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Why Does the Illinois Government Oppose the Religious Liberty of Pharmacists?

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The government of Illinois does not understand the importance of, and the legal protections for, religious liberty. The law protects the right of conscience of health care providers, but the Illinois bureaucracy is on a six-year (so far) unholy war to force two pharmacists who own their own businesses to stock and dispense the "Plan B" or "morning-after" drug or close their businesses. Their consciences, based on their religious beliefs, do not allow them to stock and dispense the drug.

The bureaucracy of the state of Illinois established a rule (which it has issued in four versions from 2005 to 2010) that a pharmacy must dispense the drug known as "Plan B" or the "morning-after pill," and called an "emergency contraceptive" under the Illinois rule, upon receipt of a valid prescription. Then-Governor Rod Blagojevich stated in a 2005 press release:

> 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 customers.[1]

State officials publicly declared that they would vigorously prosecute pharmacists with religious objections to drive them out of the profession and that a pharmacy must fill Plan B prescriptions without making moral judgments if it wants to stay in business.[2]

Pharmacist Luke Vander Bleek describes himself as a lifelong Catholic with a baccalaureate degree in pharmacy who "has formed a professional opinion 'about teratogenic or abortifacient drugs and their destruction of what he considers is human life,'" believes that "Plan B has an 'abortifacient mechanism of action,'" and believes that "life begins at conception."[3] Pharmacist Glen Kosirog describes himself as a lifelong Christian with a baccalaureate degree in pharmacy who "has formed a professional opinion 'about teratogenic or abortifacient drugs and their destruction of what he considers is human life'" and believes that "Plan B has an 'abortifacient mechanism of action, i.e., [it] can cause abortions by preventing an already fertilized egg from implanting in the womb.'"[4]

The two pharmacists asked an Illinois court to issue an order preventing the state officials from enforcing the rule against them and their respective pharmacies, but the state officials argued that the pharmacists had not followed administrative procedures for complaints and therefore could not be heard in court. The state officials fought the pharmacists all the way through the Illinois court system to the Supreme Court of Illinois, which, by a 5–2

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vote, held, on December 18, 2008, that the pharmacists were entitled to their day in court.[5] The State Supreme Court sent the case back down to the trial court to consider the religious conscience claims in the case. The trial court has now issued its decision.

The Circuit Court of the Seventh Judicial Circuit (Sangamon County) of Illinois conducted a trial and, on April 5, 2011, ruled in favor of the pharmacists. The Circuit Court set forth its findings of facts and conclusions of law in an opinion that vindicated religious liberty.

The Circuit Court found that Messrs. Vander Bleek and Kosirog (referred to as the "Plaintiffs") have "sincere religious and conscience-based objections to participating in any way in the distribution of emergency contraceptives."[6] The Court further found that the state rule "imposes financial harms by making it more difficult for Plaintiffs to recruit employees (causing one Plaintiff pharmacy to close) and plan their businesses."[7]

Although the current version of the Illinois rule requires dispensation of all drugs approved by the federal Food and Drug Administration, and not merely emergency contraceptives as did the first three versions, the Circuit Court found that "the focus on emergency contraceptives is still apparent" and that the idea for a broader rule occurred "not because of any problems experienced with other drugs…but because" a senior state official "saw a similar rule in an emergency contraceptives case" in another court.[8] The Circuit Court noted that the trial revealed "no evidence of a single person who ever was unable to obtain emergency contraception because of a religious objection" and that the state government did not "provide any evidence that anyone was having difficulties finding willing sellers of over-the-counter Plan B, either at pharmacies or over the internet."[9] The Circuit Court also found that the Vander Bleek and Kosirog pharmacies "are within either reasonably close walking or driving distance to emergency contraception distributors, and that emergency contraception is also available over the internet" and further that the state government "conceded that any health impact from Plaintiffs' religious objections would be minimal."[10]

The Circuit Court concluded that the Illinois rule requiring Messrs. Vander Bleek and Kosirog to dispense Plan B violated the Illinois Health Care Right of Conscience Act, the Illinois Religious Freedom Restoration Act, and the federal right to free exercise of religion guaranteed by the First and Fourteenth Amendments to the U.S. Constitution.

