No. 4-05-1050

IN THE APPELLATE COURT OF ILLINOIS FOURTH JUDICIAL DISTRICT

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

PETITION FOR REHEARING OF PLAINTIFFS-APPELLANTS

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

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

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

Attorneys for Plaintiffs-Appellants

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

INTRODUCTION

For the reasons set forth below, this is the rare case in which rehearing is required to address discrete and important new issues raised by the Court's opinion, which were not the subject of the motion being appealed, or of the parties' briefs in this Court or the court below. Rehearing is also particularly appropriate in this case for basic reasons of judicial efficiency and economy.

The Illinois Supreme Court has held that when this Court affirms a dismissal on a basis that was not raised at the trial court, this Court must allow the plaintiffs leave to amend their complaint on remand if the defect can be corrected. *See, e.g., Geaslen v. Berkson, Gorov & Levin, Ltd.*, 155 Ill. 2d 223, 230 (1993); *see also CGE Ford Heights, L.L.C. v. Miller*, 306 Ill. App. 3d 431, 442 (1999). As this Court noted in its opinion, the key ripeness issue that was the basis of the Court's decision was not briefed by the parties on appeal. Slip Opinion ("Slip Op.") 9-10. Nor, in fact, had Defendants asserted ripeness as a separate ground in their motion to dismiss or briefed it below. C00085-97. In such a circumstance, the Plaintiffs should not be barred from returning to court to plead facts that would satisfy the specific ripeness analysis set forth in the opinion. *See, e.g., Geaslen*, 155 Ill. 2d at 230; *CGE Ford Heights*, 306 Ill. App. 3d at 442. Moreover, this Court specifically noted that its opinion was not intended to foreclose a pharmacist from "alleging facts sufficient to allow him or her to bring a preenforcement challenge to the validity of this Rule" at issue in this case. Slip Op. 18. For this reason, and to minimize the need for unnecessary further trial or appellate proceedings, this Court should modify its opinion to make clear that Plaintiffs may amend their complaint in the Circuit Court and that this Court is not affirming dismissal with prejudice.

As to the merits, Appellants respectfully submit that this Court should modify its opinion to correct three discrete errors. These specific errors also require the conclusion that this Court should reverse the Circuit Court's grant of Defendants' motion to dismiss. In the alternative, this Court should grant reargument to give the Court the benefit of briefing and argument on these key issues.

First, the slip opinion did not apply the appropriate standard for reviewing the grant of a motion to dismiss. When reviewing a decision on a motion to dismiss, the Appellate Court must accept as true all facts pleaded in the complaint; must make all reasonable factual inferences in the plaintiffs' favor; and may dismiss the complaint only if *no* set of facts can be proven to justify relief. *See, e.g., In re Estate of Schlenker*, 209 Ill. 2d 456, 461 (2004). Moreover, it is *the defendants*, rather than plaintiffs, who have the burden of proving the affirmative defense relied upon in a Section 2-619 motion. *Id.*

In this case, the Plaintiffs stated in their complaint that they had policies against selling emergency contraception, but that the Rule required them to do so, with penalties for noncompliance up to and including the revocation of their licenses to do business. First Amended Complaint ("Compl." or "complaint") ¶¶ 22-26, 30-34, 41-45, 53, 57-58 (C00108-114). The Plaintiffs further pled that they had experienced multiple "specific instances" of customers seeking emergency contraception in the past few years, at *each of three different pharmacies*. Compl. ¶¶ 26, 34, 45 (C00108-111). Yet the slip opinion stated that the chances of any future hardship are "so slim" because it is "extremely unlikely" that one of the Plaintiffs "will ever be placed in a position where he will either have to violate his conscience or the letter of the Rule." Slip Op. 12, 18. Appellants

respectfully submit that these statements are not consistent with the allegations of the complaint and do not apply the established standard of review for a motion to dismiss.

Second, the slip opinion suggested that *Kerr-McGee Chemical Corp. v. Department of Nuclear Safety*, 204 Ill. App. 3d 605 (1990), is inconsistent with or was silently overruled by *National Marine, Inc. v. Illinois Environmental Protection Agency*, 159 Ill. 2d 381, 389 (1994). In particular, the opinion noted that *National Marine* cited and applied the two-part ripeness test set forth in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). Slip Op. 8-9. But the Illinois Supreme Court actually adopted *Abbott Labs*' ripeness framework at least as early as 1977, and this Court itself applied the *Abbott Labs* test prior to *Kerr-McGee*. *See, e.g.*, *Bio-Medical Labs., Inc. v. Trainor*, 68 Ill. 2d 540, 546 (1977) (relying on *Abbott Labs* in explaining "the basic rationale of the ripeness doctrine"); *A.E. Staley Mfg. Co. v. Illinois Commerce Comm'n*, 166 Ill. App. 3d 202, 206 (1988). For this reason, *National Marine*'s reliance in 1994 on *Abbott Labs* – a well-known administrative law decision from 1967 – cannot possibly be thought to overrule or undermine *Kerr-McGee*, a case decided in 1990. To the extent this Court refused to apply *Kerr-McGee* because of a belief that this case is no longer good law, that view is erroneous and constitutes an independent basis for granting rehearing and correcting the error.

Third, the slip opinion does not provide an answer to the persuasive dissent of Justice Turner. As Justice Turner explained, the Plaintiffs have alleged a ripe claim asserting that the Rule *itself* is "a form of coercion expressly prohibited by the Right of Conscience Act." Slip Op. 22. Likewise, Justice Turner explained that the Plaintiffs had pled a *present* burden on their religion under the Illinois Religious Freedom Restoration Act (RFRA), in that the Rule "*has placed* substantial pressure on them to modify or

violate their religious beliefs." *Id.* at 24 (emphasis supplied). In response to these claims of past and ongoing harms, the slip opinion focuses only on the likelihood of additional future events, and merely states the Court's conclusion that neither law "makes this claim ripe for our consideration." *Id.* at 18. However, as Justice Turner noted, the Right of Conscience Act and RFRA provide special grounds for concluding that Plaintiffs' claims are ripe: (1) these statutes specifically identify current, ongoing (not threatened or future) harms of coercion and burdens on protected rights; and (2) they provide discrete causes of action for bringing suit when a person's exercise of these rights is coerced or burdened. Plaintiffs respectfully submit that the parties and other courts, including the state supreme court in the event of further review in this case, would benefit from an explicit analysis of the arguments made in the dissent. Moreover, Plaintiffs submit that this Court's reconsideration of this discrete issue would lead the Court to conclude that these two special statutes alone suffice to make Plaintiffs' claims ripe.

Finally, the Court's opinion suggests that there would be no ripeness problem whatsoever if Plaintiffs simply allege that they have continued to be presented with prescriptions for emergency contraception after filing the complaint (which was filed shortly after the Rule took effect). To address this specific concern, Plaintiffs offer such additional proof in affidavits accompanying this motion at A-25 to A-30. Such post-complaint evidence is relevant and properly considered in ripeness analysis, because ripeness is not determined as of the time of the complaint. Here, each of the plaintiff pharmacies, and each of the plaintiff pharmacists, ***has in fact been presented with prescriptions for emergency contraception since the Rule has been in effect.*** In fact, this has happened approximately ***fifteen times*** since the Rule took effect. Because the

slip opinion was predicated precisely on the view that this fact scenario was highly unlikely, Plaintiffs respectfully submit that this case satisfies the very ripeness test suggested by this Court in its current opinion.

Furthermore, one of the pharmacies operated by Plaintiffs ***has been forced to close***, in part because a pharmacist retracted his agreement to work at the pharmacy because the pharmacy's license might be revoked due to its policy against selling "morning after" contraceptives.[1]

For these reasons, as set forth in more detail below, the Court should permit rehearing of this appeal; should modify its opinion for the specific reasons set forth herein; and should reverse the decision of the Circuit Court.

THE COURT'S OPINION

In affirming dismissal of Plaintiffs' claims, this Court made factual statements as to the likelihood of Plaintiffs' being presented with a prescription for emergency contraception in the future: "[B]ased on the allegations in plaintiffs' complaint, the chances of plaintiffs suffering any hardship in the future as a result of this rule are so slim, albeit not impossible, they do not outweigh the judiciary's traditional reluctance to get involved in administrative determinations such as this." Slip Op. 11-12; *see also id.* at 18 ("[I]t is extremely unlikely based on the allegations in plaintiffs' complaint that one

[1] Plaintiffs emphasize that this post-complaint evidence is not necessary to make this case ripe, but merely additional proof of ripeness. For the reasons stated herein and in Plaintiffs' briefs on the merits, this case would be ripe even if nothing new had happened since the filing of the complaint.

of the individual plaintiffs in this case will ever be placed in a position where he will either have to violate his conscience or the letter of the Rule.").

The Court noted in its opinion that it appeared to both the Court and the parties that the Circuit Court had based its decision on an alleged absence of "actual controversy" rather than on ripeness grounds. Slip Op. 9-10 ("It also appears plaintiffs and defendants also believed the court meant plaintiffs did not meet the 'actual controversy' requirement because this is what both plaintiffs and defendants focused on in their briefs."). In fact, on appeal, Defendants asserted that varied references to "standing" and "ripeness" in Illinois law "do not appear to reflect significant analytical differences in what ultimately constitutes a justiciable issue." Gov't Br. 14 n.6. The slip opinion did not suggest that Plaintiffs lack standing or failed to plead an "actual controversy." Rather, the Court's decision relied on a ripeness requirement that this Court (unlike the parties) appears to have believed is different from, or in addition to, the basic requirements for an actual controversy. As the slip opinion acknowledged, the parties did not address this particular issue in their briefs to this Court. Slip Op. 9-10.

