

PROTECTING CONSCIENCE THROUGH LITIGATION: LESSONS LEARNED IN THE LAND OF BLAGOJEVICH†

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Resolved, That the guarantee of the rights of conscience, as found in our Constitution, is most sacred and inviolable, and one that belongs no less to the Catholic, than to the Protestant; and that all attempts to abridge or interfere with these rights, either of Catholic or Protestant, directly or indirectly, have our decided disapprobation, and shall ever have our most effective opposition.¹

—Abraham Lincoln

[Illinois] pharmacists with moral objections [to dispensing certain drugs,] should find another profession.²

—Governor Rod Blagojevich

INTRODUCTION

On April 1, 2005, Illinois Governor Rod Blagojevich issued an Emergency Amendment to the Illinois Pharmacy Practice Act requiring all Illinois retail pharmacies to dispense all Federal Drug Administration (“FDA”) approved contraceptives “without delay.”³ The Emergency Amendment (“the Rule” or “the Emergency Rule”) contained no exemption for pharmacists or pharmacy owners with religious objections to selling any forms of contraception, particularly contraception considered by the pharmacists to be abortifacient in

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¹ THE COLLECTED WORKS OF ABRAHAM LINCOLN 338 (Roy P. Basler et al. eds., 1953) (quoting a resolution proposed by Abraham Lincoln to a meeting of the Whig Party in Springfield, Illinois, on June 12, 1844).

² *Morr-Fitz v. Blagojevich*, 231 Ill. 2d 474, 501 (2008) (quoting a statement made by Governor Rod Blagojevich) (internal quotation marks omitted).

³ Press Release, Office of the Governor, Gov. Blagojevich Takes Emergency Action to Protect Women’s Access to Contraceptives (Apr. 1, 2005) [hereinafter Press Release, Gov. Blagojevich Takes Emergency Action] (on file with author).

nature.⁴ The Blagojevich Emergency Rule brought to a boil a simmering controversy about conscience rights and gave rise to a series of lawsuits whose starts and stops and twists and turns provide a useful framework for examining how litigation can be used effectively to protect the rights of conscience of pro-life citizens in the medical profession. In Parts I and II, this Article looks at the sources of the controversy. Part III proceeds with an account of the Illinois pharmacists' legal battle against the Blagojevich Emergency Rule. Part IV discusses the various lawsuits brought in response to the Rule, the legal strategies employed, the arguments advanced, and the results obtained. The Article concludes, in Part V, with a review of the lessons learned from a legal standpoint—which strategies worked and which failed—along with some observations about which of those lessons learned in the Illinois battle show promise for pro-life medical professionals who find themselves involved in similar struggles elsewhere.

I. THE BACKGROUND

One of the effects of the Supreme Court's decisions in *Roe v. Wade*⁵ and *Doe v. Bolton*⁶ was the creation within the American health care system of a potential class of conscientious objectors of a kind and on a scale previously unknown.⁷ The Court's 1973 decisions, effectively striking down the abortion laws of all the states, placed in jeopardy the consciences of health care professionals for whom participation in abortion was the equivalent of participating in an act of killing an innocent human being. Yet, at the same time the Court was legalizing abortion, the Court itself recognized the potential clash between its decision and the consciences of those to whom abortion was repugnant, and expressly recognized—and, at least arguably, upheld—the constitutionality of statutory measures designed to protect the right of conscience. In *Doe v. Bolton*, the Court unanimously upheld Section 26-1202(e)⁸ of the Georgia abortion law at issue in that case.⁹ Justice

⁴ Press Release, Office of the Governor, State Comm'n Gives Permanent Approval to Gov. Blagojevich's Emergency Rule Protecting Ill. Women's Right to Birth Control (Aug. 16, 2005) [hereinafter Press Release, State Comm'n Gives Permanent Approval to Emergency Rule] (on file with author).

⁵ 410 U.S. 113 (1973).

⁶ 410 U.S. 179 (1973).

⁷ See generally Eric M. Uslaner & Ronald E. Weber, *Public Support for Pro-Choice Abortion Policies in the Nation and States: Changes and Stability After the Roe and Doe Decisions*, 77 MICH. L. REV. 1772, 1780 (1979) ("The abortion policies of *Roe* and *Doe* have not been legitimized. We have not seen substantial increases in public support for abortion after the Court decisions; instead, we have witnessed a hardening of positions by many who were opposed to abortions. The issues have become increasingly salient rather than resolved.").

⁸ The Court in *Doe* quoted the Georgia statute, including the relevant subsection:

Blackmun described the provisions of that statute as providing that “a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure.”¹⁰ Blackmun’s opinion on this issue was joined by the entire Court, leading Professor Lynn Wardle to note,

Thus, not merely the author of *Roe*, Justice Blackmun, and not merely the majority of justices on the Court, but all nine justices in the seminal abortion cases, expressed clearly that statutory conscience protections for both individual and institutional health-care providers are constitutionally permissible. The constitutionality of “conscience clause” legislation in principle cannot be in doubt as a matter of general constitutional principle after *Doe*.¹¹

In response to *Roe* and *Doe*, and the green light given to conscience-protecting legislation as noted above, state and federal legislatures enacted a patchwork of “conscience clauses.”¹² These laws range in scope from measures that cover broad classes of potential objectors and objectionable procedures to laws that are narrowly focused on one or two categories of medical personnel performing abortions.¹³ On the state level, some forty-seven state legislatures have over the years enacted conscience legislation directly addressing the moral and ethical dilemma faced by those seeking to remain fully engaged in the provision of health care within a system that, post *Roe* and *Doe*, is required to include the provision of services many find morally and ethically unacceptable.¹⁴

The state conscience laws are, however, anything but uniform in scope. To illustrate the available spectrum of conscience protections among state laws, contrast North Carolina’s conscience law, which provides protection only to physicians and nurses who refuse to

Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b)(5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

Doe, 410 U.S. at 205 (quoting GA. CODE ANN. § 26-1202(e) (1968)).

⁹ *Id.* at 201–02, 205.

¹⁰ *Id.* at 197–98.

¹¹ Lynn D. Wardle, *Protection of Health-Care Providers’ Rights of Conscience in American Law: Present, Past, and Future*, 9 AVE MARIA L. REV. 1, 18–19 (2010).

¹² *Id.* at 27.

¹³ *Id.* at 27–28, 34 & n.123.

¹⁴ *See id.* at 27.

participate in abortions,¹⁵ with Illinois's Health Care Right of Conscience Act,¹⁶ which makes it unlawful for "any person, public or private institution, or public official to discriminate against any person in any manner, . . . because of such person's conscientious refusal to . . . participate in any way in any particular form of health care services contrary to his or her conscience."¹⁷ The North Carolina law hews closely to the relatively narrow language and scope of the Georgia provision upheld in *Doe*.¹⁸ The Illinois statute, on the other hand, opens up the widest vista of conscience protection imaginable.¹⁹ For those who favor broad conscience protection in health care, the Illinois Health Care Right of Conscience Act has long been the "gold standard."

On the federal level, the "Church Amendment" appears to offer conscience protection to a class of individuals and procedures as broad as

¹⁵ N.C. GEN. STAT. § 14-45.1(e) (2009) ("Nothing in this section shall require a physician licensed to practice medicine in North Carolina or any nurse who shall state an objection to abortion on moral, ethical, or religious grounds, to perform or participate in medical procedures which result in an abortion. The refusal of such physician to perform or participate in these medical procedures shall not be a basis for damages for such refusal, or for any disciplinary or any other recriminatory action against such physician.").

¹⁶ The Illinois Health Care Right of Conscience Act provides in pertinent part as follows:

Findings and policy. 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 refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; 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 ILL. COMP. STAT. ANN. 70/2 (West 2010) (emphasis added).

Liability. No physician or health care personnel shall be civilly or criminally liable to any person, estate, public or private entity or public official by reason of his or her refusal to perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care service which is contrary to the conscience of such physician or health care personnel.

Id. at 70/4.

¹⁷ *Id.* at 70/5.

¹⁸ *Compare Doe v. Bolton*, 410 U.S. 179, 197–98 (1973) (citing GA. CODE ANN. § 26-1202(e) (1968)) (permitting conscience protections for hospitals and physicians), *with* N.C. GEN. STAT. § 14-45.1(e) (2009) (providing conscience protections solely to physicians and nurses).

¹⁹ *See* 745 ILL. COMP. STAT. ANN. 70/2, 70/4 (West 2010) (providing broad conscience protections to "all persons" involved in the health-care industry in addition to explicitly protecting physicians and health care personnel).

those set forth in the Illinois Health Care Right of Conscience Act.²⁰ Unlike the Illinois statute, however, the Church Amendment was drafted without the enforcement mechanism of a private right of action. And, thus far, arguing to the courts that a private right of action is implied under the law has proven unavailing.²¹ Other federal conscience measures also lack any effective enforcement mechanisms for private citizens seeking to invoke their protection.²²

In addition to specific “conscience clause” measures, enacted expressly to respond to the Supreme Court’s legalization of abortion, First and Fourteenth Amendment arguments in favor of the right of conscience have been advanced by those seeking conscience protection.²³ As discussed below, despite dire warnings of the “end of free exercise” following the Supreme Court’s decision in *Employment Division v. Smith*,²⁴ arguments that certain conscience-coercing statutory and regulatory measures violate the Free Exercise Clause have proven successful on occasion.²⁵ In addition, state Religious Freedom Restoration Acts (“RFRA”)—enacted in response to *Smith*—have also been invoked in conscience litigation.²⁶ Also widely invoked in the area of

²⁰ 42 U.S.C. § 300a-7(c)(1) (2006) provides in pertinent part as follows:

No entity which receives a grant, contract, loan, or loan guarantee under [certain statutory schemes governing federal health care funding] . . . may . . . discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel . . . because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

²¹ See *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 698–99 (2d Cir. 2010); *Nead v. Bd. of Trs. of E. Ill. Univ.*, No. 2:05-cv-02137-HAB-DGB, slip op. at 6 (C.D. Ill. June 6, 2006); *Moncivaiz v. Dekalb*, No. 3:03-cv-50226, slip op. at 1 (N.D. Ill. Mar. 12, 2004).

²² See, e.g., 42 U.S.C. § 238n (2006) (disallowing Federal funds when there is abortion-related discrimination in governmental activities regarding training and licensing of physicians, but lacking an enforcement mechanism); see also *Hyde-Weldon Amendment*, Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209 (2007).

²³ See *infra* Part III.A.

²⁴ 494 U.S. 872, 890 (1990) (holding that the Free Exercise Clause permits Oregon to prohibit religious peyote use and thus deny unemployment compensation to respondents using the drug).

