No. 4-11-0398

IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

MORR-FITZ, INC., an Illinois corporation D/B/A/ FITZGERALD PHARMACY, Licensed and Practicing in the State of Illinois as a Pharmacy; 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,	**On Appeal from an Order of the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois.**
Plaintiffs-Appellees,	**No. 05-CH-495**
v.	
PAT QUINN, Governor, State of Illinois; BRENT E. ADAMS, Secretary, Illinois Department of Financial and Professional Regulation; JAY STEWART, Director, Division of Professional Regulation; and STATE BOARD OF PHARMACY, in their official capacities,	**The Honorable JOHN W. BELZ, Judge Presiding.**
Defendants-Appellants.	

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

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Illinois ("ACLU") is a statewide, non-profit, non-partisan organization of over 20,000 members and supporters, 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 500,000, have a long 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 present in the instant case, which involves an Illinois regulation designed to advance the state's public health interest in regulating pharmacy practice to safeguard patient access to prescription and other pharmacy-restricted medication – including constitutionally protected contraceptive medication.

The State of Illinois issued the regulations challenged in this litigation following numerous incidents in Illinois and elsewhere of harmful refusals at pharmacy counters. In so doing, the state recognized a critical public health concern that arises when patients seeking access to time-sensitive, pharmacy-distributed medication are thwarted as a result of a commercial pharmacy's failure to have procedures in place to assure access to care and information for patients when an individual pharmacist on staff asserts a religious objection to participating in the sale of a particular drug. The challenged regulation – 68 Ill. Admin. Code 1330.500(e)-(h) (the "Rule") – like its predecessors, imposes obligations on retail pharmacies to implement such procedures. By instituting a regulatory mechanism that requires pharmacies to assure patient access to medication, the Rule not only provides security to the third party patients who would otherwise be

harmed by the pharmacist's refusal, but also appropriately accommodates religious liberty interests of individual objecting pharmacists.

Amicus submits this brief in support of the Rule and to address significant errors in the circuit court's decision invalidating the Rule, including its failure to account for the constitutional significance of access to contraception which is grossly obstructed by the court's injunction.

INTRODUCTION

The plaintiffs, three for-profit pharmacy corporations and their two controlling owners, challenge the Rule under the Illinois Health Care Right of Conscience Act, 745 ILCS 70/1 *et seq.* ("HCRCA"), the Illinois Religious Freedom Restoration Act, 775 ILCS 35/1 *et seq.* ("IRFRA"), and the First Amendment to the United States Constitution, based on the pharmacy owners' objections to emergency contraception.[1] Emergency contraception is an essential component of constitutionally protected reproductive health care for women, whose timely access must be secured for it to be effective in preventing unintended pregnancy. Emergency contraception can only be obtained through a licensed pharmacist or prescriber. Women are thus at the mercy of the pharmacy as they seek effective access to this medication. The Rule's protections ensure that women are not forced to travel from pharmacy to pharmacy in search of a willing dispenser, all the while increasing their risk of an unintended pregnancy.

The for-profit corporate pharmacies here have no religious mission or purpose, but they assert the right to refuse services based on their owners' religious beliefs. As a

[1] In addition to emergency contraception, plaintiff Kosirog Pharmacy recently instituted a policy of refusing to stock, dispense or otherwise assist patients in obtaining daily birth control pills. Trial Transcript, Record on Appeal Vol. IX (hereinafter Tr.), at 73.

result of their owners' objections, they refuse to stock or dispense emergency contraception, they prohibit their employees from referring patients elsewhere to obtain this lawful medication, and they advocate for invalidation of the Rule as to every commercial pharmacy in the state regardless of whether any other pharmacy can or does assert a religious objection to dispensing a particular medication. (R. C00766-803.)

After a one day trial, the Circuit Court of Sangamon County ruled in plaintiffs' favor, holding that the Rule violates HCRCA, IRFRA and the First Amendment. (R. C01111-17.) In so doing, the court erroneously ascribed the religious beliefs of the individual plaintiffs to the for-profit, non-religious pharmacies, and dangerously failed to give proper weight to the state's compelling interest in regulating to assure that patients are able to obtain lawful medication, including constitutionally protected emergency contraception, at state-licensed pharmacies. The court entered a sweeping injunction, not only exempting the plaintiff pharmacies from participating in the protective mechanism established with the passage of the Rule, but also facially invalidating the Rule and thus removing its protections statewide. (R. C01117.)

As shown below, plaintiffs do not meet the threshold requirement of any of their claims because the plaintiff pharmacies do not hold religious or conscience beliefs, nor can they assert those of their owners.[2] In any event, however, the Rule passes strict scrutiny and thus must be upheld under HCRCA and IRFRA. In addition, even if, as the plaintiffs contend and the circuit court erroneously concluded, strict scrutiny applies in

[2] As defendants demonstrate, plaintiffs' HCRCA claim also fails because HCRCA does not apply to pharmacies or pharmacists, Defendants-Appellants' Brief (hereinafter Def. Br.) at section V.A, and even if it did, the requirement that plaintiff pharmacies facilitate access to emergency contraception would fall within HCRCA's emergency exception. *Id.* at section V.B.

evaluating plaintiffs' First Amendment claim, the Rule survives such scrutiny and must be upheld.

STATEMENT OF FACTS

Refusals to Dispense Contraception, Including Emergency Contraception, Harm Women.

The State of Illinois issued the challenged regulations following a rash of refusals in pharmacies in Illinois and throughout the country that forced women to endure delay, frustration, shame, and physical harm as they sought to obtain timely access to constitutionally protected contraceptive medication, including emergency contraception. Over the past decade, there have been hundreds of reports of pharmacies refusing to dispense such medication. Editorial, *Moralists at the Pharmacy*, N.Y. Times, Apr. 3, 2005 (explaining that during a six month period in 2004, there were "some 180 reports of refusals" in the United States).

In 2005, the year the Illinois Department of Financial and Professional Regulation (the "Department") passed the rule initially challenged in this litigation, Illinois experienced a number of pharmacy refusals consistent with the pattern developing around the country. The Department filed complaints against four Illinois pharmacies in the span of seven months that year. *See* Gala M. Pierce, *Complaint Filed Against Pharmacy; State Says St. Charles Osco Refused to Fill Prescription for Contraceptive*, Daily Herald, Sept. 16, 2005, at 1 (hereinafter Pierce, *Complaint Filed*); *see* (R. C00994-1014 (Department complaints against three of the four pharmacies).). One of those complaints stemmed from February 2005 incidents in which an Osco drugstore in Chicago twice refused to fill lawful prescriptions for emergency contraception. Pierce, *Complaint Filed*; *see also* Jim Ritter, *Planned Parenthood Protests over Morning-After Pill; Downtown Pharmacist*

Wouldn't Sell Emergency Contraceptive, Chicago Sun-Times, Mar. 23, 2005, at 10 (detailing incident). A similar incident occurred in July 2005 at an Osco drugstore in St. Charles, when a pharmacist, "citing her moral beliefs," refused to fill prescriptions for regular birth control pills and emergency contraception, and no other pharmacist on site stepped in to provide the patient with the lawfully prescribed medication. Gala M. Pierce, *Osco Hit with Fine; St. Charles Store Refused to Fill Birth Control Prescription*, Daily Herald, Jan. 12, 2006, at 3; *see* (R. C01009-14 (Department complaint).); Illinois Dep't of Fin. & Prof'l. Regulation, News Bulletin, Dec. 2005, at 10 (detailing reprimand and fine against Osco resulting from this incident), *available at* http://www.idfpr.com/Forms/DISCPLN/0512_dis.pdf.