Crucially, this Court cited its own precedent for the proposition that the state declaratory judgment act – a statute that allows parties to obtain judicial construction of statutes and rules before they are enforced against those parties – makes this action justiciable. The Court specifically stated that *Kerr-McGee Chemical Corp. v. Department of Nuclear Safety*, 204 Ill. App. 3d 605, 610 (1990), "would seem to allow Plaintiffs to pursue this declaratory judgment action." In *Kerr-McGee*, this Court stated:

> In other words, a declaratory judgment action may be maintained where statutes *or administrative rules*, which have cleared all hurdles

> prerequisite to their becoming fully effective, require one either to take a certain action or to refrain from a certain action, *regardless of the actual probability of prosecution for noncompliance.*

Id. (emphasis supplied). The slip opinion, however, departed from *Kerr-McGee* based on the discussion of the two-part *Abbott Labs* test in *National Marine, Inc. v. Illinois Environmental Protection* Agency, 159 Ill. 2d 381 (1994), which the Court thought implicitly superseded or modified the precedential effect of *Kerr-McGee*:

> However, this court made the above statement [in *Kerr-McGee*, quoted immediately above] before our supreme court adopted the two-step process described in *Abbott Labs* to determine whether a claim is ripe for judicial consideration, which requires us "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."

Slip Op. 8-9 (internal quotations omitted). Applying this two-step test, the Court concluded that the issue raised in Plaintiffs' complaint – the facial validity of the Rule – was in fact fit for judicial decision. *Id.* at 11. Nevertheless, the Court held that Plaintiffs' claim was not ripe because any "hardship" in the future is too "slim" to "outweigh the judiciary's traditional reluctance to get involved in administrative determinations such as this." *Id.* at 12.

The slip opinion does not explain what aspects of the complaint are inadequate in this regard and does not explicitly state what allegations would be needed to claim adequate hardship. But in its discussion of the background of the case, this Court noted that Plaintiffs had not alleged, *inter alia*, that they had been presented with a prescription

for emergency contraception since the Rule went into effect. Slip Op. 4; *see also id.* at 4-5 ("Plaintiffs also failed to allege they stock the 'morning after pill,' the Rule requires them to do so, or the Rule has required them to take any immediate action to comply with the Rule.").

At the same time, the Court made clear that there are circumstances in which a pharmacist could challenge the Rule:

> We do not foreclose with this ruling the possibility of another pharmacist alleging facts sufficient to allow him or her to bring a preenforcement challenge to the validity of this Rule. We are only holding plaintiffs in this case have not pleaded facts establishing that they have felt the effects of this rule in a concrete way and will suffer a substantial hardship if they are not allowed to pursue this action at this time.

Slip Op. 18. Despite this express acknowledgment, the Court affirmed the Circuit Court's dismissal of the complaint, which was *with prejudice*. C00214.

REASONS FOR RECONSIDERATION

I. THE COURT SHOULD MODIFY ITS OPINION TO MAKE IT CLEAR THAT PLAINTIFFS MAY AMEND THEIR COMPLAINT ON REMAND

This Court's opinion indisputably contemplates that it is possible to plead a ripe pre-enforcement challenge to the Rule. Slip Op. 18. Yet the Circuit Court's dismissal was with prejudice. The Court should correct this oversight to ensure that further proceedings are conducted in accordance with this Court's opinion.

When a trial court dismisses a complaint and the Appellate Court holds that dismissal was warranted, but on a new, alternative ground, the Appellate Court and the trial court must allow the plaintiffs the opportunity to amend their complaint on remand.

Geaslen v. Berkson, Gorov & Levin, Ltd., 155 Ill. 2d 223, 230 (1993), illustrates this principle. In *Geaslen*, the issue of breach of duty was raised for the first time on appeal. Nevertheless, the Appellate Court affirmed the trial court's dismissal with prejudice. Reversing the Appellate Court, the Illinois Supreme Court held that the plaintiffs must be allowed to amend their complaint in the trial court:

> Neither defendants' motion to dismiss nor the trial court proceedings addressed plaintiffs' allegations concerning breach of duty. The appellate court's affirmance of the trial court's dismissal of plaintiffs' complaint with prejudice, therefore, denied plaintiffs any meaningful opportunity to either defend or amend their complaint. Remanding this cause to the trial court will give plaintiffs an opportunity to amend their complaint to properly allege a breach of the duty of due care that the appellate court found defendants owed to plaintiffs.

Id. at 230.

As in *Geaslen*, dismissal without allowing leave to amend would be reversible error in this case. In particular, the analysis of ripeness – as an issue distinct from standing and justiciability – was not raised either in Defendants' motion to dismiss or in their appellate briefs. Nor was the ripeness analysis set forth in this Court's opinion raised or discussed by the Circuit Court at the motion hearing or in the brief docket entry that summarizes the Circuit Court's decision.[2] Furthermore, the slip opinion specifically

[2] As this Court noted in its opinion, the Circuit Court appears to have applied the "actual controversy" requirement for standing, rather than any requirement relating to the hardship to the parties of withholding court consideration of an issue. Slip Op. 9-10.

identified certain facts that it appears would be relevant to ripeness, if pled. Accordingly, it would be reversible error to affirm a dismissal with prejudice without providing Plaintiffs the opportunity to correct any defects in their complaint. *See, e.g.*, *CGE Ford Heights, L.L.C. v. Miller*, 306 Ill. App. 3d 431, 442 (1999) ("While we believe plaintiffs have not pled an actual controversy in their injunctive counts and dismiss them for that reason, the issue was raised by the court for the first time on appeal. In keeping with *Geaslen* ... the dismissal is without prejudice with leave to replead on remand."); *Douglas Theater Corp. v. Chicago Title & Trust Co.*, 266 Ill. App. 3d 1037, 1048 (1994).

II. THE COURT SHOULD MODIFY ITS OPINION TO APPLY THE REQUIRED STANDARD OF REVIEW FOR A CIRCUIT COURT DECISION GRANTING A SECTION 2-619 MOTION TO DISMISS

A. Under The Established Standard Of Review, This Court Is Required To Accept All Well-Pleaded Facts As True And To Make All Reasonable Inferences In Plaintiffs' Favor

In analyzing a Section 2-619 motion to dismiss, a court is required to "accept as true all well-pleaded facts in plaintiff's complaint and all inferences that can reasonably be drawn in plaintiff's favor." *In re Estate of Schlenker,* 209 Ill. 2d 456, 461 (2004). The Court cannot dismiss the complaint "unless it clearly appears that no set of facts could be proved under the pleadings which would entitle the plaintiff to some type of relief." *Roland Mach. Co. v. Reed*, 339 Ill. App. 3d 1093, 1096 (2003) (quoting *Alderman Drugs, Inc. v. Metropolitan Life Ins. Co.*, 79 Ill. App. 3d 799, 803 (1979)). The Defendants – not

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Furthermore, dismissal on ripeness grounds should be without prejudice, because a ripeness determination by definition does not address the merits of the claim. *See, e.g.*, *Missouri Soybean Ass'n v. EPA*, 289 F.3d 509, 513 (8th Cir. 2002); *Peters v. Fair*, 427 F.3d 1035, 1038 (6th Cir. 2005).

the Plaintiffs – bear the burden of proof on the motion to dismiss. *See, e.g.*, *Noyola v. Board of Educ. of Chi.*, 227 Ill. App. 3d 429, 433 (1992). Appellants respectfully submit that the slip opinion should be modified to apply this established standard of review to the complaint in this case.

B. The Plaintiffs' Complaint States Claims That Are Ripe Under The Established Standard of Review

The complaint asserts that both of the individual plaintiffs have sincerely held religious and conscientious objections to dispensing emergency contraception. *See* Compl. ¶¶ 22, 41, 58, 92 (C00108-120). Based on these religious and conscientious objections, none of the pharmacy plaintiffs sells emergency contraceptives. *Id.* ¶¶ 24, 32, 44 (C00108-111). For example, plaintiffs Morr-Fitz and Doyle do not sell *and do not stock* emergency contraceptives under Mr. Vander Bleek's policy. C00129 (Vander Bleek Policy – Exhibit A to Complaint) ("Because I regard that complicity in making available products that are intended for the termination of human life to be immoral, ***I will not stock or have dispensed these therapies in my pharmacies.*** I have ordered our prime wholesaler to block shipments of purchase orders for Plan B to any of my pharmacies. . . . I cannot conscientiously be professionally and financially involved in a practice that participates in abortion." (emphasis supplied)). In the past, each of the plaintiff pharmacies has refused to provide emergency contraceptives when presented with prescriptions. Compl. ¶¶ 26, 34, 45 (C00108-111). By contrast, the Rule requires pharmacies to dispense contraceptives "without delay" or, if a contraceptive is not in

stock, to "obtain the contraceptive under the pharmacy's standard procedures for ordering contraceptive drugs not in stock." 68 IL ADC 1330.91(j).[3]

Moreover, the complaint makes clear that the receipt of a prescription for emergency contraceptives occurs with some frequency. In particular, as to *each* of the three pharmacy plaintiffs, the complaint – which was filed shortly after the Rule took effect – alleged that there had been multiple "specific instances" in the "past few years" of customers seeking emergency contraception. Compl. ¶¶ 24-26, 32-34, 43-45 (C00108-

[3] For this reason, it is immaterial to ripeness that Plaintiffs have not alleged that "the Rule requires them" to stock emergency contraception. Slip Op. 4. Whether the pill is in stock or out of stock, the Rule requires *dispensing* the pill on demand. For the same reason, it is likewise immaterial that Plaintiffs "failed to allege they stock the 'morning after pill.'" *Id.* In any case, the Plaintiffs *did* allege that they had policies against selling these drugs. Compl. ¶¶ 24, 32, 44 (C00108-111); *see also* C00129 ("*I will not stock . . . these therapies in my pharmacies.*"). Under the settled standard of review, Plaintiffs were entitled to the reasonable inference that they do not stock them – if only because it would be unreasonable for a pharmacist to stock an item for sale if the pharmacist knew that he or she would never sell such an item. Both in the Circuit Court and in this Court, Plaintiffs also responded to the State's *legal* argument – an argument on the merits – that the Rule can be effectively avoided by perpetually keeping a drug out of stock. *See* C00166-167; Reply Br. 4 n.1. The State's argument in this regard is particularly weak because the Rule was promulgated under the section of the Pharmacy Practice Act requiring a pharmacy to "*have in stock and maintain* sufficient drugs and materials as to protect the public." 29 Ill. Reg. 5586, 2005 WL 943559 (citing 225 ILCS 85/14) (emphasis added).