²⁵ See, e.g., *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (holding that city ordinances prohibiting religious practices violated the Free Exercise Clause); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (holding that the Department’s policy regarding the wearing of beards by officers for religious reasons violated the Free Exercise Clause).

²⁶ See, e.g., *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 233–34 (3d Cir. 2008).

conscience protection is Title VII of the Civil Rights Act of 1964.²⁷ Although not necessarily the first place one might look for legal defense against public or private threats to conscience rights, Title VII has, in fact, proven a most flexible and effective tool in preventing or redressing specific threats to conscience rights, at least when those threats have arisen in the workplace.

II. CONSCIENCES IN CONFLICT WITH “EMERGENCY CONTRACEPTION”

In the post-*Roe/Doë* period, it must be admitted that reported instances of government or private actors compelling, or threatening to compel, unwilling objectors to directly perform or participate in surgical abortions, including suction aspiration, dilation and curettage, or dilation and evacuation procedures, have been relatively rare.²⁸ But with the FDA’s 1997 approval of the Yuzpe regimen of post-coital contraception, followed soon thereafter by widespread U.S. marketing of various forms of “emergency contraception,” “morning-after pills,” and “Plan B,” there occurred an upsurge in conscientious objection claims that shows no sign of subsiding anytime soon.²⁹ “Emergency contraception” became the catalyst for new attention to conscience clauses and conscience cases for several reasons: (1) disagreement about whether emergency contraception drugs or regimens may properly be seen as causing abortions;³⁰ (2) ambiguity in existing conscience laws about whether such laws cover procedures other than surgical abortions;³¹ (3) ambiguity in existing conscience laws about who may

²⁷ See *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 995, 1002–03 (C.D. Ill. 2006) (illustrating plaintiffs’ successful use of Title VII as a legal defense against threats to conscience rights).

²⁸ But see *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 696 (2d Cir. 2010) (detailing an account of a nurse’s supervisors compelling her to participate in a late-term abortion against her conscientious objections); Settlement Order at 1, *Danquah v. UMDNJ*, No. 2:11-cv-06377-JLL-MAH (D.N.J. Dec. 23, 2011), ECF No. 41 (detailing a case where employers required employees to perform terminations of pregnancies, which were contrary to the employees’ religious beliefs and moral convictions).

²⁹ See R. Alta Charo, *The Celestial Fire of Conscience—Refusing to Deliver Medical Care*, 352 NEW ENG. J. MED. 2471, 2471 (2005); Robert K. Vischer, *Conscience in Context: Pharmacist Rights and the Eroding Moral Marketplace*, 17 STAN. L. & POLY REV. 83, 91 (2006); Jessica D. Yoder, Note, *Pharmacists’ Right of Conscience: Strategies for Showing Respect for Pharmacists’ Beliefs While Maintaining Adequate Care for Patients*, 41 VAL. U. L. REV. 975, 1010 (2006).

³⁰ See Yoder, *supra* note 29, at 978–80 (describing the conflict between different medical/scientific studies and opinions); see also Donald W. Herbe, Note, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist’s Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77, 85 (2002–03) (explaining that the conflict as to whether emergency contraception constitutes abortion stems from different views of “when human life begins”).

³¹ See Herbe, *supra* note 30, at 97–98.

claim their protection;³² and (4) the venue where emergency contraception is typically sought, or the retail pharmacy as opposed to the privacy of the physician's office or a clinic.³³

With regard to the first reason, there is no room for doubt about what happens in a surgical abortion: A pregnant woman undergoes a medical procedure the purpose and effect of which is to terminate the pregnancy by any one of a number of medical techniques. For those who hold that human life begins at fertilization, and whose religious or ethical principles forbid them to participate in the direct taking of an innocent human life, participating in such a procedure is obviously unacceptable. In emergency contraception, on the other hand, there is at least room for scientific debate about whether the action of the drugs used terminates a pregnancy or merely prevents pregnancy from occurring.³⁴ Much of the ambiguity here can be traced to the still controversial actions of the American College of Obstetricians and Gynecologists ("ACOG"), the American Medical Association ("AMA"), and the FDA in defining pregnancy as beginning at implantation as opposed to fertilization.³⁵ By defining pregnancy as beginning at implantation, and by assuming *sub silentio* that the beginning of pregnancy marks the beginning of human life, it is logical to conclude that drugs that merely prevent (sometimes) the implantation of the blastocyst in the uterine wall merely prevent pregnancy from occurring and thus cannot be seen as causing an abortion. For those who believe that human life begins at fertilization, however, regardless of when "pregnancy" is said to begin, administering drugs that prevent implantation in the uterine wall

³² See *id.* at 98.

³³ See *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 1001 (C.D. Ill. 2006). Plaintiffs alleged that the Emergency Rule applies only to Division I pharmacies, not hospitals and emergency rooms. *Id.*

³⁴ See Yoder, *supra* note 29, at 979–80 n.27; FDA Center for Drug Evaluation and Research, *FDA's Decision Regarding Plan B: Questions and Answers*, FDA (May 7, 2004), available at <http://www.fda.gov/cder/drug/infopage/planB/planBQandA.htm> (providing the FDA's description of how Plan B works).

³⁵ Rachel Benson Gold, *The Implications of Defining When a Woman Is Pregnant*, GUTTMACHER REP. ON PUB. POL'Y, May 2005, at 7, 7 ("In fact, medical experts—notably the American College of Obstetricians and Gynecologists (ACOG)—agree that the establishment of a pregnancy takes several days and is not completed until a fertilized egg is implanted in the lining of a woman's uterus."); Donald W. Herbe, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & Health 77, 86 (2002–03) ("The American Medical Association (AMA) equates conception, and in effect the beginning of life, with the implantation of the blastocyst in the woman's uterus."); Walter L. Larimore et al., *In Response: Does Pregnancy Begin at Fertilization?* 36 FAM. MED. 690, 690 (2004); Yoder, *supra* note 29, at 979 ("[T]he FDA has adopted the view that pregnancy begins when a fertilized egg is implanted in the uterine lining . . .").

evidences the intent to terminate a human life and, thus, intent to abort.³⁶

In addition to this most basic reason for the upsurge in conscience-related controversies beginning in the late 1990s, the ambiguity in existing conscience laws regarding what and whom they cover as well as the venue where the controversy is normally played out—the retail pharmacy counter—all contributed to the disturbance of the previously mentioned relative calm post-*Roe* and *Doe*, at least when it came to public or private coercion of unwilling participants' consciences. But beginning with the 1999 case of *Brauer v. K-Mart Corporation*,³⁷ in which an Ohio pharmacist sued her ex-employer after being fired for refusing to dispense birth control pills with post-implantation mechanisms of action, cases involving pharmacists and other medical workers in disputes with employers over the issue of emergency contraception, the morning-after pill, and Plan B became more frequent.³⁸ An Alan Guttmacher Institute report in June 1999, sounded a warning that such cases, once seen as no more than “isolated cases” and “fluke occurrences,” were becoming more widespread, jeopardizing access

³⁶ For example, a leading textbook on embryology responds to a question about whether “morning-after pills” (postcoital birth control pills) may properly be said to cause abortions as follows:

Postcoital birth control pills (“morning after pills”) . . . usually prevent implantation of the blastocyst, probably by altering tubal motility, interfering with corpus luteum function, or causing abnormal changes in the endometrium. *These hormones prevent implantation, not fertilization.* Consequently, they should not be called contraceptive pills. Conception occurs but the blastocyst does not implant. It would be more appropriate to call them “contraimplantation pills.” Because the term *abortion* refers to a premature stoppage of a pregnancy, the term *abortion* could be applied to such an early termination of pregnancy.

KEITH L. MOORE & T.V.N. PERSAUD, *THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY* 532 (6th ed. 1998).

³⁷ Order, *Brauer v. K-Mart Corp.*, No. 1:99-cv-00618-TSB (S.D. Ohio Jan. 23, 2001). In *Brauer*, the court denied K-Mart’s motion for summary judgment on Brauer’s claim under Ohio’s abortion conscience clause, O.R.C. § 4731.91(D). Brauer had argued, and the court agreed, that the statute which read, in pertinent part, that “no person is required to . . . participate in medical procedures which result in abortion” and that refusal to participate in such procedures “is not grounds . . . for disciplinary or other recriminatory action” did apply to pharmacists and that, given the intent of the legislature in enacting the measure to provide broad protection to individuals to act in accordance with the dictates of their consciences, Brauer should be permitted to pursue her claim. *Id.* at 1, 8, 22.

³⁸ See, e.g., Order at 1–2, *Diaz v. Cnty. of Riverside Health Servs. Agency*, No. 5:00-cv-00936-VAP-SGL (C.D. Cal. July 23, 2002), ECF No. 81 (detailing jury verdict for nurse who was terminated for refusing to dispense the morning-after-pill and awarding damages and attorneys’ fees); Settlement Agreement, *Koch v. Indian Health Serv.*, IHS-027-01 (2005) (reaching agreement exempting pharmacist employed by the Bureau of Indian Affairs from dispensing morning-after-pill).

to the full range of contraceptive services nationwide.³⁹ The report noted with alarm that retail giant Wal-Mart, apparently responding to concerns expressed by some of its pharmacists, had elected to not sell emergency contraception at all on a company-wide basis.⁴⁰

Enter Illinois Governor Rod Blagojevich.

III. BLAGOJEVICH ANNOUNCES THE EMERGENCY RULE

The Illinois Emergency Rule announced by Governor Blagojevich on April 1, 2005, read, in pertinent part, 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.⁴¹

The issuing of the Rule was accompanied by considerable publicity. At a press conference announcing the Rule, Governor Blagojevich stood with National Abortion Rights Action League ("NARAL") President Nancy Keenan, and President of Planned Parenthood Karen Pearl, and boasted that he was making Illinois the first state to require pharmacies and pharmacists to dispense emergency contraceptives "without delay."⁴²

³⁹ Susan A. Cohen, *Objections, Confusion Among Pharmacists Threaten Access To Emergency Contraception*, GUTTMACHER REP. ON PUB. POL'Y, June 1999, at 1, 1.

⁴⁰ *Id.* at 1-2.

⁴¹ 29 Ill. Reg. 13639, 13663 (Sept. 9, 2005).