The Department also cited Walgreens pharmacies in West Peoria and Chicago for refusing to dispense prescription contraceptives upon presentation of lawful prescriptions. *See* Pierce, *Complaint Filed* (describing complaints); (R. C00996-1008 (Department complaints).). And, in a 2006 incident occurring at the same West Peoria pharmacy that was cited the previous year, a pharmacist affirmatively misled a nurse practitioner who called to inquire about the availability of emergency contraception at her pharmacy. Though the medication was in stock, the pharmacist falsely stated that it was not. Ill. Dep't of Fin. & Prof'l. Regulation, Notice of Preliminary Hearing & Complaint, Mar. 27, 2006, *available at* http://mail.ildpr.com/News/newsrls/032706BrownOrder.pdf; Ill. Dep't of Fin. & Prof'l. Regulation, News Bulletin, Dec. 2007, at 8 (detailing Department reprimand for unprofessional conduct issued to pharmacist), *available at* http://www.idfpr.com/Forms/DISCPLN/1207_dis.pdf.

One well-publicized Wisconsin case illustrates the onerous barriers women can face at the hands of a refusing pharmacist and the need for appropriate institutional protocols at the pharmacy to ensure access to prescription medication. In that case, a woman attempted to obtain a refill of her birth control pills at the local pharmacy that held her prescription. The pharmacist on duty not only refused to dispense the medication or arrange to have another pharmacist employed by the same pharmacy do so, but also rejected a request from another local pharmacist that he transfer the prescription information to allow the patient to obtain her medication, which she was to begin taking the next day. As the pharmacist held the prescription hostage, the woman was unable to obtain her medication for two days until a different pharmacist came on duty. *Noesen v. State of Wis. Dep't of Regulation & Licensing, Pharmacy Examining Bd.*, 751 N.W.2d 385 (Wis. App. Ct. Mar. 25, 2008).[3]

Refusals of this kind can increase the risk of unintended pregnancy. Even a one day delay in taking certain regular birth control pills increases this risk. Robert Hatcher et al., Contraceptive Technology 188 (19th ed. 2008); *see also Noesen*, 751 N.W.2d at 392.

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[3] In some cases, patients have also been lectured or berated by refusing pharmacists. *See, e.g.*, Charu A. Chandrasekhar, *RX for Drugstore Discrimination: Challenging Pharmacy Refusals to Dispense Prescription Contraceptives under State Public Accommodations Laws*, 70 Alb. L. Rev. 55, 55-56 (2007) (patient seeking emergency contraception was told by pharmacist, "You're a murderer. I will not help you kill this baby" and was too traumatized to seek medication elsewhere; patient became pregnant and terminated her pregnancy); Margarita Raycheva, *Refill Refusal Kindles Protest*, The Saratogian, Aug. 17, 2006, *available at* http://www.saratogian.com/articles/2006/08/17/todays_stories/17065169.txt (pharmacist opined that women seeking emergency contraception are "being irresponsible"); Chrisanne Beckner, *Birth Control Battle*, Sacramento News & Review, Aug. 10, 2006, *available at* http://www.newsreview.com/sacramento/content?oid=113250 (pharmacist told patient "If you and your boyfriend were not so irresponsible, you would not have to be dealing with this.") (internal quotations omitted); *Woman Says Pharmacist Denied Her Birth-Control Prescription*, Kerrville Daily Times, Mar. 31, 2003, at 14A (pharmacist told patient birth control is "not right" and "the pills cause cancer").

And, for women seeking emergency contraception, any delay is potentially a denial, as the effectiveness of the medication decreases sharply with the passage of time. Rebecca H. Allen & Alisa B. Goldberg, *Emergency Contraception: A Clinical Review*, 50 Clinical Obstetrics & Gynecology 927, 930 (2007).[4] In many instances, women have reported that while they were able to obtain emergency contraception following an initial refusal, they only succeeded in doing so after "the optimal time frame for taking the medication had passed." *See, e.g.*, Rob Stein, *Pharmacists' Rights at Front of New Debate*, Wash. Post, Mar. 28, 2005, at A01.

Timely access to pharmacy-controlled medication is a particular challenge in rural areas where the number of pharmacies is limited. *See* LaVonne A. Straub & Debbie Hedger, *Consumer Satisfaction With Rural Pharmacy Services*, (10)1 Rural Research Report 1 (Institute for Rural Affairs Fall 1998), *available at* http://www.iira.org/pubs/publications/IIRA_RRR_48.pdf (discussing pharmacy access in Illinois rural communities). In addition, even in communities with multiple pharmacy options, there can be so many objecting pharmacists that a woman may have to make repeated attempts before finding one who will dispense her medication. For example, a pharmacist in Glen Carbon, Illinois reported that more than half of the pharmacists in her community would not dispense emergency contraception. *See, e.g.*, Joan Villa, *Right of Refusal*, Ill. Times, June 16, 2005 (quoting Glen Carbon, Illinois pharmacist Peggy Pace explaining that "In my immediate geographic area I know of six pharmacies . . . and, in mine, 50 percent, or

[4] Emergency contraception is most effective when taken immediately after unprotected sexual intercourse, becoming progressively less effective until it reaches the point at which it can no longer prevent pregnancy, generally 72 hours later. *See Plan B One-Step Prescribing Information* (R. C00969-974); *Plan B Labeling Information, available at* http://ec.princeton.edu/pills/PlanBLabeling.pdf; *Next Choice Prescribing Information, available at* http://mynextchoice.com/index_prescribers.asp.

two out of four [pharmacists], don't dispense; in another there are two pharmacists and both dispense; and in another there are three out of four staff who will not dispense; in the next, four out of four will not dispense; and in the furthest, two out of four will not dispense . . . .").[5] And, a patient whose pharmacist refuses to transfer prescription information, as in the Wisconsin case above, or refuses to release a prescription to a patient, is denied access altogether. *See* Beckner, *supra* (describing incident in which a pharmacist refused to dispense emergency contraception and also refused the patient access to the emergency contraception prescription her physician had called in to the pharmacy).

Absent a requirement that licensed commercial pharmacies maintain procedures to ensure access in the face of individual pharmacist refusals, patients are at the mercy of the pharmacist on duty when they attempt to obtain their medication. If forced to travel to multiple pharmacies before finding a pharmacist willing to dispense their medication, women face an increased risk of unintended pregnancy that could otherwise have been avoided.

Barriers to Accessing Contraception in Pharmacies Interfere With Essential Health Care for Women and With Their Ability to Participate Fully and Equally in Society.

Throughout history, women and their children have suffered from the health consequences of pregnancies that were too early, too frequent, and too closely spaced. Access to safe and effective contraception – including emergency contraception – thus has become a critical component of basic preventative health care for women. Adam

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[5] In one stark example, a rape victim in Lubbock, Texas was forced to travel to four different pharmacies – including one in which none of the three pharmacists on duty was willing to assist her – before succeeding in filling the prescription for emergency contraception she had received from a hospital physician. *Pharmacist Refuses Contraceptive Pill to Victim of Rape*, Lubbock Avalanche-Journal, Feb. 22, 2004.

Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing*, 14 Guttmacher Policy Review 7 (Winter 2011).

Without contraception, the average woman could expect to become pregnant twelve to fifteen times during the approximately three fertile decades of her life. William D. Mosher et al., *Use of Contraception and Use of Family Planning Services in the United States: 1982-2002*, 350 Advance Data from Vital & Health Statistics (Nat'l Ctr. for Health Statistics), Dec. 10, 2004, at 3, *available at* http://www.cdc.gov/nchs/data/ad/ad350.pdf; Rowena Bonoan & Julianna S. Gonen, *Promoting Healthy Pregnancies: Counseling and Contraception as the First Step*, 3 Family Health in Brief (Wash. Bus. Grp. on Health), Aug. 2000, at 1. Perhaps, understandably then, virtually all (more than 99 percent) of American women aged 15-44 who have ever had sexual intercourse have used at least one method of contraception. William D. Mosher & Jo Jones, *Use of Contraception in the United States: 1982-2008*, 23(29) Vital & Health Statistics (Nat'l Ctr. for Health Statistics), Aug. 2010, at 5, *available at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_029.pdf.

The inability to control reproduction can result in permanent physical health problems for women. *See* Guttmacher Institute, *Women and Societies Benefit When Childbearing Is Planned*, 3 Issues in Brief 2002, at 3. For all women, pregnancy carries health risks. Out of every 100,000 births in the United States, 12.7 women die as a result of pregnancy-related complications. U.S. Census Bureau, The 2012 Statistical Abstract of the United States, tbl. 115 (131st ed. 2012), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0115.pdf. And, for women with chronic illnesses such as pulmonary hypertension and certain heart diseases, there is an

even greater risk of serious complications. Institutes of Medicine, *Clinical Preventative Services for Women: Closing the Gaps* 103-04 (Nat'l Academies Press 2011); *see* James Trussell et al., *The Economic Value of Contraception: A Comparison of 15 Methods*, 85 Am. J. Pub. Health 494, 494 (1995) ("For women who should not become pregnant because of medical problems, contraception [can] save[] lives and prevent[] morbidity.").

Unintended pregnancies can also have significant consequences for newborn children. Women who plan for pregnancy are more likely to initiate early prenatal care that can lead to positive birth outcomes. Jessica D. Gipson et al., *The Effects of Unintended Pregnancy on Infant, Child, and Parental Health: A Review of the Literature*, 39 Studies in Family Planning 18, 22-23 (2008). By contrast, infants born as a result of unintended or mistimed pregnancies are more likely to be premature or low-birth-weight compared to infants whose birth was intended. Institutes of Medicine, *supra*, at 103; *see also* Agustin Conde-Agudelo et al., *Birthspacing and Risk of Adverse Perinatal Outcomes: A Meta-Analysis*, 295 J. Am. Med. Ass'n 1809-21 (2006) (finding correlation between short pregnancy intervals and birth outcomes).

In addition to these physical health benefits, controlling fertility through contraceptive use empowers women to take advantage of educational and employment opportunities that have long term health, economic, and social benefits for them, their families, and their communities. As the Supreme Court recognized in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 856 (1992), "[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." *See also* U.S. Dep't of Health and Human Servs., *Healthy People 2020: Leading Health Indicators –*

Reproductive and Sexual Health, available at http://www.healthypeople.gov/2020/LHI/reproductiveHealth.aspx ("Improving reproductive and sexual health is crucial to eliminating health disparities, reducing rates of infectious diseases and infertility, and increasing educational attainment, career opportunities, and financial stability."). Recognizing these benefits, the 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).

Because contraceptive methods vary in effectiveness, and because not all kinds of birth control will be appropriate for all women, maximizing access to many forms of contraception, including a full range of prescription contraceptives, leads to optimal contraceptive use. Lisa Koonin, *Overview: Contraception in the Healthy Pregnancy Continuum*, *in* Promoting Healthy Pregnancies: Counseling and Contraception as the First Step 3 (Wash. Bus. Group on Health 2000); *see also* Jill L. Schwartz & Henry L. Gabelnik, *Current Contraceptive Research*, 34 Persp. on Sexual & Reprod. Health 310, 310 (2002) ("Successful prevention of unplanned pregnancies relies not only on access to available marketed products, but also on the products' acceptability and couples' willingness and ability to use them effectively.").

Many of the most common and effective forms of contraception can be obtained only through a licensed prescriber or pharmacist. One such medication, the hormonal birth control pill, is the leading method of contraception for women under 30. Mosher & Jones, *supra*, at 7. Contraceptive pills are generally dispensed in 28 day packets, with

each pill a required daily dose. Hatcher et al., *supra*, at 200-01. As a result, women who use birth control pills typically must return to their pharmacies each month or several times a year to obtain a refill of their medication, which must be taken at a particular time in order to avoid an increase in the risk of pregnancy. *Id.* at 210; *see also* Diana Greene Foster et al., *Number of Oral Contraceptive Pill Packages Dispensed, Method Continuation, and Costs*, 108 Obstetrics & Gynecology 1107, 1107 (2006) (noting the vast majority of women required a monthly refill of their oral contraceptive pills).[6] A woman's ability to limit her risk of becoming pregnant is thus dependent on her ability to obtain her medication at the pharmacy that holds her prescription in a timely fashion or, in the case of intermittent unavailability, having the prescription information timely transferred to another accessible pharmacy.

In addition, increasing numbers of women have turned to emergency contraception to help prevent pregnancy after unprotected sexual intercourse or a failure of another chosen method of birth control. Mosher & Jones, *supra*, at 1-2.[7] Emergency contraception is a higher dose of regular hormonal birth control pills that, like other hormonal contraceptives, can prevent pregnancy by delaying or inhibiting ovulation, inhibiting fertilization, or inhibiting implantation of a fertilized egg. James Trussell et al., *The Role of Emergency Contraception*, 190 Am. J. Obstetrics & Gynecology S30, S32

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[6] *See also* Hatcher et al., *supra*, at 188 (discussing increase in risk of pregnancy resulting from a delay of just hours in taking progestin-only birth control pill).

[7] Emergency contraception has the potential to reduce significantly the incidence of unintended pregnancies, which account for half of all pregnancies in the United States. Mosher & Jones, *supra*, at 1-2; *see also* Lawrence B. Finger & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006* (Aug. 2011), *available at* http://www.guttmacher.org/pubs/journals/j.contraception.2011.07.13.pdf (noting 43 percent of unintended pregnancies end in abortion).

(2004). And, like regular birth control pills, emergency contraception must be obtained through a licensed prescriber or pharmacy.