110); *see also infra* Section III (noting post-complaint evidence of customers' seeking emergency contraception from Plaintiffs after promulgation of Rule). These customers were turned away due to the stores' policies against filling such prescriptions. *Id.* Accepting these well-pleaded facts as true, and making all reasonable inferences in Plaintiffs' favor, the slip opinion's statement that recurrence of these events is "extremely unlikely" is incorrect. These statements are inconsistent with the established standard of review for Section 2-619 motions to dismiss and provide an independent basis for reversal.[4]

III. TO THE EXTENT THIS COURT DECIDES THAT ADDITIONAL EVIDENCE OR ALLEGATIONS ARE NECESSARY, POST-COMPLAINT FACTUAL DEVELOPMENTS SHOW THAT PLAINTIFFS' CLAIMS ARE RIPE UNDER THE ANALYSIS SET FORTH IN THIS COURT'S UNMODIFIED OPINION

Ripeness was not raised as a ground for Defendants' motion to dismiss under 735 ILCS 5/2-619. Had ripeness been asserted, Defendants would have had the burden of proof because the defendant has the burden of proving any affirmative defense relied upon in a Section 2-619 motion. On appeal, Defendants expressly disclaimed ripeness as a separate ground, asserting that varied references to "standing" and "ripeness" in Illinois law "do not appear to reflect significant analytical differences in what ultimately constitutes a justiciable issue." Gov't Br. 14 n.6. Accordingly, briefing and argument to

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[4] The slip opinion notes that the FDA approved Plan B in August 2006 for over-the-counter distribution to individuals over the age of 18. Slip Op. 5. The opinion does not discuss the legal significance (if any) of this development. Given the procedural posture of the case, any factual speculation as to the frequency with which persons under the age of 18 seek emergency contraception would be improper. In any case, Plaintiffs have in fact experienced requests for Plan B since the FDA's decision. *See infra* Section III.

date have focused on standing, which is determined by examining the allegations made in the complaint. *See, e.g.*, *Crusius ex rel. Taxpayers of Ill. v. Illinois Gaming Bd.*, 348 Ill. App. 3d 44, 48, *aff'd*, 216 Ill. 2d 315 (2005).

By contrast with standing, ripeness "is peculiarly a question of timing" and ***is determined at the time of judicial decision, rather than at the time of the complaint.*** Accordingly, consideration of post-complaint evidence is appropriate and, in this case, dispositive of the ripeness issue entirely. "Ripeness should be decided on the basis of all the information available to the court. Intervening events *that occur after decision in lower courts should be included*, just as must be done with questions of mootness." 13A Wright & Miller, *Federal Practice and Procedure* § 3532.1 (2007) (emphasis supplied). *See, e.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974); *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 140 (1974); *Hargrave v. Vermont*, 340 F.3d 27, 34 (2d Cir. 2003); *Buckley v. Valeo,* 424 U.S. 1, 114-118 (1976) (per curiam) (basing ripeness determination on facts occurring "[s]ince the entry of judgment by the Court of Appeals"); *In re UAL Corp.* (*Pilots' Pension Plan Termination*), 468 F.3d 444, 453 (7th Cir. 2006) (describing *Buckley* as case where "dispute [was] resolved on the merits on appeal, even though the controversy was not ripe at the time the district court acted"); *see also Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 73 (1993) ("[I]t is the situation now … rather than at the time of the initial complaints, that must govern" (O'Connor, J., concurring).). *Cf. Fisch v. Loews Cineplex Theatres, Inc.*, 365 Ill. App. 3d 537, 537 (2005) (considering new evidence alleged after appellate briefing on issue of mootness); *City of Chi. v. Yellen*, 325 Ill. App. 3d 311, 314 (2001) (allowing supplementation of record to aid court in deciding personal jurisdiction issue).

The slip opinion noted that Plaintiffs' complaint, which was filed shortly after the Rule took effect, "failed to allege that they have been presented with a prescription for emergency contraception *since* the Rule went into effect." Slip Op. 4 (emphasis supplied). Plaintiffs' post-complaint submissions demonstrate not only that Plaintiffs can make this allegation, but that they can support it with credible evidence. Since the Rule went into effect, Plaintiffs have been presented with prescriptions for emergency contraception *more than fifteen times*. *See* Affidavit of Luke Vander Bleek (attached hereto at A-25 to A-28), A-26 ¶ 2 (3-4 times); Affidavit of Glenn Kosirog (attached hereto at A-29 to A-30), A-30 ¶ 2 (12 times).[5] These are precisely the occurrences that the Court deemed so "extremely unlikely" as to render Plaintiffs' claims unripe.[6]

Furthermore, one of the pharmacies operated by Plaintiffs ***has been forced to close*** because a pharmacist refused to work there due to the possibility that the pharmacy could be closed because of its policy against selling "morning after" contraceptives. Vander Bleek Aff., A-26 to A-28 ¶¶ 4-15. The complaint alleges that Plaintiff Morr-Fitz (of which Plaintiff Luke Vander Bleek is the sole shareholder) operated a pharmacy in Prophetstown, Illinois (State License #054-014623). Compl. ¶¶ 8, 11 (C00106). In September 2005, the chief pharmacist at the Prophetstown pharmacy moved to Wisconsin, prompting Morr-Fitz and Mr. Vander Bleek to search for a new pharmacist to

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[5] Appellants were advised by the Clerk's office to include these affidavits as an appendix rather than file a separate motion to supplement the record. If the Court prefers, of course, Plaintiffs are prepared to file a separate motion to supplement the record.

[6] Moreover, Plaintiffs have been presented with requests for the drug *after* the FDA's over-the-counter decision in August 2006. Vander Bleek Aff., A-26 ¶ 3; Kosirog Aff., A-30 ¶ 3.

keep the store open, sending letters to every pharmacist within a 60-mile radius of the store. Vander Bleek Aff., A-26 ¶¶ 4-5. As a result of that extensive search, one candidate was identified. *Id.* at ¶¶ 6-7. That candidate accepted the job, both verbally and in writing, prompting Morr-Fitz and Mr. Vander Bleek to announce publicly that a new pharmacist had been located and the Prophetstown pharmacy would remain open. *Id.* at A-26 to A-27 ¶¶ 8-10. However, upon learning of the conflict between the Rule and the pharmacy's policy against providing emergency contraception, the new pharmacist withdrew his acceptance, expressly citing his fear that the pharmacy might lose its license under the Rule. A-27 ¶¶ 11-12. As no other qualified pharmacists had been identified, the Prophetstown pharmacy was forced to close. *Id.* at ¶ 13. Prior to closing, this pharmacy generated approximately $75,000 in annual profits. *Id.* at ¶ 14; *see also* Kosirog Aff., A-30 ¶ 5 ("I have been required to spend additional resources recruiting pharmacists and addressing their concerns about the impact of the Rule on my business.").

The slip opinion stated that "[t]he regulation at issue in this case has not forced plaintiffs out of business or had any effect on their day-to-day operations." Slip Op. 18. Appellants respectfully submit that this statement (1) is not legally relevant, because the coercion and burden on religious exercise caused by the Rule are legally actionable independent of any separate effect on Plaintiffs' businesses; and (2) in any event, is incorrect in light of the factual developments since the filing of the complaint, which must be considered as part of the Court's ripeness analysis.

IV. THIS COURT SHOULD MODIFY ITS OPINION TO CORRECT DISCRETE ERRORS IN ITS RIPENESS ANALYSIS

A. Supreme Court And Other Decisions Analyzing The Directness And Immediacy Of Threatened Harms in Pre-Enforcement Challenges To Statutes And Ordinances Are Directly Relevant To The Analysis Of Whether the Harm Threatened By A Challenged Administrative Rule Is Sufficiently Direct And Immediate To Constitute Hardship Under *Abbott Labs*

The slip opinion distinguishes many (but not all) of the myriad cases cited by Appellants on the ground that they involve statutes and ordinances. *See* Slip Op. 10-11. This was error. Because many of these cases apply the same substantive analysis of directness and immediacy that is set forth in *Abbott Labs*, they are directly relevant to any hardship analysis of ripeness that would apply in this case.

First, some of Appellants' cases in fact pertain to administrative decisions. *See, e.g., First of Am. Bank, Rockford N.A. v. Netsch*, 166 Ill. 2d 165, 174-176 (Ill. 1995) (holding that plaintiff could bring declaratory judgment action to challenge policies adopted by state official); *see also Buege v. Lee*, 56 Ill. App. 3d 792 (1978). Second, Illinois courts have treated statutes and administrative regulations interchangeably specifically for ripeness purposes. *See, e.g., Board of Trs. of Addison Fire Prot. Dist. No. 1 Pension Fund v. Stamp*, 241 Ill. App. 3d 873, 883 (1993) ("A statute *or regulation* is ripe for challenge when the challenger must choose between disadvantageous compliance and risk of sanction" (emphasis supplied).); *On-Line Fin. Servs., Inc. v. Department of Human Rights*, 228 Ill. App. 3d 99, 102 (1992) (same).[7]

[7] *See also* 73 C.J.S. *Public Administrative Law and Procedure* § 214 (2007) ("A court determines standing to challenge an agency rule or regulation under the same standards as standing to challenge a statute or municipal ordinance."). Indeed, administrative rules

Third, many of the cases cited by Plaintiffs apply the same substantive test to statutes or ordinances that is required by the *Abbott Labs* hardship inquiry. The hardship analysis asks whether "the impact of the regulations upon the [Plaintiffs] is sufficiently *direct* and *immediate* as to render the issue appropriate for judicial review at this stage." *See Abbott Labs.*, 387 U.S. at 152 (emphasis added). Many of the cases cited by Plaintiffs analyze whether the impact of specific statutes or ordinances is direct and immediate.[8] These cases are therefore relevant to the ripeness inquiry.