⁴² Press Release, Gov. Blagojevich Takes Emergency Action, *supra* note 3; *see also* Appellants' Brief at 6, 9, *Morr-Fitz, Inc. v. Blagojevich*, 901 N.E.2d 373 (Ill. 2008) (No. 104692) (noting Governor Blagojevich's "unequivocal commitment to enforcing the Rule against objecting pharmacists"); Press Release, Office of the Governor, Statement from Gov. Rod Blagojevich (Apr. 13, 2005) [hereinafter Statement from Gov. Rod Blagojevich] (on file with author) ("If a pharmacy wants to be in the business of dispensing contraceptives, then it must fill prescriptions without making moral judgments. Pharmacists—like everyone else—are free to hold personal religious beliefs, but pharmacies are not free to let those beliefs stand in the way of their obligation to their

Blagojevich cited two instances of women in Chicago having their prescriptions for emergency contraception declined by pharmacists with religious objections to filling them.⁴³ During the press conference, Blagojevich made clear that the Rule was directed at pharmacists who refused to dispense drugs due to the pharmacists' moral or religious convictions.⁴⁴ On the same day, the Governor issued a press release that included supportive quotations from NARAL and other pro-choice groups and urged citizens to call a toll-free number to report instances of pharmacies refusing to dispense emergency contraceptives.⁴⁵

Less than two weeks later, Blagojevich issued a letter warning that pharmacists who turned away emergency contraception prescriptions because they "disagree with the use of birth control" would face serious consequences up to and including revocation of their licenses.⁴⁶ On April 13, 2005, the Governor's office issued a press release stating that pharmacies must fill prescriptions "without making moral judgments."⁴⁷ Blagojevich conceded that "[p]harmacists—like everyone else—are free to hold personal religious beliefs," but warned that "pharmacies are not free to let those beliefs stand in the way of their obligation to their customers."⁴⁸

A. *Pro-life Pharmacists Respond to the Rule*

Governor Blagojevich's Emergency Rule contained an inherent ambiguity that contributed greatly to the numerous lawsuits the Rule sparked and bedeviled their easy resolution. The Rule, on its face, applied only to pharmacies—not pharmacists.⁴⁹ But both the common-sense reading of it—pharmacies do not dispense drugs, pharmacists do—as well as Blagojevich's own public utterances about the Rule's intended targets, served to render this pharmacy/pharmacists distinction a distinction without any real practical difference for pharmacists and pharmacy owners.

customers."); Letter from Rod Blagojevich, Governor of Ill., to Paul Caprio, Exec. Dir., Family-Pac (Apr. 11, 2005) [hereinafter Letter from Blagojevich to Caprio] (on file with author) ("If a pharmacist refuses to fill a woman's prescription for birth control, their employer faces significant penalties, ranging from fines to losing their license to fill prescriptions of any kind.")

⁴³ Press Release, Gov. Blagojevich Takes Emergency Action, *supra* note 3.

⁴⁴ *Id.*; see also Appellants' Brief at 6, 9, *Morr-Fitz*, 901 N.E.2d 373 (Ill. 2008) (No. 104692).

⁴⁵ *Id.*

⁴⁶ Letter from Blagojevich to Caprio, *supra* note 42.

⁴⁷ Statement from Gov. Rod Blagojevich, *supra* note 42.

⁴⁸ *Id.*

⁴⁹ 29 Ill. Reg. 5586, 5596 (Apr. 15, 2005).

Peggy Pace and John Menges were the first Illinois pharmacists to file legal challenges to the Rule.⁵⁰ As of the date the Rule was announced, both Pace and Menges were employed by Walgreens, the largest retail pharmacy chain in Illinois.⁵¹ They shared “religious, moral, and ethical beliefs” that prohibited them from dispensing drugs with an abortifacient mechanism of action, including emergency contraception.⁵² Pace and Menges had each informed Walgreens in the past of their opposition to dispensing such drugs and Walgreens had, in fact, honored and accommodated their beliefs through its company-wide “Referral Pharmacist Policy.”⁵³ This policy allowed Walgreens pharmacists to decline to fill prescriptions based on their religious convictions as long as the prescriptions could be filled by another pharmacist at the store or in a nearby store.⁵⁴ According to Pace and Menges, this policy had worked for a number of years and enabled them to avoid conflicts with their employer or their customers.⁵⁵ But on the same day that Blagojevich issued the Rule, Walgreens sent an e-mail to each of its pharmacists informing them that, because of the Rule, the company was rescinding its Referral Pharmacist Policy in the state of Illinois.⁵⁶ Pace, Menges, and other Walgreens pharmacists were thus faced with a stark choice: Obey their employer’s rules, purporting to apply the Emergency Rule, or face adverse employment action and possible state discipline.⁵⁷

On April 13, 2005, less than two weeks after the Rule’s effective date, Pace and Menges filed suit against the Governor and state regulatory officials in the Seventh Judicial Circuit, Sangamon County, Springfield, Illinois.⁵⁸ Their Complaint contained the following allegations: (1) that the Rule was a regulation in direct conflict with the Illinois Health Care Right of Conscience Act’s (“HCRCA”) broad prohibition of discrimination by public or private parties against “any person in any manner” because of that person’s refusal to “participate in any way in any particular form of health care services contrary to his or

⁵⁰ Complaint at 1–2, *Pace v. Blagojevich*, No. 2005-MR-000199 (Ill. 7th J. Cir. Ct. Apr. 13, 2005) [hereinafter *Pace Complaint*]; Rachel Rustay, *Illinois Pharmacists Have Right to Refuse*, LIBERTY CHAMPION, Apr. 26, 2005, at A5 (documenting that the Complaint against Blagojevich was filed on April 13, 2005).

⁵¹ *Pace Complaint*, *supra* note 50, at 3–4. Although this Complaint does not specify Walgreens was the employer, the federal case of *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 995–96 (C.D. Ill. 2006), which includes plaintiff Menges, does specifically name Walgreens as the pharmacy chain.

⁵² *Pace Complaint*, *supra* note 50, at 3–4.

⁵³ *Menges*, 451 F. Supp. 2d at 998.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Pace Complaint*, *supra* note 50, at 4.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1; Rustay, *supra* note 50, at A5.

her conscience"; (2) that the Rule imposed a substantial burden on the plaintiffs' exercise of religion in violation of the Illinois Religious Freedom Restoration Act; (3) that the Rule, which contained no exceptions for religious objectors, was in direct conflict with the provisions of both Title VII and the Illinois Human Rights Act requiring employers to make reasonable accommodations for their employees' religious beliefs and practices; and (4) that the Rule was adopted in violation of the Illinois Administrative Procedure Act.⁵⁹ In addition to filing their Complaint, Pace and Menges moved for a preliminary injunction.⁶⁰

With regard to the first count, the plaintiffs' argument was straightforward: The Rule (at least as interpreted by the Governor himself, if not expressly) compelled pharmacists such as Pace and Menges to participate in health care services contrary to their consciences, such as dispensing emergency contraception.⁶¹ Since the Rule, an administrative regulation, was subordinate to any contrary state statute, such as the HCRCA, the Rule was invalid. The RFRA argument was (not surprisingly, given the purpose of RFRA) essentially the type of free exercise argument that carried the day in *Wisconsin v. Yoder*⁶² and *Sherbert v. Verner*.⁶³ The Rule substantially burdened the plaintiffs in their exercise of religion and was not justified by any compelling state interest.⁶⁴ The Title VII and Human Rights Act counts argued that the Rule was invalid because its lack of even the possibility of an employee religious exemption conflicted with both statutes' religious accommodation provisions.⁶⁵ Finally, Pace and Menges claimed that the government's failure to adhere to the notice and comment

⁵⁹ Pace Complaint, *supra* note 50, at 5, 7–12.

⁶⁰ *Id.* at 12.

⁶¹ *Id.* at 4, 6.

⁶² 406 U.S. 205 (1972). The Court reasoned,

[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, "prepare [them] for additional obligations."

Id. at 214 (quoting *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925)) (second alteration in original).

⁶³ 374 U.S. 398, 410 (1963) (holding that "South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest").

⁶⁴ Pace Complaint, *supra* note 50, at 8. Curiously, especially in light of subsequent developments, Pace and Menges did not include a straight free exercise challenge.

⁶⁵ *Id.* at 9–10.

provisions of the Illinois Administrative Procedure Act, coupled with the lack of anything approaching a true emergency, rendered the Rule void.⁶⁶

The State responded with a Motion to Dismiss the Complaint.⁶⁷ In addition to attempting to counter plaintiffs' merits arguments, the State took a position that, frankly, contradicted the position publicly taken by the Governor. The State argued that the plaintiffs lacked standing because the Rule, on its face, did not apply to the plaintiffs since they were pharmacists and not pharmacies.⁶⁸ Further, the State represented to the court that it did not intend, indeed it lacked the authority, to take any action whatsoever against individual pharmacists under the Rule.⁶⁹ Only pharmacies themselves were affected. According to the Illinois Attorney General's Office, it was up to pharmacy owners to come up with a way to comply with the Rule without compelling objecting pharmacists whom they employed.⁷⁰

Before the *Pace* motions were adjudicated, two Illinois pharmacy owners also filed a challenge to the Rule. Luke Vander Bleek and Glenn Kosirog, principal owners of three pharmacies between them, shared with Pace and Menges the same beliefs regarding emergency contraception.⁷¹ Vander Bleek and Kosirog refused for religious reasons to stock or sell emergency contraception in their stores.⁷² They sued in the same court as Pace and Menges under the caption, *Morr-Fitz, Inc. v. Blagojevich*.⁷³ The *Morr-Fitz* Complaint alleged the same causes of action as *Pace* with the addition of counts alleging violations of the Free Exercise Clause, the Fourteenth Amendment, and the federal Hyde-Weldon Amendment.⁷⁴ The *Morr-Fitz* plaintiffs moved for a permanent injunction, and the State countered with a motion to dismiss.⁷⁵

As it did in *Pace*, the State's response in *Morr-Fitz* argued that the plaintiffs lacked standing, the case was not ripe, and the plaintiffs had failed to exhaust their administrative remedies.⁷⁶ The Circuit Court was

⁶⁶ *Id.* at 11–12.

⁶⁷ Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiff's Complaint at 1, *Pace v. Blagojevich*, No. 2005-MR-000199 (Ill. 7th J. Cir. Ct. May 2, 2005).

⁶⁸ *Id.* at 2.

⁶⁹ *Id.* at 7.

⁷⁰ *Id.* at 5–6.

⁷¹ See *Morr-Fitz, Inc. v. Blagojevich*, 867 N.E.2d 1164, 1164–65 (Ill. App. Ct. 2007).

⁷² *Id.* at 1165.

⁷³ *Morr-Fitz, Inc.* was the name of one of Vander Bleek's corporations. *Morr-Fitz, Inc. v. Blagojevich*, 901 N.E.2d 373, 378 (Ill. 2008).

⁷⁴ First Amended Complaint for Declaratory and Injunctive Relief at 12, 14, 17–21, *Morr-Fitz*, 901 N.E.2d 373 (Ill. 2008).

⁷⁵ *Morr-Fitz*, 867 N.E.2d at 1165.

