330.91(j)(1).[12] The choice is up to the pharmacy owner to balance the revenues generated from contraceptive sales against their desire to ban certain—but not all—forms of contraception. By providing this and other alternatives, the State has chosen the least intrusive means of achieving the goal of protecting multiple compelling but competing interests.[13]

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[12] *See also* 31 Ill. Reg. 15399 (Nov. 26, 2007) (to be codified at Ill. Adm. Code tit. 68, § 1330.91) (proposed amendment reiterates in concrete terms that only pharmacies that "continue[] to sell contraception" are required to stock and dispense emergency contraception).

[13] For these same reasons, plaintiffs cannot demonstrate a substantial burden. Plaintiffs argue that they have had to close a pharmacy because of the Rule; however, no such allegation appears in their complaint. Moreover, they do not allege—or argue—that they even considered the option of eliminating contraceptive drugs entirely and thereby avoiding the impact of the Rule. Nor do they allege that they ever sought a variance from the Rule under the Pharmacy Practice Act based on their special circumstances. See 225 ILCS 85/11(c). Instead, plaintiffs seek to parlay their conclusory assertions of coercion into a complete invalidation of the Rule as to all pharmacies, under all circumstances.

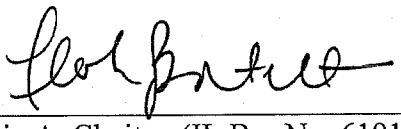
The strict scrutiny standard does not require the state to abandon its otherwise compelling goals to allow a religious institution to practice its tenets in *every* way it chooses. *See City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 302 Ill.App.3d 564, 572, 707 N.E.2d 53, 59 (1st Dist. 1998), (holding that because the zoning ordinance affected only 40 percent of the city, allowing the Church free access to the other 60 percent of the city, the zoning ordinance was the least restrictive means of achieving the city's compelling interests), *aff'd in part and rev'd in part on other grounds,* 196 Ill.2d 1, 749 N.E.2d 916 (2001); *see also Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 993 (N.D. Ill. 2003) (holding that the "significant expense" of renting out alternative facilities and "logistical difficulties" incurred by a church that could not obtain a special use permit to use its property for worship purposes "does not rise to the level of a substantial burden"). This is so, particularly, where, as here, the compelling goals are based on competing constitutional rights.

As pharmacies have multiple options to avoid running afoul of the Rule, the applicable strict scrutiny standard has been met.

CONCLUSION

For the reasons stated herein, if this Court reaches the merits issues plaintiffs have raised, *amicus curiae,* The American Civil Liberties Union of Illinois, urges the Court to uphold the Rule in the face of plaintiffs' assertion of absolute, unfettered rights.

Respectfully Submitted,



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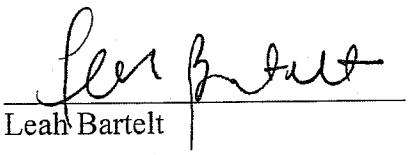
I, Leah Bartelt, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief is 21 pages.



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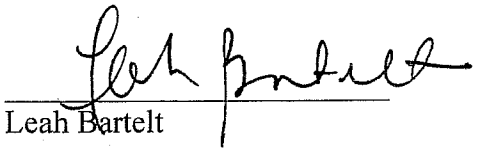
CERTIFICATE OF SERVICE

I, Leah Bartelt, certify that on this 30th day of January, 2008, three true and correct copies of the foregoing Brief of *Amicus Curiae,* The American Civil Liberties Union of Illinois, were served upon each attorney shown below by United States First Class Mail, postage prepaid, addressed as follows:



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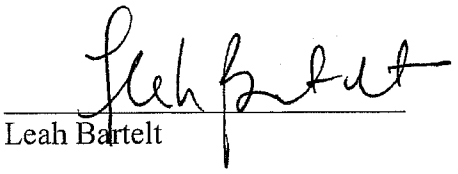
CERTIFICATE OF FILING

I, Leah Bartelt, an attorney, in accordance with Illinois Supreme Court Rule 373, certify that I mailed twenty (20) copies of this Brief of *Amicus Curiae* The American Civil Liberties Union of Illinois to the Court by depositing said copies in the U.S.P.S. first-class mail, postage paid, addressed to the Clerk of the Supreme Court, Supreme Court Building, 200 East Capitol Avenue, Springfield, Illinois 62701, at approximately 5:00 p.m. on January 30, 2008.



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