In 2006, the U.S. Food and Drug Administration ("FDA") approved a specific brand of emergency contraception for "behind-the-counter" status, permitting adult women to purchase the medication from a licensed pharmacy without a prescription. Rebekah E. Gee et al., *Behind-the-Counter Status and Availability of Emergency Contraception*, 199 Am. J. Obstetrics & Gynecology 478.e1 (Nov. 2008). Currently, three of the four FDA-approved pharmaceutical products sold for use as emergency contraception are available "behind-the-counter" without a prescription. Guttmacher Institute, *State Policies in Brief: Emergency Contraception*, Sept. 1, 2011, http://www.guttmacher.org/statecenter/spibs/spib_EC.pdf. The fourth is available only with a prescription. *Id.* The three "behind-the-counter" forms of emergency contraception are most effective when taken immediately after intercourse and become progressively less effective over the next 72 hours, after which they can no longer prevent pregnancy.[8] The prescription-only option must be taken "as soon as possible within 120 hours (5 days) after unprotected intercourse or a known or suspected contraceptive failure."[9]

As a result of the FDA's action to improve access to emergency contraception, in tandem with a growing awareness of the availability and efficacy of this form of pregnancy prevention, an increasing number of American women have sought emergency contraception at their local pharmacies in an effort to avoid unintended pregnancy.

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[8] *See Plan B One-Step Prescribing Information* (R. C00969-974); *Plan B Labeling Information, available at*, http://ec.princeton.edu/pills/PlanBLabeling.pdf; *Next Choice Prescribing Information, available at*, http://mynextchoice.com/index_prescribers.asp.

[9] *See ella Prescribing Information* (R. C00975-985).

Mosher & Jones, *supra*, at 15 (percentage of women who used emergency contraception increased from 4% in 2004 to 10% in 2006-2008). At the same time, however, numerous incidents of health care refusals at pharmacies in Illinois and elsewhere have denied women timely access to such medication.

Illinois Pharmacy Access Rules.

In 2005, after concluding that pharmacies in the state were not implementing procedures to assure prompt access to medication when a pharmacist on staff objected to dispensing it, the Department issued an emergency rule imposing obligations on commercial pharmacies designed to reconcile the rights of those individual pharmacists who object to dispensing certain kinds of medication with those of pharmacy customers seeking timely professional access to the medications prescribed by their health care providers. *See* 29 Ill. Reg. 5586 (Apr. 15, 2005) ("Recent instances of a pharmacy's refusal to dispense legally prescribed contraceptives has resulted in delay and/or prevention of women from meeting their most basic health needs, including pregnancy prevention and treatment of various medical conditions."). A permanent regulation was adopted in August of 2005, 68 Ill. Admin. Code 1330.91(j) (2005) (effective Aug. 25, 2005), was subsequently amended in April of 2008, 68 Ill. Admin. Code 1330.91(j) (2008) (amended by 32 Ill. Reg. 7116) (effective Apr. 16, 2008), and was replaced in April of 2010, by the current Rule. 68 Ill. Admin. Code 1330.500(e)-(h) (amended by 34 Ill. Reg. 6690) (effective Apr. 29, 2010).

The current Rule imposes a duty on commercial pharmacies that serve the general public "to deliver lawfully prescribed drugs to patients and to distribute nonprescription drugs approved by the [FDA] for restricted distribution by pharmacies" in a timely

fashion. 68 Ill. Admin Code 1330.500(e). In certain circumstances, where, for example, medication is unavailable, the pharmacy is not required to dispense, but it must nonetheless assist the patient by facilitating alternative access. Such assistance includes, for example, obtaining the drug for the patient, or, at the patient's request, returning the unfilled prescription or "communicat[ing] or transmit[ting] . . . the original prescription information to a pharmacy of the patient's choice that will fill the prescription in a timely manner." *Id.* § 1330.500(g).[10]

The circuit court invalidated the Rule on its face and as applied to the plaintiffs, (R. C01111-17) and, in doing so, deprived the pharmacy customers of Illinois of essential regulatory protections designed to ensure timely access to lawful medication at Illinois retail pharmacies.

ARGUMENT

The circuit court erred in striking the rule under IRFRA, HCRCA, and the First Amendment, both as applied to plaintiffs and on its face. As an initial matter, the plaintiff for-profit, non-religious pharmacies here do not even meet the threshold inquiry under their claims. They do not hold religious beliefs and thus cannot document a religious or conscience basis for their refusals under HCRCA, or demonstrate a substantial burden on religious exercise under IRFRA or the free exercise clause of the First Amendment. Nor can they assert the religious beliefs of their corporate owners to support their refusals.

[10] A pharmacy is not required to dispense medication where it cannot do so safely because it does not have the equipment or expertise to properly "produce, store or dispense" the medication, *id.* § 1330.500(e)(3), the prescription is "[p]otentially fraudulent," *id.* § 1330.500(e)(4), or the patient cannot pay for the medication. *Id.* § 1330.500(f).

This alone defeats their claims. And, as the Rule imposes obligations only on the pharmacies, the individual plaintiffs have no basis to challenge its requirements.

In any event, however, even if the individual owners' religious beliefs could form the basis of plaintiffs' claims, plaintiffs cannot prevail given the countervailing weight of the constitutional rights of third parties to access contraception and the regulatory importance of the state's effort to advance each of the interests affected when state-licensed pharmacies refuse to provide prescription and other pharmacy-controlled medication. The circuit court erred in failing to undertake the exacting assessment of rights and interests that is demanded under each of the claims raised here.[11] When properly evaluated, the challenged Rule passes scrutiny as an essential regulatory mechanism to safeguard access to constitutionally protected medication at the licensed commercial pharmacies of the state. The Rule serves compelling government interests in protecting access to lawful medication, including contraception, promoting public health, and preventing gender discrimination. And, it is the least restrictive means of doing so in the face of refusals at the pharmacy counter.

I. PLAINTIFFS FAIL THE THRESHOLD INQUIRY FOR EACH OF THEIR CLAIMS.

The for-profit pharmacy corporations here have no conscience-based or religious mission or purpose and thus cannot demonstrate the right to refuse under HCRCA or a substantial burden on religious exercise for purposes of IRFRA or the First Amendment. Nor is there any legal support for the circuit court's decision to ascribe the religious

[11] Strict scrutiny is the applicable standard for plaintiffs' IRFRA and HCRCA claims. 775 ILCS 35/10(b)(1); *see infra*, at section III. The circuit court erred in concluding that the Rule is not a neutral law of general application for purposes of plaintiffs' First Amendment claim. However, *amicus* will not address that issue, for regardless, as discussed, the Rule passes strict scrutiny analysis.

beliefs of the pharmacy owners to the corporations. The corporations are not "one and the same" with their owners and thus cannot justify their actions based on their owners' religious objections. (R. C01112.)

A. The For-Profit, Non-Religious Pharmacy Corporations Here Cannot Assert a Religious or Conscience Basis for Refusing to Stock, Dispense or Assist Patients in Obtaining Lawful Medication.

HCRCA establishes certain protections for persons and entities who refuse to participate in the delivery of health care services or medical care by reason of their "conscience or conscientious convictions." 745 ILCS 70/2. HCRCA defines "conscience" as "a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths." *Id.* § 3(e). Under HCRCA, a "facility" can only refuse to provide care if it can demonstrate that doing so "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." *Id.* § 10.