⁷⁶ The State's standing, ripeness, and exhaustion arguments are summarized (and decisively rejected) by the Illinois Supreme Court in *Morr-Fitz*. 901 N.E.2d at 384–88 (Ill. 2008).

persuaded by the State's arguments on ripeness and exhaustion and therefore dismissed the *Morr-Fitz* complaint.⁷⁷ In *Pace*, plaintiffs Pace and Menges agreed to voluntarily dismiss their case without prejudice, based upon the State's representation that it did not intend to enforce the Rule against individual pharmacists because the Rule did not apply to them (whatever the Governor might have said), as well as facing certain dismissal from the same court that had held that the claims of the pharmacy owners themselves were not ripe.⁷⁸ Thus, the initial skirmish over the Blagojevich Rule ended with pro-life pharmacy owners (Vander Bleek and Kosirog) heading off to the court of appeals and pro-life individual pharmacists (Pace and Menges) working under, at best, an uncertain cease-fire.

The cease-fire for individual pharmacists lasted less than a month. On November 28, 2005, Walgreens, the employer of Pace, Menges, and a number of other pharmacists with the same objection, suspended without pay Menges and four other downstate Illinois pharmacists⁷⁹ who had refused to sign a form indicating that they would, in fact, agree to dispense emergency contraception.⁸⁰ Walgreens took this action because it had received what it called "informal guidance" from the State's Department of Professional Regulation that, in spite of the representations being made by the Attorney General's Office in the *Pace* litigation, Walgreens was not permitted to keep in place its Referral Pharmacist Policy.⁸¹ In addition, since the issuing of the Rule in April, the Department had filed two enforcement actions against Walgreens under the Rule in cases where Walgreens pharmacists had refused to fill emergency contraception prescriptions based on the pharmacists' religious beliefs.⁸²

Menges and the other suspended Walgreens pharmacists responded swiftly to their suspension by filing complaints of employment

⁷⁷ *Id.* at 378.

⁷⁸ Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiff's Complaint at 2, *Pace v. Blagojevich*, No. 2005-MR-000199 (Ill. 7th J. Cir. Ct. May 2, 2005) (stating the position of the Attorney General's office that the rule only applied to pharmacies not pharmacists); Case Information, *Pace v. Blagojevich*, No. 2005-MR-000199 (Ill. 7th J. Cir. Ct. dismissed Jan. 6, 2006).

⁷⁹ Peggy Pace was not suspended because she had, by this time, resigned from Walgreens and gone to work in the State of Missouri.

⁸⁰ *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 998 (C.D. Ill. 2006); Complaint and Demand for Jury Trial at 4, *Quayle v. Walgreen Co.* (Ill. 3d J. Cir. Ct. dismissed Oct. 13, 2009) (No. 2006-L-93) [hereinafter *Quayle Complaint*].

⁸¹ Third-Party Plaintiff/Intervenor Walgreen Co.'s Complaint for Declaratory and Injunctive Relief at 4, *Menges*, 451 F. Supp. 2d 992 (C.D. Ill. 2006) (No. 05-3307) [hereinafter *Walgreen Co.'s Complaint*].

⁸² *Menges*, 451 F. Supp. 2d at 998.

discrimination in violation of Title VII with the EEOC.⁸³ The suspensions and the filing of the EEOC Complaints received national publicity. On December 1, 2005, in an interview on CNN's Lou Dobbs program, Governor Blagojevich stated that what Walgreens had done was "following the law," seeming to contradict the representations made by his own Attorney General's Office, which had indicated in court filings that the rule only applied to pharmacies not individual pharmacists.⁸⁴ Individual pharmacists in Illinois with religious objections to dispensing emergency contraception now knew that they could no longer rely on the representations made in the *Pace* litigation.

B. The Pharmacists' Two-Pronged Strategy

Menges and other pro-life pharmacists found themselves faced with employers that, with the express concurrence of the Governor himself, claimed to do only what the State demanded of them, and a state government that sent decidedly mixed messages about whether the Rule applied to individual pharmacists at all. In response, the pro-life pharmacists adopted a two-pronged strategy that ultimately succeeded in persuading the State to revise the Rule in a manner that expressly acknowledged the right of objecting pharmacists (though not pharmacy owners) to step away from and not participate in dispensing emergency contraception. That strategy consisted of two very different lawsuits filed nearly simultaneously in January 2006.

In the first lawsuit, Menges and six other pharmacists sued in the United States District Court in Springfield, Illinois, naming as defendants the Governor and various state officials charged with implementing the Rule.⁸⁵ The Menges complaint, dispensing with two of the four counts that had been in the *Pace* complaint, alleged two causes of action: (1) a violation of the Free Exercise Clause; and (2) a conflict, impermissible under the Supremacy Clause, between the Rule and Title

⁸³ *Id.* at 999.

⁸⁴ *Lou Dobbs Tonight: Walgreens Suspends Pharmacists for Not Giving Out Morning After Pill* (CNN television broadcast Dec. 1, 2005), <http://transcripts.cnn.com/TRANSCRIPTS/0512/01/ldt.01.html>; see *Menges*, 451 F. Supp. 2d at 998 ("Governor Blagojevich allegedly stated in a national television broadcast that Walgreens' actions were in compliance with the Rule and that, in terminating the Discharged Plaintiffs for asserting their religious objections to dispensing Emergency Contraceptives, Walgreens was following the law."); Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiff's Complaint at 2, *Pace v. Blagojevich*, No. 2005-MR-000199 (Ill. 7th J. Cir. Ct. May 2, 2005) ("Contrary to Plaintiffs' allegations, the Rule does not require pharmacists to fill any prescriptions. The rule only requires that pharmacies implement policies to make certain that patients have access to their lawfully prescribed medications.").

⁸⁵ *Menges*, 451 F. Supp. 2d at 995–96.

VII's requirement of religious accommodation.⁸⁶ Five days after filing the federal lawsuit, Menges and the other suspended Walgreens pharmacists sued Walgreens in state court in Madison County, Illinois, alleging a single count of violation of the Illinois Health Care Right of Conscience Act.⁸⁷ In the federal case, the plaintiffs sought both a declaratory judgment that the Rule was unconstitutional under the Free Exercise Clause and in violation of the Supremacy Clause and a permanent injunction against enforcement of the Rule.⁸⁸ In the state case, the plaintiffs demanded that the court make Walgreens pay treble damages, costs, and attorney's fees as permitted under the Health Care Right of Conscience Act.⁸⁹

Within weeks of being sued in the state court damages action, Walgreens took the unusual step of moving to intervene in the federal case as a co-plaintiff with its suspended pharmacists.⁹⁰ The court granted Walgreens's motion in June 2006, and the issues were joined in one case among the three parties: state, employer, and individuals.⁹¹

1. The Arguments in *Menges v. Blagojevich*

In their complaint, the *Menges* plaintiffs alleged that the Rule placed a substantial burden on their exercise of religion by requiring them to engage in conduct forbidden by their religious principles, namely, dispensing drugs that the plaintiffs believed caused the termination of human life.⁹² The complaint alleged that, prior to the Rule's adoption, their employers had accommodated their beliefs but that, after the Rule's adoption, their employers had notified them that they could no longer offer such an accommodation.⁹³ The plaintiffs cited government press releases and other public statements by the Governor and his spokespeople that expressed or implied that the State's intention in adopting the Rule was to coerce religious objectors into dispensing emergency contraception.⁹⁴ The plaintiffs pointed out that the Rule was "underinclusive" in that it did not apply to all Illinois pharmacies and their pharmacists, but left untouched by its provisions a large of number

⁸⁶ Amended Complaint for Declaratory and Injunctive Relief at 9–10, *Menges*, 451 F. Supp. 2d 992 (C.D. Ill. 2006) (No. 05-3307) [hereinafter *Menges* Amended Complaint].

⁸⁷ Quayle Complaint, *supra* note 80, at 5.

⁸⁸ *Menges* Amended Complaint, *supra* note 86, at 11–12; *see also* 745 ILL. COMP. STAT. ANN. 70/12 (West 2010).

⁸⁹ Quayle Complaint, *supra* note 80, at 6.

⁹⁰ *Menges*, 451 F. Supp. 2d at 995.

⁹¹ *Id.*; *Menges v. Blagojevich*, No. 05-3307, slip op. at 17 (C.D. Ill. June 8, 2006).

⁹² *Menges*, 451 F. Supp. 2d at 997–98.

⁹³ *Id.* at 998.

⁹⁴ *Id.* at 997–98.

of pharmacies, for example, hospital pharmacies.⁹⁵ Further, the plaintiffs argued, the Rule did allow individual pharmacists to decline to dispense for no less than eight specific reasons, some of which involved subjective assessments by the pharmacist, but not for religious reasons.⁹⁶

In joining the individual pharmacists, Walgreens alleged that the Rule was pre-empted by Title VII.⁹⁷ The company asserted that the Rule, both on its face and as it had been interpreted by the State in its dealings with Walgreens, “denies Walgreens a mechanism to provide reasonable accommodations to sincerely-held religious beliefs of its pharmacists.”⁹⁸ Walgreens’s complaint detailed the ultimately unsuccessful efforts the company had made in the months following enactment of the Rule to comply with both the Rule and the obligations of Title VII.⁹⁹ The company claimed that the Rule “required or permitted Walgreens to take adverse employment action against its pharmacists [the Menges plaintiffs] who refused to dispense emergency contraception,” and the adverse employment action had subjected Walgreens to damages lawsuits.¹⁰⁰ In addition, the Walgreens complaint went beyond a mere request (such as the plaintiffs were making) that the court declare the Rule violates Title VII. Walgreens also asked the court to declare that its Referral Pharmacist Policy complied with the Rule and to order state officials to accept that interpretation.¹⁰¹

The State responded by filing a 12(b)(6) motion to dismiss.¹⁰² The State argued that the Rule was a neutral law of general applicability and, citing *Employment Division v. Smith*, should not be subjected to strict scrutiny.¹⁰³ The State contended that the Rule was facially neutral and neutral in its effects. The State brushed off the statements by the Governor and those speaking on his behalf as irrelevant to the analysis under Seventh Circuit precedent¹⁰⁴ and simply ignored the “under-inclusiveness” pointed out in the complaint.¹⁰⁵ If anything, the State dug itself deeper into the under-inclusiveness hole by pointing out that,

⁹⁵ *Id.* at 1001–02.

⁹⁶ *Id.* at 997–98; *see also* Menges Amended Complaint, *supra* note 86, at 6.

⁹⁷ Walgreen Co.’s Complaint, *supra* note 81, at 1–2.

⁹⁸ *Id.* at 4.

⁹⁹ *Id.* at 5–6.

¹⁰⁰ *Id.* at 6.

¹⁰¹ *Id.* at 9–10.

¹⁰² *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 995 (C.D. Ill. 2006) (denying Defendants’ Motion to Dismiss the Amended Complaint but allowing in part and denying in part Defendants’ Motion to Dismiss Walgreens’s Third Party Complaint).

