IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

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

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

FILED
APR 05 2011 CIV-6
Clerk of the Circuit Court

Case No. 2005-CH-000495

ORDER GRANTING DECLARATORY AND INJUNCTIVE RELIEF

The Plaintiffs are two pharmacists and the three corporations through which they own and operate their pharmacies. Plaintiffs' claim they are prohibited by their religion and consciences from participating in the sale of drugs called "emergency contraceptives." Plaintiffs challenge 68 ILL. ADMIN. CODE 1330.500(e)-(h) ("the Rule"), which requires them to participate in sales of drugs called emergency contraceptives. Under an agreement between the parties, Count III and Count V were voluntarily dismissed on Plaintiffs' motion prior to trial. Additionally, the court is granting Plaintiff's Motion to Voluntarily Dismiss Count II without prejudice. Finally, all Plaintiffs' claims with respect to administrative rules no longer in effect have been dismissed with prejudice. On March 10, 2011, this Court held a bench trial on Plaintiffs' claims that the Rule is invalid under the Healthcare Right of Conscience Act, 745

ILCS 70/1 *et seq.* (the "Conscience Act"), the Religious Freedom Restoration Act, 735 ILCS 35/1 *et seq.* ("RFRA"), and the First and Fourteenth Amendments to the U.S. Constitution. The Court is familiar with the parties and their arguments, as this suit has been pending for nearly six years. After consideration of the evidence, the Court finds as follows:

Based upon the testimony of the Plaintiffs, Luke Vander Bleek and Glenn Kosirog, who are the owners of the pharmacies in question, the Court finds Plaintiffs have sincere religious and conscience-based objections to participating in any way in the distribution of emergency contraceptives. The Plaintiffs testified that the Rule chills their religious exercise by forcing them to choose between violating their religion and violating the law. Their pharmacies have written ethical guidelines prohibiting participation in distribution of these drugs. The evidence was clear from the trial that the objections of these Plaintiffs and their closely held corporation are essentially one and the same. The owners clearly set the policy and tightly control the day to day operations of their pharmacies. The Rule also imposes financial harms by making it more difficult for Plaintiffs to recruit employees (causing one Plaintiff pharmacy to close) and plan their businesses. The Plaintiffs have produced sufficient evidence to show the Rule has imposed a financial hardship on their businesses.

The current Rule is the fourth version of a policy initiated in April 2005. At the outset, Governor Blagojevich announced the rule's purpose: to stop religion from "stand[ing] in the way" of dispensing drugs, and force pharmacies to "fill prescriptions without making moral judgments." *See* Statement (Apr. 13, 2005) (Ex. J). Secretary of the Illinois Department of Financial and Professional Regulation ("IDFPR") Fernando Grillo announced that the Rule would make sure the drugstore counter "will not become a place to debate" religious beliefs, and that "it is not the responsibility of the State of Illinois to accommodate those beliefs." *See* Letter

to Chicago Tribune (Apr. 16, 2005) (Ex. H) ("We are telling pharmacies . . . they can't let an individual pharmacist's beliefs" interfere with selling contraceptives). Even in 2008, the Governor's Office acknowledged that the rule was issued "because of the conscience concerns of some pharmacists." *See* Sept. 9, 2008, Press Release (Ex. P). Both Plaintiffs testified to hearing Gov. Blagojevich say that pharmacists with religious objections should find another profession. The record in this case shows extensive commentary about the Plaintiffs from the Defendant and their representatives.

From April 2005 until April 2010, the first three versions of the Rule focused solely on contraceptives, and particularly emergency contraceptives. Although the current Rule applies to all FDA-approved drugs, the focus on emergency contraceptives is still apparent. The idea for a broader law occurred not because of any problems experienced with other drugs—in fact IDFPR Secretary Adams testified that there were *no* complaints about other drugs—but because Adams saw a similar rule in an emergency contraceptives case in the Ninth Circuit. Secretary Adams acknowledged that he kept his file on the new law under the heading "Plan B" (referring to a brand-name for emergency contraceptives) and that all of the articles in his files about the new Rule concerned emergency contraception. The candid testimony of Secretary Adams as a whole showed the present Rule was drafted with the Plaintiffs in mind. Secretary Adams acknowledged he was unaware of refusals to sell emergency contraception for any reason *other than* religion. He further testified that he did not believe that religious views should determine whether a pharmacy dispenses a particular drug.

The government asserts that this Rule serves a compelling interest in timely access to drugs. Yet the government also concedes that it had never done anything to advance its asserted interest prior to April 2010. Even as to emergency contraception, the Court heard no evidence of

a single person who ever was unable to obtain emergency contraception because of a religious objection. The testimony indicated the Defendants had not been vigorously enforcing its prior rules. Nor did the government provide any evidence that anyone was having difficulties finding willing sellers of over-the-counter Plan B, either at pharmacies or over the internet.

The Rule is also subject to a host of exceptions for what the government called "common sense business realities." For example, it is permissible to refuse a prescription if a pharmacy has made a business decision not to acquire certain specialized equipment or expertise, if the pharmacist has a medical or legal concern, or if a patient is a few dollars short of the price set by the pharmacy. *See* 68 Ill. ADC 1330.500(e)(3)-(4), (1), (f). And a specialized pharmacy is excused from selling drugs not carried in "similar practice settings." *See id.* at (e)(6).

No parallel exemption exists for pharmacists and pharmacy owners barred by their religion from participating in sales of particular drugs. In fact, although the law contains a variance procedure providing for what the government called "individualized governmental assessments," Secretary Adams testified that he could envision a "whole variety" of reasons that might be accepted, but he could not foresee a variance being granted for a religious objection.