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carry the full force and effect of law and are therefore generally treated the same as statutes and ordinances. *See, e.g., Northern Illinois Auto. Wreckers & Rebuilders Ass'n v. Dixon*, 75 Ill. 2d 53, 58 (1979) ("[A]dministrative rules and regulations have the force and effect of law, and must be construed under the same standards which govern the construction of statutes.").

[8] *See, e.g., Illinois Gamefowl Breeders Ass'n v. Block*, 75 Ill. 2d 443, 451 (1979) (finding plaintiff met the requirement of "sustain[ing], or be[ing] in immediate danger of sustaining, a direct injury as a result of enforcement of the challenged statute"); *First of Am. Bank*, 166 Ill. 2d at 175 (justiciability established by "the mere existence of a claim, assertion or challenge to plaintiff's legal interests . . . which casts doubt, insecurity, and uncertainty upon plaintiff's rights" (internal citations omitted)); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 292 (1979) (finding certain claims presented a justiciable case or controversy because plaintiff showed a "realistic danger of sustaining a direct injury"

The United States Supreme Court's recent decision in *Medimmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764 (2007), demonstrates that the coercive power of government action, considered by itself, gives rise to a ripe claim. *Medimmune* made clear that a case is ripe when *government* action is threatened, without stating that it had to be in the form of a statute or ordinance, rather than a final administrative rule. Accordingly, the Court recognized that "where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat ... *[even when t]he plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution.*" *Id.* at 772 (second emphasis added).[9] The Court specifically cited *Abbott Labs* for the proposition that "[t]he dilemma posed by

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that was "certainly impending"); *Doe v. Bolton*, 410 U.S. 179, 188 (1979) ("The physician-appellants ... assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392 (1988) (finding the requisite "threatened or actual injury" from a law "aimed directly at plaintiffs" to present a justiciable controversy); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[P]etitioner has alleged threats of prosecution that cannot be characterized as imaginary or speculative ... In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.").

[9] Like the parties here, the *Medimmune* Court dispensed with any distinction between standing and ripeness because the inquiry "boil[s] down to the same question in this case." 127 S. Ct. at 772 n.8.

... putting the challenger to the choice between abandoning his rights or risking prosecution[ ]is a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Id.* at 773 (internal quotations omitted). This is the very "dilemma" that Plaintiffs face – and will continue to face absent judicial relief – because of the coercive impact of the Rule: either abandon their rights or risk losing their professional licenses.

To avoid this dilemma, the *Medimmune* Court found a controversy ripe for declaratory relief even when there was no government action at all, real or threatened. The plaintiff – a licensee of a patent in good standing under the license – brought suit to challenge the patent. In response, the defendant argued that there was no justiciable controversy because the plaintiff had not violated the patent and faced no reasonable apprehension of suit from the defendant to enforce the defendant's rights under the patent. The Supreme Court held that the plaintiff's challenge was justiciable – satisfying the requirements of both standing and ripeness – *even though the plaintiff voluntarily continued to comply with the license and was not in breach of it.* 127 S. Ct. at 777; *see id.* n. 11 (rejecting lower court's "reasonable apprehension of suit" requirement and concluding that no such apprehension is required to make a case justiciable). Significantly, standing and ripeness under Illinois law are broader and more generous to plaintiffs than in federal cases, and ripeness is not jurisdictional in Illinois. *See Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 491 (1988); *Stokes v. Pekin Ins. Co.*, 298 Ill. App. 3d 278, 283 (1998).

Though the slip opinion distinguishes *Alternate Fuels, Inc. v. Director of Illinois Environmental Protection Agency*, 215 Ill. 2d 219 (2004), *see* Slip Op. 15-18, a proper reading of Plaintiffs' complaint demonstrates (especially in light of *Medimmune*) that

Plaintiffs' dilemma is no less real or concrete than the purely economic dilemma that satisfied ripeness in *Alternate Fuels*. Plaintiffs risk serious monetary and licensing sanctions if they choose not to comply with the Rule, including a concrete harm that they have already experienced – difficulty hiring employees – which forced one pharmacy, like the plaintiff in *Alternate Fuels*, to shut down. *See* Vander Bleek Aff., A-27 ¶ 13. But unlike in *Alternate Fuels*, Plaintiffs also face a grave moral dilemma as well: to comply would require violating their religious beliefs and consciences, but refusal to comply would risk losing their licenses and livelihoods. It is this very *moral* dilemma that imposes a burden so unacceptable that specific constitutional and statutory provisions protect against it, and makes Plaintiffs' case for ripeness even stronger than in *Alternate Fuels*.

In sum, directness and immediacy of harm – the very heart of the *Abbott Labs* hardship inquiry that formed the basis for this Court's decision – are relevant to justiciability for challenges to *administrative rules* as well as statutes and ordinances. Plaintiffs' cited cases should therefore have been considered for this purpose, and require a finding that Plaintiffs' claims are ripe under *Abbott Labs*.

B. This Court's Decision In *Kerr-McGee* Has Not Been Undermined By Intervening Precedent

The slip opinion correctly noted that *Kerr-McGee Chemical Corp. v. Department of Nuclear Safety*, 204 Ill. App. 3d 605 (1990), "would seem to allow plaintiffs to pursue this declaratory-judgment action even though they would not suffer any hardship if judicial consideration was withheld." Slip Op. 9. However, the slip opinion then suggested that this portion of *Kerr-McGee* had been implicitly overruled or undermined four years later when the Illinois Supreme Court, in *National Marine*, adopted the two-part ripeness test

from *Abbott Labs*. *See id.* Plaintiffs respectfully submit that this suggestion is error, and that *Kerr-McGee* remains good law that is precedent in this Court.

Not only is *Kerr-McGee* consistent with *Abbott Labs*, but it was decided after the Illinois courts had adopted the *Abbott Labs* two-part ripeness test. Not long after its issuance (and long before both *Kerr-McGee* and *National Marine*), *Abbott Labs* was recognized as "completely in accord with the decisions of the courts of Illinois." *Gromer Supermarket, Inc. v. Pollution Control Bd.*, 6 Ill. App. 3d 1036, 1043 (1972) (applying *Abbott Labs* and its companion cases and finding no ripeness because administrative agency had not yet adopted challenged regulation). The Illinois Supreme Court expressly adopted the *Abbott Labs* ripeness analysis in 1977. *See Bio-Medical Labs., Inc. v. Trainor*, 68 Ill. 2d 540, 546 (1977) (citing *Abbott Labs* for the proposition that agencies should be protected from "judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties"). Most notably, Illinois appellate courts – including appellate courts in the Fourth District – were consistently applying the two-part ripeness test from *Abbott Labs* well before both *Kerr-McGee* and *National Marine*. *See, e.g., A.E. Staley Mfg. Co. v. Illinois Commerce Comm'n*, 166 Ill. App. 3d 202, 206 (1988) (applying *Abbott Labs* two-part test and citing other Illinois appellate cases that had followed this test). Accordingly, *Kerr-McGee* was decided *after*, rather than before, Illinois' adoption of *Abbott Labs.*

Not surprisingly, *Kerr-McGee* did not indicate that it was parting company with *Abbott Labs* or with any of the prior Illinois cases that had applied the two-part test. On the contrary, *Kerr-McGee* actually cited *A.E. Staley*, a Fourth District case that itself

applied the two-part *Abbott Labs* test. *See Kerr-McGee*, 204 Ill. App. 3d at 613; *A.E. Staley*, 166 Ill. App. 3d at 206.

Moreover, there is nothing inconsistent between the slip opinion's quoted language from *Kerr-McGee* and the hardship prong of the *Abbott Labs* test. *Kerr-McGee* merely indicates that the hardship prong is satisfied when a plaintiff is currently required to act, or refrain from acting, pursuant to a fully effective administrative rule. Nor did *National Marine* mention anything about overruling *Kerr-McGee*, or say anything to suggest that the validity of that case was being undermined. And so it is no surprise that since *National Marine*, Illinois appellate courts have continued to cite *Kerr-McGee* without any suggestion that it is no longer the law or has been undermined in any respect. *See, e.g.*, *Silver Fox Limousine v. City of Chi.*, 306 Ill. App. 3d 103, 113 (1999); *Crawford v. City of Chi.*, 304 Ill. App. 3d 818, 823 (1999); *CGE Ford Heights, L.L.C. v. Miller*, 306 Ill. App. 3d 431, 443 (1999); *see also* 16 *Illinois Law and Practice (Declaratory Judgments)* § 25 (2006) (relying on *Kerr-McGee* in 2006 for the same proposition the slip opinion suggested was overruled in 1994: "A declaratory-judgment action may be maintained where statutes or administrative rules, which have cleared all hurdles prerequisite to their becoming fully effective, require one either to take certain action or to refrain from certain action, regardless of the actual probability of prosecution for noncompliance.") (attached hereto at A-31).

Because *Kerr-McGee* remains the law, this Court was not free to ignore its statement that a declaratory judgment remedy is available when a final administrative rule "require[s] one either to take a certain action or to refrain from a certain action, regardless of the actual probability of prosecution for noncompliance." In fact, *Kerr-McGee*'s

statement on this point is entirely consistent with other Illinois cases establishing that a plaintiff seeking a declaratory judgment need not plead that harm is imminent. *See, e.g.*, *City of Chi. v. Department of Human Rights*, 141 Ill. App. 3d 165, 169-170 (1986) ("The requirement that an actual controversy be present does not mean that a party must have been wronged and suffered an injury *nor that a party must allege the existence of the possibility of imminent harm*" (emphasis supplied) (internal citation omitted).); *see also DeWitt County Pub. Bldg. Comm'n v. County of DeWitt*, 128 Ill. App. 3d 11, 16 (1984).

C. An Asserted Chill On First Amendment Rights Satisfies *Abbott Labs*

The *Abbott Labs* test for ripeness is independently satisfied in this case because Plaintiffs are alleging a First Amendment claim, for which the ripeness standard is relaxed. *See, e.g.*, *U.S. West Inc. v. Tristani*, 182 F.3d 1202, 1208 (10th Cir. 1999) ("The customary ripeness inquiry is relaxed ... in circumstances where there is a facial challenge implicating the First Amendment.").