¹⁰³ *Id.* at 999.

¹⁰⁴ *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1292–93 (7th Cir. 1996).

¹⁰⁵ Defendants’ Memorandum of Law in Support of Motion to Dismiss at 4, *Menges*, 451 F. Supp. 2d 992 (No. 05-3307).

under the Rule, pharmacies were not even required to stock *any* contraceptives; the Rule simply required those which did to also stock and dispense emergency contraceptives.¹⁰⁶ On the Title VII preemption issue, the State once again denied that the Rule had any bearing on individual pharmacists (though the State seemed to have abandoned the lack of standing and ripeness arguments it had made in *Pace*), and argued that although “the Rule in question might have some bearing on the hardship an employer will face in accommodating a particular pharmacist’s religious views, it does not require an employer to violate Title VII.”¹⁰⁷ Finally, the State argued that the Eleventh Amendment barred the court from granting the relief requested by Walgreens for a declaration that its Referral Pharmacist Policy complied with the Rule.¹⁰⁸

In responding to the State’s motion, the Menges plaintiffs began by noting, “Like that of Mark Twain, rumors of the Free Exercise Clause’s death have been greatly exaggerated.”¹⁰⁹ The plaintiffs argued that facial neutrality was hardly the end of the inquiry, relying heavily on language to that effect from *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* and a pair of Third Circuit opinions, including one authored by then-Judge, now-Justice Alito.¹¹⁰ The plaintiffs cited the statements of the Governor as indicating a specific intent on his part to single out for coercion religious objectors and drew an analogy between these statements and statements by Hialeah City Council members regarding the practice of Santeria in *Lukumi*.¹¹¹ In addition, the plaintiffs highlighted the numerous non-religious reasons for which a customer seeking emergency contraception, lawfully according to the State, could be turned away from a pharmacy in Illinois.¹¹² For instance, hospital pharmacies were not covered by the Rule despite the fact that it was precisely in such a setting—a hospital *emergency* room—that one would logically expect to be faced with patients seeking *emergency*

¹⁰⁶ *See id.* at 1, 3.

¹⁰⁷ *Id.* at 5–6.

¹⁰⁸ *Id.* at 6–7.

¹⁰⁹ Plaintiffs’ Response to Defendants’ Motion to Dismiss Plaintiffs’ Statement of Points and Authorities at 4, *Menges*, 451 F. Supp. 2d 992 (No. 05-3307) [hereinafter Plaintiffs’ Response to Defendants’ Motion to Dismiss].

¹¹⁰ *Id.* at 4–7; *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537–38, 540, 542 (1993); *Tenaflly Eruv Ass’n v. Borough of Tenaflly*, 309 F.3d 144, 165–67 (3d Cir. 2002); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 364–65 (3d Cir. 1999).

¹¹¹ Plaintiffs’ Response to Defendants’ Motion to Dismiss, *supra* note 109, at 7.

¹¹² *Id.* at 8.

medications.¹¹³ Pharmacists were permitted to turn away patients based merely on their subjective conclusions that a particular drug was not appropriate for a patient for a variety of medical or social reasons, such as clinical abuse or misuse.¹¹⁴ Finally, as the State's motion revealed, it was interpreting the Rule in such a way that it permitted a pharmacy, for non-religious, business reasons, to decline to stock *any* contraceptives and thus avoid entirely the operation of the Rule.¹¹⁵

On the Title VII issue, the plaintiffs argued that the Rule did indeed conflict with Title VII's accommodation provisions and cited language from Title VII itself that "any law which purports to require or permit the doing of any act which would be an unlawful employment practice" under Title VII was preempted by the Act and, therefore, unenforceable.¹¹⁶ Plaintiffs also cited Supreme Court precedent standing for the proposition that state laws that would stand as obstacles to the accomplishment and execution of Title VII's objectives would be preempted.¹¹⁷ This, plaintiffs argued, was precisely what the Rule did.

For its part, Walgreens echoed and amplified plaintiffs' arguments on the Title VII issue. Walgreens emphasized that, until the Rule was promulgated, the company had in place throughout the nation, including Illinois, a policy that allowed objecting pharmacists to step away from prescriptions they deemed morally unacceptable.¹¹⁸ Once the Rule was in place, however, and after seeking guidance from the State regulatory authority on the issue, Walgreens had concluded that it could no longer offer its Illinois pharmacists the accommodation it had previously offered under its Referral Pharmacist Policy—or any meaningful accommodation for that matter.¹¹⁹

2. The District Court Rejects Illinois' 12(b)(6) Motion

The U.S. District Court, Honorable Jeanne Scott,¹²⁰ denied in part and granted in part the State's motion.¹²¹ The court denied the motion as

¹¹³ *Id.* at 7. This was most likely a political calculation on the State's part since a rule that encompassed say, Catholic hospitals, would likely have brought yet another influential intervenor into the case.

¹¹⁴ *Id.* at 8.

¹¹⁵ Menges Amended Complaint, *supra* note 86, at 6.

¹¹⁶ Plaintiffs' Response to Defendants' Motion to Dismiss, *supra* note 109, at 10 (quoting 42 U.S.C. § 2000e-7 (2006)) (internal quotation marks omitted).

¹¹⁷ *Id.* at 10 (citing *Cal. Fed. Sav. & Loan Ass'n. v. Guerra*, 479 U.S. 272, 281 (1987)).

¹¹⁸ Opposition of Plaintiff Walgreen Co. to Defendants' Motion to Dismiss Walgreens' Third Party Complaint at 3, *Menges v. Blagojevich*, 451 F. Supp. 2d 992 (C.D. Ill. 2006) (No. 05-3307).

¹¹⁹ *Id.* at 3–4.

¹²⁰ Judge Scott was nominated by President Clinton. See *History of the Federal Judiciary: Scott, Jeanne E.*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=2804&cid=999&ctype=na&inststate=na> (last visited Apr. 6, 2012).

to both the Free Exercise and Title VII preemption causes of action brought by the individual plaintiffs,¹²² denied the motion as to Walgreens's Title VII preemption cause of action,¹²³ but granted it, on Eleventh Amendment grounds, as to Walgreens's request for a declaration that its policy complied with the Rule.¹²⁴

With regard to the free exercise claim, Judge Scott, applying the familiar 12(b)(6) standard, accepted as true all of the well-plead allegations of the complaint.¹²⁵ The court then followed the analytical framework laid out in *Smith* and *Lukumi*.¹²⁶ The court cited the plaintiffs' allegations that the Governor and other state officials had made statements that indicated that religious objectors were, indeed, the specific targets of the Rule. The court found these statements to be not only relevant but potentially highly probative of a lack of religious neutrality: "In the Free Exercise context, the Court must look beyond the face of the statute to determine its object. Governor Blagojevich's statements regarding the object of the Rule are relevant."¹²⁷ The court held as follows:

The Plaintiffs' allegations, if true, may establish that the object of the Rule is to target pharmacists, such as the Plaintiffs, who have religious objections to Emergency Contraceptives, for the purpose of forcing them either to compromise their religious beliefs or to leave the practice of pharmacy. Such an object is not religiously neutral. If so, the Rule may be subject to strict scrutiny.¹²⁸

On the under-inclusiveness issue, the court cited the numerous exceptions to the Rule that suggested that the sort of universal, "without delay" access that was purportedly its goal was questionable at best:

The Rule is supposed to meet a critical need to make Emergency Contraceptives available. . . . [H]owever, . . . [t]he Rule only applies to Division I pharmacies. The Rule, therefore, does not apply to hospitals and, in particular, emergency rooms. The Rule also allows Division I pharmacies to refuse to dispense Emergency Contraceptives or to delay dispensing them for reasons other than the pharmacist's

¹²¹ *Menges*, 451 F. Supp. 2d at 995.

¹²² *Id.* at 1002, 1004–05.

¹²³ *Id.* at 1004–05.

¹²⁴ *Id.* at 1005.

¹²⁵ *Id.* at 999–1002.

¹²⁶ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (reasoning that, in order to withstand scrutiny, the state must demonstrate that a compelling state interest exists and that the law in question is "narrowly tailored to advance that interest"); *Emp't Div. v. Smith*, 494 U.S. 872, 878 (1990) (reasoning that a law imposing incidental burdens on religion does not necessarily violate the First Amendment if such burdens are not the object of the law in question).

¹²⁷ *Menges*, 451 F. Supp. 2d at 1000 n.2 (citation omitted).

¹²⁸ *Id.* at 1001.

personal religious beliefs. These allegations, at least, create an issue of fact regarding whether the Rule is generally applicable.¹²⁹

On the Title VII claims of both the plaintiffs and Walgreens, the court determined that, given the allegations made by both parties about the practical effect of the Rule's lack of provision for religious accommodation, both parties stated cognizable claims that the Rule was in conflict with Title VII.¹³⁰ The court seemed particularly persuaded by the allegations of plaintiffs and Walgreens that, prior to adoption of the Rule, Walgreens had no difficulty whatsoever in accommodating pharmacists with the same objections and continued to do so in every state except Illinois.¹³¹ Finally, the court granted the State's motion solely as to Walgreens's request for a declaratory judgment regarding the compliance of its Referral Pharmacist Policy with Title VII and the Rule.¹³²

In a footnote to its opinion, the court wrote that the State's arguments "may suggest a basis for possible amendment of the Rule to clarify its object and application," and advised the parties that it was inclined to refer the matter to the magistrate judge "to explore settlement possibilities that would be consistent with individual constitutional rights."¹³³ Accordingly, following the decision on the motion to dismiss in September 2006, the parties entered into a lengthy mediation process before the Honorable Byron Cudmore.¹³⁴ That process culminated in April 2008 with the adoption of the Amended Rule.¹³⁵

In the Amended Rule, the State for the first time recognized and protected what it labeled an "objecting pharmacist."¹³⁶ The Amended Rule provided a procedure whereby an "objecting pharmacist" presented with a prescription for emergency contraception (or any other drug for that matter) would be able to decline to personally participate in the filling of such a prescription while, at the same time, his employing pharmacy could have the prescription filled through something called "Remote Medication Order Processing" ("RMOP").¹³⁷ Thus, three years after the issuance of the Emergency Rule, individual pro-life

¹²⁹ *Id.*

¹³⁰ *Id.* at 1003–04.

¹³¹ *Id.* at 1003.

¹³² *Id.* at 1004–05.

¹³³ *Id.* at 1004 n.4.

¹³⁴ See Agreed Joint Motion of Plaintiff Walgreen Co. and Defendants to Stay Case at 1, *Menges v. Blagojevich*, No. 05-3307 (C.D. Ill. Oct. 5, 2007) (explaining that as a result of mediation efforts, Walgreens and the defendants were able to enter into a Mutual Agreement and Understanding).

¹³⁵ 32 Ill. Reg. 7116, 7127 (May 2, 2008).