The pharmacies here did not introduce any documentary or other evidence of a conscience-based or religious corporate purpose or mission underlying their refusal to provide pharmacy services. Each corporate pharmacy has a policy that prohibits its employees from participating in the sale of emergency contraception. (R. C00966-68 (policy for corporations controlled by Vander Bleek); R. C00987 (policy for corporation controlled by Kosirog).). However, these policies do not "document[]" the pharmacies' "conscience" as defined by HCRCA, or, even mention a corporate religious or conscience belief. They simply state that it is the pharmacy's policy not to stock, dispense or

otherwise participate in the sale of emergency contraception. *Id.*; *see also* Tr. at 36 (Vander Bleek conceding that corporate policy statement does not "speak about the conscientious objection of the pharmacy or the corporation that owns the pharmacy."). As a result, the pharmacy plaintiffs do not meet the requirements for an entity to assert conscience-based refusals under HCRCA. *See* 745 ILCS 70/10.

Nor can the for-profit pharmacies here, absent any showing of a religious purpose or mission, demonstrate free exercise rights. This is hardly surprising, since profit seeking is rarely aligned with a religious purpose. The U.S. Supreme Court has never held that a for-profit corporation possesses free exercise rights. Nor has any Illinois court, under HCRCA, IRFRA or elsewhere, conferred on a for-profit corporation the rights of a person who holds religious beliefs. In the 13 years since Illinois enacted IRFRA, the circuit court here is the only court to have concluded that a for-profit corporation could demonstrate a substantial burden under IRFRA.

Even where courts are evaluating requests by religious organizations seeking exemption from generally applicable statutes, profit status serves as an objective factor in assessing whether relevant activity is religious or secular and thus whether the exemption should be permitted. *See, e.g.*, *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, Inc. v. Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring) (determining that non-profit status "makes plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose"); *State v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 (Minn. 1985) (holding that the Minnesota Human Rights Act's exemption for religious entities did not apply to the Club because it "is not a

religious corporation – it is a Minnesota business corporation engaged in business for profit. By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs."); *see also Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985) (denying religious exemption from Fair Labor Standards Act because non-profit religious foundation derived income from commercial businesses). The for-profit pharmacies here do not have even a plausible claim that their activities are imbued with a religious purpose to allow them to qualify for HCRCA, IRFRA or free exercise protection.

B. The For-Profit, Non-Religious Pharmacy Corporations Here Cannot Rely on the Religious Beliefs of Their Owners.

Nor is there any legal basis for ascribing the religious beliefs of the owners to the corporations, as the circuit court did here. "It is a well-established principle that a corporation is separate and distinct as a legal entity from its shareholders, directors and officers. This is true even in a closely-held corporation in which the stock is held in a few hands." *Thompson v. Ill. State Bd. of Elections*, 408 Ill. App. 3d 410, 415 (1st Dist. 2011) (internal quotations and citation omitted). Therefore, the panoply of rights held by the corporation is not identical to that of its owners, even when that corporation is owned and managed by a single shareholder. *See Rohe v. CNA Ins. Co.*, 312 Ill. App. 3d 123, 127 (1st Dist. 2000) (because corporation is separate legal entity from shareholders, insurance policy that identified "insured" as corporation did not provide coverage to owner and owner's family member); *Michel v. Gard*, 181 Ill. App. 3d 630, 638-40 (3d Dist. 1989) (rejecting argument that attorney representing closely-held corporation necessarily also

represented all principals). The pharmacy owners and their closely held corporations simply are not one and the same.[12]

The U.S. Supreme Court's associational standing decisions are instructive here. The Court has set clear limits on the ability of an association to assert the constitutional rights of its individual members, including demonstrating that "the interests it seeks to protect are germane to the organization's purpose." *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *see Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272, 1279 (5th Cir. 1981) (applying *Hunt* test in concluding that church could bring free exercise claim on behalf of its members); *Blanding v. Sports & Health Club, Inc.*, 373 N.W.2d 784, 790 (Minn. Ct. App. 1985) (applying *Hunt* test in concluding that for-profit corporation could not assert free exercise rights of its owners). As the *Blanding* court explained, "[w]hile the relationship of the principals to a corporation is clearly different from the relationship of members to an association, the test is helpful, for if a corporation could assert the free exercise of its principals, it would have to meet standards at least as

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[12] As plaintiffs chose to benefit from the corporate structure in setting up their pharmacy businesses, (*see* Tr. at 36 (testimony of Vander Bleek)), they are also bound by its limitations. Had they instead, for example, operated as sole proprietorships, they would have a stronger argument for asserting their personal religious beliefs on behalf of their businesses. *See Gregersen v. Blume*, 743 P.2d 88 (Idaho Ct. App. 1987) (individual proprietor asserts religious beliefs in effort to support objection to seeking barber's license to run his business); *Sports & Health Club*, 370 N.W. 2d at 850-51 (where corporate veil pierced, corporation permitted to assert First Amendment rights of principles). However, even if plaintiffs were asserting religious beliefs as sole proprietors, they could not prevail given the state's compelling interest in promoting public health and regulating to safeguard access to constitutionally protected contraceptive medication. *See infra,* at section II; *see also United States v. Lee*, 455 U.S. 252, 257 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."); *Gregersen*, 743 P.2d at 92 (barber with religious objection to state licensure requirement could not prevail on free exercise claim because the licensure requirements were essential to the overriding state interest in protecting health and safety).

rigorous as those set forth in *Hunt*." 373 N.W.2d at 790. Here, the corporate plaintiffs cannot rely on the religious beliefs of their owners because they have introduced no evidence that such beliefs are germane to the purposes of the corporations, which is to make money by operating pharmacies. *See id.* ("The evangelical religious commitment of its principals is not germane to the Club's purpose, profitseeking.").

Contrary to the weight of authority, the Ninth Circuit Court of Appeals permitted for-profit corporations to assert the religious beliefs of their owners in *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988), and *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009); however, that court's analysis is flawed, and, in any event, would not apply here. The *Townley* court purported to follow the Supreme Court's decision in *Alamo Foundation*, *see Townley*, 859 F.2d at 620 n.15 (citing *Alamo Found.*, 471 U.S. 290), which held that a non-profit, religious foundation could assert the free exercise rights of individuals who were "members of the religious organization." 471 U.S. at 303 n.26. However, the *Townley* court failed to recognize the critical distinction between the "primarily secular," for-profit corporation before it and the non-profit, religious organization in *Alamo Foundation*, which had as a primary purpose, "as stated in it Articles of Incorporation," "to 'establish, conduct and maintain an Evangelistic Church. . . .'" *Id.* at 292. *Alamo Foundation* simply does not support permitting for-profit, non-religious corporations to assert the religious beliefs of their owners. *See also Stormans*, 859 F.3d at 1120 (following the holding in *Townley* without analysis).[13]

[13] The *Townley* court was swayed by the fact that the for-profit corporation "reflect[ed] its founders' covenant . . . by enclos[ing] a Gospel tract in every piece of outgoing mail; [printing] Biblical verses on all company invoices, purchase orders, and other commercial documents; [giving] financial support to various churches and missionaries; and [holding] a devotional service once a week during work hours." 859 F.2d at 612.

As the plaintiff corporations cannot assert free exercise or comparable rights, each of their claims fails. However, even assuming their owners' religious beliefs could form the basis of an IRFRA, HCRCA, or First Amendment claim, the Rule survives applicable scrutiny and must be upheld.