Specifically, courts have frequently found that the hardship prong of the ripeness test is met when a law poses a risk of chilling First Amendment activity. *See, e.g.*, *Minnesota Citizens Concerned For Life v. FEC*, 113 F.3d 129, 132 (8th Cir. 1997) ("Sufficient hardship is usually found if the regulation imposes costly, self-executing compliance burdens *or if it chills protected First Amendment activity*" (emphasis supplied).); *Tristani*, 182 F.3d at 1208. In fact, courts routinely find not just harm but *irreparable* harm where a plaintiff asserts a chill on free exercise rights. *See, e.g.*, *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir. 2002) ("Limitations on the free exercise of religion inflict irreparable injury."); *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("[C]ourts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of [the federal version of] RFRA.").

Because the Rule in this case has a chilling effect on constitutionally and statutorily protected First Amendment and religious exercise rights, the Rule independently satisfies ripeness requirements on First Amendment grounds.

V. THE ILLINOIS HEALTH CARE RIGHT OF CONSCIENCE ACT AND RELIGIOUS FREEDOM RESTORATION ACT PROVIDE AN INDEPENDENT BASIS FOR RIPENESS

As the dissenting opinion of Justice Turner persuasively explained, Plaintiffs' causes of action under the Health Care Right of Conscience Act and RFRA independently require the conclusion that their claims are ripe. Plaintiffs respectfully submit that this Court's opinion should be modified to provide an explicit analysis of the dissent's arguments on this issue.

As Justice Turner explained, the Plaintiffs have alleged a ripe claim asserting that the Rule itself is "a form of coercion expressly prohibited by the Right of Conscience Act." Slip Op. 22. In particular, the Act bars the government from coercing participation in health care services contrary to one's conscience. The Act states that it is the public policy of Illinois to "respect and protect the right of conscience of all persons" providing health care services, and outlaws "*all forms of coercion* . . . upon" persons who refuse "to act contrary to their conscience or conscientious conviction." 745 ILCS 70/2 (emphasis supplied). By its very nature, and without the pendency of any specific enforcement action against Plaintiffs, the Rule is a deliberate "form of coercion" to induce Plaintiffs and other objecting pharmacists to "act contrary to their consciences." *Id.*; Pl. Br. 33-34; Compl. ¶¶ 58-59 (C00114). The Act makes clear that anyone subject to such coercion "may commence a suit therefor." 745 ILCS 70/12.

Likewise, Justice Turner explained that the Plaintiffs had pled a *present* burden on their religion under RFRA, in that the Rule "*has placed* substantial pressure on them to

modify or violate their religious beliefs." Slip Op. 24 (emphasis supplied). In particular, the Plaintiffs pled that the Rule *presently* violates their rights by imposing a substantial burden on their religious liberties (Compl. ¶ 61 (C00114)) and because it was enacted for the purpose of coercing religious objectors (Compl. ¶ 59 (C00114)). Among other things, the Rule imposes a chill on Plaintiffs' exercise of their religious liberties. *See, e.g., Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717-718 (1981) ("Where the state ... denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").[10] RFRA and the state and federal constitutions grant Plaintiffs the right to challenge burdens on their free exercise of religion, and RFRA expressly provides that claims of burdens on those rights may be asserted "as a claim or defense in a judicial proceeding." 775 ILCS 35/20 ("Judicial Relief").

In response to Plaintiffs' allegations of current, ongoing harms under these special statutes, the slip opinion merely states the Court's conclusion that neither law "makes this claim ripe for our consideration." Slip Op. 18. As for the rest of the opinion, it focuses only on the likelihood of additional *future* events, without discussing these statutes at all.

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[10] Moreover, the Plaintiffs have asserted that the Rule is void because it targets religious activity. *See* Compl. ¶ 59 (C00114); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."); Slip Op. 21-22 (citing statement of defendant Blagojevich about pharmacists' beliefs) (Turner, J., dissenting)).

Plaintiffs respectfully submit that the parties and other courts would benefit from an explicit analysis of these statutes in light of the dissent's arguments, and that this Court's reconsideration of this particular issue would lead the Court to conclude that these two special statutes alone suffice to make Plaintiffs' claims ripe.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request rehearing to allow the Court the benefit of briefing and argument on the new issues of law raised in the majority opinion and to correct the errors identified above. This Court should reverse the judgment of dismissal. In the alternative, this Court should remand with directions to allow Plaintiffs leave to amend their complaint in light of this Court's opinion. Plaintiffs respectfully request oral argument.

By: _____

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

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

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

No. 4-05-1050

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 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.	)	Case No. 2005-CH495

CERTIFICATE OF COMPLIANCE

I certify that this Petition For Rehearing (Plaintiffs-Appellants' Petition For Rehearing) conforms to the requirements of rules 341(a) and (b). The length of this Petition For Rehearing, excluding the appendix, is twenty-seven (27) pages.

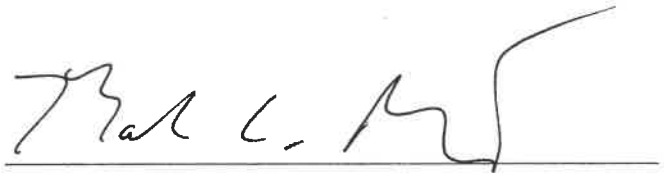
Mark L. Rienzi

4/6/07
Date

CERTIFICATE OF SERVICE

I, Mark L. Rienzi, certify that I served three copies of this Petition For Rehearing upon the below named party by FedEx (postage prepaid) overnight mail on April 6, 2007.

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



Mark L. Rienzi

APPENDIX

NO. 4-05-1050

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

MORR-FITZ, INC., an Illinois Corporation d/b/a FITZGERALD PHARMACY, Licensed and Practicing in the State of Illinois as a Pharmacy; L. DOYLE, INC., an Illinois Corporation d/b/a EGGELSTON PHARMACY, Licensed and Practicing in the State of Illinois as a Pharmacy; KOSIROG PHARMACY, INC., an Illinois Corporation d/b/a KOSIROG REXALL PHARMACY, Licensed and Practicing in the State of Illinois as a Pharmacy; LUKE VANDER BLEEK; and GLENN KOSIROG, Plaintiffs-Appellants, v. ROD R. BLAGOJEVICH, Governor, State of Illinois; FERNANDO E. GRILLO, Secretary, Illinois Department of Financial and Professional Regulations; DANIEL E. BLUTHARDT, Acting Director, Division of Professional Regulations; and THE MEMBERS OF THE STATE BOARD OF PHARMACY, in Their Official Capacities, Defendants-Appellees.	)	Appeal from Circuit Court of Sangamon County No. 05CH495 Honorable John W. Belz, Judge Presiding.

JUSTICE KNECHT delivered the opinion of the court:

In October 2005, plaintiffs, two individual pharmacists and three Illinois corporations that own and operate pharmacies in Illinois, filed their first amended complaint seeking injunctive and declaratory relief against defendants, Governor Rod Blagojevich, Secretary Fernando Grillo of the Illinois Department of Financial and Professional Regulations, Acting Director Daniel Bluthardt of the Division of Professional Regulations, and the State Board of Pharmacy. The suit alleged

an administrative rule requiring pharmacies to dispense a certain contraceptive, levonorgestrol, also known as "Plan B" or the "morning after pill" (Rule) (68 Ill. Adm. Code §1330.91(j), as amended by 29 Ill. Reg. 13639, 13663 (eff. August 25, 2005)), violates federal and state law by forcing plaintiffs to dispense the "morning after pill" even though this violates their religious beliefs and consciences. In November 2005, the trial court granted the State's motion to dismiss with prejudice on the grounds of lack of standing, ripeness, and failure to exhaust administrative remedies. Plaintiffs appeal, arguing the following: (1) they had standing; (2) they did not have to wait until a customer presented them with a prescription and then refuse to fill the prescription, thereby subjecting themselves to disciplinary proceedings, before they could challenge the Rule; and (3) they did not need to exhaust their administrative remedies before bringing this action in circuit court. We affirm.

I. BACKGROUND

Plaintiffs in this case allege having moral and religious objections to dispensing the "morning after pill." Based on the plaintiffs' beliefs, life begins at conception. As a result, according to plaintiffs' beliefs, the "morning after pill" has the effect of destroying human life because it can prevent an already fertilized egg from implanting in the uterus.

According to the Rule, plaintiffs have certain obligations regarding emergency contraception, such as the

"morning after pill." The Rule states as follows:

"Duty of Division I Pharmacy to Dispense Contraceptives

1) Upon receipt of a valid, lawful prescription for a contraceptive, a pharmacy must dispense the contraceptive, or a suitable alternative permitted by the prescriber, to the patient or the patient's agent without delay, consistent with the normal timeframe for filling any other prescription. If the contraceptive, or a suitable alternative, is not in stock, the pharmacy must obtain the contraceptive under the pharmacy's standard procedures for ordering contraceptive drugs not in stock, including the procedures of any entity that is affiliated with, owns, or franchises the pharmacy. However, if the patient prefers, the prescription must be transferred to a local pharmacy of the patient's choice under the pharmacy's standard procedures for transferring prescriptions for contraceptive drugs, including the procedures of any entity that is affiliated with, owns, or franchises the pharmacy. Under any circumstances an unfilled prescription for contraceptive drugs

must be returned to the patient if the patient so directs.

2) For the purposes of this subsection (j), the term 'contraceptive' shall refer to all FDA-approved drugs or devices that prevent pregnancy." 68 Ill. Adm. Code §1330.91(j), as amended by 29 Ill. Reg. 13639, 13663 (eff. August 25, 2005).