¹³⁶ *Id.*

¹³⁷ *Id.* at 7127–28. The details of the RMOP procedure are summarized by the Illinois Supreme Court in *Morr-Fitz, Inc. v. Blagojevich*, 901 N.E.2d 373, 382 (Ill. 2008).

pharmacists in Illinois finally enjoyed a significant measure of protection against the coercion embodied in the Governor's original edict.¹³⁸ Upon formal adoption of the Amended Rule, *Menges v. Blagojevich* was dismissed by agreement of the parties.¹³⁹

C. *The Damages Actions Against Walgreens and Wal-Mart*

While continuing to participate as co-plaintiffs in the federal court mediation seeking an amendment of the Rule "consistent with individual constitutional rights" in Judge Scott's phrase,¹⁴⁰ Walgreens, Menges, and the other downstate pharmacists remained pitted against each other in the state court action under the caption of *Quayle v. Walgreens*.¹⁴¹ In that case, the plaintiffs' sole cause of action was based on Walgreens's alleged violation of the Illinois Health Care Right of Conscience Act in handing the plaintiffs indefinite, unpaid suspensions in November 2005 when they refused to agree to dispense emergency contraceptives.¹⁴² In April 2006, Walgreens moved to dismiss the *Quayle* cases, arguing that the Health Care Right of Conscience Act did not apply to pharmacists or the dispensing of drugs at all and relying on arguments that had originally been made by the State in the *Pace* case.¹⁴³ While Walgreens's motion was pending, the court entered a stay of the cases upon hearing that the mediation in *Menges* could have an impact on the resolution of the

¹³⁸ Compare 29 Ill. Reg. 5586, 5596 (Apr. 15, 2005) (stating that a pharmacist must dispense a contraceptive upon receipt of a valid prescription), with 32 Ill. Reg. at 7127 (providing protocol to accommodate the refusal of an "objecting pharmacist" to dispense a contraceptive).

¹³⁹ The individual plaintiffs in *Menges* did not sign on to the settlement agreement in that case because, while the Amended Rule gave individual pharmacists a right to object and decline to participate in dispensing emergency contraception, it maintained the requirement that pro-life pharmacy owners do so. See *Their Own 'Plan B': State, Pharmacists Reach Deal on Dispensing the Morning-After Pill*, DAILY HERALD, Oct. 11, 2007, at 8 ("Francis Manion, an attorney for those pharmacists, said the settlement is technically an agreement between Walgreens and the state. Although his clients are dropping their lawsuit, they aren't part of the compromise to let a remote pharmacist oversee filling the prescription."); Editorial, *Fair Compromise on Morning-After Pill*, DAILY HERALD, Oct. 15, 2007, at 12 ("The American Center for Law and Justice, which is representing pharmacists, agreed to drop the lawsuits but did not agree to be part of the compromise (it is between the state and Walgreens) because it still requires pharmacies to sell the morning-after pill . . .").

¹⁴⁰ *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 1004 n.4 (C.D. Ill. 2006). The plaintiffs were G. Richard Quayle, Carol Muzzarrelli, Kelly Hubble, and John Menges. *Id.* at 995–96.

¹⁴¹ *Quayle v. Walgreen Co.*, No. 2006-L-93 (Ill. 3d J. Cir. Ct. dismissed Oct. 13, 2009).

¹⁴² *Quayle Complaint*, *supra* note 80, at 4–6; see *Menges*, 451 F. Supp. 2d at 998.

¹⁴³ *Illinois Court Backs Pro-Life Pharmacists*, ACLJ (Apr. 22, 2008), <http://aclj.org/pro-life/illinois-court-backs-pro-life-pharmacists>.

Quayle cases.¹⁴⁴ Ironically, it would be a decision by U.S. District Judge Jeanne Scott, not in *Menges*, but in a separate case against a different retail pharmacy chain, *Vandersand v. Wal-Mart*,¹⁴⁵ that would ultimately prove decisive in convincing the state court in *Quayle* to deny Walgreens's motion to dismiss, leading directly to the settlement of those cases.¹⁴⁶ The *Vandersand* case would also play an important part in the pharmacists' eventual victory in *Morr-Fitz*, as will be explained in Part IV.

Ethan Vandersand was an Illinois pharmacist who worked for Wal-Mart. Like the plaintiffs in *Menges*, *Quayle*, and *Morr-Fitz*, Vandersand had a religious objection to selling emergency contraception.¹⁴⁷ In February 2006, he was placed on unpaid leave by his employer after turning away a prescription for emergency contraception.¹⁴⁸ Vandersand sued in U.S. District Court and alleged that Wal-Mart had violated his rights under Title VII and the Illinois Health Care Right of Conscience Act.¹⁴⁹ The case was assigned to Judge Jeanne Scott. Wal-Mart moved to dismiss or, in the alternative, to stay the case pending the resolution of *Menges*. In support of its motion to dismiss, Wal-Mart argued that it could not be liable as a matter of law because it was only complying with the Rule when it took action against the plaintiff.¹⁵⁰ The court rejected this argument, noting that it was unclear at that early stage of the proceedings whether Wal-Mart could have both complied with the Rule and accommodated Vandersand.¹⁵¹

Wal-Mart's arguments on the Health Care Right of Conscience Act essentially parroted the arguments made by Walgreens in its motion to dismiss the *Quayle* cases, a motion that was then subject to a stay.¹⁵² Wal-Mart argued that the Right of Conscience Act covered only medical care "rendered by physicians, nurses, paraprofessionals or health care facilities"; further, so the argument went, pharmacists were not within the Act's definition of "health care personnel."¹⁵³ In addition, Wal-Mart

¹⁴⁴ Order at 1, *Quayle*, No. 2006-L-93 (Ill. 3d J. Cir. Ct. May 3, 2007) (granting Walgreens's motion to stay the case).

¹⁴⁵ *Vandersand v. Wal-Mart Stores, Inc.*, 525 F. Supp. 2d 1052, 1055–58 (C.D. Ill. 2007).

¹⁴⁶ Order at 1, *Quayle*, No. 2006-L-93 (Ill. 3d J. Cir. Ct. Apr. 9, 2008) (denying Defendant's Motion to Dismiss); Order at 1, *Quayle*, No. 2006-L-93 (Ill. 3d J. Cir. Ct. Oct. 13, 2009) (dismissing the case with prejudice based on the written stipulation of both parties).

¹⁴⁷ *Vandersand*, 525 F. Supp. 2d at 1054–55.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1055.

¹⁵⁰ *Id.* at 1053.

¹⁵¹ *Id.* at 1056.

¹⁵² *Id.* at 1057.

¹⁵³ *Id.* (internal quotation marks omitted).

referred the court to legislative history that the company claimed compelled the conclusion that pharmacists were not intended to be included in the Act's coverage.¹⁵⁴ Judge Scott rejected all these arguments. The court reasoned that, since the Act by its plain terms covered "any person" participating "in any way in any particular form of health care services," there was no doubt that it should be read to include pharmacists.¹⁵⁵ Moreover, the court declined to look to the legislative history, noting that Illinois courts do not resort to aids for construction, such as legislative history, when the language of the statute is clear.¹⁵⁶ Vandersand stated claims under both Title VII and the Right of Conscience Act.¹⁵⁷ Finally, Judge Scott declined Wal-Mart's request to stay the *Vandersand* matter pending the outcome of the *Menges* case.¹⁵⁸

Once the stay was lifted in the *Quayle* cases, a hearing date was set for Walgreens's motion to dismiss.¹⁵⁹ The state court, however, now having the benefit of Judge Scott's opinion in *Vandersand*, disposed of Walgreens's arguments *in toto*, citing the *Vandersand* opinion as persuasive.¹⁶⁰ The *Quayle* cases proceeded through the discovery process before settling in 2009.¹⁶¹

IV. THE RETURN OF *MORR-FITZ* AND THE DEMISE OF BLAGOJEVICH'S RULE

While the individual pharmacists were litigating their claims and achieving real results against the State and their respective employers, the pharmacy owners in the *Morr-Fitz* case moved forward with their appeal.¹⁶² It should be recalled that the fruit of the *Menges v. Blagojevich* litigation—an Amended Rule allowing objecting pharmacists to opt out of dispensing certain prescriptions—provided no relief for pharmacy

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1056–57.

¹⁵⁶ *Id.* at 1057.

¹⁵⁷ *Id.* at 1053. Following the denial of the Motion to Dismiss, the *Vandersand* case was settled for an undisclosed amount. See Stipulation to Voluntary Dismissal by Plaintiff at 1, *Vandersand*, No. 06-cv-3292-JES-DGB (C.D. Ill. May 29, 2008).

¹⁵⁸ *Vandersand*, 525 F. Supp. 2d at 1058.

¹⁵⁹ Order Granting Plaintiffs' Motion to Lift Stay and Schedule Motion Hearing at 1, *Quayle v. Walgreen Co.*, No. 2006-L-93 (Ill. 3d J. Cir. Ct. Feb. 11, 2008) (lifting the stay and setting a hearing date for Walgreens's Motion to Dismiss).

¹⁶⁰ Order at 1, *Quayle*, No. 2006-L-93 (Ill. 3d J. Cir. Ct. Apr. 9, 2008) (denying Walgreens's Motion to Dismiss and finding Judge Scott's reasoning in *Vandersand* to be "instructive, influential and logical").

¹⁶¹ Order at 1, *Quayle*, No. 2006-L-93 (Ill. 3d J. Cir. Ct. Oct. 13, 2009) (dismissing the case with prejudice based on the written stipulation of both parties).

¹⁶² See Appellants' Brief at 2, *Morr-Fitz, Inc. v. Blagojevich*, 901 N.E.2d 373 (Ill. 2008) (No. 104692).

owners like Vander Bleek and Kosirog.¹⁶³ In March 2007, a divided appellate court upheld the Sangamon Circuit Court's dismissal of the case on ripeness grounds.¹⁶⁴

But on December, 18, 2008, the Illinois Supreme Court reversed and remanded the case.¹⁶⁵ The court noted that the Amended Rule, adopted while *Morr-Fitz* was on appeal, in its application to pharmacy owners was even more coercive than the original Rule.¹⁶⁶ The Amended Rule now required all pharmacy owners to stock emergency contraception: "Under the current version, the simple failure by plaintiffs to make efforts to stock the contraceptive in question would subject plaintiffs to a range of penalties, including license revocation."¹⁶⁷ Citing Judge Scott's *Menges* opinion as well as a case from the Western District of Washington, the Illinois Supreme Court found that the *Morr-Fitz* plaintiffs stated a justiciable First Amendment claim.¹⁶⁸

The court also rejected the State's exhaustion of administrative remedies argument. The State had argued that the plaintiffs should be required to formally request, and be denied, a variance from the Rule before being allowed to bring a court challenge.¹⁶⁹ Noting that the exhaustion requirement is based on the theory that ordinarily an administrative agency has some special expertise that a court lacks and is the proper place to resolve factual issues surrounding a variance request, the Illinois Supreme Court concluded,

[I]f there are no questions of fact or agency expertise is not involved, a litigant is not required to exhaust remedies. In our opinion, this is largely a case involving a question of law—whether pharmacists and pharmacies can be compelled to violate their consciences and religious beliefs in violation of two Illinois statutes and the *first amendment*.