II. THE CIRCUIT COURT ERRED IN INVALIDATING THE RULE UNDER IRFRA.

The General Assembly enacted IRFRA to impose strict scrutiny on government regulation that burdens free exercise of religion. 775 ILCS 35/10(b). In so doing, it recognized that government action affecting religious belief often involves competing rights and thus requires an exacting analysis to properly account for each of the interests affected:

> 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). Here, the exercise of religious beliefs by licensed professionals interferes with the interests of third parties who depend on such state-licensed professionals to preserve their own constitutionally based interests. The Rule properly reconciles the affected interests in a manner necessary to advance the state's compelling interest in public health and protecting the rights of patients to access contraception at the licensed pharmacies in

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Assuming that the Ninth Circuit believed that Townley could define its purpose broadly enough to encompass both profit making and furthering the Christian beliefs of its principles, its circumstances are plainly distinguishable from those of the plaintiff pharmacies here (and in *Stormans*) that presented no evidence of a religious corporate purpose.

the state. In addition, by fostering access to critical medication for women, the state furthers its compelling interest in promoting gender equality and preventing gender discrimination. The Rule sets up a carefully crafted, statewide, protective mechanism that is necessary to advance these interests effectively, in a manner that is the least intrusive on religious exercise. The Rule thus passes strict scrutiny.

A. The Rule Advances Compelling Government Interests in Promoting and Protecting Public Health, Facilitating Access to Contraception and Preventing Gender Discrimination.

Contraception, including emergency contraception, is constitutionally protected reproductive health care. *See Carey v. Population Servs. Int'l*, 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 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965). In promoting access to reproductive health care, the state advances a compelling public interest. *American Life League, Inc. v. Reno*, 47 F.3d 642, 655-56 (4th Cir. 1995) (holding government has a compelling interest in protecting access to reproductive healthcare that outweighs a burden on federal RFRA rights); *United States v. Brock*, 863 F. Supp. 851, 860-61 (E.D. Wis. 1994) (same).

In addition, the state advances compelling interests in promoting and protecting public health and in regulating the health care professions. *See Lasdon v. Hallihan*, 377 Ill. 187, 193 (1941) (State has broad authority to license and regulate the health care professions because "services customarily rendered by those engaged in such professions are so closely related to the public health, welfare and general good of the people, that regulation is deemed necessary to protect such interests."); *People v. Adams*, 149 Ill.2d

331, 343 (1992) ("States enjoy broad discretion in devising means to protect and promote public health."); *Methodist Med. Ctr. v. Ingram*, 82 Ill.2d 511, 523 (1980) ("The States have wide regulatory power with respect to the practice of health care professions."). As the U.S. Supreme Court made clear in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), "activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare. . . ." *Id.* at 220 (applying strict scrutiny analysis to free exercise claim).

Finally, by securing access to medication used exclusively by women to prevent pregnancy, the state took significant steps to further its compelling interest in promoting gender equality and eliminating gender discrimination. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (eliminating gender discrimination is a compelling government interest); *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 coverage for prescription contraceptives from an otherwise comprehensive prescription drug health benefit plan, "serves the compelling state interest of eliminating gender discrimination"). Access to safe and effective contraception gives women control of their fertility, thus improving their physical wellbeing 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. *Casey*, 505 U.S. at 856 (recognizing that women's control over reproductive decision making furthers gender equality in economic and social spheres).

1. State Regulatory Systems That Advance Compelling Interests Can Overcome Burdens on Free Exercise.

By requiring pharmacies to dispense lawful medication or, where the medication is unavailable, to otherwise facilitate access, the state created a system that allows patients to obtain time-sensitive, pharmacy-restricted medication, and assures them the assistance of the licensed pharmacies of the state in obtaining it. It is essential to the effective functioning of this system that every pharmacy participates, as full participation is the only way to eliminate the dangerous delay that results when patients are forced to travel from pharmacy to pharmacy, hoping to find one willing to provide emergency contraception.

Where, as here, states advance compelling interests through regulatory systems that command compliance by religious objectors to prevent harm to the third parties those systems were created to protect, courts have rejected free exercise challenges. *See United States v. Lee*, 455 U.S. 252, 258-59 (1982) (holding that where granting exemption from otherwise comprehensive regulatory system would make system "difficult, if not impossible, to administer," the government has an interest in ensuring mandatory compliance) *id.* at 261 (further recognizing that "granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees"); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) (holding that the government has a "'broad public interest in maintaining a sound tax system' free of 'myriad exceptions flowing from a wide variety of religious beliefs") (quoting *Lee*, 455 U.S. at 260); *Catholic Charities*, 85 P.3d at 93 ("[A]ny exemption from the [contraception coverage mandate] sacrifices the affected women's interest in receiving equitable treatment with respect to health benefits."); *South Ridge Baptist Church v.*

Indus. Comm'n of Ohio, 911 F.2d 1203, 1207-08 (6th Cir. 1990) (determining that mandatory participation by employers essential to solvency of its workers' compensation fund, which was a state interest of "high order" because it is based on "the state's fundamental police power to safeguard the welfare of its citizens"). This, of course, is particularly so where, as here, those third party interests are constitutionally based.

The individual plaintiffs here have chosen to take ownership interests in corporations that are regulated by the state for the protection of the public. They cannot assert their religious objections to undermine the regulatory system designed to ensure that pharmacies serve the needs of patients, nor can they, as they have done here, leverage their own asserted interest to upend the entire set of protections. *See Lee*, 455 U.S. at 261.

2. Contrary to the Circuit Court's Conclusion, the Rule Does Not Authorize Exceptions That Undermine the Compelling Interests Here.

The circuit court was unconvinced by the state's assertion of a compelling interest in providing access to essential medication because it believed that the Rule excused pharmacies from complying for a variety of reasons other than religious objection. (R. C01114; R. C01116.) The "exceptions" cited, however, are either not exceptions at all, do not apply to emergency contraception, or are otherwise irrelevant. For example, a pharmacy is not required to dispense medication if the pharmacist has clinical concerns about the prescribed drug, 68 Ill. Admin. Code 1330.500(e)(1), the medication sought is unavailable, *id.* § 1330.500(e)(2), *id.* § 1330.500(e)(5), and *id.* § 1330.500(g), or the medication is not carried in similar practice settings. *Id.* § 1330.500(e)(6). However, the pharmacy nonetheless must facilitate patient access to the drug by providing "a timely alternative for appropriate therapy," which may include ordering the drug, contacting the

prescriber to discuss drug interaction concerns, returning the prescription, referring the patient to another pharmacy, or transferring the prescription "to a pharmacy of the patient's choice that will fill the prescription in a timely manner." *Id.* § 1330.500(g). The plaintiff pharmacies refuse to permit their employees to assist patients in these ways. These are not "exceptions," nor do they give benefits unavailable to religious objectors.

The circuit court also erred in concluding that because a pharmacy is not required to dispense medication if the patient cannot pay for it, the state lacks a compelling interest. (R. C01114, citing 68 Ill. Admin. Code 1330.500(f).) The government is not required to eliminate financial barriers to purchasing contraception in order to assert a compelling interest that justifies regulation designed to otherwise promote access. *Compare Harris v. McRae*, 448 U.S. 297, 302-03 (1980) (discussing federal law prohibiting the use of federal funds to pay for abortion care, except in limited circumstances), *with American Life League, Inc.*, 47 F.3d at 655-56 (holding federal government has compelling interest in protecting access to abortion clinics, in upholding Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, against federal RFRA challenges); *Council for Life Coal. v. Reno*, 856 F. Supp. 1422, 1430 (S.D. Cal. 1994) (same). That the government has not eliminated all barriers – including those created by a particular patient's financial constraints – does not undercut its compelling interest in otherwise facilitating access.