The "morning after pill" falls within the definition of a contraceptive. The State has made clear it intends to enforce the Rule. Under the Pharmacy Practice Act of 1987 (Pharmacy Act) (225 ILCS 85/1 through 40 (West 2004)), the Department of Financial and Professional Regulation may take disciplinary action against a licensee if the licensee violates the Pharmacy Act or any rules promulgated under the Pharmacy Act. 225 ILCS 85/30(a)(2) (West 2004).

In October 2005, plaintiffs filed their first amended complaint for declaratory and injunctive relief challenging the Rule, claiming various state and federal causes of action. In their amended complaint, plaintiffs allege they have been presented with prescriptions for emergency contraception in the past. However, they failed to allege that they have been presented with a prescription for emergency contraception since the Rule went into effect. Plaintiffs also failed to allege they stock the "morning after pill," the Rule requires them to do so, or the Rule has required them to take any immediate action to

comply with the Rule. That same month, the State filed a motion to dismiss plaintiffs' claim based on their lack of standing. The trial court dismissed plaintiffs' claim with prejudice based on plaintiffs' lack of standing, lack of ripeness of the claim, and plaintiffs' failure to exhaust their administrative remedies.

This appeal followed. In August 2006, the Food and Drug Administration (FDA) approved "Plan B" for over-the-counter, nonprescription sales to women age 18 and older.

II. ANALYSIS

A. Standard of Review

We review de novo a trial court's decision to grant a motion to dismiss. Midland Hotel Corp. v. Director of Employment Security, 282 Ill. App. 3d 312, 315, 668 N.E.2d 82, 85 (1996).

B. Standing in Declaratory-Judgment Actions

According to our supreme court, a preliminary question in any declaratory-judgment action is whether the plaintiff has standing. Messenger v. Edgar, 157 Ill. 2d 162, 170, 623 N.E.2d 310, 313 (1993). According to our supreme court, "standing only requires some injury in fact to a legally cognizable interest."

> "There are two components to the standing requirement in the context of declaratory[-] judgment actions. There must be [(1)] an 'actual controversy' between adverse parties, and [(2)] the party seeking the declaratory judgment must be 'interested' in the controversy." Flynn v. Ryan, 199 Ill. 2d

430, 436, 771 N.E.2d 414, 418 (2002).

In Underground Contractors Ass'n v. City of Chicago, 66 Ill. 2d 371, 362 N.E.2d 298 (1977), the supreme court explained both of these components. As for the second component that a party must be "interested" in the controversy, the court has stated:

> "The word[] 'interested' does not mean merely having a curiosity about or a concern for the outcome of the controversy. Rather, the party seeking relief must possess a personal claim, status, or right which is capable of being affected. [Citations.] The dispute must, therefore, touch the legal relations of parties who stand in a position adverse to one another." Underground Contractors Ass'n, 66 Ill. 2d at 376, 362 N.E.2d at 301.

As for the "actual controversy" component, the court has stated:

> "'Actual' in this context does not mean that a wrong must have been committed and injury inflicted. Rather, it requires a showing that the underlying facts and issues of the case are not moot or premature, so as to require the court to pass judgment on mere abstract propositions of law, render an advisory opinion, or give legal advice as to future events. [Citations.] The case must,

> therefore, present a concrete dispute admitting of an immediate and definitive determination of the parties' rights, the resolution of which will aid in the termination of the controversy or some part thereof." Underground Contractors Ass'n, 66 Ill. 2d at 375, 362 N.E.2d at 300.

Most of the arguments of both plaintiffs and defendants center on these two components. Both plaintiffs and defendants ignore the fact that this is not the only consideration courts take into account in determining whether they will hear a declaratory judgment action concerning the validity of an administrative action.

In Abbott Laboratories v. Gardner, 387 U.S. 136, 138-39, 18 L. Ed. 2d 681, 686, 87 S. Ct. 1507, 1510 (1967) (Abbott Labs), the petitioners challenged an administrative regulation, arguing the Commissioner of Food and Drugs exceeded the authority Congress granted in an amendment to the Federal Food, Drug, and Cosmetic Act. The Supreme Court found the plaintiffs' claim was "ripe." According to the Supreme Court:

> "The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution. Without

> undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also *** protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." (Emphasis added.) Abbott Labs, 387 U.S. at 148-49, 18 L. Ed. 2d at 691, 87 S. Ct. at 1515.

The Court stated "[t]he problem [of determining whether a controversy is 'ripe'] is best seen in a twofold aspect, requiring [the court] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Labs, 387 U.S. at 149, 18 L. Ed. 2d at 691, 87 S. Ct. at 1515.

In 1990, this court stated:

> "[A] declaratory[-]judgment action may be maintained where statutes or administrative rules, which have cleared all the hurdles prerequisite to their becoming fully effective, require one either to take a certain action or to refrain from a certain

action, regardless of the actual probability of prosecution for noncompliance." (Emphasis added.) Kerr-McGee Chemical Corp. v. Department of Nuclear Safety, 204 Ill. App. 3d 605, 610, 561 N.E.2d 1370, 1374 (1990).

The above statement would seem to allow plaintiffs to pursue this declaratory-judgment action even though they would not suffer any hardship if judicial consideration was withheld. However, this court made the above statement before our supreme court adopted the two-step process described in Abbott Labs to determine whether a claim is ripe for judicial consideration, which requires us "'to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" National Marine, Inc. v. Illinois Environmental Protection Agency, 159 Ill. 2d 381, 389, 639 N.E.2d 571, 574 (1994), quoting Abbott Labs, 387 U.S. at 149, 18 L. Ed. 2d at 691, 87 S. Ct. at 1515.

In the case at bar, the trial court dismissed plaintiffs' case in part because the court found the claim was not ripe. It is not entirely clear from the record whether the court meant plaintiffs did not meet the "actual controversy" requirement discussed by our supreme court in Underground Contractors Ass'n, or whether the court believed plaintiffs had not felt the concrete effects of the Rule and would not suffer any hardship by withholding court consideration. It appears the trial court was basing its decision on the former. It also

appears plaintiffs and defendants also believed the court meant plaintiffs did not meet the "actual controversy" requirement because this is what both plaintiffs and defendants focused on in their briefs. This provides some explanation why plaintiffs failed to make any real argument that their claim was ripe under the test established in Abbott Labs.

That being said, this court's duty is not to determine if the trial court's reasoning was correct. Instead, our duty is to determine if the trial court's decision to dismiss plaintiffs' cause of action was correct. City of Chicago v. Holland, 206 Ill. 2d 480, 491-92, 795 N.E.2d 240, 247-48 (2003). We find it was correct.

Plaintiffs cite numerous cases in support of their argument they should not have to wait to violate the Rule before challenging it. However, most of the cases they cite deal with challenges to statutes or ordinances, not administrative rules. See Illinois Gamefowl Breeders Ass'n v. Block, 75 Ill. 2d 443, 448, 389 N.E.2d 529, 530 (1979) (constitutional challenge to certain provisions of the Humane Care for Animals Act); Hays v. City of Urbana, 104 F.3d 102, 103 (7th Cir. 1997) (challenge to the validity of a city ordinance); Babbitt v. United Farm Workers National Union, 442 U.S. 289, 292, 60 L. Ed. 2d 895, 902, 99 S. Ct. 2301, 2305 (1979) (challenge to the constitutionality of Arizona's farm-labor statute); Doe v. Bolton, 410 U.S. 179, 181, 35 L. Ed. 2d 201, 206, 93 S. Ct. 739, 742 (1973) (challenge to criminal statute placing restrictions on abortions); Virginia v.

American Booksellers Ass'n, 484 U.S. 383, 388, 98 L. Ed. 2d 782, 791, 108 S. Ct. 636, 640 (1988) (challenge to statute that placed restrictions on the display of adult publications); Steffel v. Thompson, 415 U.S. 452, 456, 39 L. Ed. 2d 505, 512-13, 94 S. Ct. 1209, 1213-14 (1974) (challenge to criminal-trespass statute); Epperson v. Arkansas, 393 U.S. 97, 98, 21 L. Ed. 2d 228, 231, 89 S. Ct. 266, 267 (1968) (challenge to "anti-evolution" statute); Stenberg v. Carhart, 530 U.S. 914, 921-22, 147 L. Ed. 2d 743, 754, 120 S. Ct. 2597, 2604-05 (2000) (challenge to statute involving partial-birth abortions); Burson v. Freeman, 504 U.S. 191, 193, 119 L. Ed. 2d 5, 11, 112 S. Ct. 1846, 1848 (1992) (challenge to statute restricting speech within 100 feet to entrance to polling place); Village of Chatham v. County of Sangamon, 351 Ill. App. 3d 889, 893, 814 N.E.2d 216, 221 (2004) (question of which of two statutes controlled who had zoning and building-code jurisdiction); Boles Trucking, Inc. v. O'Connor, 138 Ill. App. 3d 764, 770, 486 N.E.2d 362, 364 (1985) (challenge to the constitutionality of section 18-702 of the Illinois Motor Carrier of Property Law). These cases would be more persuasive if plaintiffs were seeking declaratory relief from a statute passed by the Illinois General Assembly or an ordinance passed by a municipal body containing the same language found in the Rule.

However, plaintiffs are seeking declaratory relief from an administrative rule. It is fairly clear the issue of whether the Rule is facially valid is fit for a judicial decision. However, based on the allegations in plaintiffs' complaint, the

chances of plaintiffs suffering any hardship in the future as a result of this rule are so slim, albeit not impossible, they do not outweigh the judiciary's traditional reluctance to get involved in administrative determinations such as this.

This is not always the case. Situations do arise when the hardship to a plaintiff of withholding judicial consideration outweighs the judiciary's traditional reluctance to get involved in administrative determinations this early. For example, in Abbott Labs, the Supreme Court stated:

> "This is also a case in which the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage. These regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate. As the District Court found on the basis of uncontested allegations, 'Either they must comply with the every[-]time requirement and incur the costs of changing over their promotional material and labeling or they

to an action brought by the Government might harm them severely and unnecessarily. Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here.