There is no agency expertise involved.¹⁷⁰

Accordingly, the court reversed the decision of the Illinois Court of Appeals and remanded.¹⁷¹

And so, nearly four years after Governor Blagojevich announced his Emergency Rule, and only a week after Blagojevich himself was arrested

¹⁶³ See *supra* note 139 and accompanying text; see also *Menges*, 451 F. Supp. 2d at 1001.

¹⁶⁴ *Morr-Fitz, Inc. v. Blagojevich*, 867 N.E.2d 1164, 1171 (Ill. App. Ct. 2007).

¹⁶⁵ *Morr-Fitz*, 901 N.E.2d at 393.

¹⁶⁶ *Id.* at 386.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 387 (citing *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245 (W.D. Wash. 2007); *Menges*, 451 F. Supp. 2d 992 (C.D. Ill. 2006)).

¹⁶⁹ *Id.* at 392.

¹⁷⁰ *Id.* (emphasis added).

¹⁷¹ *Id.* at 393.

on federal corruption charges,¹⁷² the *Morr-Fitz* case was headed back to Sangamon Circuit Court for trial.

A. Illinois Moves the Target

Now armed with the Illinois Supreme Court's decision, which contained ample dicta on the underlying merits in addition to reversing on the justiciability arguments, all of which tended to favor the plaintiffs, Vander Bleek and Kosirog first obtained a Temporary Restraining Order after a hearing in circuit court on April 3, 2009,¹⁷³ and then obtained a full Preliminary Injunction after a second hearing on August 21, 2009.¹⁷⁴ The case then proceeded to discovery with a trial anticipated sometime in 2010. Upon completion of discovery, the plaintiffs moved for summary judgment.¹⁷⁵

On April 29, 2010, while plaintiffs' motion for summary judgment was pending, Illinois adopted yet another version of the Rule.¹⁷⁶ This fourth version¹⁷⁷ was purportedly modeled after the Washington State rule at issue in *Stormans, Inc. v. Selecky*.¹⁷⁸ Gone from the new version was the entire "objecting pharmacist" procedure that was the result of the *Menges* litigation. The new Rule made no allowance whatever for conscientious objections by pharmacists or pharmacies. Indeed, the new Rule was actually worse than its predecessors for two reasons: (1) It eliminated the wiggle room in the prior version that allowed pharmacy owners to avoid its application by declining to sell any contraceptives; and (2) It extended its coverage to include non-prescription drugs,

¹⁷² See generally Jeff Coen et al., *Arrested*, CHICAGO TRIBUNE, Dec. 9, 2008, at C1.

¹⁷³ Temporary Restraining Order at 1, *Morr-Fitz, Inc. v. Blagojevich*, No. 2005-CH-000495 (Ill. 7th J. Cir. Ct. Apr. 3, 2009) (granting Plaintiffs' Motion for a Temporary Restraining Order).

¹⁷⁴ Order Granting Preliminary Injunction and Denying Motion to Dismiss at 2, *Morr-Fitz*, No. 2005-CH-000495 (Ill. 7th J. Cir. Ct. Aug. 21, 2009).

¹⁷⁵ Plaintiffs' Opposition to Defendants' Motion to Dismiss and Reply Brief in Support of Plaintiffs' Motion for Summary Judgment at 10, *Morr-Fitz*, No. 2005-CH-000495 (Ill. 7th J. Cir. Ct. Aug. 17, 2010).

¹⁷⁶ 34 Ill. Reg. 6688, 6727-32 (May 14, 2010).

¹⁷⁷ The first version was the April 1, 2005 Emergency Rule. 29 Ill. Reg. 5586, 5596 (Apr. 15, 2005). The second version was the Permanent Rule adopted by JCAR on August 25, 2005. 29 Ill. Reg. 13639, 13656 (Sept. 9, 2005). The third version was the Amended Rule that resulted from the *Menges/Walgreens* mediation in April 2008. 32 Ill. Reg. 7116, 7126-33 (May 2, 2008). See Order Granting Declaratory and Injunctive Relief at 2-3, *Morr-Fitz*, No. 2005-CH-000495 (Ill. 7th J. Cir. Ct. Apr. 5, 2011) (containing a history of the various versions of the Rule).

¹⁷⁸ 524 F. Supp. 2d 1245, 1249-50 (W.D. Wash. 2007), *rev'd*, 586 F.3d 1109 (9th Cir. 2009). On remand, the United States District Court for the Western District of Washington permanently enjoined the enforcement of the rule against the plaintiffs, who were religious objectors, stating that the rule was not neutral and was not generally applicable. *Stormans, Inc. v. Selecky*, No. 3:07-cv-05374-RBL, slip op. at 47-48 (W.D. Wash. Feb. 22, 2012).

presumably to bring within its purview over-the-counter requests for emergency contraceptives.¹⁷⁹

The plaintiffs sought and were granted leave to amend their complaint to assert their claims against this latest iteration of the Rule.¹⁸⁰ A motion by the State to dismiss the amended complaint and the plaintiffs' motion for summary judgment was denied on December 15, 2010, and the court scheduled the matter for a bench trial to take place on March 10, 2011.¹⁸¹

B. The Blagojevich Rule on Trial

On March 10, 2011, nearly six years after Governor Blagojevich announced his Emergency Rule, Luke Vander Bleek and Glenn Kosirog finally had the opportunity to try their claims on the merits in open court.¹⁸² Both pharmacy owners testified about their religious beliefs, their opposition to selling emergency contraceptives, the impact that the Rule (in all of its iterations) had on their businesses and on them personally, and their determination to do whatever they could to remain in business without having to violate their consciences.¹⁸³ Both men testified that their pharmacies were located within minimal walking or driving distances of other pharmacies whose owners did not share their objection to emergency contraception.¹⁸⁴

Brent Adams, the Secretary of the Illinois Department of Financial and Professional Regulation, testified for the State. Adams acknowledged that the fourth version of the Rule was prompted not by any complaints about shortages of any particular drugs but solely to develop a regulation that he hoped would compel objecting pharmacists to dispense emergency contraceptives and would also survive constitutional and other legal challenges.¹⁸⁵ He testified that he drafted the new Rule after reading the decision in *Stormans, Inc. v. Selecky* and modeled the Rule directly on the Rule at issue in *Stormans*.¹⁸⁶

¹⁷⁹ See 34 Ill. Reg. 6690, 6730–31 (May 14, 2010). On December 14, 2006, the FDA approved over-the-counter sales of emergency contraceptives (“Plan B”) for those over 17 years of age. U.S. Dep’t Health & Human Servs., *Plan B: Questions and Answers*, FDA, <http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm109783.htm> (last updated Dec. 14, 2006).

¹⁸⁰ Case Information, *Morr-Fitz*, No. 2005-CH-000495 (Ill. 7th J. Cir. Ct. May 28, 2010).

¹⁸¹ *Id.*

¹⁸² Order Granting Declaratory and Injunctive Relief at 1, *Morr-Fitz*, No. 2005-CH-000495 (Ill. 7th J. Cir. Ct. Apr. 5, 2011).

¹⁸³ *Id.* at 1–2.

¹⁸⁴ *Id.* at 4.

¹⁸⁵ *Id.* at 3.

¹⁸⁶ *Id.*

Adams conceded that he had no evidence of any person in Illinois being unable to obtain emergency contraception because of a pharmacy owner's religious beliefs.¹⁸⁷ Nor did he have any evidence of anyone in the State having difficulty obtaining over-the-counter emergency contraceptives.¹⁸⁸ Adams acknowledged that he was unaware of any pharmacist ever refusing to sell such drugs for any reason other than religious beliefs.¹⁸⁹ The Secretary admitted that the Rule contained numerous exceptions for what he called "common sense business realities."¹⁹⁰ Perhaps most telling of all, Adams conceded that the Rule contained a variance procedure for what he himself labeled "individualized governmental assessments" and that, while "he could envision a 'whole variety' of reasons that might be accepted, . . . he could not foresee a variance being granted for a religious objection."¹⁹¹

In its April 5, 2011 ruling on the merits, the court found for the plaintiffs on three of their four causes of action.¹⁹² On the Health Care Right of Conscience Act claim, the court, citing the Act's definitions and Judge Scott's opinion in *Vandersand*, held that "[t]he Illinois Right to Conscience Act applies to pharmacists and pharmacies."¹⁹³ Moreover, the court found that "[t]he government may certainly promote drug access, but the Act requires them to do so without coercing unwilling providers."¹⁹⁴ The court rejected an argument by the State that plaintiffs had failed to show that their personal conscientious objections were attributable to their closely-held corporations as separate legal entities.¹⁹⁵

On plaintiffs' RFRA claim, the court found that plaintiffs had proven the existence of a substantial burden on their religion as to all versions of the Rule.¹⁹⁶ The Government had failed to prove that "forcing participation by these Plaintiffs is the least restrictive means of furthering a compelling interest."¹⁹⁷ The court found that the Government's compelling interest argument was seriously undermined

¹⁸⁷ *Id.* at 3–4.

¹⁸⁸ *Id.* at 4.

¹⁸⁹ *Id.* at 3.

¹⁹⁰ *Id.* at 4.

¹⁹¹ *Id.*

¹⁹² The court found for the plaintiffs on all but their Fourteenth Amendment substantive due process claim. *Id.* at 5–7.