Similarly, the state cannot be faulted for allowing pharmacies to refuse to fill "potentially fraudulent prescriptions." (R. C01114, citing 68 Ill. Admin. Code 1330.500(e)(4).) The state does not have to require pharmacies to fill fraudulent prescriptions in order to justify a mandate that they fill valid prescriptions for medication

to which there could be religious objections.[14] Ensuring that prescription medications are distributed only to patients holding legal prescriptions furthers the state's interest in protecting public health. *See Adams*, 149 Ill.2d at 343. Nothing about IRFRA changes this.[15]

Finally, the court improperly relied on the provision of the Pharmacy Practice Act permitting a pharmacy to apply for a variance. 225 ILCS 85/11(a); 68 Ill. Admin. Code 1330.70. Under that provision, the Director must determine whether a third party "will be injured by the granting of the variance." 68 Ill. Admin. Code 1330.70(a)(2). As a result, the statutory availability of a variance does not undermine the state's compelling interest in promoting access to contraception because no variance would be granted when it would interfere with third party access to constitutionally protected emergency contraception.

None of the exceptions the circuit court considered actually takes away from the state's interest here in exercising its regulatory authority to foster access to

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[14] The court's focus on the exception for pharmacies lacking "specialized equipment or expertise needed" to safely dispense the drug, (*see* R. C01114, citing 68 Ill. Admin. Code 1330.500(e)(3)), is irrelevant to the provision of emergency contraception, which comes prepackaged from the manufacturer, and requires no compounding or specialized "storage for nuclear medicine." *See Stocking Plan-B One-Step, available at* http://www.planbonestep.com/plan-b-pharmacists/plan-b-otc.aspx; *Ella Full Prescribing Information, How Supplied/Storage and Handling, available at* http://pi.watson.com/data_stream.asp?product_group=1699&p=pi&language=E.

[15] Nor does the fact that the Rule applies pharmacies instead of doctors, nurses or hospitals, (*see* R. C01116), undermine the state's interests in regulating here. First, the Rule appropriately applies to community pharmacies, the institutions in the state that "offer pharmacy service to[] the general public." 68 Ill. Admin. Code 1330.500(a). Moreover, contrary to plaintiffs' and the circuit court's understanding, under a separate law, non-religious hospitals in Illinois are required to provide emergency contraception, 410 ILCS 70/2.2; 77 Ill. Admin. Code 545.95; *id.* § 545.App'x C, and even religious hospitals must provide information about such medication, *id.* – something plaintiffs refuse to permit at their pharmacies.

constitutionally protected contraceptive drugs for the protection of Illinois citizens. Because the Rule's requirements for facilitating patient access to such medication further compelling interests, the Rule satisfies that prong of IRFRA.

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

The regulatory mechanism here, which carefully allocates protections for the interfacing rights at issue, is the least restrictive means of advancing the state's compelling interests. By placing the responsibility for facilitating patient access on pharmacies, the Rule protects objecting pharmacists to the greatest degree possible while ensuring that the third party pharmacy customers who depend on the state's licensed pharmacies to access constitutionally protected medication are not harmed.[16] To the extent that individual pharmacists like the plaintiffs here claim a burden on their personal religious practice because they choose to hold ownership interests in for-profit corporate pharmacies that are obligated to facilitate patient access under the Rule, their burden is of their own making. *See Lee*, 455 U.S. at 260-61 (determining that in granting a statutory exemption from the social security system to self-employed individuals but not employers, "Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it is a violation of their faith to participate in the social security system," and rejecting employer's free exercise claim under a strict scrutiny analysis).

[16] As a point of law, while the Rule does not obligate individual pharmacists to participate in the sale of emergency contraception, *amicus* submits that, given the state's compelling interests and the weight of the constitutional rights of the third party pharmacy patients, even a regulation that imposed such a requirement would survive strict scrutiny.

The state has created a regulatory system that requires compliance by every retail pharmacy in order to achieve its compelling interests. *See supra*, at section II.A. As a result, to the extent that there is some burden on the religious exercise of plaintiff pharmacy owners, it is the least intrusive means of assuring protections for third parties who are dependent on the licensed pharmacies of the state to safeguard their own constitutionally based interests. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261.

The circuit court concluded that the Rule does not meet the least restrictive means requirement, because, in its view, adequate alternatives exist and, in any event, the state could "provid[e] the drug directly, or us[e] its website, phone numbers, and signs to help customers find willing sellers." (R. C01116.) The court's evaluation of existing alternatives is contrary to the manifest weight of the evidence presented at trial and ignores the prospect of refusals at pharmacies other than plaintiffs'. For example, the circuit court found that the corporate plaintiffs were located within "reasonably close walking or driving distance to emergency contraception distributors." (R. C01114.) But, plaintiff Vander Bleek's own testimony undermines this finding. Vander Bleek testified that the closest community pharmacies to corporate plaintiff Morr-Fitz were approximately 14 miles away, (Tr. at 30, 32), and that, in any event, he did not know whether those pharmacies dispensed emergency contraception. (Tr. at 30.) The circuit court also relied on the fact that plaintiff Morr-Fitz was located near "a public hospital that dispenses emergency contraception." (R. C01114.) Again, however, Vander Bleek

testified that the hospital pharmacy is an "inpatient pharmacy," accessible only to patients of the hospital. (Tr. at 32, 56.) Finally, the court concluded that the internet provided an acceptable alternative. (R. C01114.) However, the court failed to consider the uncontested evidence that the efficacy of emergency contraception decreases sharply with the passage of time. *See supra*, at p. 7. A patient seeking to avoid pregnancy does not have the luxury of waiting for emergency contraception purchased over the internet to arrive.

The court's conclusion that the state could alleviate the harms of pharmacy refusals by, among other things, "providing the drug directly," is equally unfounded. (R. C01116.) The state does not have the physical distribution channels that would permit it to act as a community pharmacy, let alone to replace such pharmacies statewide. Nor can the state advance its interest in fostering timely access to emergency contraception through distributing information about "willing sellers." *Id.* Even if the state had a list of community pharmacies that stocked emergency contraception, it would have no way of knowing when any of those pharmacies was being staffed by a pharmacist with a religious objection to facilitating access to such medication. Thus, even with a list of "willing sellers," without the Rule in place assuring that every pharmacy has developed a protocol for facilitating patient access regardless of whether a particular pharmacist objects, patients remain at the mercy of the pharmacist on duty when they arrive to purchase their medication.

As the Rule burdens exercise of religion only as much as is necessary to achieve the state's compelling government interests, it survives scrutiny under IRFRA. Under any circumstances, however, the circuit court went too far in striking the Rule in its entirety

as to every commercial pharmacy in the state. There was not a shred of evidence that any pharmacy other than plaintiffs had asserted religious objections to the Rule. Thus, even if plaintiffs could prevail on their claim, which they cannot, there is simply no basis to remove the Rule's protections statewide. The circuit court erred in striking the Rule and should be reversed.