The evidence also showed that all of Plaintiffs' pharmacies are within either reasonably close walking or driving distance to emergency contraception distributors, and that emergency contraception is also available over the internet. For example, Kosirog's Chicago store has more than a dozen competitors within three miles, and one within three blocks. Vander Bleek's Morrison store is a few blocks from a public hospital that dispenses emergency contraception, and has more than a dozen competitors within a fifteen-minute drive. The government conceded that any health impact from Plaintiffs' religious objections would be minimal.

1. Count I: Illinois Healthcare Right of Conscience Act: The Rule violates Plaintiffs' rights under the Conscience Act, which was designed to forbid the government from doing what it aims to do here: coercing individuals or entities to provide healthcare services that violate their beliefs. *See* 745 ILCS 70/2, 70/5, and 70/10. The distribution of contraceptives by pharmacists and pharmacies clearly falls within the reach of the Act. *See, e.g.* 745 ILCS 70/3. Plaintiffs and their pharmacies have memorialized their opposition to selling these drugs in ethical guidelines and governing documents. The government cannot pressure them to violate their beliefs. *See, e.g.*, 745 ILCS 70/5, 70/10. The government may certainly promote drug access, but the Act requires them to do so without coercing unwilling providers. *See* 745 ILCS 70/2. In Vandersand v. Wal-Mart Stores, Inc., 525 F. Supp 2d 1052 (C.D. Ill. 2007), Judge Scott concluded that, "any person, including [Plaintiff Pharmacist] who refuses to participate in any way in providing mediation because of his conscience is protected by the Right of Conscience Act." See id. At 1057. The language of the statute is clear. The Illinois Right to Conscience Act applies to pharmacists and pharmacies. The plain language of the statute makes it clear that pharmacists and pharmacies are covered under the Illinois Right to Conscience Act. Additionally, the Defendants argue the Plaintiffs have not proven that pharmacies have a conscience under the Act. The Court finds the testimony of Plaintiffs, Vander Bleek and Kosirog, to be persuasive on this issue. The evidence at trial established that the objections of the individual Plaintiffs and their closely held corporations are essentially one and the same, because the individual Plaintiffs clearly set the policy and tightly control the day to day operations of their pharmacies.

2. Count IV: Illinois Religious Freedom Restoration Act: Plaintiffs have established the existence of a substantial burden on their religion as to all versions of the Rule. *See Diggs v.*

Snyder, 333 Ill. App. 3d 189, 195 (Ill. App. Ct. 5th Dist. 2002). The government has not carried its burden of proving that forcing participation by these Plaintiffs is the least restrictive means of furthering a compelling interest. *See* 775 ILCS 35/15. The government conceded that the Rule is inapplicable to doctors, nurses and hospitals, despite admitting refusals by these parties would cause the same harm as refusals by the pharmacists. Moreover, the Rule allows pharmacies to avoid selling drugs or to obtain variances for "common sense business" reasons other than religion. These facts are in direct contrast to the government's compelling interests argument. Nor has the government demonstrated narrow tailoring, or that there are no less restrictive ways to improve access, such as by providing the drug directly, or using its websites, phone numbers, and signs to help customers find willing sellers. The Rule therefore violates the Illinois Religious Freedom Restoration Act.

3. **Count VI: Violaion of United States Constitution, First Amendment Free Exercise of Religion**: The evidence at trial established a Free Exercise violation because the Rule is neither neutral nor generally applicable. The Rule and its predecessors were designed to stop pharmacies and pharmacists from considering their religious beliefs when deciding whether to sell emergency contraceptives. The record evidence demonstrates the Rule and all prior rules were drafted with pharmacists and pharmacy owners with religious objections to selling emergency contraceptives in mind. This lack of neutrality requires a strict scrutiny test be applied to this Rule. Furthermore, the law is not generally applicable. The Rule excuses compliance for a host of "common sense business" reasons, but not for religious reasons. And the variance process is, by the government's admission, a system of individualized governmental assessments that is available for non-religious reasons, but not for religious ones, even though the government acknowledged that the proximity of willing competitors nearby Plaintiffs'

pharmacies made any health-related impact of their religious constraints unlikely. *See Morr-Fitz*, 231 Ill. 2d at 501 ("[I]t can be concluded that granting variances in these kinds of cases would eviscerate the whole purpose of the rule."); *see also Lukumi*, 508 U.S. at 542-43. Where, as here, "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." *Id.* at 537-38. Accordingly, the law is subject to the compelling interest test under the federal Free Exercise clause, *id.* at 537-38, and fails that test for the reasons set forth above concerning Illinois Religious Freedom Restoration Act.

4. **Count VII: United States Constitution Fourteenth Amendment**: The Court finds the case law cited by the Plaintiffs to be distinguishable in this area. The Court finds the Plaintiffs have not met their burden of proof as to Count VII and judgment is entered for Defendants on this Count.

Relief: 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. Plaintiffs have demonstrated clearly ascertainable rights needing protection, that they will suffer irreparable harm without an injunction, and that have no adequate remedy at law. The Court has balanced the interest of the parties and finds for the Plaintiffs. Accordingly, Defendants and all those acting in concert from them are hereby permanently enjoined from enforcing the Rule. Accordingly, judgment is entered for the Plaintiffs and against the Defendants on Counts I, IV, and VI of the Third Amended Complaint.

ENTER: 4/5/11 _____ John B. _____
Circuit Judge