¹⁹³ *Id.* at 5 (citing *Vandersand v. Wal-Mart Stores, Inc.*, 525 F. Supp. 2d 1052 (C.D. Ill. 2007)).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 6.

by its concessions about numerous exceptions to the Rule as well as the variance procedure.¹⁹⁸

On the free exercise claim, the court found that the Rule was neither neutral nor generally applicable.¹⁹⁹ The record evidence showed that, from the beginning, the Rule targeted pharmacists and pharmacy owners with religious objections to selling emergency contraceptives: “The Rule and its predecessors were designed to stop pharmacies and pharmacists from considering their religious beliefs when deciding whether to sell emergency contraceptives.”²⁰⁰ The court found that this demonstrated a lack of neutrality. In addition, the court found that the Rule was not generally applicable since the variance procedure was “by the government’s admission, a system of individualized governmental assessments that is available for non-religious reasons, but not for religious ones.”²⁰¹ The court quoted *Lukumi*’s holding that where “individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason.”²⁰² The court concluded that the Rule must, therefore, be subjected to strict scrutiny and that it failed that test for the same reasons outlined in the court’s discussion of the RFRA claim.²⁰³

Having found for the plaintiffs on three of their four causes of action the circuit court concluded, “The Court finds and declares that the Rule is invalid on its face and as applied under the Illinois Right to Conscience Act, Illinois Religious Freedom Restoration Act, and is unconstitutional on its face and as applied and is void under the First Amendment.”²⁰⁴ The court thereupon entered judgment for the plaintiffs and permanently enjoined the State of Illinois from enforcing the Rule.²⁰⁵

Not surprisingly, the State has appealed the trial court’s decision.²⁰⁶ And while prognostications of such things are fraught with peril, several factors augur well for the upholding of the permanent injunction. To begin with, the appeal will ultimately make its way back to the Illinois Supreme Court. That court, in ruling on the prior dismissal of plaintiffs’ case on justiciability grounds, managed to signal in dicta a view of the

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 7 (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993)) (internal quotation marks omitted).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Case Information, *Morr-Fitz, Inc. v. Blagojevich*, No. 2005-CH-000495 (Ill. 7th J. Cir. Ct. Apr. 5, 2011).

merits that clearly favored the pharmacists' claims.²⁰⁷ Also, on appeal the factual findings made by the trial court are unlikely to be disturbed given the deferential standard of review.²⁰⁸ Those findings, based to a large extent on the State's own damning admissions, give solid support to the trial court's legal conclusions. The State will simply be unable to avoid the fact that it attempted to create a regulation complete with a system of variances with—in the State regulator's own words—"individualized governmental assessments" that are only *unavailable* to those citizens requesting variances for religious reasons.²⁰⁹

Thus, at the end of this very long day, with the author of the Rule soon to be ensconced in federal prison,²¹⁰ the right of Illinois pharmacists and pharmacy owners to practice their profession in a manner consistent with their deeply held religious beliefs appears to be on solid legal ground.

V. LESSONS LEARNED FOR THE PROTECTION OF CONSCIENCE

With the benefit of now six years of experience with conscience litigation in the Land of Blagojevich, it is useful to assess what lessons have been learned from both a legal perspective as well as a broader strategic perspective of what can and cannot be done to ensure the protection of the conscience rights of pro-life health care professionals. Those lessons include at least the following:

A. Legislation Is Not Enough.

Perhaps the most obvious lesson is this: Mere legislation, however broadly it appears to protect conscience rights, is not enough. Against a government determined to impose its will in defiance of statutory and constitutional protections of conscience, a swift and vigorous litigation response is essential. When Governor Blagojevich announced his Emergency Rule in April 2005, Illinois already had on the books for many years the "gold standard" of conscience protecting legislation: the Illinois Health Care Right of Conscience Act. The Governor, however, completely ignored the law, casting pharmacists, pharmacy owners, and businesses into an uncertainty that resulted in loss of jobs, disruption of pharmacists' careers, interference with pharmacy owners' businesses, and expensive litigation for those businesses that felt compelled to apply the Governor's Rule to their employees. It was only after several years of

²⁰⁷ *Morr-Fitz*, 901 N.E.2d 373, 390–93 (Ill. 2008).

²⁰⁸ *See, e.g.*, *Illinois v. Ballard*, 794 N.E.2d 788, 798 (Ill. 2002).

²⁰⁹ Order Granting Declaratory and Injunctive Relief at 4, *Morr-Fitz*, No. 2005-CH-000495 (Ill. 7th J. Cir. Ct. Apr. 5, 2011).

²¹⁰ In December 2011, Governor Blagojevich was sentenced to fourteen years in prison on federal corruption charges. Monica Davey, *Blagojevich Draws 14-Year Sentence for Corruption Conviction*, N.Y. TIMES, Dec. 8, 2011, at A22.

hard-fought litigation that a partial measure of protection (for individual pharmacists at least) was secured with the settlement of the *Menges v. Blagojevich* case. And when that protection proved to be short-lived with the State's continual amendments to the Rule, another two years would pass before the conscience rights of all Illinois pharmacists were secured due to the March 2011 victory following trial in *Morr-Fitz v. Blagojevich*. Aside from the *Morr-Fitz* permanent injunction barring enforcement of the Rule itself, faced with the precedents established in the *Menges*, *Morr-Fitz*, *Vandersand*, and *Quayle* cases, it is difficult to imagine an Illinois government official or private employer ever again taking the position consistently argued by the State, Walgreens, and Wal-Mart that the Right of Conscience Act does *not* cover pharmacists or may be construed in any but the broadest possible way.

B. Litigation Should Not Be Confined to Direct Statutory/Constitutional Challenges.

One of the critical elements in achieving the successes that have been achieved in Illinois conscience litigation was the decision to file employment litigation/damages cases at the same time as the direct statutory/constitutional challenge in federal court. The pharmacists could have limited themselves to filing direct challenges on statutory and constitutional grounds to the Rule.

By suing the State and Walgreens simultaneously, the *Menges* and *Quayle* plaintiffs made it impossible for either of those entities to avoid dealing with and resolving the fundamental conscience issues created by the Rule. The State could no longer fall back on a literalist reading of the Rule—pharmacies *not* pharmacists—when it was now clear that the State itself had told Walgreens it could not accommodate individual pharmacists, and with the Governor, the chief law enforcement officer of the State, publicly praising Walgreens's suspension (the pharmacists called it "firing") of individual pharmacists as "following the law."²¹¹ Conversely, Walgreens could not simply point the finger at the State because the absolutist language of the Health Care Right of Conscience Act left no wiggle room for such a defense. Thus, the pharmacists, squeezed between two far more powerful adversaries, attacked them both and did so with enough force to convince them to come to the negotiating table.

It was the filing of the *Quayle* damages cases in state court that caused Walgreens to intervene in the direct constitutional challenge then pending in *Menges v. Blagojevich*. And there can be little doubt that it was the involvement of Walgreens, the largest retail pharmacy chain

²¹¹ Lou Dobbs Tonight: Walgreens Suspends Pharmacists for Not Giving Out Morning After Pill, *supra* note 84.

in Illinois and employer of thousands of Illinois citizens, that more or less compelled the State to come up with the reasonable *modus vivendi* embodied in the Amended Rule.

In addition, the role played by the seemingly unrelated *Vandersand* case cannot be overlooked. *Vandersand* eschewed any involvement in the statutory/constitutional challenge then proceeding, opting instead to confine himself to a damages action against his former employer. But it was Judge Scott's opinion in *Vandersand* that was thereafter crucial in the favorable decisions in the *Quayle* cases, and was the only case cited by the circuit court in ruling in favor of the *Morr-Fitz* plaintiffs on their Right of Conscience Act claims.

C. *The Free Exercise Clause Is Alive and Well.*

Somber academic warnings notwithstanding,²¹² the Free Exercise Clause of the First Amendment remains an effective weapon against governmental efforts to override the rights of conscience. Close attention to the circumstances of the Rule's promulgation—the statements of government officials, press releases, and the like—were important elements in the plaintiffs' successful argument in both *Menges* and *Morr-Fitz* that the Rule was not neutral but, instead, impermissibly targeted people because of their religious views.

On the question of general applicability, these cases demonstrate that political and business realities, such as the desire not to alienate important constituencies, will often make it virtually impossible for regulators to avoid drafting rules that savvy litigators will not be able to drive a truck through. Thus, the Blagojevich Rule—despite protestations of a compelling need to ensure universal access to emergency contraceptives—failed to include large swathes of the known universe of pharmacies. These included all hospitals—Catholic hospitals would certainly have balked at the Rule's application to them—and basically any pharmacy that for “common sense business reasons” chose not to or simply failed to comply with the strictures of the Rule. On top of that, the system of “individualized governmental assessments” available to pharmacy owners with non-religious reasons for not stocking emergency contraceptives—another concession to business reality—completely undermines any pretense of general applicability. Once a plaintiff overcomes *Smith's* neutrality and general applicability hurdles, strict

²¹² See, e.g., Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 848 (1992) (arguing that “formal neutrality”—or no discrimination against religion—would cause religion to be overly regulated just like any other secular activity or institution); see also Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1120–21 (1990) (arguing that the Court largely ignores the historical and textual meaning of the Free Exercise Clause).

scrutiny virtually insures that a challenged measure will be found invalid.

D. Not All State Conscience Laws Are of Equal Value.

In spite of what has previously been said about the Governor's roughshod handling (or rather, ignoring) of the Illinois Health Care Right of Conscience Act, it cannot be denied that the Illinois law's broadest imaginable conscience protection was a major factor in the ultimate success of this litigation. It is hard to imagine a remotely similar result being possible under the conscience law of, say, North Carolina, as described above,²¹³ or similar narrow conscience clauses of other states. It is, of course, somewhat speculative to conclude that the Illinois law, with its soaring preamble about the rights of conscience may have influenced how courts resolved the free exercise and RFRA claims, but it certainly cannot have hurt.

E. Administrative Defects and Other Technical Claims Are Non-Starters.

Both the *Pace* and *Morr-Fitz* plaintiffs included claims in their original complaints that the promulgation of the Rule violated the Illinois Administrative Procedure Act. The *Menges* plaintiffs never had such a claim and the *Morr-Fitz* plaintiffs eventually dropped theirs, and for good reason. Such claims add little to a case in terms of getting the court's attention or, more importantly, in terms of winning on the merits. It is simply too easy for the defendant to correct any such technical difficulties. Even the most well-founded claim of this nature will only result in, at most, further delay in the process of obtaining a final adjudication on the merits.

CONCLUSION

Despite the undeniable success in protecting the conscience rights of health care professionals illustrated by the Illinois pharmacists' litigation recounted herein, the threats to conscience rights continue to loom and grow.²¹⁴ But as this review of the Illinois conscience litigation

²¹³ See *supra* notes 15–19 and accompanying text.

²¹⁴ See, e.g., *Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost*, HHS (Aug. 1, 2011), <http://www.hhs.gov/news/press/2011pres/08/20110801b.html>. This HHS proposed Interim Final Rule would mandate that religious employers provide for their employees coverage for services deemed morally objectionable by the employing religious institutions. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621 (proposed Aug. 3, 2011) (to be codified at 45 C.F.R. pt. 147). A recent regulation issued by the Department of Health and Human Services requires all faith-based employers to provide health-care coverage of contraceptives with few exceptions and only a one-year safe harbor from enforcement of the regulation. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services

shows, those threatened are not without recourse in our legal system. The creative and vigorous use of litigation of all kinds has been and will continue to be an important bulwark against both governmental and private encroachments upon what Illinois's Lincoln—if not Blagojevich—referred to as the “sacred and inviolable” right of conscience.