The Government does not dispute the very real dilemma in which petitioners are placed by the regulation, but contends that 'mere financial expense' is not a justification for pre-enforcement judicial review. It is of course true that cases in this Court dealing with the standing of particular parties to bring an action have held that a possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action. [Citations.] But there is no question in the present case that petitioners have sufficient standing as plaintiffs: the regulation is directed at

them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions." (Emphasis added.) Abbott Labs, 387 U.S. at 152-54, 18 L. Ed. 2d at 693-94, 87 S. Ct. at 1517-18.

In Alternate Fuels, Inc. v. Director of the Illinois Environmental Protection Agency, 215 Ill. 2d 219, 830 N.E.2d 444 (2004), our supreme court found the claim brought by Alternate Fuels against the Illinois Environmental Protection Agency (Agency) was ripe. The issue before the court was whether a business that has been issued a violation notice by an administrative agency for failure to secure a permit can proceed with a claim against the agency in circuit court to test the validity of the violation notice if the notice caused it to cease operations before the administrative agency made a final ruling. Alternate Fuels, 215 Ill. 2d at 221, 830 N.E.2d at 446.

Alternate Fuels was in the business of providing fuel to customers in the form of shredded plastic agricultural chemical containers. Alternate Fuels, 215 Ill. 2d at 222, 830 N.E.2d at 446. In July 1998, the Agency issued a notice to the plaintiff that it was violating section 21(d) of the Illinois Environmental Protection Act (Act) (415 ILCS 5/21(d) (West 1998)) by storing and treating "waste" without a permit from the Agency.

Alternate Fuels, 215 Ill. 2d at 227, 830 N.E.2d at 449. The Agency also alleged Alternate Fuels was violating section 21(e) of the Act (415 ILCS 5/21(e) (West 1998)). Alternate Fuels, 215 Ill. 2d at 227, 830 N.E.2d at 449. Alternate Fuels alleged after the Agency issued the violation notice, its primary investors withdrew their support and its primary supplier withdrew from its agreement with Alternate Fuels. Alternate Fuels then stopped its operations. Alternate Fuels, 215 Ill. 2d at 227, 830 N.E.2d at 449.

In its complaint against the Agency, Alternate Fuels asked for a declaration the materials it was using were not "waste" because they had not been discarded. Alternate Fuels, 215 Ill. 2d at 228, 830 N.E.2d at 449. The Agency moved to dismiss the claim, arguing the case did not present an actual ripe controversy because Alternate Fuels had not exhausted its administrative remedies. Alternate Fuels, 215 Ill. 2d at 228, 830 N.E.2d at 449. The circuit court denied the Agency's motion to dismiss and later granted Alternate Fuels' motion for summary judgment, "finding that the materials were not 'wastes' because they were not discarded." Alternate Fuels, 215 Ill. 2d at 229, 830 N.E.2d at 449-50. The appellate court affirmed. Alternate Fuels, 215 Ill. 2d at 229, 830 N.E.2d at 450.

Before the supreme court, the Agency argued the claim was not ripe because the Agency had not concluded its investigatory process. Alternate Fuels, 215 Ill. 2d at 230, 830 N.E.2d at 450. After finding the issue fit for judicial

decision, the court examined what, if any, hardship Alternate Fuels would suffer if the court withheld its consideration. According to the court, the Agency's interpretation of the Act created a dilemma for Alternate Fuels. Alternate Fuels, 215 Ill. 2d at 232, 830 N.E.2d at 452. It could secure what it considered an unnecessary permit with the required local siting approval, it could continue its operations without getting a permit and risk prosecution and serious penalties, or it could shut down its operations. Alternate Fuels, 215 Ill. 2d at 232-33, 830 N.E.2d at 452. After Alternate Fuels chose to shut down its operations, the Agency had no reason to refer the alleged violation for prosecution because the alleged violation was no longer occurring. The court found if it did not allow judicial review to Alternate Fuels it would basically eliminate any chance Alternate Fuels had of getting a determination of whether it was in fact processing "waste" under the Act. Alternate Fuels, 215 Ill. 2d at 233, 830 N.E.2d at 452. The court further found:

> "The Agency's decision affected [Alternate Fuels] in a concrete way; the notice of violation caused [Alternate Fuels] to lose financing, lose its suppliers, and halt operations, thereby ending [Alternate Fuels's] agreement with Illinois Power. Thus, [Alternate Fuels] has already felt a direct and palpable injury and has an immediate financial stake in the resolution

of the instant action." Alternate Fuels, 215 Ill. 2d at 233, 830 N.E.2d at 452.

Plaintiffs' situation in the instant case is not nearly as compelling as the situations the plaintiffs faced in Abbott Labs and Alternate Fuels, respectively. The regulation at issue in this case has not forced plaintiffs out of business or had any effect on their day-to-day operations. In other words, plaintiffs have not felt the effects of this Rule in a concrete way. Further, plaintiffs are currently in compliance with the Rule, and it is extremely unlikely based on the allegations in plaintiffs' complaint that one of the individual plaintiffs in this case will ever be placed in a position where he will either have to violate his conscience or the letter of the Rule. As a result, plaintiffs will not suffer any hardship by our denial of judicial consideration.

We do not foreclose with this ruling the possibility of another pharmacist alleging facts sufficient to allow him or her to bring a preenforcement challenge to the validity of this Rule. We are only holding plaintiffs in this case have not pleaded facts establishing that they have felt the effects of this rule in a concrete way and will suffer a substantial hardship if they are not allowed to pursue this action at this time. Further, the provisions of neither the Illinois Health Care Right of Conscience Act (745 ILCS 70/1 through 14 (West 2004)) nor the Illinois Religious Freedom Restoration Act (775 ILCS 35/1 through 99 (West 2004)) makes this claim ripe for our consideration.

C. Exhaustion of Administrative Remedies

Because we have found this claim is not ripe for review, we decline plaintiffs' invitation to address this issue.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment.

Affirmed.

APPLETON, J., concurs.

TURNER, J., dissents.

JUSTICE TURNER, dissenting:

I disagree with the majority's conclusion that the provisions of the Health Care Right of Conscience Act (Right of Conscience Act) and the Illinois Religious Freedom Restoration Act fail to make plaintiffs' claims ripe for consideration. Therefore, I respectfully dissent.

A. Right of Conscience Act

Section 2 of the Right of Conscience Act provides, in part, as follows:

> "The General Assembly finds and declares that people and organizations hold different beliefs about whether certain health[-]care services are morally acceptable. It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons who *** are engaged in *** health[-]care services *** and to prohibit all forms of discrimination, disqualification, coercion, disability[,] or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health[-]care services and medical care." 745 ILCS 70/2 (West 2004).

"Conscience" has been defined as "a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths." 745 ILCS 70/3(e) (West 2004). Section 5 prohibits public officials from discriminating against persons "in any manner" because of that person's "conscientious refusal to *** participate in any way in any particular form of health[-]care services contrary to his or her conscience." 745 ILCS 70/5 (West 2004). A person injured by any action prohibited by the Right of Conscience Act may commence an action therefor and recover damages. 745 ILCS 70/12 (West 2004).

I would find plaintiffs have stated a compelling case under the Right of Conscience Act, one that is worthy of and ripe for consideration. In the case sub judice, plaintiff pharmacists are alleged to have moral and religious objections to dispensing emergency contraception pursuant to the Rule. The Right of Conscience Act purports to protect their beliefs and prevent "all forms" of coercion on the part of the government to alter those beliefs. Governor Blagojevich, however, has stated pharmacists "are not free to let [religious] beliefs stand in the way" of delivering emergency contraception to customers and "must fill prescriptions without making moral judgments." Press Release, Office of the Governor, Statement of Gov. Rod Blagojevich in response to lawsuit filed by Pat Robertson's American Center for Law and Justice challenging Governor's emergency rule for pharma-

cies (April 13, 2005), available at http://www.illinois.gov/PressReleases/PrintPressRelease.cfm?SubjectID=3&RecNum=3849. Further, the Governor has warned pharmacists that the State will "vigorously protect" the right of access to birth control and will take "any and all necessary steps to ensure a woman's access to her health care." Letter from Rod Blagojevich, Governor, State of Illinois, to Paul Caprio, Executive Director, Family-Pac (April 11, 2005). The intent of the Governor's statements is clear and undeniable--either comply with the Rule or else. Plaintiffs allege, therefore, they must choose either to violate the Rule or their consciences, a form of coercion expressly prohibited by the Right of Conscience Act. The risk of the revocation of their professional licenses unless they comply with the Rule is the ultimate in government coercion, threatening their very livelihood in the workforce within the State of Illinois. Accordingly, plaintiffs' claim the Right of Conscience Act offers them an avenue of relief is ripe for consideration.

B. Religious Freedom Restoration Act

Under section 10 of the Religious Freedom Restoration Act, the General Assembly has found "[t]he free exercise of religion is an inherent, fundamental, and inalienable right secured by [a]rticle I, [s]ection 3[,] of the Constitution of the State of Illinois." 775 ILCS 35/10(a)(1) (West 2004). One of the purposes of the Religious Freedom Restoration Act is "[t]o provide a claim or defense to persons whose exercise of religion

is substantially burdened by government." 775 ILCS 35/10(b)(2) (West 2004).

> "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 (West 2004).

Section 20 allows a person to raise a claim in a judicial proceeding and seek appropriate relief if his or her "exercise of religion has been burdened in violation" of the Religious Freedom Restoration Act. 775 ILCS 35/20 (West 2004).

Based on the purposes and protections of the Religious Freedom Restoration Act, I would find plaintiffs have standing to pursue their claims. Plaintiffs have alleged the Rule burdens their right to the free exercise of religion in violation of Illinois law. A forced choice between violating one's religious beliefs and complying with the law can amount to a substantial burden within the meaning of the Religious Freedom Restoration Act. See Wisconsin v. Yoder, 406 U.S. 205, 218, 32 L. Ed. 2d 15, 26, 92 S. Ct. 1526, 1534 (1972) ("[t]he impact of the compulsory-attendance law on respondents' practice of the Amish religion is

not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs"); Sherbert v. Verner, 374 U.S. 398, 404, 10 L. Ed. 2d 965, 970, 83 S. Ct. 1790, 1794 (1963) (where the appellant's declared ineligibility for benefits "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand").