The Illinois Health Care Right of Conscience Act makes it the public policy of Illinois to "respect and protect the right of conscience of all persons…who are engaged in…the delivery of…health care services and medical care" and provides that no health care personnel shall be liable to any person for "refusal to…participate in any way in any particular form of health care service which is contrary to

1. Press Release by Governor Rod Blagojevich of Illinois, April 13, 2005, cited by the Illinois Supreme Court in *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 482 (2008)(hereafter "Illinois Supreme Court Decision").
2. Illinois Supreme Court Decision, p. 501.
3. Illinois Supreme Court Decision, pp. 478–479. The Supreme Court of Illinois noted that the federal Food and Drug Administration acknowledges with respect to the Plan B drug that "[if] fertilization does occur, Plan B may prevent a fertilized egg from attaching to the womb." *Ibid.*, p. 480, n. 1.
4. Illinois Supreme Court Decision, p. 479.
5. Illinois Supreme Court Decision, pp. 504–505 ("[W]e believe that plaintiffs' claims are ripe and that plaintiffs were not required to exhaust administrative remedies.").
6. *Morr-Fitz, Inc. v. Blagojevich,* Case No. 2005-CH-000495 (Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois April 5, 2011)(hereafter "Illinois Circuit Court Decision"), slip opinion, p. 2.
7. Illinois Circuit Court Decision, p. 2.
8. Illinois Circuit Court Decision, p. 3.
9. Illinois Circuit Court Decision, pp. 3–4.
10. Illinois Circuit Court Decision, p. 4.

the conscience of such…health care personnel."[11] The Circuit Court held that the state rule requiring Vander Bleek and Kosirog to dispense Plan B "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."[12]

The Illinois Religious Freedom Restoration Act provides that "Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest."[13] The Circuit Court held that Vander Bleek and Kosirog "have established the existence of a substantial burden on their religion as to all versions of the Rule," that "[t]he government has not carried its burden of proving that forcing participation by these Plaintiffs is the least restrictive means of furthering a compelling interest," and that the state government had not "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 Circuit Court therefore held that the state rule "violates the Illinois Religious Freedom Restoration Act."[14]

The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," and the U.S. Supreme Court has held the prohibition applicable to the states by virtue of the Fourteenth Amendment prohibition that no state shall "deprive any person of life, liberty, or property, without due process of law."[15] The Circuit Court ruled that, for the same reasons that the state rule violated the compelling interest test under the Illinois Religious Freedom Restoration Act, it also failed the compelling interest test applicable to, and therefore violated, the federal right to free exercise of religion.

Then-Governor Blagojevich and other state officials plainly had little respect for the rights of religious liberty guaranteed by Illinois and federal law. The Circuit Court has made clear that Illinois and federal law protect the rights of conscience of pharmacists Vander Bleek and Kosirog, and the state has admitted that the pharmacists' refusal based on conscience to dispense the Plan B drug does not prevent people from obtaining the Plan B drug and does not have any health impact.

Why, then, do the current governor and other state officials in Illinois continue to press the two pharmacists either to act contrary to their religious beliefs and dispense the drug or to go out of business as the price of following their religious beliefs?

The Governor of Illinois, the Secretary of the Illinois Department of Financial and Professional Regulation, the Acting Director of the Illinois Division of Professional Regulation, and the Illinois State Board of Pharmacy should accept the Circuit Court's injunction against forcing the pharmacists to violate

11. 745 Ill. Comp. Stats. 70/2 and 70/4. The statute defines "conscience" to mean "a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths." *Ibid.* 70/3(e).
12. Illinois Circuit Court Decision, p. 5.
13. 775 Ill. Comp. Stats. 35/15.
14. Illinois Circuit Court Decision, pp. 5–6.
15. *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985). ("As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience. Until the Fourteenth Amendment was added to the Constitution, the First Amendment's restraints on the exercise of federal power simply did not apply to the States. But when the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power. This Court has confirmed and endorsed this elementary proposition of law time and time again." (footnotes omitted)).

their religious beliefs. They should not appeal the injunction. They should end the state government's multi-year effort to crush the faith-based consciences of Luke Vander Bleek and Glen Kosirog.

Perhaps most importantly in the long run, Illinois Governor Pat Quinn should take appropriate steps to ensure that the executive branch of the Illinois government hereafter shows proper respect for the religious liberty guaranteed to the people by the Constitutions and laws of the United States and Illinois.

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