III. THE CIRCUIT COURT ERRED IN INVALIDATING THE RULE UNDER HCRCA.

As defendants' demonstrate, the Rule is in full accord with HCRCA. *See, e.g.*, Def. Br. at section V.A (HCRCA does not apply to pharmacists and pharmacies); *id.* at V.B (the need for emergency contraception constitutes an "emergency" under HCRCA provision requiring health care providers, regardless of religious objection, to provide care in emergency situations). Furthermore, as discussed above, the pharmacies here cannot demonstrate a religious or conscience basis for their refusal to comply with the Rule and thus cannot maintain a claim under HCRCA. *See* 745 ILCS 70/10; *supra*, at section I. In any event, however, for the same reasons that it does not violate IRFRA, the Rule survives scrutiny against a claim under HCRCA.

A. The Circuit Court Erred in Giving Plaintiffs' Asserted Right to Refuse Pharmacy Care Primacy over All Other Interests.

HCRCA was enacted in 1977 to, among other things, protect health care providers from discrimination based on religious beliefs. 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 unlawful "discrimination" arising out of government action that affects religious liberty. Since its enactment, HCRCA has been the subject of only a handful of lawsuits, none of which 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 interference with religious liberty under HCRCA should be analyzed – in any context, let alone one involving government regulation.[17] Plaintiffs here successfully seized on this void to assert an absolute, unqualified right to refuse to provide pharmacy care on religious grounds regardless of the impact on the constitutional rights of third parties and the government's interest in regulating to protect such rights.

The circuit court's discussion of HCRCA claim does not refer to strict or any other level of scrutiny or purport to engage in any sort of weighing of interfacing interests. The court simply stated that the HRCRA applies to pharmacies and pharmacists, that the plaintiff pharmacies are one and the same with their owners and that while the state may promote drug access, it cannot "coerc[e] unwilling providers." (R. C01115; *contrast* R. C01115-16 (in evaluating IRFRA claim, considering whether state used least restrictive means of furthering compelling interest), and R. C01117 (using same analysis in addressing First Amendment claim).) The court's construction of HCRCA to permit all health care refusals tied to religious beliefs without regard to the government's bona-fide interests in protecting third parties harmed by such refusals runs

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[17] *See Morr-Fitz v. Blagojevich*, 231 Ill.2d 474, 504 (2008) (declining to address merits of HCRCA claim); *Vandersand v. Wal-Mart Stores, Inc.*, 525 F. Supp. 2d 1052, 1056-57 (C.D. Ill. 2007) (discussion of HCRCA limited to whether pharmacists are protected under the act); *Nead v. Bd. of Trs. of E. Ill. 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 Cnty.*, No. 03-C-50226, 2004 WL 539994 at *3 (N.D. Ill. Mar. 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 (5th Dist. 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 (1st Dist. 1987) (HCRCA claim dismissed because it was premised on objecting nurse's professional ethical beliefs, not covered by the act).

afoul of competing fundamental rights and renders government ineffective to address important societal issues any time its action has an effect – however slight—on religious exercise. As governing principles of statutory interpretation dictate, IRFRA's strict scrutiny standard provides the appropriate framework for evaluating HCRCA claims involving government regulation that affects religious exercise.[18]

B. IRFRA Provides the Framework for Evaluating HCRCA Claims of Government Discrimination Based on Religion.

In interpreting HCRCA to determine the applicable standard of review for claims of "discrimination" based on religious belief, the court must turn to well-established principles of statutory construction. The goal is to ascertain the legislative intent. *Wade v. City of N. Chi. Police Pension Bd.*, 226 Ill.2d 485, 509 (2007) ("The cardinal rule of statutory construction . . . is to ascertain and give effect to the intent of the legislature."). 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," and must interpret the statute "to avoid, if possible, a construction that would raise doubts as to its validity." *Id.* at 510. An interpretation of HCRCA that instructs a court to permit all religious refusals regardless of the impact on other fundamental rights or the state's important regulatory authority would be "absurd[]" and "[u]njust[]," and would call into serious question the statute's validity. It is thus incumbent on the court to interpret the statute to avoid such a result. *Id.* ("When a literal interpretation of a statutory term would

[18] 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. 20003(j), and the Illinois Human Rights Act, 775 ILCS 5/2-101(F), would provide appropriate guidance. *See, e.g., Kenny v. Ambulatory Ctr. of Miami, Fla.*, 400 So.2d 1262 (Fla. Dist. Ct. App. 1981).

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 (1990). In addition, "[w]hen 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 (3rd Dist. 1994); *see United Citizens of Chi. & Ill. v. Coal. to Let the People Decide in 1989*, 125 Ill.2d 332, 338-39 (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 (4th Dist. 1996) (under the doctrine of *in pari materia*, "statutes that relate to the same matter or 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 (1985)). And, even if they are not "strictly *in pari materia*," courts will "consider similar and related enactments." *Wade*, 226 Ill.2d at 511-12.

IRFRA provides a recent and definitive view of the Illinois General Assembly's intentions regarding restrictions on government conduct that affects religious liberty. IRFRA was enacted two decades after HCRCA and clearly establishes the legislature's intention to apply a strict scrutiny standard of review to all claims of government interference with religious exercise. 775 ILCS 35/10(b)(1); *id.* § 15; *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) ("[I]RFRA simply restores a standard of review to be applied to all, and I emphasize all, state and local laws and ordinances."). This standard must be applied not only under IRFRA but also to claims regarding government conduct that affects religious practice under HCRCA.[19]

The Illinois Supreme Court has 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. Ill. Cent. Gulf R.R. Co.*, 74 Ill.2d 213, 223-24 (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 Chi. & Ill.*, 125 Ill.2d at 340-41 (provisions of Municipal Code used to fill gap in Election Code).[20]

This approach is also consistent with 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; *see also Moore v. Green*, 219 Ill.2d 470, 480 (2006) ("[W]e will presume that the legislature intended the more recent statutory provision to

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[19] Indeed, 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); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[20] 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).

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).

IRFRA 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 IRFRA is the later enacted, more specific statute, HCRCA must be construed to apply IRFRA's framework for evaluating identical claims raised. *Moore*, 219 Ill.2d at 480 ("Where 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 IRFRA strict scrutiny standard advances the General Assembly's purpose in enacting IRFRA while also furthering the two statutes' common goal of protecting religious liberty. IRFRA was enacted after HCRCA for the purpose of clarifying the review process for government interference with religious liberty – a process left undefined by HCRCA. As shown above, evaluated within the IRFRA strict scrutiny framework, the Rule is lawful as it is in furtherance of compelling governmental interests and is the least restrictive means of furthering such interests. As such, the Rule also passes scrutiny under HCRCA and must be upheld.

CONCLUSION

For the foregoing reasons, the circuit court erred in declaring that the Rule violates the Illinois Religious Freedom Restoration Act, the Health Care Right of Conscience Act, and the free exercise clause of the First Amendment to the United States Constitution, and in prohibiting defendants from enforcing it against all Illinois community pharmacies. The circuit court's order should be reversed.

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CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 341(c)

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statements 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 38 pages.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2011, I caused true and correct copies of the foregoing **Brief of *Amicus Curiae* The American Civil Liberties Union of Illinois** to be served by the following methods upon:

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