In this case, plaintiffs claim the Rule, along with the Governor's edicts, has placed substantial pressure on them to modify or violate their religious beliefs or face the threat of government sanction. The alleged disregard here by the State's Chief Executive of the fundamental constitutional rights of these Illinois citizens to the free exercise of their religious beliefs is sufficient to grant them standing under the Religious Freedom Restoration Act. Therefore, I would find plaintiffs have set forth a justiciable claim that the State has placed a substantial burden on their protected constitutional right to the free exercise of religion. As plaintiffs have established a compelling claim, their action is ripe for consideration.

No. 4-05-1050

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 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.	Case No. 2005-CH495

AFFIDAVIT OF LUKE VANDER BLEEK

COMES NOW plaintiff-appellant Luke Vander Bleek, owner and part-owner respectively of plaintiff-appellants Morr-Fitz, Inc. and L.Doyle, Inc., and after being duly sworn, states as follows:

1. I am a plaintiff-appellant in this case and make this affidavit based upon personal knowledge and upon information conveyed to me by my employees.

2. Since the Rule has been in effect, I estimate that at least 3-4 customers have presented a prescription or otherwise requested emergency contraception from the pharmacies operated by Morr-Fitz and L. Doyle, in which I have ownership interests. I have personally observed at least 2 of these incidents.

3. We have continued to have customers present prescriptions or otherwise request emergency contraception even after the FDA's August 2006 decision to permit over-the-counter sales of Plan B to customers over the age of 18. I have personally observed this occurring.

4. Before the Rule took effect in August 2005, Morr-Fitz owned a pharmacy in Prophetstown, Illinois. That September our pharmacist manager gave notice of her relocation to her home state of Wisconsin, citing personal reasons.

5. On September 8, 2005, I posted a letter to more than 200 pharmacists residing within an approximate 60-mile radius to solicit an interested pharmacist as a replacement.

6. On September 24, 2005, Mr. Stan Weimer, R.Ph. of Geneseo, Illinois, called me at home to inquire more about the position. I emailed him more information and requested his updated resume. I subsequently received his updated resume, reviewed it, and requested a face-to-face interview. The 3 plus hour interview took place on October 3, 2005 in Prophetstown, IL. It included touring our facilities and meeting some of the staff members.

7. Mr. Weimer was the only qualified pharmacist to respond to my letter.

8. On October 6, 2005, Mr. Weimer gave me his commitment that he would take the position following a reasonable professional notice to his current employer to confirm that his pension would vest.

9. On October 7, 2005, Mr. Weimer emailed me stating: " I'm really looking forward to working for you in Prophetstown. I'm excited about the opportunities this presents. I

wish I could start Monday. I appreciate your patience and understanding of my current situation. I'll do everything I can to get things moving on my end."

10. On or about Wednesday October 19, 2005, I spoke again with Mr. Weimer. At that time Mr. Weimer advised me that his pension situation had been resolved. Mr. Weimer also confirmed that his first day of employment at my Prophetstown pharmacy would be November 21, 2005. I subsequently gave an interview to the local Prophetstown Newspaper, The Echo. In the interview I made the announcement that we had secured a full time pharmacist for the pharmacy and that Mr. Weimer would begin Monday, November 21, 2005.

11. On Thursday, October 27, 2005, Mr. Weimer telephoned me and inquired as to more details concerning this lawsuit and my religious and conscientious objection to providing emergency contraception as required by the Rule. Although he expressed support for my position, Mr. Weimer expressed his insecurity about making a move to a new business where the threat of government imposed sanctioning and closure is present.

12. On Friday, October 28, 2005, Mr. Weimer and I again spoke by telephone when he withdrew his commitment to join our staff. His reasoning was that he and his wife were not comfortable with the controversy and uncertainty surrounding the new Pharmacy Regulations and this lawsuit.

13. Due to the inability to hire a qualified pharmacist in charge for the Prophetstown Pharmacy, I closed the pharmacy on November 18, 2005.

14. Prior to closing, the Prophetstown pharmacy generated approximately $75,000 in annual profits.

15. Since I closed the Prophetstown pharmacy, a competitor, Hartig Pharmacy, has opened a pharmacy in Prophetstown. Mr. Weimer currently works as the pharmacist in charge at Hartig Pharmacy in Prophetstown.

Dated this 4th day of April, 2007

Luke Vander Bleek, R.Ph.

Subscribed and sworn before me, Luke Vander Bleek this __ day of April 2007

JODYMAE A. ROESER NOTARY PUBLIC STATE OF WISCONSIN

Notary Public

My Commission Expires: 2-10-11

No. 4-05-1050

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 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.	Case No. 2005-CH495

AFFIDAVIT OF GLENN KOSIROG

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

1. I am a plaintiff-appellant in this case and make this affidavit based upon personal knowledge and upon information conveyed to me by my employees.

2. Since the Rule has been in effect, I estimate that at least 12 customers have presented a prescription or otherwise requested emergency contraception from the pharmacy operated by Kosirog Pharmacy, Inc. I have personally observed several of these incidents.

3. We have continued to have customers present prescriptions or otherwise request emergency contraception even after the FDA's decision in August 2006 permitting over-the-counter sales of Plan B to customers over age 18. I have personally observed this occurring.

4. We do not stock emergency contraceptives. Our policy is not to obtain such drugs if requested by a patient.

5. Potential employees have expressed concerns about working in my pharmacy because of the conflict between our policy against distributing emergency contraceptives and the Rule's requirement to distribute them. I have been required to spend additional resources recruiting pharmacists and addressing their concerns about the impact of the Rule on my business.

Dated this __ day of April, 2007

Glenn Kosirog, R.Ph.

Subscribed and sworn before me, Glenn Kosirog this 4th day of April 2007

Danuta Tech

"OFFICIAL SEAL"
DANUTA TECH
NOTARY PUBLIC STATE OF ILLINOIS
My Commission Expires 09/23/2008

Notary Public

My Commission Expires:

Illinois Law & Practice
Database updated June 2006

Declaratory Judgments
Kathleen M. Geiger, J.D.
III. Subjects of Declaratory Relief
C. Constitutions, Statutes, or Ordinances

Summary; Correlation Table; References

§ 25. Availability of relief

West's Key Number Digest

West's Key Number Digest, Declaratory Judgment  122 to 127

A declaratory-judgment action may be maintained where statutes or administrative rules, which have cleared all hurdles prerequisite to their becoming fully effective, require one either to take certain action or to refrain from certain action, regardless of the actual probability of prosecution for noncompliance.[FN1] However, an action will not lie to determine the construction of validity of a statute or ordinance where the essential elements requisite to declaratory relief are not present, as where there is no actual justiciable controversy between the parties.[FN2]

In accordance with general principles, a plaintiff is not entitled to declaratory relief unless he or she can show not only that the statute or ordinance is invalid, but also that he or she has sustained, or is in immediate danger of sustaining, some immediate injury as a result of its enforcement; [FN3] the mere applicability of a statute or ordinance to the rights of a person in some future time does not give the person standing to challenge the validity of the statute or ordinance in a declaratory-judgment action.[FN4]

Moreover, where a challenged statute is amended while a cause is pending, the question of the preamended statute's validity becomes moot.[FN5]

The court will not grant a declaratory judgment as to the validity of a statute and ordinance under which it is proposed to issue certain bonds, since until the legislative process which includes the holding of a referendum election is concluded there is no controversy ripe for a declaratory judgment.[FN6] However, a declaratory-judgment action will lie to determine rights under a statute and the constitutionality of the statute even though the statute has not yet taken effect.[FN7]

[FN1] **Kerr-McGee Chemical Corp. v. Department of Nuclear Safety, 204 Ill. App. 3d 605, 149 Ill. Dec. 674, 561 N.E.2d 1370 (4th Dist. 1990)**.

[FN2] Berg v. City of Chicago, 97 Ill. App. 2d 410, 240 N.E.2d 344 (1st Dist. 1968).

City's allegation that federal law preempted provision of Illinois Aeronautics Act directing Illinois Department of Transportation (IDOT), when considering whether to issue certificate of approval for expansion of airport facilities, to consider effect of the proposed development on "the then current State airport plan," was not ripe for review, where IDOT had taken no action on city's plan to acquire land for airport expansion and IDOT had not sought to curtail airport expansion based on the allegedly preempted state statute; court would not assume IDOT

would take any action conflicting with federal law. Philip v. Daley, 339 Ill. App. 3d 274, 274 Ill. Dec. 188, 790 N.E.2d 961 (2d Dist. 2003), appeal denied, 281 Ill. Dec. 96, 803 N.E.2d 500 (Ill. 2003).

[FN3] Winokur v. Rosewell, 83 Ill. 2d 92, 46 Ill. Dec. 671, 414 N.E.2d 724 (1980); Stone v. Omnicom Cable Television of Illinois, Inc., 131 Ill. App. 3d 210, 86 Ill. Dec. 226, 475 N.E.2d 223 (2d Dist. 1985).

[FN4] Berg v. City of Chicago, 97 Ill. App. 2d 410, 240 N.E.2d 344 (1st Dist. 1968); Salem Nat. Bank v. City of Salem, 47 Ill. App. 2d 279, 198 N.E.2d 137 (5th Dist. 1964).

[FN5] Silver Fox Limousine v. City of Chicago, 306 Ill. App. 3d 103, 239 Ill. Dec. 52, 713 N.E.2d 583 (1st Dist. 1999) (validity of city ground transportation tax).

[FN6] Slack v. City of Salem, 31 Ill. 2d 174, 201 N.E.2d 119 (1964).

[FN7] CGE Ford Heights, L.L.C. v. Miller, 306 Ill. App. 3d 431, 239 Ill. Dec. 477, 714 N.E.2d 35 (1st Dist. 1999), as modified on denial of reh'g, (Aug. 4, 1999).

IL-LP DECLJUDS § 25
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